

## Observations on the Right to Withdraw from the European Union: Who are the “Masters of the Treaties”?

By Jochen Herbst\*

### A. Introductory Notes: The Withdrawal Debate *De Lege Lata*

Discussing the withdrawal provision pursuant to Article I-60 of the Constitutional Treaty (CT), also referred to as the sunset clause, in the morning light of the establishment of a European Constitution is pretty much like talking about divorce on your wedding day. Before I try to start analyzing the text of this new provision, I will briefly outline the status of the legal debate on the right of withdrawal from the current EU/EC Treaty. In this context, I would like to highlight three aspects by making one political and two legal observations.

Firstly, to mention only one aspect of the political reality, withdrawal from an international organization, in particular a withdrawal from the EU, is a drastic step. It indicates that a member state has been unable to express its needs adequately in the organization. In this situation, withdrawal serves as a last resort of the respective member state.

Secondly, whatever legal position one may take, either based on a European autonomist view or on a rather traditional public international law-inspired perspective: there can be no serious doubt that, currently, there exists no unlimited right of an EU Member State to withdraw from the Union, *i.e.* without any further prerequisites and simply at the free discretion of the respective Member State, within the confines of its internal (constitutional) law provisions. Instead, the Vienna Convention on the Law of Treaties does not provide for such a virtually unlimited withdrawal right, but rather sets forth strict limitations for the exercise of a withdrawal right.

Thirdly, when applying a modern European law approach, taking into account the well-established jurisprudence of the ECJ, the Member States of the EU may no

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longer dispose of the key elements of the current European legal order. The respective reasoning of the Court is primarily still based on the conclusion that “the Community constitutes a new legal order of international law [...] the subjects of which comprise not only Member States but also their nationals.” And the ECJ continues that “[i]ndependently of the legislation of Member States, community law [...] therefore not only imposes obligations on individuals but also intended to confer upon them rights which become part of their legal heritage.”<sup>1</sup>

### **B. Some Thoughts and Open Issues Regarding the New Right to Withdraw from The Union**

Article I-60(1) CT, in my opinion, provides for a right of the individual Member State to withdraw from the Union at its free discretion simply by applying its internal, constitutional law provisions. This view is supported by the drafting history of the sunset clause.<sup>2</sup> In contrast to, *e.g.*, a Cologne doctoral thesis on the Union’s solidarity principle,<sup>3</sup> I thus particularly hesitate to limit the express right to withdraw as such by referring to more general principles both under the Community Treaties and the Constitutional Treaty, such as solidarity or loyalty of the Member States.

How will such right to withdraw be implemented according to Article I-60 CT? First of all, the Member State wishing to withdraw from the EU notifies the European Council of such intention (para. 1). As such, this notification does not have any direct terminating legal effect. Instead, a minimum period of two years, which may be best described as a notice period, for negotiating the terms and

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<sup>1</sup> See ECJ, Case C-26/62, *van Gend & Loos*, 1963 E.C.R. 1. Similarly, in its first opinion on the EEA Treaty, the ECJ held that, in contrast to the European Economic Area, which was established on the basis of an international treaty merely creating rights and obligations between the Contracting Parties and not providing for a transfer of sovereign rights to the respective inter-governmental institutions, the EEC Treaty, albeit concluded in the form of an international agreement, nonetheless constitutes the constitutional charter of a Community based on the rule of law. According to the ECJ, the Community Treaties established a new legal order for the benefit of which the states have limited their sovereign rights and the subjects of which comprise not only Member States but also their nationals; the essential characteristics of the Community legal order which has thus been established are in particular its primacy over the law of the Member States and the direct effect of a whole series of provisions. See Case C-1/91, 1991 E.C.R. I-6079, 6102.

<sup>2</sup> To date, all proposals and suggestions for a respective amendment of the sunset clause have been rejected. The documentation of the drafting process and the proposed amendments of Article I-60 Constitutional Treaty are available at <http://european-convention.eu.int/amendments.asp?content=46&lang=EN>.

<sup>3</sup> See PETER GUSSONE, *DAS SOLIDARITÄTSPRINZIP IN DER EUROPÄISCHEN UNION UND SEINE GRENZEN* (forthcoming 2006).

conditions of a withdrawal and its implementation in the form of a withdrawal implementation agreement, is triggered by the Member State's notification to the European Council.<sup>4</sup>

Pursuant to Article I-60(2), sentence 1 CT, the withdrawal implementation agreement needs to take account of the framework for the "future relationship" between the withdrawing Member State and the EU. As it appears, the drafters of the Constitutional Treaty thus assume that some kind of (legal) relationship will still remain between the Union and the withdrawing Member State even after the withdrawal has come into effect. Furthermore, the withdrawal implementation agreement will need to determine the effective date as well as all terms and conditions of the withdrawal because Article I-60 CT does not directly deal with these issues. Most importantly, though not expressly mentioned in the provision, any legal consequences of the withdrawal regarding the rights and obligations for any natural persons and legal entities affected by the withdrawal need to be dealt with. In the absence of a well-drafted withdrawal implementation agreement, the specific legal consequences will remain open to doubt. What, for instance, should happen to the employees of the Union who are nationals of the withdrawing Member State? What will be the fate of the Union's offices on the territory of the withdrawing Member State? And can nationals of the withdrawing Member State still be eligible for scholarships sponsored by the EU? Is the withdrawing Member State obligated to pay its outstanding contributions?<sup>5</sup> What happens, *e.g.*, to damage claims by individuals based on European law against the withdrawing Member State which were already brought before the ECJ during the two-year notice period but which have neither been satisfied nor even adjudicated by the effective date of the withdrawal? The latter question *e.g.* involves aspects of both substantive and procedural law. On the other hand, regarding the legal consequences arising from withdrawal, para.3 of the withdrawal provision stipulates that the Constitutional Treaty shall "cease to apply" to the withdrawing Member State as of the effective date of the withdrawal. If this questionable provision were to be construed as prohibiting interim and grandfathering provisions in a withdrawal implementation agreement, the drafters of such an agreement would have a hard time finding practicable solutions regarding ongoing legal relationships such as cases pending before the ECJ, etc. Bearing the complexity of these issues in mind, I am convinced that the two-year notice period,

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<sup>4</sup> In this context, I suspect that the two-year notice period for withdrawal is related to the Union's experience in the Greenland case. In this case, the withdrawal implementation took approximately 2.5 years to take effect.

<sup>5</sup> Regarding further issues, see KLABBERS, AN INTRODUCTION TO INTERNATIONAL INSTITUTIONAL LAW 126 (2004).

as a general rule, is far too short for negotiating and concluding a withdrawal implementation agreement in an “average” Member State withdrawal case.

Although the latter issues are crucial elements of any withdrawal, the conclusion of a withdrawal implementation agreement is, again, not a precondition for the withdrawal by a Member State taking effect. Having said that, both the Union and the withdrawing Member State will have a vital interest in concluding a withdrawal implementation agreement. It needs to be noted in this context, however, that an express legal obligation to negotiate and conclude such agreement is only imposed on the Council, not on the withdrawing Member State (see Article I-60(1) CT). And how do the withdrawing Member State’s “own constitutional requirements” referred to in Article I-60(1) of the Constitutional Treaty fit into the timetable of the negotiation process regarding the withdrawal implementation agreement? In Germany, for instance, such constitutional requirements for a withdrawal of the Federal Republic of Germany would include an amendment of the German Basic Law (*Grundgesetz*), to be resolved in accordance with Article 79(2) of the German Basic Law by two-third majorities in both the Federal Parliament (*Bundestag*) and the Federal Council (*Bundesrat*). Such constitutional amendment procedure would certainly need to be launched prior to the conclusion of the withdrawal implementation agreement, or even before the decision to withdraw at the European level was taken. And what if, during the negotiation process, the Member State revokes its withdrawal decision?

Despite the fact that the withdrawal implementation is no “reverse agreement” in relation to the admission agreement previously concluded between the Member States and the candidate state (Article 49(2) EU Treaty; Article I-58(2) CT), it is noteworthy that the withdrawal implementation agreement is negotiated and concluded between the withdrawing Member State on the one hand and the Council, but not the Member States, on the other hand.

Finally, I would like to turn to the most fundamental issue arising under the Article I-60 of the Constitutional Treaty. As already stated above, I understand that Article I-60 CT provides for a virtually unlimited right of withdrawal from the Union by a Member State. Bearing in mind my two introductory legal observations, and based on the legal view expressed by the ECJ as broadly interpreted by certain authors,<sup>6</sup> the legality of the introduction of the new withdrawal right into the Community legal order could well be challenged if one assumes that European integration is irreversible, and that the Member States have waived their right to dissolve the Union, even by unanimous agreement, and that a point of no return in

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<sup>6</sup> For a brief summary of this legal debate, *see id.*, at 28-9.

the European integration process has been reached. According to such a line of reasoning, the Member States are no longer the “masters of the treaties” because they have irreversibly vested third parties, namely the nationals of the Member States, with a legal heritage of rights. How can these Member States now claim the power, by acting collectively, to infringe such a legal heritage of third-party rights by creating the Constitutional Treaty and introducing a withdrawal provision, which ultimately, though theoretically, allows for a dissolution of the EU by way of multiple withdrawal notifications launched by all but one Member State? Bearing in mind the principle of sovereign equality of Member States, Article I-60 CT cannot be interpreted or construed in such a way that it allows only a certain number of Member States to withdraw from the Union on a “first come – first served” basis.

At the same time, however, the Council is vested with the power and responsibility to negotiate and conclude the withdrawal implementation agreement. By exercising this power and responsibility, the Council, as opposed to the Member States, thus also acts as a treasurer and custodian of the “legal heritage of rights” of the individuals emphasized by the ECJ in its well-established jurisprudence. The latter is, in my opinion, the key to understanding the withdrawal provision, which is an attempt to harmonize traditional, state-centered sovereignty and the more modern type of sovereignty or autonomy of supranational organizations. By highlighting the concept of the Council being the treasurer of the EU individuals’ legal heritage of rights in the context of a withdrawal by Member States (to be implemented by way of a withdrawal implementation agreement), Article I-60 CT provides for a model to harmonize the latter two types of sovereignty. At the same time, the involvement of the Council in the withdrawal process, therefore, adequately deals with and removes any concerns regarding (i) individuals’ rights and (ii) the legality of Article I-60 of the Constitutional Treaty itself.

### C. Conclusion

In a 1946 essay, George Orwell perfectly captured the fundamental tension between international organizations and their member states, namely that organizations are, at one and the same time, independent of their member states, and fundamentally dependent on them.<sup>7</sup> Nowhere in the Constitutional Treaty is this tension as clearly expressed as in Article I-60(1). On the other hand, the recent case before the Spanish Constitutional Court<sup>8</sup> clearly indicates that the right to withdraw will have a promoting effect on the European integration process rather than being a

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<sup>7</sup> See GEORGE ORWELL, *THE COLLECTED ESSAYS, JOURNALISM AND LETTERS OF GEORGE ORWELL*. VOLUME 4: *IN FRONT OF YOUR NOSE*, 1945-1950, 152, 153 (1968). See also KLABBERS, *supra* note 5, at 39-40.

<sup>8</sup> For details on this case, see Bast, in this volume.

contradictory and explosive element. Joseph Weiler has convincingly demonstrated that insisting on the impossibility of withdrawal might be counterproductive, especially in an organization like the EU.<sup>9</sup> A decision by one Member State of the Union to withdraw would be greeted, be it with regret or relief – but it would ultimately be accepted. If a Member State of the Union cannot accept its obligations in the EU, it will be the lesser evil to allow that state to withdraw, even unilaterally. Adhering to political realities, Article I-60(1) CT allows for unilateral withdrawal at the Member State's own discretion.

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<sup>9</sup> See Joseph H. H. Weiler, *Alternatives to Withdrawal from an International Organization: The Case of the European Economic Community*, 20 ISRAEL LAW REVIEW 282, 287 (1985).