Article 50 TEU – The Legal Framework of a Withdrawal from the European Union

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Table of Contents

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A. Introduction

The founding fathers of the European Union (EU) started from the premise that there is no right of unilateral withdrawal. *Jean Monnet*, chairman of the negotiations of the European Coal and Steel Community Treaty (ECSC Treaty), published a press release at the time. The part of it dealing with the withdrawal, reads as follows:

> "Over and above coal and steel [the new Community] is laying the foundations of a European federation. In a federation, no State can secede by its own unilateral decision. Similarly, there can be no Community except among nations which commit themselves to it with no limit in time and no looking back".[1]

Also for *Robert Schuman*, the basic idea behind European integration was

> "the principle of community: a community of quasi-unlimited duration, which could not be cancelled".[2]

While the ECSC Treaty[3] was concluded for a duration of 50 years, the European Economic Community (EEC) and its successors[4] as well as the Euratom Treaty[5] were "concluded for an unlimited period" and did not contain a withdrawal clause. In fact, it had always been recognised that international law provides the option of leaving an international treaty. Nevertheless, the negotiators of the non-ratified Treaty establishing a Constitution for Europe found it necessary to include a specific procedure allowing to withdraw. This formula was also included in the subsequent Treaty of Lisbon, which now explicitly mentions a right of withdrawal from the European Union in Article 50 Treaty on the European Union (TEU).

The emergence of a withdrawal clause goes hand in hand with growing Euro scepticism in several Member States. Some of the Euro sceptics argue that their country would be better off not being a Member of the European Union and therefore recommend to their state to make use of Article 50 TEU. The United Kingdom Independence Party (UKIP) serves as an example. Under its leader *Nigel Farage*, one of the key aspects of the party's program is that the United Kingdom (UK) should withdraw from the EU. But even other mainstream parties like the Conservative Party in the UK have become more reluctant towards the EU. Its leader, British Prime Minister *David Cameron*, announced in 2013 that – if he is re-elected in May 2015 – the UK will renegotiate its relationship to the EU and that the outcome will be the basis for a referendum of the UK's citizens about the EU membership of the UK in 2017. The UK is the first Member State whose government is publicly considering a withdrawal.[6]

None of the Member States has yet made use of Article 50 TEU so legal questions which arise when a Member State seeks to withdraw from the European Union remain to be tested in practice. Due to the introduction of Article 50 TEU, it is now at least in the realm of possibility that a Member State will seek to withdraw from the EU. Therefore it is relevant and necessary to research the actual legal framework for a

1 *Monnet*, Memoirs, 1978, p. 326.
2 *Schuman*, For Europe, 1st ed. 2010, p. 100.
3 Article 97 ECSC Treaty.
4 Article 240 EEC Treaty; Article 312 EC Treaty; Article 51 TEU.
5 Article 208 Euratom Treaty.
6 *Nicolaides*, Withdrawal from the European Union: An Option with Unforeseen Consequences, in: de Visser/van der Mei (eds.), The Treaty on European Union 1993-2013: Reflections from Maastricht, 2013, p. 111.

withdrawal and to assess whether it is sufficient to guarantee protection of and a satisfactory procedure to all affected parties.

To approach this question, first of all the controversial situation before the Treaty of Lisbon will be recalled to understand why there was a need for the withdrawal clause. To demonstrate the withdrawal procedure and the conditions for withdrawal, Article 50 TEU will be interpreted. Selected legal consequences of a withdrawal both for the European Union's and the leaving Member State's respective legal orders are another main part of this article. In this context, several alternatives to a total separation are briefly reviewed. Finally, the critical analysis of Article 50 TEU will be used to assess whether and how the legal framework of a potential withdrawal procedure could be improved.

B. Withdrawal before the Treaty of Lisbon

Before the Treaty of Lisbon, there was no unilateral right to withdraw from the European Communities (EC) explicitly mentioned in the treaties. Therefore, the issue of whether a voluntary withdrawal was possible was contentious. Such a right could be derived both from public international and European law.

I. Withdrawal based on public international law

A right to withdraw could have been granted by public international law. This article is assuming that public international law is applicable to European law[7] because the EU was and is still aiming for deeper integration but is as an association of sovereign states still on this path without having reached an integration stage that would justify excluding the application of the complete public international law.[8] Therefore, it is convincing to apply the Vienna Convention on the Law of Treaties (VCLT) to EU law. But the general rules of international law as *lex generalis* are only applicable if the European law as *lex specialis* does not provide a specific rule about the issue in question, because of the principle "*lex specialis derogat legi generali*".[9] The VCLT contains in Articles 54-62 VCLT several rules dealing with the termination and suspension of the operation of treaties.[10] Either their conditions were not fulfilled (Articles 54(a) and 56 VCLT) or those rules were superseded by EU law as *lex specialis* (Article 54(b)

7 This contentious issue is discussed for example in *Zeh*, Recht auf Austritt, ZEuS 2004, pp. 173-210.

8 *Blagoev*, Expulsion of a Member State from the EU after Lisbon: Political Threat or Legal Reality?, Tilburg Law Review 16 (2011), p. 233; *Jaekel*, Das Recht des Austritts aus der Europäischen Union – zugleich zur Neuregelung des Austrittsrechts gem. Art. 50 EUV in der Fassung des Vertrages von Lissabon, Jura 2010, p. 88; *Wyrozumska*, Withdrawal from the Union, in: Blanke/Mangiameli (eds.), The European Union after Lisbon: Constitutional Basis, Economic Order and External Action, 2012, p. 344.

9 *Hofmeister*, 'Should I Stay or Should I Go?' – A Critical Analysis of the Right to Withdraw from the EU, European Law Journal 16 (2010), p. 591.

10 The conditions of those norms are described for example in *Zeh*, (fn. 7), p. 180; *Wyrozumska*, (fn. 8), p. 344.

VCLT is *lex generalis* to EU treaty amendment procedure; Article 60 VCLT is *lex generalis* to specific EU rules like the infringement procedure), or the conditions that need to be fulfilled are very narrow, as it is the case for Article 62 VCLT. In general, under a normal situation within the EU, including normally working institutions, a withdrawal from the Union under these rules was only a theoretical option, if not altogether impossible.[11] In addition, these norms do not guarantee a right to withdraw because they are open to interpretation.[12] Consequently, the final interpretation depends on the circumstances of the situation and their legal subsumption. This legal uncertainty, in the sense of whether a court would in fact apply international law to EU law and whether the conditions to withdraw were fulfilled created the need for a withdrawal clause from an international law perspective.

II. Withdrawal based on European law

As already stated, before Lisbon European law did not contain an explicit withdrawal clause. Consequently, EU law did not grant the possibility to a unilateral withdrawal. The above-mentioned quotations of *Monnet* and *Schuman* lead one to assume that such a clause would have been in direct contradiction with the idea of an ever closer union.

However, concerning a withdrawal based on the unanimity of all the Member States, the treaty amendment procedure allowed the Member States to alter the membership, including the possibility for a Member State to even withdraw.[13] The withdrawal of Greenland – an autonomous Danish territory – in 1985 serves as a proof for this statement. Here, it became clear that the Member States have the power to let a state withdraw by the treaty amendment procedure.[14] But Greenland cannot serve as a far reaching precedent for future withdrawals because it was not itself a member of the European Communities whereas Denmark still remains as a member.[15]

III. Findings before Lisbon

European law did not provide the possibility to withdraw unilaterally from the EU. A withdrawal upon the treaty amendment procedure was possible. Only under very exceptional circumstances did public international law allow for a withdrawal from the EU. As neither EU law nor public international law guaranteed a right to with-

11 *Hofmeister*, (fn. 9), p. 591; *Wyrozumska*, (fn. 8), p. 349.
12 *Berglund*, Prison or Voluntary Cooperation? The Possibility of Withdrawal from the European Union, Scandinavian Political Studies 29 (2006), p. 164.
13 *Lenaerts/Van Nuffel/Bray/Cambien*, European Union Law, 3rd ed. 2011, p. 98; *Zbiral*, Searching for an Optimal Withdrawal Clause for the European Union, in: Niedobitek/Zemanek (eds.), Continuing the European Constitutional Debate, 2008, p. 300.
14 *Friel*, Providing a Constitutional Framework for Withdrawal from the EU: Article 59 of the Draft European Constitution, International and Comparative Law Quarterly 53 (2004), p. 410.
15 *Berglund*, (fn. 12), p. 159; *Wyrozumska*, (fn. 8), p. 343.

draw, the possibility to withdraw depended on several factors that could not be influenced by the Member State. This was the main reason for the legal uncertainty.

C. Withdrawal since the Treaty of Lisbon

Even after the Treaty of Lisbon one should differentiate whether a right to withdraw can be derived from international or European law.

I. Withdrawal based on public international law

The voluntary withdrawal from the Union proposed by a Member State is a determination of several international treaties, meaning the withdrawal might also be regulated by the VCLT along with Article 50 TEU.[16] The VCLT contains several rules about the unilateral termination of international treaties (especially Articles 56 and 60-62 VCLT). However, as Article 50 TEU does not ask for preconditions to be fulfilled, it is *lex specialis* to the general rules of the VCLT and does not give any further possibility of applying these rules,[17] while for the withdrawal upon consensus as stated in Article 54(b) VCLT, Article 50 TEU is *lex specialis* too, due to the same reasoning.

To conclude, a withdrawal proposed by a Member State and based on international law is not possible after Lisbon because Article 50 TEU is *lex specialis* and supersedes the general rules of public international law.

II. Withdrawal based on European law

The introduction of a right to withdraw in Article 50 TEU has now brought an end to the uncertain situation of whether a Member State was able to withdraw or not.

1. Travaux préparatoires of the right to withdraw

As early as 1984, *Altiero Spinelli* said that "the European Union should not be a prison" during the elaboration of his draft of a European Constitution.[18] But it took several years until this idea of a right to withdraw appeared for the first time seriously on the agenda, namely in the context of the negotiations of the Treaty establishing a Constitution for Europe.[19] Here, the Praesidium of the European Convention finally considered that there were three main reasons that a withdrawal clause was needed:[20] First,

16 *Dörr*, in: Grabitz/Hilf/Nettesheim (eds.), Das Recht der EU, 50. EL 2013, Article 50 TEU, para. 12.
17 Ibid.
18 *Spinelli* as cited in: *Bonde*, Contribution to the Convention: The Convention about the FutureS of Europe, CONV 277/02, p. 21.
19 The discussion about and the development of the right to withdraw within the European Convention is described in *Zeh*, (fn. 7), p. 193.
20 The European Convention, Cover Note of 28/5/2003 from the Praesidium to the Convention, CONV 724/1/03 REV 1, p. 131.

it would clarify the situation by bringing an end to the legal dispute on whether a withdrawal was possible. Second, the Union could be involved into the withdrawal procedure and therefore would shape the arrangements for withdrawal and the future relationship with the former Member State. Third, the introduction of a withdrawal clause would be a "political signal" for the EU sceptics and would provide proof that the EU is not a "rigid entity which it is impossible to leave". Even though the Constitution for Europe never entered into force, the idea of Article I-60 Constitutional Treaty as a withdrawal clause was rescued into the Treaty of Lisbon where only editorial changes were made.

2. Withdrawal from the EU – The content of Article 50 TEU

Having seen why Article I-60 of the Constitutional Treaty was drafted, Article 50 TEU should now be reviewed. There are essentially two different ways of interpreting Article 50 TEU and its regulation of a voluntary withdrawal proposed by a Member State itself: the unilateral withdrawal without any further agreement and a withdrawal based upon a special withdrawal agreement.

a) Unilateral withdrawal

Some academics state that Article 50 TEU provides the possibility to withdraw from the EU unilaterally. To prove whether this view is right, Article 50 TEU must be interpreted.

(1) Interpretation of the wording

The wording of Article 50(1) TEU only states that a Member State can take the decision to withdraw. The wording of paragraph one leaves open whether or not a withdrawal can be made unilaterally.

With regard to Article 50(2) TEU, there are two possible readings. On the one hand the wording "setting out the arrangements for its withdrawal" can be read in the sense that a withdrawal agreement only refers to the legal consequence when the withdrawal has already been notified and is not a matter of fact or condition for withdrawal.[21] On the other hand one could read the same passage in another way so that the withdrawal agreement is a necessary condition for a withdrawal.

Finally, reading Article 50(3) TEU, it becomes clear that a withdrawal is also possible without an agreement because it provides a solution in the event that a withdrawal agreement fails, namely that the consequences of a withdrawal enter into force two years after the withdrawal notification.

21 *Bruha/Nowak*, Recht auf Austritt aus der Europäischen Union? – Anmerkungen zu Art. I-59 des Entwurfs eines Vertrages über eine Verfassung für Europa, Archiv des Völkerrechts 42 (2004), p. 7.

From a literal point of view, it seems to be possible to withdraw unilaterally from the European Union.

(2) Systematic interpretation

For the systematic interpretation it is necessary to have a look at the whole concept of the EU treaties. Here, two different arguments can be mentioned in particular.

First, Article 50 TEU is located in the Title VI of the TEU, where the final provisions are regulated. Article 49 TEU, which deals with the accession procedure, is also in the same chapter. One could compare the withdrawal procedure with the procedure of accession. In the latter, the constitution of the acceding state allows entrance to the EU, but the procedure and the criteria which have to be fulfilled are determined by the EU.[22] In contrast, one could also understand Article 50(1) TEU in a very narrow way so that only the mere decision to withdraw ("Any Member State may decide") lies within the free choice of the Member State, whereas the details of a withdrawal and its procedure have to be set by the EU.[23]

The second argumentation for a withdrawal to be based on an agreement takes into account the whole system of the EU where the citizens and their legal status play a major role. One could argue that the citizens have received a legal status that deserves protection through the legislation of the EU.[24] Here the right to vote for the European Parliament, the fundamental freedoms and rights, the general prohibition of discrimination and the fact that, in general, the citizens have the possibility to realise their rights against the other Member States and the European Institutions can be mentioned.[25] The protection of the citizen's rights can only be guaranteed by a withdrawal agreement.

A systematic interpretation would suggest a withdrawal only upon agreement.

(3) Historical/teleological interpretation

Historically, one can argue with the development of the norm and its discussion in the European Convention. Once again, it is worthwhile to point to the above-mentioned statements of the Praesidium. It argued that a withdrawal agreement should not be a necessary condition in order not to "void the concept of voluntary withdrawal of its substance" and to prove that the EU is still a voluntary cooperation between states.[26] Another reason for a unilateral withdrawal can be seen in the fact that the

22 *Lazowski*, Withdrawal from the European Union and Alternatives to Membership, European Law Review 37 (2012), p. 527.
23 Ibid.
24 *Gold*, Voraussetzungen des freiwilligen Austritts aus der Union, in: Niedobitek/Ruth (eds.), Die Neue Union: Beiträge zum Verfassungsvertrag, 2007, p. 66.
25 Ibid.
26 The European Convention, Note of 2/4/2003 from the Praesidium to the Convention, CONV 648/03, p. 9.

European Convention did not implement any of the proposed changes concerning the procedural or substantive conditions for a withdrawal.[27]

The teleological interpretation is based on these historical findings. The spirit and purpose of the withdrawal clause was to give the states the sovereignty to decide upon their membership in the EU. In addition, actual or prospective Member States should be encouraged to take part in the whole EU integration process because they have the possibility to leave whenever they want. This aim can only be achieved when the withdrawal is not conditional upon an agreement.

(4) Findings on unilateral withdrawal

All in all, it is difficult to overcome the wording of Article 50 TEU. The historical and teleological interpretations are also convincing because it would be questionable what a withdrawal clause would be worth if the Member State did not have the final decision on its own responsibility. If a withdrawal was based upon an agreement, the purpose of Article 50 TEU would be undermined because the EU could then block the withdrawal procedure.

Concerning the systematic argumentation that the rights of the citizens must be protected, this could be done one step earlier by obliging the Member States to ask their citizens in a referendum whether the Member State should notify the withdrawal from the European Union.[28] Concerning the argumentation that during an accession the EU sets the procedural framework one might argue that the drafters could have oriented the withdrawal clause to Article 49 TEU. This is, however, not the case. In addition, there are further differences between Articles 49 and 50 TEU, for example, that in Article 49(2) TEU it is the "Member States" that conclude the accession agreement, whereas in Article 50(2) TEU it is "the Union" that shall negotiate the withdrawal agreement. Therefore, the systematic argumentation is ultimately not convincing.

The interpretation reveals that a unilateral withdrawal without any agreement is possible. Even if a unilateral withdrawal is theoretically and legally possible, one should also have in mind the legal and political reality of the European Union. Confirming *Lazowski*, it is true that the EU is neither a "golf club" nor a mere political entity, but a complex "legal order agreed between the […] member states".[29] The very deep legal and economic integration between the Member States existing today, including the internal market with its positive influences on citizens and companies, makes it necessary to conclude a withdrawal agreement.[30] Consequently, by leaving without any agreement, the Member State would harm its own national interests.[31]

27 *Herbst*, Observations on the Right to Withdraw from the European Union: Who are the Masters of the Treaties?, German Law Journal 6 (2005), p. 1756; *Zeh*, (fn. 7), p. 198.
28 See for this idea the chapter E.III. about recommendations.
29 *Lazowski*, (fn. 22), p. 523; *Lazowski*, How to withdraw from the European Union? Confronting hard reality, Centre for European Policy Studies Commentary, 2013, p. 1.
30 Ibid., p. 2.
31 *Weiler*, Alternatives to withdrawal from an international organisation: The case of the European Economic Community, Israel Law Review 20 (1985), p. 287.

The withdrawal of Greenland has already shown that a withdrawal is closely linked to the negotiation of a withdrawal agreement to arrange the future relationship with the European Union.[32] Even today, the EU still has enacted several laws dealing with the relationship to Greenland.[33] Therefore it should be in the interest of the Member State first to try to reach an agreement. But if it fails, a unilateral withdrawal will be allowed.

To sum up, due to its far reaching consequences, a unilateral withdrawal is not recommended in practice, even though the wording and the structure do not prohibit it.

b) Withdrawal agreement

To realise its withdrawal a Member State should usually conclude an agreement with the Union. This is why the withdrawal procedure is analysed in this section. The leaving Member State has at least the duty to enter into negotiations of a withdrawal agreement because it is still bound by the duty of loyalty of Article 4(3) TEU.[34] However, even if the negotiations to such an agreement fail, the Member State can leave the EU. A withdrawal agreement would only determine the "how" and not the "if" of a withdrawal.[35] Specific conditions do not need to be fulfilled. In particular, a Member State is neither bound by the restrictive conditions of withdrawal as stated in the Vienna Convention (e.g. Article 62 VCLT) nor has the Member State to notify the reason why it wants to withdraw.[36] As Article 50(1) TEU states, a Member State has to only follow its own constitutional provisions. This only means that, for example, the withdrawing Member State has to follow national procedures as stated by its national law or that its national constitution has to be amended in order to make a withdrawal possible in the sense that it dissociates itself from the European Union when it previously provided a close link to the EU.[37] The national constitutional procedure cannot be controlled by the EU or the ECJ and it is not a substantive condition for withdrawal.[38]

(1) Withdrawal procedure

When a Member State has decided to withdraw from the EU, it first has to notify the European Council of its intention of withdrawal. The notification is necessary to start the process of a withdrawal. Without the notification, a withdrawal would be unlaw-

32 *Friel*, (fn. 14), p. 410.
33 For example: Decision 2014/137/EU on relations between EU, Greenland and Denmark.
34 *Gold*, (fn. 24), p. 69.
35 *Heintschel von Heinegg*, in: Vedder/Heintschel von Heinegg (eds.), Europäisches Unionsrecht, 1st ed. 2012, Article 50 TEU, para. 4.
36 Ibid.
37 *Gold*, (fn. 24), p. 62; *Calliess*, in: Calliess/Ruffert (eds.), EUV/AEUV, 4th ed. 2011, Article 50 TEU, para. 4.
38 *Gold*, (fn. 24), p. 62.

ful.[39] The time limit of Article 50(2) TEU starts, when the notification sent by the responsible government body arrives at the European Council.[40]

The European Council then gives political guidelines, which are the basis for further discussions of the Union with the Member State. Article 50(2) TEU provides that the withdrawal agreement shall be negotiated under application of Article 218(3) TFEU. Hence, the Commission or the High Representative has to submit recommendations to the Council so that the Council can decide upon the EU negotiator. In practice, it is likely that the negotiations will be held by the Commission based on the guidelines by the European Council.[41]

For the time of the negotiations, the leaving state has to be seen as a third country.[42] This means that the representative of the leaving country is not allowed to participate in the consultations and the decision-making process within the Council or European Council concerning the withdrawal, Article 50(4) TEU. Nevertheless, until the agreement is concluded and entered into force, the leaving Member State is still bound by European law.[43]

(2) Conclusion of the withdrawal agreement

If an agreement is reached between the EU and the Member State, it will be concluded by the Council, which acts by qualified majority, based on the consent of the European Parliament. It is partially argued that the withdrawal agreement must be concluded as a so-called mixed agreement because it may fall within different categories of competence.[44] Mixed agreements fall partly under the competence of the EU and partly under the competence of the Member States so that it must be signed and concluded jointly by the EU and its Member States.[45] But when a mixed agreement is concluded, the remaining Member States are involved in the decision-making and ratification procedure of the mixed agreement so that it can take a long time until the agreement is finally ratified.[46] It might even be the case that a Member State does not ratify the agreement and therefore blocks the whole procedure.[47] This would be contrary to the idea of a voluntary withdrawal.[48] Another argument against the withdrawal agreement as a mixed agreement is that the Member States have transferred the competence of concluding the withdrawal agreement to the EU via Article 50(2) TEU ("the Union shall negotiate and conclude an agreement").[49] Furthermore, the wording of Article 50(2)

39 *De Waele*, The European Union on the Road to a New Legal Order – The Changing Legality of Member State Withdrawal, Tilburg Foreign Law Review 12 (2005), p. 181.
40 *Dörr*, (fn. 16), Article 50 TEU, para. 25.
41 *Lazowski*, (fn. 22), p. 528.
42 *Lazowski*, (fn. 29), p. 2.
43 *Dörr*, (fn. 16), Article 50 TEU, para. 9.
44 *Lazowski*, (fn. 22), p. 528.
45 *Eeckhout*, EU External Relations, 2nd ed. 2011, p. 212.
46 *Lazowski*, (fn. 29), p. 2.
47 *Maresceau*, Typology of Mixed Agreements, in: Hillion/Koutrakos (eds.), Mixed Agreements Revisited – the EU and its Member States in the World, 2010, p. 12.
48 *Gold*, (fn. 24), p. 72.
49 Ibid., p. 71.

TEU does not provide for a rule similar to the one in Article 49(2) TEU regarding the accession procedure.[50] Here, reference is made to an "agreement between the Member States and the applicant State". This makes sense because the withdrawal agreement contains only the bilateral relationship between the Union and the withdrawing Member State.[51] The aim of Article 50 TEU is to grant every Member State the possibility to withdraw on its own volition.[52] Therefore the withdrawal agreement cannot be concluded as a mixed agreement.

(3) Possible content of the withdrawal agreement

Article 50(2) TEU provides that the withdrawal agreement sets out the arrangements for the withdrawal by taking account of the framework for the future relationship between the EU and the outgoing Member State.

In general, the content of the withdrawal agreement depends on the issues that the EU and the outgoing Member State want to settle in order to shape their future relationship. Almost all legal consequences mentioned below could be regulated in such an agreement and its content could be orientated at the negotiation chapters of the accession procedure.

A withdrawal would mean the end of the membership in the European Union, but it does not mean that any relationship to the EU is automatically terminated.[53] It is hardly predictable how such a relationship might look like. A simple relationship similar to the European neighbourhood policy of Article 8 TEU, a Most Favoured Nation relationship under WTO Law, a bilateral Free Trade Agreement or the participation in the European Economic Area as an EFTA state, a customs union or even a complete new relationship may be possible.[54] It might also be agreed on interim arrangements such as the maintenance of the "*acquis unionaire*", especially for the protection of subjective rights of individuals.[55] The content of the withdrawal agreement could also be the takeover of EU agreements with third countries, the continuous participation of the leaving Member State in the entities of the EU or the connection of its national legal order with the EU.[56]

3. Findings on European law after Lisbon

In summary, according to European Law after Lisbon, Article 50 TEU is now determined to constitute a right to withdraw from the European Union and lays down the procedure that must be followed. This right can be exercised unilaterally. In practice,

50 *Heintschel von Heinegg*, (fn. 35), Article 50 TEU, para. 7.
51 Ibid.
52 *Gold*, (fn. 24), p. 72.
53 Ibid., p. 58.
54 *Dörr*, (fn. 16), Article 50 TEU, para. 31; *Geiger*, in: Geiger/Khan/Kotzur, EUV/AEUV, 5th ed. 2010, Article 50 TEU, para. 5; *Nicolaides*, (fn. 6), p. 105; *Streinz*, in: Streinz (ed.), EUV/AEUV, 2nd ed. 2012, Article 50 TEU, para. 9.
55 *Dörr*, (fn. 16), Article 50 TEU, para. 29.
56 Ibid., para. 30.

it is more likely that a withdrawal agreement will be concluded so that the future relationship with the EU is declared.

D. Legal consequences of a withdrawal

To assess whether the rules for a withdrawal are sufficient, it is also necessary to examine the consequences of such a step. Article 50 TEU gives the Member State the right to withdraw, but does not grant an "immediate right" to do so.[57] According to Article 50(3) TEU, the treaties no longer apply to the leaving state and the legal consequences take effect when the withdrawal agreement enters into force or if the negotiations fail, two years after the notification of the withdrawal. But the European Council together with the leaving Member State can decide to extend the negotiation period.

It can be deduced from Article 1(3) TEU that "Treaties" mean the TEU and the TFEU. Pursuant to Article 51 TEU, this includes all Protocols and Annexes of the two treaties. Therefore, a withdrawal would have several legal consequences as the European Union's legal order consists of a variety of different areas. A withdrawal would have consequences both on the leaving country and its citizens and on the remaining member states and EU citizens.[58] The scope of the expiration of EU law depends on the potential withdrawal agreement.[59] All of the following consequences can be reduced or even prevented when a withdrawal agreement is concluded. First, selected consequences of a complete withdrawal for both the EU and the leaving Member State are going to be described. Afterwards some alternatives to a total separation are going to be analysed.

I. Consequences for the EU

As a very important consequence for the EU, the remaining EU Member States need to conclude a separate agreement that amends all the provisions affecting the withdrawing state.[60] This is necessary because the withdrawal agreement is a bilateral treaty between the EU and the outgoing Member State, meaning the EU cannot change the EU law without the participation of the remaining Member States.[61] This has to be done by using the ordinary revision procedure of Article 48 TEU.[62] During this process, all of the treaties annexed provisions and protocols which refer to the leaving state have to be adapted or deleted.[63] The territorial application of EU law, as stated

57 *Friel*, (fn. 14), p. 425.
58 *Edward*, EU Law and the Separation of Member States, Fordham International Law Journal 36 (2013), p. 1164.
59 *Dörr*, (fn. 16), Article 50 TEU, para. 37.
60 *Lazowski*, (fn. 29), p. 2.
61 *Kumin*, Vertragsänderungsverfahren und Austrittsklausel, in: Hummer/Obwexer (eds.), Der Vertrag von Lissabon, 2009, p. 320.
62 *Heintschel von Heinegg*, (fn. 35), Article 50 TEU, para. 7.
63 *Lazowski*, (fn. 29), p. 2.

in Article 52 TEU, also decreases.[64] In addition, the international agreements between the EU or mixed agreements between the EU and its Member States with third countries no longer apply to the leaving country.[65] Apart from these general consequences there are also specific consequences to the EU.

1. Institutional consequences

A withdrawal of a Member State will have consequences for the EU institutions in particular. In all the EU entities, e.g. the institutions named in Article 13 TEU, agencies, organs or advisory bodies, there are people employed as nationals of the leaving Member State.[66] In this context, it has to be differentiated between the representatives of the Member State nominated by their government, for example in the Council (Article 16(2) TEU), at the ECJ (Article 19(2) TEU and Articles 253, 254 TFEU) or at the College of Commissioners (Article 17(3) and (7) TEU), and the staff members that are recruited as employees directly by the European Union. Even though the latter are appointed because they are nationals of an EU Member State (Article 27 Staff Regulation No 1023/2013), they passed through the specific selection procedure of the EU. It was the EU which offered them the job and which is responsible for their appointment and not the leaving Member State. Therefore, it would not be justifiable to dismiss this staff, particularly because according to Article 11 Staff Regulation they must fulfil their tasks in an objective and impartial manner always in the interest of the Union. Concerning the representatives of the Member States nominated by their government, it is clear that if the Member State is no longer a member of the EU, the representation in all EU entities has to end as well. As a consequence, all entities must be restructured. This restructuring also includes adapting all the voting and majority rules in the EU institutions, especially in the Council and the European Parliament. In the European Parliament the seats of the leaving state must be reallocated, either by increasing the number of seats of the remaining states or by not allocating the seats, which has the consequence of reducing the overall number of seats in the Parliament.[67]

The withdrawal also has an impact on the pending cases and the participation of judges and advocates general at the ECJ. Pending cases like preliminary rulings or actions for annulment or compensation of damages where the departing country is involved should still be decided even if the withdrawal is already executed.[68] As the ECJ decides in the interest of the EU, it is of no consequence whether the leaving Member State is still represented or not.

64 *Streinz*, (fn. 54), Article 50 TEU, para. 8.
65 *Dörr*, (fn. 16), Article 50 TEU, para. 39; *Kumin*, (fn. 61), p. 319.
66 *Lazowski*, (fn. 29), p. 3.
67 *Oliver*, Europe without Britain – Assessing the Impact on the European Union of a British Withdrawal, Stiftung Wissenschaft und Politik – Research Paper 2013/RP 07, p. 15.
68 *Lazowski*, (fn. 22), p. 531.

2. Other consequences

Within the EU, the withdrawing state would no longer be part of the internal market anymore.[69] As a consequence, the remaining states and EU citizens will no longer be able to make use of the positive aspects of the internal market in relation to the withdrawing state. There are, for example, companies or citizens making use of their fundamental freedoms in the respective other state. They cannot disappear or stop their conduct from one day to another. As an interim solution, one could propose that the respective people or companies would preserve or "grandfather" their rights as long as they are active in the territory or economy of the other country, whereas new arrivals would no longer receive protection.[70] To reduce or absorb these consequences, the European Council could make use of its right to determine guidelines for the withdrawal agreement and could propose several conditions for withdrawal.

Another important consequence for the EU is that it must restructure its budget. Depending on the Member State that leaves and on the future relationship with the EU, some remaining states may have to absorb the financial contributions of the leaving state so that their contribution might rise.[71]

II. Consequences for the departing country

Having seen the consequences that a withdrawal would have for the European Union, this chapter aims to point out the consequences from the perspective of the departing country. One must also bear in mind that the legal consequences that comprise the majority of this section are closely related to economic and political consequences.

1. Legal aspects

a) Restructuring of the national legal order

At the moment the withdrawal takes effect, the previous Member State neither has duties (e.g. reports, statistical information, granting access to internal market and no internal barriers)[72] nor can it derive rights out of the treaties.[73] The EU's primary and secondary law as such no longer applies. In contrast to this, all national laws which can be traced back to European law (especially transposed directives) remain valid until the national legislator changes them.[74] As an example, there are 1.823 direc-

69 See for this section *Nicolaides*, Withdrawal from the European Union: A Typology of Effects, Maastricht Journal of European and Comparative Law 2 (2013), p. 214.
70 Ibid.; *Nicolaides*, (fn. 6), p. 106.
71 *Oliver*, (fn. 67), p. 15.
72 *Nicolaides*, (fn. 6), pp. 107 and 110.
73 *Heintschel von Heinegg*, (fn. 35), Article 50 TEU, para. 10.
74 *Dörr*, (fn. 16), Article 50 TEU, para. 41.

tives[75] and 11.318 regulations[76] in force today. Therefore, the departing country must think about how it will deal with these remnants. The Member State must restructure its national legal order and here the state must decide whether it leaves all the laws as they are or whether it will revise the EU influenced laws. Regulations have to be replaced by national law, especially in the field of exclusive EU competences.[77] If some traces of EU law remain, there would be a need to clarify whether new developments of ECJ judgments have an impact or not.[78] However, the withdrawal does not force the leaving Member State to delete all remnants of EU law.[79] As the State has left the European Union because it was no longer in line with its politics, it is likely that it will revise most of the EU influenced law. This would especially demonstrate the State's retrieved sovereignty.

b) Consequences for citizens and companies

The benefits of the internal market including the freedoms associated with it (free movement of persons, goods, services, capital) will cease to be valid for the leaving state and its citizens and companies[80] and the EU citizens of the leaving state will also relinquish their EU citizenship.[81] This can be avoided if the leaving state chooses a form of continued cooperation with the EU as discussed in chapter D.III. It is very unlikely that a withdrawing Member State would build barriers to trade, effectively isolating its economy and being satisfied with the Most Favoured Nation Status, which would then only be valid because of its WTO membership.[82]

In general, all special interests like the subjective rights of the leaving Member States' nationals which deserve protection must be respected.[83] This is the reason why the whole European integration process was and is formed by the individuals too, so that a withdrawal would also have consequences for the legal situation of the private persons.[84]

Another consequence for the citizens and companies is that without any agreement, the research sector would no longer benefit from an EU contribution.[85] In addition, access to EU education projects like Erasmus, Erasmus+ or the Horizon 2020 research project would cease.

75 Research on www.eurlex.eu (20/3/2015), search by EU-Law and Related Documents – Legislation – Search by European Legislation Identifier (ELI) – *directives* in force.
76 Ibid. – *regulations* in force.
77 *Nicolaides*, (fn. 6), pp. 108 and 110.
78 Ibid., p. 106.
79 *Nicolaides*, (fn. 69), p. 214.
80 *Hofmeister*, (fn. 9), p. 601; *Lazowski*, (fn. 29), p. 3.
81 *Streinz*, (fn. 54), Article 50 TEU, para. 8.
82 *Nicolaides*, (fn. 69), p. 214; *Nicolaides*, (fn. 6), p. 110.
83 *Becker*, in: Schwarze (ed.), EU-Kommentar, 3rd ed. 2012, Article 50 TEU, para. 7; *Heintschel von Heinegg*, (fn. 35), Article 50 TEU, para. 6.
84 *Calliess*, (fn. 37), Article 50 TEU, para. 19.
85 *Nicolaides*, (fn. 69), p. 216.

c) Fields of external competences

One of the main aspects in restructuring the national legal order can be traced back to the exclusive competences of the EU. Especially in these policy fields, the leaving Member State needs to adopt several national laws and in general must establish national authorities that exercise tasks which are today fulfilled by the European institutions.[86] The state aid area or anti-dumping rules, where the tasks are fulfilled by the Commission and no such authority exists in national law, can serve as an example.[87]

The customs union and the common commercial policy, in particular, are important areas with more than hundreds of international agreements between the EU, its Member States and third states.[88] Consequently, the leaving Member State must not only set its own customs tariff or trade protection mechanisms, but must also negotiate new international treaties with all trading partners on its own.[89] Agreements signed only by the EU definitely have to be renegotiated. This is also true in general for all external relations of the leaving state with third countries. Assuming that the EU has the largest number of trade agreements worldwide, this is a huge task for the outgoing state.[90] As described below, an alternative would be to leave the EU as such and remain in the customs union to maintain international trade relations.

d) Budget and finances

When a Member State leaves the EU one could easily assume that all the financial contributions to the EU stop too: If a state is not a member any more, it will neither pay, nor receive money.[91] However, this assumption again depends on the withdrawal agreement because even EEA members like Norway contribute to EU programmes.[92] Especially in the agricultural sector there are a lot of subsidies within the framework of the EU that have to be wound up and restructured in the relationship between the EU and the outgoing state and the state must also adapt a new national agricultural policy.[93] But the same is true for the general financial aid paid by the EU, like structural or regional fund projects or subsidies to undertake research.[94]

e) National currency

If a Member State was also part of the Eurozone, then its withdrawal has even more consequences. First of all, the leaving National Central Bank must regain complete

86 Ibid., p. 215.
87 *Nicolaides*, (fn. 6), p. 110.
88 *Lazowski*, (fn. 29), p. 3.
89 Ibid.
90 *Nicolaides*, (fn. 6), p. 106.
91 Ibid., p. 108.
92 Ibid.
93 *Lazowski*, (fn. 22), p. 532.
94 Ibid.; *Nicolaides*, (fn. 6), p. 108.

sovereignty in monetary issues because it currently falls under the exclusive competence of the EU and the European Central Bank.[95] Afterwards, it must establish a new currency, though the country's legal tender prior to the Euro could be reintroduced,[96] unless it concludes a special monetary agreement with the EU to keep the Euro as a currency, like Monaco, Andorra or San Marino.[97] As every Member State's National Bank contributes to the capital of the European Central Bank and transfers reserve assets to the Eurosystem, these amounts must be disbursed and outstanding gains and deficits must be wound up.[98] If a Member State leaves the Eurozone, one must bear in mind that this might weaken the Euro.[99] Conversely, it might also be that the new established currency might depreciate strongly versus the Euro if the leaving Member State faces a bad financial situation.[100]

f) Further consequences

The withdrawing state must also bear in mind that EU law is not limited to the internal market, but also comprises several other policy areas, for example the area of freedom of security and justice including illegal cross-border activities, transport policy, environmental protection including air pollution or fisheries, energy and communication collaboration and agricultural policy.[101] In all these fields where a cross-border element can be found or the management or protection of common public goods are at stake, the leaving Member State has to agree on some cooperation with the remaining EU members.[102]

2. Economic and political consequences

To give a complete overview of the legal consequences, one must also address economic and political consequences.

The economic costs of a withdrawal depend on what kind of relationship the leaving Member State wants with the EU.[103] In general, it would cost the state's administration and economy a huge amount of money to adapt to the new situation without the EU.[104] It is obvious that the costs of a withdrawal are higher when a Member State

95 *Athanassiou*, Withdrawal and Expulsion from the EU and EMU – Some Reflections, European Central Bank Legal Working Paper Series, No 10, December 2009, p. 10.
96 Ibid.
97 European Commission, Economic and Financial Affairs, The euro outside the euro area, http://ec.europa.eu/economy_finance/euro/world/outside_euro_area/index_en.htm (20/3/2015).
98 *Athanassiou*, (fn. 95), p. 10; *Proctor*, Mann on the legal aspect of money, 7th ed. 2012, p. 840.
99 *Berglund*, (fn. 12), p. 162.
100 *Nicolaides*, (fn. 69), p. 216.
101 *Lazowski*, (fn. 29), p. 3; *Nicolaides*, (fn. 69), p. 216.
102 *Nicolaides*, (fn. 6), p. 109.
103 Ibid., p. 108.
104 *Hofmeister*, (fn. 9), p. 600.

does not want to keep any further economic relationship with the EU.[105] Especially for the UK this would be unthinkable, because the UK's most important national interest – trade – would be harmed.[106] If a withdrawing Member State does not agree with the EU on further economic cooperation, then the future non-participation in the internal market could lead to raising prices for consumers with further consequences for the economy.[107]

Alternatively, when a Member State was also a Member of the Eurozone, a new national currency had to be introduced which is cost-intensive and might have an impact on the whole economy.[108] In addition, when a Member State has received several financial contributions from the EU, the leaving state may have to absorb this financial loss by raising its taxes.[109] On the other hand, when a Member State was more a donator than a receiver of the EU financial contributions, this argument does not apply because in this case the Member State actually has no loss.[110]

In addition to economic consequences a withdrawal would also have political consequences. Having left the EU, the withdrawing Member State loses a political forum to discuss important issues. The withdrawal could also lead to disruption between the remaining and leaving Member States concerning future international agreements outside of the EU framework.[111] The EU could also lose its credibility in the international arena because it might be seen as an unstable entity which is not able to resolve its conflicts.

III. Alternatives to a total separation

After the state has recognised which consequences a withdrawal might have, it should also have a plan for its future relationship with the EU. Membership in the European Union does not only impose duties to the Member States. On the contrary, the Member States receive actual benefits from the EU and its policies. One very important benefit of the EU is its internal market where no trade barriers should exist. Every Member State has its own strengths and weaknesses in its own national economy and they are balanced through the internal market and the economic access to the other Member States. Therefore, one can suggest that the leaving Member State would not want to face a customs barrier in the future. Today's economy, in particular, is based on the relationship between states.[112] Therefore, it is unlikely that a Member State is going to withdraw from the European Union without any further cooperation. *Cameron* also has the view that it would be best for the UK to keep the benefits of

105 *Berglund*, (fn. 12), p. 162.
106 *Fiott*, Leaving the EU would harm the UK's number one national interest – trade, Carta Capital – Internacional, Interview by Gianni Carta on 21/12/2013.
107 *Berglund*, (fn. 12), p. 162.
108 *Hofmeister*, (fn. 9), p. 600.
109 *Lechner* as cited in ibid., p. 600, fn. 77.
110 *Berglund*, (fn. 12), p. 162.
111 Ibid.
112 *Lazowski*, (fn. 22), p. 533.

the internal market, with the possibility of participating in the development of future EU rules but with more intense forms of intergovernmental cooperation.[113] The following models, which are the most important of those already existing, can serve as orientation for a future relationship.

1. Partial withdrawal/opt-outs

A first alternative to a full withdrawal could be a partial withdrawal or an opt-out. The difference between a partial withdrawal and an opt-out is the time to exercise it. With an opt-out, the Member State says in advance that it does not want to participate in a certain policy field, whereas in a partial withdrawal the Member State notifies at a later date that it no longer wants to participate.

Article 50 TEU does not dictate a special form of future relationship between the EU and the leaving Member State so that one could assume that a Member State might make use of a partial withdrawal from only chosen politics based on the framework of Article 50 TEU, while remaining member of the European Union.[114] The partial membership of a state withdrawing on its own volition from policies that are not in the actual national interest or unfavourable would lead to a form of "cherry picking" or "Europe à la carte".[115] A negative consequence would be that a lack of legal certainty would be created if several Member States were to use it because different rights and obligations for every member state would prevail.[116] Furthermore, Article 50 TEU is designed to deal with withdrawal from the whole EU and not only from some subsets such as the Eurozone:[117] Article 50(3) TEU foresees that as a consequence of the withdrawal "the Treaties shall cease to apply". This can only be understood in reference to the EU treaties as a whole and not only some parts.[118] Partial withdrawal under the framework of Article 50 TEU should also be forbidden, because otherwise this would avoid the procedure of Article 48 TEU. Opt-outs are usually negotiated at intergovernmental conferences according to this treaty revision procedure[119] and unanimity is needed.[120] But as we have seen above, Article 50(2) TEU only asks for the participation of the other Member States in the Council where a qualified majority is needed. Therefore, Article 50 requires fewer conditions than Article 48 TEU and Article 48 seems to be *lex specialis* for those purposes. The interests of the other Mem-

113 *Nicolaides*, (fn. 6), p. 114.
114 *Wyrozumska*, in: Blanke/Mangiameli (eds.), The Treaty on European Union (TEU), 2013, Article 50, para. 29.
115 Ibid.
116 *Hofmeister*, To Bail Out Or Not to Bail Out? – Legal Aspects of the Greek Crisis, Cambridge Yearbook of European Legal Studies 2010/2011, p. 131.
117 Ibid.
118 Ibid.
119 *Sion*, The Politics of Opt-Out in the European Union: Voluntary or Involuntary Defection?, in: Cashin/Jirsa (eds.), Thinking Together – Proceedings of the IWM Junior Fellows' Conference, Winter 2003/2004, p. 2.
120 *Ohler*, in: Grabitz/Hilf/Nettesheim (eds.), Das Recht der EU, 51. EL 2013, Article 48 TEU, para. 23.

ber States and their participation rights must be protected. All in all, it is in the interest of the EU to argue that a partial withdrawal based on Article 50 TEU should not be possible, neither for unilateral withdrawal nor for a withdrawal by agreement. This situation will remain until the withdrawal procedure is amended, for example, by allowing a partial withdrawal in specific policy fields like Schengen or the EMU.[121]

One exception is that there is the possibility of reluctant Member States remaining in the EU and negotiating opt-outs in only some parts of a certain policy field.

Opt-outs are granted to a Member State when it does not want to give up sovereignty and does not want to participate in a specific area of deeper integration, with a protocol added to the treaty at an intergovernmental conference that exempts the Member State from participating in the integration policy in question.[122] This has been done, for example, by states that do not participate in the Schengen area or by the UK and Denmark, which do not participate in the third step of the Economic and Monetary Union policies and, therefore, do not have the Euro as currency.[123]

In this context, the question arises as to which extent the EU is willing to allow future opt-outs because they are also a weaker form of "cherry picking". It might be a case by case decision depending on the importance of the policy field for the development of the whole EU but opt-outs should only be a last resort if the integration process could not otherwise continue.

2. The European Economic Area Model

It might be a possibility for the leaving state to conclude an agreement within the framework of the European Economic Area (EEA). The EEA is comprised of the EU Member States and three out of four states of the European Free Trade Association (EFTA), Norway, Liechtenstein and Iceland; with the other EFTA state Switzerland the EU holds bilateral relationships.[124] Every EFTA country can join the EEA, meaning that a withdrawing Member State needs to negotiate on its membership in both the EFTA and the EEA.[125]

The EEA relationship is the nearest relationship to the EU without being a full member.[126] It creates a common internal market with the four fundamental freedoms combined with further joint policies and EU programmes.[127] All the EU legislation concerning the internal market including competition and state aid rules is integrated into the EEA legal framework and within the EEA equal conditions for all market

121 *Hofmeister*, (fn. 116), p. 131.
122 *Sion*, (fn. 119), p. 2.
123 *Schäfer*, Withdrawal Legitimised? On the Proposal by the Constitutional Convention for the Right of Secession from the EU, Intereconomics July/August 2003, p. 183.
124 *Lazowski*, (fn. 22), p. 534.
125 Ibid.
126 *Nicolaides*, (fn. 6), p. 107.
127 *Lazowski*, (fn. 22), p. 534.

participants should prevail.[128] In addition, further policies like "consumer protection, company law, environment, [or] social policy" are included and also so called "flanking policies such as research and technological development, education, training and youth, employment, […] enterprise, entrepreneurship and small and medium-sized enterprises" are adopted.[129]

Not included in the framework of the EEA are for example the policy fields of "common agriculture and fisheries policies […], customs union, common trade policy, common foreign and security policy, justice and home affairs […], […] taxation or economic and monetary union."[130] The participation in the Schengen area is stated in a separate agreement.[131]

The participation in the EEA has two major weaknesses. First, according to Article 6 of the EEA Agreement, even the relevant judgments of the European Court of Justice have to be followed to guarantee a consistent interpretation of rules. Secondly, the EEA-EFTA states are obliged to incorporate secondary EU legislation that falls via the scope of the EEA agreement into their law through responsible permanent institutions, even though they can only participate in a very limited way in the early decision-making process (e.g. in Commission's expert committees or by submitting comments).[132] The state would, however, then be in a weak position as it must follow the rules set by the EU without essentially being able to influence their content in the decision-making process.[133] In some areas it would almost be seen as a member of the EU.[134] It is hardly imaginable that a Member State would accept the demotion from being a full participant in the decision-making process to an EEA-member to which the applicable law is dictated.[135]

Alternatively, a leaving State could negotiate a new Free Trade Agreement that serves its needs better than the existing EEA/EFTA relationship.

3. Bilateral relationship: the "Swiss Model"

The bilateral approach is practised only as a loose sector specific cooperation, with around 120 agreements between the EU and Switzerland.[136] These agreements create rights and obligations and aim to strengthen the economic relationship between the EU and Switzerland, even though Switzerland does not participate in the EEA or the

128 The Basic Features of the EEA Agreement, European Economic Area, Standing Committee of the EFTA States, Ref. 1112099, http://www.efta.int/eea/eea-agreement/eea-basic-features#1 (20/3/2015), p. 2.
129 Ibid.
130 Ibid., p. 3.
131 *Lazowski*, (fn. 22), p. 535.
132 EFTA Standing Committee, (fn. 128), p. 7.
133 *Hofmeister*, (fn. 9), p. 601.
134 *Berglund*, (fn. 12), p. 162.
135 *Lazowski*, (fn. 22), p. 535.
136 *Maresceau*, EU-Switzerland: Quo Vadis?, Georgia Journal of International and Comparative Law 39 (2010-2011), p. 729.

internal market of the EU.[137] Specifically the EFTA agreement and those that are categorised under Bilateral I and Bilateral II do have a high significance and some agreements even require that EU law must be applied.[138] They regulate a variety of different areas, extending, for example, from free movement of persons, air transportation, trade in agricultural products and government procurement to the development of the Schengen cooperation.[139]

A main characteristic of such a bilateral relationship is that there is no coherent institutional framework and bilateral discussions only take place when there is a need for them.[140] Thus, a disadvantage of this relationship is that over time an incoherent set of rules has been concluded and there is a new joint committee that is predominantly responsible for the administrative tasks for almost every agreement.[141]

Another characteristic is that some agreements ask for the adoption of EU law into the Swiss legal order or the application of the "EU acquis" in bilateral relations, even though Swiss representatives only have the right to decision shaping but not to voting.[142] This is, for example, the case for the 2002 concluded Free Movement of Persons Agreement, where the EU extended the application of some of its legislation to Switzerland, meaning that Switzerland is for the purpose of the application of these rules "to be equated with a Member State of the European Union".[143] However, changes in EU law are usually not reflected automatically by Switzerland, but have to be negotiated in further agreements.[144] Therefore the question arises again as to the extent that the state needs to follow the changes in secondary law or the jurisprudence of the ECJ to guarantee consistent application.[145]

A further negative aspect is that the Swiss model unlike the EEA does not provide a judicial body and that the Courts in Switzerland do not have the possibility of making a preliminary ruling.[146] As a consequence the lack of legal certainty also created by the fragmentation of agreements is very high.

4. Customs Union: the "Turkish Model"

Another alternative would be to leave the EU while remaining in the Customs Union, as has been demonstrated by the relationship between the EU and Turkey since 1995.

137 ECJ, case C-506/10, *Graf and Engel*, ECLI:EU:C:2011:643, para. 33.
138 *Lazowski*, (fn. 22), p. 536.
139 Ibid., p. 537.
140 Ibid.
141 Ibid.
142 *Lazowski*, Enhanced Multilateralism and Enhanced Bilateralism: Integration without Membership in the European Union, Common Market Law Review 45 (2008), p. 1445; *Lazowski*, (fn. 22), p. 538.
143 ECJ, case C-656/11, *United Kingdom v. Council*, ECLI:EU:C:2014:97, paras. 58 and 59; ECJ, case C-247/09, *Xhymshiti*, ECLI:EU:C:2010:698, para. 31.
144 *Elliott/Lewis*, Setting Out the British Option: Liberating 95 % of UK Business from EU Red Tape, Business for Britain 2013, p. 53.
145 *Lazowski*, (fn. 22), p. 538.
146 Ibid.

Within the scope of the Customs Union fall all industrial goods and, due to further concessions, processed agricultural goods.[147] Turkey applies the EU common custom tariff, and neither party is allowed to impose customs duties or quantitative restrictions like quotas.[148] Turkey must follow EU rules in specific areas of the single market, especially in the set of industrial standards.[149]

A negative aspect of this relationship is that Turkey does not participate in the negotiation process when the EU concludes Free Trade Agreements with third countries. The result is that Turkey has to accept the consequence of goods of this third country coming into the Customs Union and also entering Turkey without any customs duty.[150] In contrast, when Turkish goods are exported to the territory of the third country, they are often charged with tariffs and other charges and do not get the same competitive benefits as EU products.[151] The EU authorities try to overcome this problem by inserting a legally non-binding clause into their trade agreements that asks the third countries to enter into free trade negotiations with Turkey, but the third states are often very reluctant to follow this request and remain protectionist against Turkey.[152]

5. Voluntary withdrawal from the Eurozone

In certain situations involving huge economic problems it might be necessary for a Member State to withdraw only from the Eurozone instead from the whole EU. In terms of EU law, one must differentiate between two procedures: leaving the whole EU or leaving only the Eurozone while remaining in the EU.

Completely leaving the EU, including the Eurozone – whether unilaterally or based on an agreement – is legally possible because Article 50 TEU grants a complete right to withdrawal[153] and the relevant provisions for the Eurozone can be found in the treaties (Articles 136-144 TFEU) that cease to apply.[154]

Article 50 TEU does not refer directly to the withdrawal from the Eurozone. This is so because the participation in the EMU has always been seen as irreversible.[155] Therefore the question arises as to whether the scope of Article 50 TEU also contains the voluntary withdrawal only from the Eurozone while remaining in the EU. One could easily argue that "*a maiore ad minus*", when it is possible to withdraw from the

147 See European Commission, EU and Turkey, http://ec.europa.eu/trade/policy/countries-and-regions/countries/turkey/ (20/3/2015).
148 *Akses*, Implications of Free Trade Agreements on Turkey-EU Customs Union, Diplomacy & Foreign Affairs 2014, The Framework and Scope.
149 See fn. 147.
150 *Akses*, (fn. 148), The Problems Encountered with Free Trade Agreements.
151 Ibid., Customs Union and asymmetric structure.
152 Ibid., The Problems Encountered with Free Trade Agreements.
153 *Proctor*, (fn. 98), p. 839.
154 *Dammann*, The Right to Leave the Eurozone, Texas International Law Journal 48 (2013), p. 131.
155 *Proctor*, (fn. 98), p. 838.

whole EU, it should be possible to withdraw only from a subset, too.[156] But this argumentation is not convincing. As argued above, partial withdrawal from the EU based on Article 50 TEU is not possible. To be consistent, this also precludes leaving the Eurozone.[157] Therefore one must conclude that voluntary withdrawal only from the Eurozone based on Article 50 TEU is not possible.[158]

Nevertheless, the Member States have the sovereignty to decide together that a Member State can leave the Eurozone. The difference to a forbidden partial withdrawal is that leaving the Eurozone would not be based on Article 50 TEU and that it might be beneficial for the EU and the Eurozone to let a Member State's economy exist outside the Euro. The most convincing way is to use the ordinary treaty revision procedure of Article 48 TEU so that the Member State can opt out of the third stage of the EMU.[159]

6. Findings – Alternatives

Preferably a Member State does not opt for complete exit of the EU, but instead will always try to renegotiate its membership and try to get concessions just like the UK has done in the previous years. If it does withdraw unilaterally, then it would only have a relationship with the EU as provided for by the framework of the WTO.[160]

If a Member State decides to leave the EU and tries to negotiate the further relationship, the above-mentioned models all have strengths and weaknesses. The EEA-EFTA as well as the Swiss-EU relationship have one large disadvantage in common: even though that both models give back some sovereignty to the withdrawing state, the price that must be paid is that neither allows these non-EU members to participate in the decision-making process while having to a certain extent the obligation to follow EU laws.[161] As described above, there is also a lack of participation in the Turkey relationship while obligations have to be followed.

In general, from the view of the state the bilateral relationship would be the most preferable option because it could decide the intensity of cooperation. But the EU might be reluctant to allow another country to "pick and choose" without having a common institution that guarantees consistent application of the law.[162] This critique came from a Council Conclusion in which it was argued that in the future the adoption of new developments in EU law (case law and EU acquis) and the enforcement and interpretation of these bilateral agreements must be guaranteed in a consistent

156 *Athanassiou*, (fn. 95), p. 29.
157 *Hofmeister*, (fn. 116), p. 131.
158 It is doubtful whether International Law (Art. 61 or 62 VCLT) would grant the right to leave the Eurozone because the Member State in question is itself usually responsible for the crisis, see *Bonke*, Die "Causa Griechenland": Rechtmäßigkeit der Krisenhilfen und Möglichkeit des Ausscheidens eines Mitgliedstaates aus der Europäischen Währungsunion, ZEuS 2010, p. 517, also about leaving the Eurozone in general.
159 Ibid., p. 520.
160 *Oliver*, (fn. 67), p. 22.
161 *Lazowski*, (fn. 22), p. 539.
162 Ibid.

way.[163] In addition, specifically those Member States that recently became full members without any exceptions or concessions might be reluctant to give a withdrawing state the possibility for "cherry picking".[164]

Therefore, it would be more likely to establish a new relationship. The Member State would ask for a relationship in which it is not degraded too much but it is clear that leaving the EU does not come for free and as a consequence it will lose its power to influence EU law. However, in negotiations everything is possible and a new relationship could be developed bearing in mind the strengths and weaknesses of the actual models to fit to the needs of the EU and the former Member State.

IV. Findings – Legal consequences

This section has shown that the EU is an entity that is very deeply linked legally, politically and economically, meaning that a withdrawal would have far-reaching consequences for both the leaving country and the EU in every imaginable policy field. The total amount of legal consequences is too manifold to explain on a few pages but the above conducted research has proved how complex a withdrawal will be. A withdrawal agreement would help to reduce this complexity. There are several alternatives to a full separation that shows that there are indeed possibilities for a life after withdrawal. Whether they are realised, depends on the political intentions of both parties as well as the practical feasibility of the various options for both the EU and the former Member State.

E. Assessment of the right to withdraw

I. Positive aspects

On the one hand, the right to withdraw brings several advantages.

First, the explicit right to withdraw in Article 50 TEU brings legal certainty.[165] It is now clear that a Member State can leave the European Union.

Second, the norm recognises and affirms the sovereignty of the States.[166] This is a reflection of the fact that the Member States remain the masters of the treaties in the voluntary European integration process and are the "Masters of their Membership" too.[167] In addition, the withdrawal possibility underlines the actual special character of the European Union as an entity of public international law and not as of a federal state.[168]

163 Council conclusions on EU relations with EFTA countries of the 14/12/2010, 3060th General Affairs Council meeting, paras. 42 and 48.
164 *Buchan*, Outsiders on the inside – Swiss and Norwegian lessons for the UK, Centre for European Reform 2012, p. 7.
165 *Dörr*, (fn. 16), Article 50 TEU, para. 3.
166 Ibid.
167 Ibid., para. 7; *Zbiral*, (fn. 13), p. 316.
168 *Dörr*, (fn. 16), Article 50 TEU, para. 3.

Third, the withdrawal clause might make the integration process easier by taking away some political pressure.[169] Member States that are more reluctant will always bear in mind that they have the right to withdraw. Thus an unsatisfied state could withdraw voluntarily. It would be counterproductive for the EU to force a Member State to stay in the European Union, meaning that the EU can focus on other important topics and let this Member State go.[170] Alternatively, if there is a deadlock or a setback within the European integration, the Member States that would like to have enhanced cooperation could, in an extremely hypothetical example, withdraw from the Union and create a new parallel more enhanced union.[171] The intergovernmental Treaty on Stability, Coordination and Governance can serve as a current example of a more enhanced parallel cooperation in the Economic and Monetary Union because some Member States as the UK or the Czech Republic do not participate.

Another good point of the withdrawal clause is that the future decisions of the EU have deeper legitimacy from the Member States because they can no longer argue that the measure was dictated from the EU and that they did not have another choice.[172]

Even though it is often argued that Member States could now threaten to withdraw from the EU, one can reverse this argument. Member States might be even more reluctant with the threat to withdraw, because once a withdrawal is announced, the political pressure from inside the country might be very high to make a withdrawal effective.[173]

Finally, there will usually be a withdrawal agreement and this is an advantage for the European Union. As not every detail or content of the withdrawal procedure is laid down, the EU preserves some flexibility to influence its content and the future relationship between the leaving state and the EU.[174] It is the Member State that wants to keep a certain level of cooperation, giving the EU a better negotiation position. During the long and intensive negotiations of the withdrawal agreement one could present the withdrawal candidate the complete range of consequences so that the candidate might be deterred.[175]

II. Criticism

Nevertheless, the norm also receives criticism and implies some disadvantages. In general, it is quite "surprising […] [that] given the significance and complexity of a

169 For this section see *Calliess*, (fn. 37), Article 50 TEU, para. 21.
170 *Athanassiou*, (fn. 95), p. 26.
171 *Blagoev*, (fn. 8), p. 225; *Calliess*, (fn. 37), Article 50 TEU, para. 21.
172 *Terhechte*, Der Vertrag von Lissabon: Grundlegende Verfassungsurkunde der europäischen Rechtsgemeinschaft oder technischer Änderungsvertrag?, EuR 2008, p. 150.
173 *Altmaier*, Wird Europea neu erfunden?, Walter-Hallstein-Institut für Europäisches Verfassungsrecht – Forum Constitutionis Europae, FCE 5/03, Speech at 17/6/2003, p. 3.
174 *Dörr*, (fn. 16), Article 50 TEU, paras. 5 and 28.
175 *Oppermann*, Eine Verfassung für die Europäische Union – Der Entwurf des Europäischen Konvents – 1. Teil, DVBl. 2003, p. 1168.

potential withdrawal" the clause is short and not very detailed.[176] Even though there is now legal certainty to a specific extent, every new rule also creates new problems. Those newly created problems should be kept as slight as possible. In the following section, we will see that this is not the case. Several practical issues in particular are lacking when it comes to a withdrawal. Firstly, several critical aspects will be mentioned. Secondly, the most realistic ones are used to develop recommendations to improve the content and the procedure of the legal withdrawal framework.

1. Wording and content of Article 50 TEU

It seems as if the wording and content is unclear and insufficient.

To begin with the wording, when reading Article 50(2) TEU, one could get the impression that the "wording is confusing" and that a withdrawal agreement is a necessary condition.[177] Only in connection with Article 50(3) TEU it becomes clear that an agreement is not absolutely necessary. The idea behind Article 50(2) TEU might be that it must be in the interest of the EU and the leaving state to first try to agree on the circumstances of the withdrawal, but if such an agreement fails, it should be avoided that the Member State is hindered to leave the Union. The structure of the two paragraphs is more a reflection of state sovereignty and a legal article always has to be read completely. Therefore, this critique is not justified.

Moreover, it can be criticised that the Member State in question does not even have to motivate its intention to withdraw from the Union, nor must it fulfil certain criteria.[178] It is also a negative aspect that there is no limitation of the right to withdraw so there might be the threat or fear of withdrawal in the future.[179] One could have learned something from the past experience of the League of Nations. The predecessor of the today's United Nations did contain a withdrawal clause and it was used by some Member States to create political pressure by threatening a withdrawal.[180] Therefore, it would have been desirable to protect the European integration by introducing safeguards as, for example, a conciliation phase.[181] This might have the positive effect that through the discussion a solution for the conflict can be found.[182] But instead of going the exhaustive long way of finding a common compromise, it might be that the short and easier way is used so that an insurgent Member State is pressed to withdraw voluntarily.[183] In general, it seems as if the withdrawal is much easier than the accession to the EU.[184]

176 *Rieder*, The Withdrawal Clause of the Lisbon Treaty in the Light of EU Citizenship: Between Disintegration and Integration, Fordham International Law Journal 37 (2013), p. 155.
177 *Hofmeister*, (fn. 9), p. 598.
178 *Terhechte*, (fn. 172), p. 152.
179 *De Waele*, (fn. 39), p. 182.
180 *Lazowski*, (fn. 22), p. 525.
181 *Terhechte*, (fn. 172), p. 150.
182 *Zeh*, (fn. 7), p. 192.
183 Ibid., p. 204.
184 *Nicolaides*, (fn. 69), p. 212.

2. Procedural aspects during a withdrawal

Regrettably, the procedure laid down in Article 50 TEU of how a withdrawal will be put into effect is insufficient. For example, according to Article 50(4) TEU, it is forbidden for the representative of the leaving Member State to take part in the discussions or decision-making process of the European Council or of the Council about the withdrawal itself. On first glance, this rule is logical because according to Article 10(2) TEU the representatives in the (European) Council represent their state and any potential conflict of interests should be avoided. But there is criticism that this rule is not far reaching enough, as it does not say anything about the general status of the withdrawing Member State and its representatives during the time of the withdrawal procedure.[185] This leads to contentious legal issues. For instance, the European Parliament also has to give its consent. But are the Members of the European Parliament (MEPs) of the leaving Member State allowed to participate in the consent-building process? To propose an answer to this unregulated question one can refer to the task of the Parliamentarians. Article 10(2) TEU states that "Citizens are directly represented at Union level in the European Parliament". Thus MEPs are not representatives of the government of the leaving Member State, but elected as political representatives of the citizens. The representation of the citizens would decrease if the Parliamentarians were not allowed to participate in the decision-making process which cannot be accepted in a European Union governed by the rule of law. In addition, especially their evaluation of the situation with background knowledge about their country might be interesting. Another argument in favour of the MEPs' participation is that the European Parliament generally decides in its entirety even though not all Member States are participating in the issue in question, e.g. when states are holding an opt-out, in the warning/suspension procedure (Article 7 TEU), or in the legislative procedure of the enhanced cooperation[186] (Article 326 et seqq. TFEU). In consequence, the same must apply in the case of a withdrawal. Hence, the Members of the European Parliament are allowed to participate in the process of building consent.

Another unregulated issue is whether the representatives of the leaving Member State in all European institutions are allowed to participate in the general decision-making process of the EU (i.e. not related to the withdrawal) or in the everyday work of the EU after notice of the withdrawal was given?[187] On the one hand, one must bear in mind that the leaving Member State and its representatives – as long as the withdrawal does not enter into force – are still Members of the European Union. In this context, it would also be possible for the negotiations on a withdrawal agreement to cease because the Member State in question wanted to remain within the EU.[188] Therefore it would not be justified to degrade the Member State in question only to observer status in all decision-making processes, as is the case for acceding countries

185 *Hofmeister*, (fn. 9), p. 594.
186 *Pechstein*, in: Streinz, (fn. 54), Article 330 TFEU, para. 3.
187 *Hofmeister*, (fn. 9), p. 594.
188 *Lazowski*, (fn. 22), p. 530.

between the signature and the entry into force of the accession agreement.[189] On the other hand, it could avoid decisions which might have a negative impact on them having left the EU. In a withdrawal situation, it might be that the nationals of the withdrawing state feel more loyal to the national interest than to Europe.[190] However, as the EU treaty does not provide a specific rule about this problem, the Member State in question does have the right to participate in all decision-making processes of the Institutions, at least until the withdrawal agreement is signed.[191] Hereby it is bound by the principle of loyalty as stated in Article 4(3) TEU so that it is not allowed to take measures that are against the interest of the EU.[192]

3. Protection of the citizens and companies

As already mentioned above, the whole European Union works very much in the interest and for the protection of its citizens and companies, as can be seen, for example, in the preamble and Articles 1, 3 and 13 TEU. The creation of subjective rights and duties for the citizens is one of the reasons for the great success of the European integration.[193] Compared to traditional international law, EU citizens have a very strong legal status that has developed continuously since the beginning of the European integration and is highlighted with the introduction of the EU citizenship (today Article 20 TFEU).[194] Before the Treaty of Lisbon, the people in Europe had legal certainty and could plan their private and business life due to the guaranteed fundamental freedoms because, only under exceptional circumstances, was there the possibility to withdraw.[195] The withdrawal clause as such is already a threat to the actual protection of EU citizens and companies because the leaving Member State can deprive its rights through discretionary action.[196] Therefore it seems as if the legal and natural persons are not protected sufficiently against a limitation of their rights.

4. Internal reorganisation of the EU

In addition, the EU does not have rules about its internal reorganisation after a Member State has left the Union. This has to be done by the ordinary treaty revision procedure. It might be a problem that this necessary treaty revision procedure could be used by some remaining Member States as a reason to renegotiate some parts of the treaties again, which might lead to some destabilisation.[197] One could avoid this situation if there were precautionary rules about it.

189 Ibid.
190 *Wyrozumska*, (fn. 8), p. 361.
191 *Lazowski*, (fn. 22), p. 531.
192 *Zeh*, (fn. 7), p. 199.
193 *Bruha/Nowak*, (fn. 21), p. 17.
194 *Rieder*, (fn. 176), p. 161.
195 *Bruha/Nowak*, (fn. 21), p. 17.
196 Ibid.
197 *Friel*, (fn. 14), p. 427.

5. Further practical problems

There are also further unsolved practical problems that might come up following a withdrawal and which are not addressed by Article 50 TEU. A very important question is who among the EU, its Member States and citizens bears the costs caused by the withdrawal.[198] Another financial issue is how and when the leaving state will pay back subsidies which are not lawful anymore because its conditions are no longer fulfilled due to the withdrawal? Or does the state have to pay compensation for the financial benefits that it has received recently?[199]

6. Compatibility with the European idea

It took several decades until the withdrawal clause was finally included in the treaties. This took so long because the idea and the aim behind the European Union and its predecessors was to create an ever closer Union through the deeper integration of states. The idea of an ever closer union can be found today in Article 1(2) TEU. This is also reflected in Article 53 TEU and Article 356 TFEU, which define that both treaties are "concluded for an unlimited period". In several decisions,[200] the European Court of Justice has shaped the characteristics and the legal nature of the Union by stating that the EU is a community of unlimited duration and that the integration process between the Union and its Member States is irreversible.[201] Hereby, one can assume that a "point of no return" is reached where the Member States cannot secede from the EU anymore because they have equipped their nationals with legal rights that cannot be taken away from them due to the integration process.[202] To grant a written right to withdraw from the Union seems to undermine this European idea and would also be contrary to the argument of the founding fathers.

However, this line of argument is, with advent of the Treaty of Lisbon, no longer persuasive. Article 53 TEU and Article 356 TFEU have received another significance through the right to withdraw.[203] Article 53 TEU and Article 356 TFEU do not say anything about the membership of an individual Member State. They just state that the treaties themselves are not of limited duration. This means that the treaties can only be brought to an end based upon the actions of the Member States.[204] Even when an international treaty or organisation aims to be valid for an unlimited duration, the composition of its members may change.[205] The ECJ decisions cannot be interpreted as prohibiting a Member State from leaving the Union. Rather, it should be understood

198 *Kumin*, (fn. 61), p. 321.
199 *Berglund*, (fn. 12), p. 160.
200 ECJ, case 6/64, *Costa v. ENEL*, ECR 1964, 585, 592; ECJ, case 26/62, *Van Gend en Loos*, ECT 1963, 1, 12.
201 *Hofmeister*, (fn. 9), p. 594.
202 *Herbst*, (fn. 27), p. 1758.
203 *Bruha/Nowak*, (fn. 21), p. 16.
204 *Dörr*, (fn. 16), Art. 53 TEU, para. 4.
205 *Hofmeister*, (fn. 9), p. 596.

that as long as a Member State is still part of the Union, national law must be in line with European law.

But the most convincing argument is that the Member States are still the "masters of the treaties" and can therefore decide to change the treaties and include new provisions like the right to withdraw, whenever they agree to do so.[206]

Furthermore, the circumstances under which the EU has to work have changed. Since the outset, when the European Union was a purely "economic and technical collaboration", it has gradually developed into also being a "political union".[207] One can no longer compare the process of European integration envisaged by *Jean Monnet* and *Robert Schuman* with the current situation.[208] One good example is the number of Member States, which has increased from six founding states to currently twenty-eight Member States, requiring different cultural values and legal views to be balanced. The introduction of a withdrawal clause is just "testimony to our present timeframe" where especially the acceded states are not willing to relinquish irreversibly their – sometimes quite recently regained – sovereignty.[209] Therefore, one must conclude that the right to withdraw from the European Union is not inconsistent with the European idea as it exists today.

III. Findings and recommendations

Some of these above-mentioned practical concerns might be addressed in the withdrawal agreement. But when it comes to a withdrawal, the relationship between the state and the EU is already very negative, meaning it might be difficult to come to an agreement.[210] This was already the case in the withdrawal of Greenland, where the negotiations about the fisheries policy were very controversial.[211] Given that the withdrawal of Greenland was already problematic, the withdrawal of an actual Member State would be even more contentious. As we have seen above, a Member State can theoretically also withdraw without an agreement. This so-called "sunset clause" of Article 50(3) TEU, i.e. that the treaties cease to apply two years after the notification, even if there is no withdrawal agreement, tries to bring legal certainty.[212] However, it does not bring legal certainty as it might be problematic when there is no understanding between the Union and the Member State. Without an agreement, there is no one to decide on the wider withdrawal procedure and there could be a worst case scenario of the normal working of the EU being paralysed.[213] To avoid an unclear situation, there should be legal clarity in so far that at least some important issues must be reg-

206 Ibid.
207 European Council, Laeken Declaration on the Future of the European Union, SN 300/01, DOC/01/18, p. 1.
208 *De Waele*, (fn. 39), p. 182.
209 Ibid., p. 181.
210 *Hofmeister*, (fn. 9), p. 594.
211 *Berglund*, (fn. 12), p. 165.
212 *Heintschel von Heinegg*, (fn. 35), Article 50 TEU, para. 9.
213 Zeh, (fn. 7), pp. 200 and 206.

ulated abstractly even before a Member State notifies its intention to withdraw. Only then a semblance of order would exist in this already very exceptional situation.[214]

Article 50 TEU has several positive aspects like introducing legal certainty and guidance, while respecting the sovereignty of states, easing the future integration process and deeper legitimation of future decisions and the possibility of shaping the withdrawal agreement. Nevertheless, there are also several disadvantages which must be addressed, as a lack of sufficient rules concerning the realisation of a withdrawal, a lack of protection of legal and natural persons or a lack of rules concerning the internal reorganisation of the EU after a withdrawal.

Having seen the far-reaching consequences and the strengths and weaknesses of Article 50 TEU, it turned out that the withdrawal framework is not sufficient. Therefore, one can give the following recommendations. It is clear that it might be difficult to establish all of these recommendations into the legal framework for a withdrawal as it depends a great deal on the political will of the Member States and the practical feasibility. Nevertheless, the more ambitious the theory is, the more likely it is that rules or at least larger parts of them will be implemented.

First, the procedure and the conditions of a withdrawal should be described in detail and with clear rules because the withdrawal will have far reaching consequences to the single market, the EU and its Member States.[215] Here it would be desirable that phase out rules are established concerning the general decision-making process (i.e. not related to withdrawal) and the involvement of the nationals of the former Member State in the EU institutions.[216] Even though a solution was proposed above, it would be better to regulate it explicitly. There should also be pre-established rules about the internal reorganisation of the EU to guarantee a smooth transition. In general, phase out rules are needed for example: to state until which time cases can be submitted to the ECJ for adjudication (which is particularly important for cases where a compensation of damages is sought against the EU or the leaving Member State);[217] to determine the time for the last financial contribution of the leaving state; to grant citizens and companies the possibility of making use of their fundamental freedoms and other rights, at least for a certain period of time.

The latter argument brings us to the second recommendation. Pre-established phase out rules and minimum standards are also very important for the protection of citizens and companies and their vested rights. This protection might derive from general rules that govern EU law, but it would bring legal certainty if it was stated explicitly and defined as to its scope. In this context, the decision of the Member State to withdraw – whether unilaterally or following an agreement – must be based on the will of the vast majority of its citizens because of the EU wide accepted values of democracy and

214 *Athanassiou*, (fn. 95), p. 25.
215 *Hübner*, European Convention, Suggestion for amendment of Article: 46, http://european-convention.europa.eu/docs/Treaty/pdf/46/ART46hubnerEN.pdf (20/3/2015).
216 *Lazowski*, (fn. 22), p. 530.
217 *Herbst*, (fn. 27), p. 1757.

the rule of law.[218] The main aim should be to prove the will of the people in the form of a referendum; alternatively, it might be sufficient that the national parliament and government were elected by the citizens with the mandate to withdraw.[219] However, referenda are not a common part of the political decision-making process in all Member States, meaning that leaving the EU cannot proceed "business as usual". It needs exceptional intensive preparation and also exceptionally high political legitimacy. This is so important because the rights of the EU citizens are at stake. Such a step may also bring the EU a bit closer to its citizens because it is them who may decide about the membership of their country in the EU. As a consequence, the EU in general would need to care more about and inform or involve its citizens into the whole EU decision-making process, which is one of the current criticisms directed towards the EU.

Thirdly, the right to withdraw could be made conditional to specific circumstances. Then the right to withdraw would not be abused for the simple purpose of applying political pressure on the EU.[220] One could link it, for example, as proposed during the European Convention, to the non-ratification of a new treaty. It would be desirable if a Member State had at least the explicit duty to provide the reasons motivating its withdrawal or if a conciliation phase was established. There has to be a good balance between the recognition of state sovereignty (i.e. right to withdraw) and legal certainty (i.e. no extensive possibility to threat with a withdrawal because arbitrariness would be limited). The withdrawal should not be made contingent on an agreement because then the EU could block the decision of a Member State.

Fourthly, there should be a rule about the cost distribution of a withdrawal and all financial issues concerning the membership. It cannot be in the interest of the remaining Member States that they would bear the costs of a withdrawal caused by another Member State. It was already proposed in the European Convention inter alia by *Robert Badinter* to include into the norm a clause which states that the withdrawing state should bear the potential damages of the EU caused by a withdrawal.[221]

Fifthly, concerning the withdrawal agreement, when a Member State leaves the EU, but nevertheless wants to keep relations with the EU, the creation of an extensive "Europe à la carte" should be avoided. Once the remaining Member States realise that this new relationship might work well without being a member of the EU, they might also try to renegotiate their own customised relationship.[222] The EU has to find a good compromise so that it is worthwhile for the remaining states to retain their membership in the EU.

218 *Tatham*, 'Don't mention divorce at the wedding, darling!': EU accession and withdrawal after Lisbon, in: Biondi/Eeckhout/Ripley (eds.), EU law after Lisbon, 2012, p. 149.
219 Ibid.
220 *Hofmeister*, (fn. 9), p. 600.
221 *Badinter*, European Convention, Suggestion for amendment of Article: 46, http://european-convention.europa.eu/docs/Treaty/pdf/46/art46badinterFR.pdf (20/3/2015).
222 *Oliver*, (fn. 67), p. 22.

F. Conclusion

In a European Union, that might someday have 35 Member States or more, very severe problems can arise due to the different interests, cultures and levels of economic development among its members.[223] In addition, the fact that the decision-making process in the EU is often based on qualified majority voting, states may be outvoted and become unsatisfied with the membership.[224] Therefore, the codified possibility of withdrawing from the Union is a necessary tool as *ultima ratio* to be prepared for the next centuries. It is worth pointing out that the EU has made a courageous step forward in the interests of the Member States with the introduction of this clause and is subordinating the process of further integration to the political reality.[225] This willingness and flexibility is needed for the EU to succeed in the upcoming years. Confirming *Piris*, the codification of Article 50 TEU shows the actual character of the European Union, namely its character as "a voluntary association between states".[226]

This research has shown that the pure legal barriers to withdrawal are not very high. But as we have seen above, the legal consequences are diverse and they are interconnected to economic and political consequences. It is more the assessment of economic and political consequences that might prevent a Member State from withdrawing. A Member State, for example, has to assess whether the advantage for the domestic policies produced by the withdrawal – which will probably only be short-term – is worth the trouble and the high costs which have to be borne.[227] In addition, a previous Member State is not able to influence the behaviour of the other Member States anymore[228] and any Member State that has left the European Union must, according to Article 50(5) TEU, run through the normal application process of Article 49 TEU. When notifying of the withdrawal, one must have this condition in mind because all acceding Member States must participate in the EMU and the Schengen Conventions, meaning that especially for the UK, it would be very difficult to receive again the same benefits (i.e. opt-outs, budgetary advantages) it already has today.[229]

It is unlikely that the possibility of a unilateral withdrawal will ever be used because the integration process between the Member States is very deep, causing the Member States to be dependent on each other. If the withdrawal clause is used at all, then a withdrawal based upon agreement with any further cooperation is more likely. The withdrawal from the EU should be only a last resort, if declarations, treaty revisions, opt-outs, or enhanced cooperation of the remaining Member States no longer bring

223 *Piris*, The Lisbon Treaty: a legal and political analysis, 2010, p. 109.
224 *Tatham*, (fn. 218), p. 149.
225 *Puttler*, Sind die Mitgliedstaaten noch 'Herren' der EU? – Stellung und Einfluss der Mitgliedstaaten nach dem Entwurf des Verfassungsvertrages der Regierunskonferenz, EuR 2004, p. 678.
226 *Piris*, (fn. 223), p. 111.
227 *Dörr*, (fn. 16), Article 50 TEU, para. 50.
228 *Weiler*, (fn. 31), p. 283.
229 *Lazowski*, (fn. 22), p. 540.

success.[230] Concerning the actual withdrawal discussion in the UK as mentioned in the introduction, it is unlikely that they will leave the EU. For both sides, making concessions through an agreement based on Article 48 TEU would be less dangerous from an economic and political point of view than bearing the consequences of a withdrawal, even if this might lead to an undesired "Europe à la carte". From the point of view of the EU, it does not want the UK to leave because this would endanger and destabilise the whole EU integration process and also lead to a shift of powers between the remaining Member States. From the UK's view, one can assume that it does not want to lose its economic connections to the EU, i.e. especially the benefits of the internal market and also the economic power of the EU in relation to third countries. Experts even calculated that a withdrawal could lead to a permanent lower output of UK's economy.[231] Without being a member of the EU, the UK could not use its strong position in Europe anymore to influence the EU politics. And the UK would risk creating political instability within its territory continuing the debate on withdrawal due to divergent views on this issue. Such instability could arise e.g. because Wales and Northern Ireland might possibly want to remain in the EU as they are net recipients from the EU budget, whereas England as a net contributor might want to withdraw.[232] It is also unlikely that the people will vote for a complete withdrawal as this would also have a negative impact on their lives and rights. Therefore, a withdrawal would neither be beneficial nor realistic for the UK. However, if the EU is not willing to make concessions, then a withdrawal of the UK based on Article 50 TEU might be possible. In this context of a potential withdrawal, a bilateral customised mere economic rather than political relationship would be created by a withdrawal agreement.

All in all, as *Barroso* said, every Member State has to decide together with its citizens what the best approach towards the European Union is for them.[233] So even if it is not the business of the EU and not in its interest to speculate about possible withdrawal candidates, it would be appropriate if the rules for a withdrawal were clear and without ambiguity. At the moment, Article 50 TEU is only a very general rule for the legal framework of a withdrawal and only alleged legal certainty is created. The EU cannot be naive and has to address these issues, especially because there are actual discussions about a withdrawal such as those in the UK. On the one hand, one could argue that this may then somehow be an invitation to withdraw. But on the other hand, the EU must be up to date and be prepared for and face even undesired developments. In addition, the EU must be consistent. When introducing a right to withdraw from the EU, the proper legal framework and procedure must also be offered. It was revealed that the actual legal framework of a withdrawal, as regulated in Article 50 TEU, does not provide a solution that guarantees a satisfactory procedure for, and protection of, all affected parties. This must be improved by the EU and its Member States. Finally,

230 *Booß*, in: Lenz/Borchardt (eds.), EU-Verträge, 6th ed. 2012, Article 50 TEU, para. 1.
231 *Pain/Young*, The Macroeconomic Impact of UK Withdrawal from the EU, Economic Modelling 21 (2004), p. 406.
232 House of Commons, Leaving the EU, Research Paper 13/42 of 1/7/2013, p. 38.
233 *Barroso* on behalf of the European Commission, Answer to written question No. E-000232/13, OJ C 346 E of 27/11/2013, p. 353.

even if the EU improved the legal framework of a withdrawal, it would be in the overall interest of all parties for Article 50 TEU to remain a more symbolic rule than a distinct possibility.