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Withdrawing from the EU: Between Sovereign Rights and Union Autonomy

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This contribution is part of a special issue of the Working Papers of the “Blog droit européen” and is a sequel to the conference organised at the Université Libre de Bruxelles on 28 and 29 March 2019 entitled "The Lisbon Treaty 10 years on: a Union at a crossroads? ». The conference was organized in cooperation with the Institute of European Studies and the Faculty of Law and Criminology of ULB, the Institute of European Studies of the Université Saint-Louis and Alliance Europa, with the support of the Belgian National Fund for Scientific Research.
Through Article 50 TEU, the Treaty of Lisbon expressly acknowledged, for the first time, the right of EU member states to withdraw from the Union. On 29 March 2017, the United Kingdom became the first member state to make use of it. This provision, however, does not define every detail of the withdrawal process. Article 50 TEU does not expressly provide, in particular, for the possibility to revoke the notification of the intention to withdraw from the Union. In other words, does the withdrawing state have the right to terminate unilaterally the withdrawal process?

This question was addressed by the Court of Justice in the Wightman case. The Court, as well as Advocate General Manuel Campos Sánchez-Bordona, held that the withdrawing State has a “sovereign right” to revoke its notification. Although it mentioned some principles of EU constitutional law, the Court based its reasoning primarily on the international principle of sovereignty, thus suggesting that withdrawal represents “a typical international law issue”, as affirmed by the Advocate General. Moreover, both the Court and the Advocate General argued that the Vienna Convention on the Law of Treaties (hereinafter: Vienna Convention) was “taken into account” in the preparatory work for the Treaty establishing a Constitution for Europe. In light of Wightman, it might seem that, to fill the gaps in Article 50 TEU, one might simply use international law, particularly the principle of states’ sovereignty and the law of treaties.

Such an approach may have practical consequences, since there are various aspects of Article 50 TEU that remain unclear. For instance, one may wonder whether a state should promptly notify its intention to withdraw as soon as it has decided to withdraw, or if it has a “sovereign right” to play for time (despite its duty of loyalty to the Union). More generally, one might wonder to what extent recourse may be had to international law to fill the gaps in EU primary law, or if the concern for the autonomy of EU law should suggest different solutions.

This paper seeks to demonstrate that the design of Article 50 TEU is only partially inspired by international law and, in particular, the principle of sovereignty. The procedural aspects of Article 50 TEU find their roots in the autonomy of the Union. Had the Court adopted this perspective in Wightman, it might have reached a different conclusion. The analysis begins with a presentation of the drafting history of Article 50 TEU (section 2). It subsequently shows that some elements of Article 50 TEU are inspired by international law (the right to withdraw, section 3), whereas others exemplify the EU’s autonomy (the withdrawal procedure, section 4). Section 5 suggests that the Wightman judgment acknowledges the specificity of Article 50 TEU in principle but fails to emphasise the EU’s autonomy in

3 Ibid., para. 72; AG Opinion in Wightman (n 1), paras 94 and 132.
4 AG Opinion in Wightman (n 1), para. 84.
5 Wightman (n 2).
practice. The concluding remarks explore the apparent inconsistency of Wightman and its consequences (section 6).

1. The Genesis of Article 50 TEU

To interpret Article 50 TEU, one may consider the preparatory works that generated it, i.e. the works of the Convention on the Future of Europe (European Convention), which operated between early 2002 and July 2003.

The Praesidium of the European Convention presented draft Article 46 (later renumbered Article 59 of the draft Constitution, Article 1-60 of the European Constitution, and eventually Article 50 TEU) in April 2004.\(^7\) The Praesidium’s comments annexed to the proposed text of draft Article 46 suggest that this provision contains two elements.

In the first place, draft Article 46 recognises the Member States’ right to withdraw from the European Union. While it is desirable, according to the Praesidium, that an agreement should be concluded between the Union and the withdrawing state on the arrangements for withdrawal, “it was felt that such an agreement should not constitute a condition for withdrawal so as not to void the concept of voluntary withdrawal of its substance”.\(^8\) This explains why draft Article 46, like Article 50 TEU, contemplates the possibility of unilateral withdrawal two years after the notification of the intention to withdraw.

The second element of the Praesidium text is the withdrawal procedure. This procedure is “partly based on the procedure under the Vienna Convention on the Law of Treaties, but at the same time it provides for the Union to conclude an agreement with the member state concerned setting out the arrangements for its withdrawal”.\(^9\) The Praesidium text, in the English version, later introduces a slightly different statement: “The procedure laid down in this provision draws on the procedure in the Vienna Convention on the Law of Treaties.”\(^10\) The French version is clearer, since it consistently affirms that “la procédure prévue dans cette disposition s’inspire en partie de celle prévue dans la Convention de Vienne sur le droit des traités.”\(^11\) The “partial” character of this inspiration is relevant for the interpretation of Article 50 TEU, as shown below, in section 4.

The members of the European Convention proposed numerous amendments to Article 46. Several proposals regarded the right to withdraw. While many Convention members agreed with the existence of this right, others opposed it or proposed the introduction of conditions for its exercise. For example, some speakers suggested that the member states could request withdrawal but could not withdraw until an agreement with the Union was concluded. Others

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\(^7\) Praesidium, doc. CONV 648/03, 2 April 2003.

\(^8\) Ibid., p. 9.

\(^9\) Ibid., p. 2.

\(^10\) Ibid., p. 9.

\(^11\) Praesidium, doc. CONV 648/03, 2 April 2003 (French version), p. 9 (emphasis added).
proposed limiting the right of withdrawal to the scenario in which the withdrawing state did not approve an amendment to the Constitution.\textsuperscript{12}

Several Convention members addressed procedural issues, too. According to two speakers, the withdrawal agreement should have been concluded by the Member States, not by the Union. According to another speaker, the procedure for withdrawal should have been eliminated, and the Council empowered to define it at a later stage. Some speakers made less radical proposals, suggesting, for instance, that the conclusion of the withdrawal agreement should have required unanimity within the Council (and not qualified majority, as proposed by the Praesidium).\textsuperscript{13}

Notwithstanding the above proposals, the essential elements of draft Article 46 remained unchanged in the final version of Article I-60 of the Constitution. The European Convention introduced only a few procedural innovations, compared to the original Praesidium text. For instance, Article I-60 stipulates that the negotiation of a withdrawal agreement should take place within the framework of “guidelines” adopted by the European Council. Article I-60 specifies that the withdrawal agreement should be negotiated according to Article III-325(3) (now Article 218(3) TFEU) and should take account of the “framework” for the withdrawing state’s future relationship with the Union. Moreover, Article I-60 introduces the possibility to extend, through a European Council Decision, the negotiation of the withdrawal agreement, beyond the two years deadline imposed by original Praesidium text.\textsuperscript{14}

After the failure of the European Constitution, the text of Article I-60 was placed under Article 50 TEU, with no substantial change. Article 50 TEU, like the original Praesidium proposal, contains two elements: the right to withdraw and the withdrawal procedure. While the first is strongly influenced by international law, and particularly the principle of sovereignty (see the next section), the withdrawal procedure appears to be grounded on the EU’s autonomy (see below, section 4).

2. The “Sovereign Right” to Withdraw Unilaterally from the Union

Article 50(1) TEU, like draft Article 46(1) of the European Constitution, enables any member state to “decide to withdraw from the Union in accordance with its own constitutional requirements”. The withdrawing state must subsequently notify its intention to the European Council (Article 50(2) TEU). EU Treaties cease to apply to the withdrawing State from the date of entry into force of a withdrawal agreement concluded by the withdrawing State and the Union or, failing that, “two years after the notification” (Article 50(3) TEU). The European Council, in agreement with the withdrawing state, may unanimously decide to extend this period (Article 50(3) TEU).


\textsuperscript{13} \textit{Ibid.}

\textsuperscript{14} In addition, Art. I-60 of the European Constitution introduced a clarification regarding the future status of the withdrawing state: “If a State which has withdrawn from the Union asks to rejoin, its request shall be subject to the procedure referred to in Article I-58”.
The explicit recognition of a right to withdraw unilaterally constitutes a novelty for the Union, since, before the Lisbon reform, EU primary law did not expressly authorise unilateral withdrawal. The Member States had created a “Community of unlimited duration” (Costa)\(^{15}\) and had undertaken obligations “irrevocably” (Simmenthal)\(^{16}\) to ensure an “ever closer union”. Therefore, according to some authors, unilateral withdrawal was impossible.\(^{17}\)

Others, however, argued that the Member States could withdraw unilaterally from the Community.\(^{18}\) Under Article 56 of the Vienna Convention on the Law of Treaties, – which might be declaratory of a rule of customary law\(^{19}\) – States may withdraw from a treaty containing no provision regarding its termination under two alternative conditions: (a) if the parties intended to admit the possibility of denunciation or withdrawal and (b) a right of withdrawal is implied by the nature of the treaty.\(^{20}\) The latter condition could be relevant for the European Community, as it has been argued that the nature of treaties establishing international organisations generally implies the right to unilateral withdrawal.\(^{21}\)

The existence of a right to unilateral withdrawal from the European Community was apparently confirmed by the practice. Greenland left the European Community in 1985 but this precedent has limited value, as the exit of Greenland was consensual (i.e. approved by the other Member States) and, above all, Greenland was not a Member State, but a territory.\(^{22}\) The precedent of the UK is perhaps more relevant: this country held a referendum on European Community membership in 1975 and, although the “remain” option won, the other Member States never contest the existence of the UK’s right to withdraw from the Community.\(^{23}\)

The members of the European Convention had different positions regarding the existence of a right to withdraw. A few speakers argued that the Member States should not have any right to withdraw unilaterally, which is allegedly incompatible with the EU’s nature.\(^{24}\) Numerous others, however, noted that the right to withdraw unilaterally is implicit in the EU’s nature as an international organisation. The Union being the result of the will of sovereign states, “no one questions their right to withdraw from the Union.”\(^{25}\) Since “the Member States’ right to

\(^{15}\) Judgment of 15 July 1964, Case 6-64, Costa, EU:C:1964:66.


\(^{17}\) See e.g. F. X. PriolLaud and D. Siritzky, La Constitution européenne - texte et commentaires (La documentation française 2005) 157.


\(^{20}\) In addition, the member states could possibly invoke a “fundamental change of circumstances”, which justified their withdrawal, as long as that those circumstances constituted an essential basis of their consent to be bound and the effect of the change was radically to transform the extent of obligations to be performed under the EC Treaty, see Art. 62 of the Vienna Convention on the Law of Treaties.


\(^{23}\) A. Vahlas (in 18) 268-269.

\(^{24}\) E.g. A. Van Lancker, Proposition d'amendement à l’article 46.

\(^{25}\) E. Lopes and M. Lobo Antunes, Suggestion for amendment of Article :Article I-59; see also Santer, Fayot, Proposition d’amendement à l’Article : Article 46 (Titre X).
withdraw follows from the basic principles of international law”, 26 “paragraph 1 [of draft Article 46] only spells out what already follows from the basic principles of international law”. 27

Even those who, within the European Convention, opposed the introduction of draft Article 46, often did so for political, rather than legal, reasons: while “no State can be forced to remain in the Union”, the “explicit inclusion” of a withdrawal clause is allegedly incompatible with the idea of solidarity of citizens and states. 28 With the explicit acknowledgement of the right to unilaterally withdraw, “le compromis pour l’édification d’une Union chaque fois plus étroite, ne deviendra plus qu’une hypothèse, une simple possibilité.” 29

The introduction of an explicit reference to the Member States’ right to unilaterally withdraw from the Union in draft Article 46(1) probably was not intended as a legal innovation, but as a mere confirmation of an existing international customary rule, grounded on the principle of sovereignty. As noted by the German Bundesverfassungsgericht, Article 50 TEU “makes explicit” for the first time in primary law “the existing right” of each member state to withdraw from the European Union. 30 The right to withdraw thus “underlines the Member States’ sovereignty”. 31 Sovereignty was also central to the Spanish Tribunal constitucional’s reasoning on Article I-60 of the Constitution (now Article 50 TEU): this provisions allegedly allows the Member States to recuperate, “by virtue of their sovereignty” (“soberanamente”), the competences they have conferred, “through the sovereign will of the state”, to the Union. 32 In other words, the explicit mention of the right to withdraw unilaterally in Article 50 TEU is not meant to address an outstanding legal issue: “le véritable objet de la clause de retrait est celui de la souveraineté des Etats”. 33

Given the centrality of an international law principle – sovereignty – to the right to unilateral withdrawal, it appears reasonable that draft Article 46 (now Article 50 TEU) should be partially based, as noted by members of the European Convention, on international law, particularly the Vienna Convention on the Law of Treaties. 34 Under Article 65 of the Vienna

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26 K. KILJUNEN and M. VANHANEN, Suggestion for amendment of Article 46: (Title X : Union membership, part I of the Constitution).
28 J. MEYER, Suggestion for amendment of: Article 46, Part I, Title X of the draft Constitution (CONV 648/03); see also E. LOPES and M. LOBO ANTUNES, Suggestion for amendment of Article: Article I-59.
29 Intervention du Représentant Suppléant du Gouvernement Portugais Manuel Lobo Antunes, Session Plénière du 24-25/04/03.
31 Ibid.
34 Intervention du Représentant Suppléant du Gouvernement Portugais Manuel Lobo Antunes, Session Plénière du 24-25/04/03.
Convention, if a treaty permits withdrawal, a party may notify the other parties of its intention to withdraw; if, after the expiry of a period of at least three months no party has raised any objection, the party making the notification may unilaterally carry out the withdrawal. The Court of Justice held in Racke that the specific requirements laid down by Article 65 of the Vienna Convention “do not form part of customary international law”. Nonetheless, they reflect a widespread practice, at least up to a point. The founding treaties of several international organisations enable member states to notify their intention to withdraw and effectively withdraw after a certain period, ranging from a few months (e.g. World Trade Organization) to two years (e.g. International Labour Organization).

Therefore, it would seem that the right to withdraw unilaterally enshrined in Article 50 TEU is modelled after a pre-existing international practice, partially codified in the Vienna Convention on the Law of Treaties, and grounded on the principle of sovereignty.

3. The Withdrawal Procedure: An Example of the Autonomy of the Union

While the right to unilaterally withdraw from the Union, enshrined in Article 50 TEU, is certainly rooted in international law, the foundations of the withdrawal procedure are more complex.

From a procedural perspective, Article 50 TEU has two elements in common with Article 65 of the Vienna Convention on the Law of Treaties (and with the founding treaties of numerous other international organisations): (a) the withdrawal procedure begins with a notification of the withdrawing state to the international organisation (the Union); (b) the withdrawal ends some months or years after the withdrawal.

However, the process that leads from (a) to (b) is very different in the cases of Article 50 TEU and other treaties. The foundational treaties of other international organisations generally provide for a simple withdrawal procedure, composed of the notification and the subsequent withdrawal. The Vienna Convention on the Law of Treaties is more articulate, as it expressly addresses the possibility that, after the withdrawing state’s notification, another party raises an objection. In this case, the parties must seek a solution through peaceful means, e.g. negotiation.

Article 50 TEU is different, as it prescribes that “the Union shall negotiate and conclude an agreement” with the withdrawing state (paragraph 3). The European Council may approve the

35 See above, text to n 19.
39 See Art. 65(2) and (3) of the Vienna Convention on the Law of Treaties. See also Art. 33 of the UN Charter.
withdrawal agreement “by a qualified majority”, after obtaining the consent of the European Parliament (paragraph 2). In other words, as noted by the European Convention Praesidium, while the withdrawal procedure is “partly” based on the Vienna Convention on the Law of Treaties, “at the same time it provides for the Union to conclude an agreement with the Member State concerned setting out the arrangements for its withdrawal”.\(^40\)

Two innovative aspects of Article 50 TEU are particularly important. In the first place, Article 50 TEU imposes an obligation to negotiate a withdrawal agreement. The obligation is directly binding on the Union and indirectly binding on the withdrawing State, which must “facilitate the achievement of the Union’s tasks” (Article 4(3) TEU).\(^41\) It has been argued that Article 50 TEU does not significantly innovate with respect to international law, as it merely prescribes an obligation of means (the negotiation) and not an obligation of result (the conclusion of a withdrawal agreement).\(^42\) The existence of such an obligation of means is nonetheless relevant: in the EU, negotiations are the necessary consequence of the notification of the intention to withdraw; in other organisations, they are the possible product of an objection raised by a Member State. Although EU Treaties do not ensure an orderly withdrawal, they facilitate, at least, a negotiated solution. The reason why EU Treaties seek to facilitate negotiation is evident: unilateral withdrawal from the EU would greatly affect the economy and citizens of both the EU and the withdrawing state, as opposed to the relatively more limited practical consequences of unilateral withdrawal from most international organisations.\(^43\)

Secondly, Article 50 TEU introduces an obligation to negotiate with the Union, not the other member states. The significance of this innovation was not lost on the members of the European Convention. Two speakers argued that the withdrawal agreement should have been negotiated by “the other Member states” and not by the Union, as “the membership or non-membership of the Union is not conferred competence”.\(^44\) This proposal was rejected, thus suggesting that the European Convention intended to introduce an innovative solution, aimed at facilitating withdrawal negotiations. One can imagine that 27 parallel negotiations between the UK and each of the other member states could have been chaotic. As argued by Lenaerts and Gerard, Article 50 TEU recognises the Union “as an autonomous entity entitled to negotiate on an equal footing with its Member states the respect of rights and obligations

\(^{40}\) Praesidium, doc. CONV 648/03, 2 April 2003, p. 2.


\(^{43}\) See e.g. A. ŁAZOWSKI, “Unilateral withdrawal from the EU: realistic scenario or a folly?” (2016) Journal of European Public Policy 1294.

\(^{44}\) S. LIEKBERG and G. LENMARKER, Suggestion for amendment of Article 46, Art. 46(2) and footnote 1.
towards it”. Therefore, the Article 50 TEU procedure may be described as an “example of the autonomy of the Union, of the [Treaties] and of the constitutional regime” they establish.

The autonomous procedure of Article 50 TEU seems capable of promoting an orderly withdrawal from the Union, as shown by the practice. Despite the vicissitudes of the Brexit negotiations – motivated by domestic political issues in the UK – the withdrawal process followed the path defined by Article 50 TEU. The UK negotiated with the EU and did not manage to divide its representation by conducting separate negotiations with individual member states. The UK did not “control the process of withdrawal to [its] own benefit”, as some expected. On the contrary, the UK government accepted several compromises, regarding for instance the possibility of customs checks on goods traded between Northern Ireland and the rest of the UK. After Wightman, however, the effectiveness of the Article 50 TEU withdrawal procedure might be put into question.

4. Sovereignty and Autonomy in the Wightman Judgment

Although the Article 50 TEU procedure exemplifies the autonomy of EU law, the Wightman judgment arguably pays lip service to this essential characteristic of the EU legal order.

The Wightman case originated from the question of a British judge, who asked the Court of Justice whether a Member State may unilaterally revoke the notification of its intention to withdraw from the Union (and, if so, subject to what conditions and with what effects) – a matter that is not regulated expressly by Article 50 TEU. Advocate General Campos Sánchez-Bordona and the Court of Justice adopted partially different readings of Article 50 TEU in Wightman, but eventually reached similar solutions.

The Advocate General postulated that Article 50 TEU is “not a self-contained provision which exhaustively governs each and every detail of that withdrawal process”: to fill the lacunae in Article 50 TEU, there is nothing to preclude recourse being had to Article 50 TEU in Wightman, but eventually reached similar solutions.


46. Ibid.
50. Wightman (n 2), para. 16.
51. AG Opinion Wightman (n 1), para. 85.
Convention (nor are several of its member states) and Article 68 may not reflect rules of customary international law.\textsuperscript{52} Pursuant to this provision, a notification of the intention to withdraw from a treaty may be revoked “at any time before it takes effect”. According to the Advocate General, this means that a notification can be revoked “at any time before the withdrawal takes effect”.\textsuperscript{53} Therefore, there is “no reason not to apply, by analogy, the same rule in the framework of the procedure for withdrawing from the European Union.”\textsuperscript{54}

I am unconvinced by this argument. If the procedure for withdrawal from the Union is autonomous from international law, the lacunae in Article 50 TEU should be filled by having recourse primarily to the norms and principles of the EU’s constitutional order – not to international law. Recourse should be had, in particular, to the objectives of Article 50 TEU and the essential characteristics of the EU’s legal order, including the EU’s autonomy.\textsuperscript{55}

The Court of Justice apparently stressed the autonomy of EU law in \textit{Wightman}, at least at first sight. The Court started its analysis by recalling that EU Treaties are “unlike ordinary international treaties”, as they set up a new legal order, possessing its own institutions, for the benefit of which the members thereof have limited their sovereign rights, and the subjects of which comprise not only those states but also their nationals.\textsuperscript{56} The essential characteristics of the European Union justify the “autonomy of EU law” with respect both to the law of the member states and to international law.\textsuperscript{57}

Furthermore, and unlike the Advocate General, the Court did not fill the gaps in Article 50 TEU by using the Vienna Convention on the Law of Treaties – at least not directly. This Convention is mentioned in the \textit{Wightman} judgment as part of a subsidiary argument, based on a historical interpretation of Article 50 TEU. According to the Court, the Vienna Convention was “taken into account in the preparatory work for the Treaty establishing a Constitution for Europe”.\textsuperscript{58} Therefore, the Court used the Vienna Convention “simplement comme un élément lié aux travaux préparatoires de l’article 50 TUE, qui ‘corrobore’ une solution fondée sur une \textit{interprétation autonome} de cet article”, as noted by judge Rossi.\textsuperscript{59}

However, one might wonder whether the Court’s interpretation of Article 50 TEU is truly “autonomous” from international law. An historical interpretation of Article 50 TEU should acknowledge that the European Convention intended to introduce a new – autonomous – withdrawal procedure, specific to the European Union. It is true that Article 50 TEU is “partly” based on the Vienna Convention on the Law of Treaties. However, the documents of

\textsuperscript{52} Ibid., paras 74, 78, 80, and 85.
\textsuperscript{53} Ibid., para.108 (emphasis added). Alternatively, it may be argued that revocation can be performed only “until the other party has started undertaking measures”, see \textit{VILLIGER} (n 19) 848; H. KRIEGER, “Article 68”, O. DÖRR and K. SCHMALENBACH (eds), \textit{Vienna Convention on the Law of Treaties: A Commentary} (Springer 2012) 1262.
\textsuperscript{54} AG Opinion \textit{Wightman} (n 1) para. 108.
\textsuperscript{56} \textit{Wightman} (n 2), para. 44.
\textsuperscript{57} Ibid., para. 45.
\textsuperscript{58} Ibid., para. 70.
\textsuperscript{59} L. S. ROSSI, “Droits fondamentaux, primauté et autonomie: la mise en balance entre les principes "constitutionnels" de l’Union européenne” (2019) \textit{Revue trimestrielle de droit européen} 75 (emphasis added).
the European Convention (see above, section 2) show that Article 50 TEU was intended to introduce an original procedure and has original elements, notably the withdrawing States’ obligation to negotiate with the Union. Using the Vienna Convention to fill the gaps in the Article 50 TEU procedure – either directly or via a reference to the works of the European Convention – is arguably inappropriate, because it denies the autonomous design of the EU withdrawal procedure, as well as the intention of its drafters. 60

More generally, the Court’s purportedly “autonomous” interpretation of Article 50 TEU appears problematic, as it is based mainly, not on EU law, but on an international principle: sovereignty. 61 The Court notes that Article 50 TEU seeks to enshrine “the sovereign right of a Member State to withdraw from the European Union” 62 and repeatedly stresses the central role of sovereignty in this area. The “sovereign nature” of the right of withdrawal allegedly supports the conclusion that the withdrawing state “has a right to revoke the notification of its intention to withdraw from the European Union”. 63 Indeed, the revocation of the intention to withdraw “reflects a sovereign decision” by the withdrawing state to retain its status as a member state of the European Union. 64 In other words, the revocation of the notification is a “unilateral sovereign right”. 65

The Court subsequently performs a contextual interpretation of Article 50 TEU in light of the EU’s objectives and principles ( paras 61-67), but this analysis remains subordinated to the main argument, based on sovereignty. The Court notes that EU Treaties are based on the values of liberty and democracy and aim at creating an ever closer union among the peoples of Europe. 66 It would be inconsistent with these values and objectives to prevent a Member State from remaining a member of the Union, despite its wish — as expressed through its democratic process in accordance with its constitutional requirements — to reverse its decision to withdraw. 67 In any event, the arguments based on EU principles and objectives are introduced in a succinct manner and seem merely subsidiary to the main argument. The first and principal part of the Court’s reasoning ( paras 50-59) focuses on the sovereignty of the withdrawing state; remarkably, sovereignty is mentioned again ad abundantiam towards the end of the judgement (para 72).

60 See also, to that effect, P. MANZINI, “Brexit: Does Notification Mean Forever”, SIDIBlog, 17 February 2017; F. MUNARI, “You can’t have your cake and eat it too: why the UK has no right to revoke its prospected notification on Brexit”, SIDIBlog, 9 December 2016. Even if the Vienna Convention applied to EU Treaties, the fact would remain that this Convention “applies to any treaty which is the constituent instrument of an international organization […] without prejudice to any relevant rules of the organization” (Art. 5 of the Vienna Convention, emphasis added). Given the differences between the withdrawal procedure of the Vienna Convention and Art. 50 TEU, the former can hardly be used to fill the lacunae in the latter “without prejudice” to EU procedural rules.


62 Wightman (n 2), para. 56.
63 Ibid., para. 57.
64 Ibid., para. 59.
65 Ibid., para. 72.
66 Ibid., paras 61-62.
67 Ibid., para. 67.
While *Wightman* overemphasises the protection of member states’ sovereignty, it pays little attention to the other objective of Article 50 TEU: establishing a procedure to enable withdrawal to take place “in an orderly fashion”.

This objective is arguably consistent with the innovative character of the Article 50 TEU procedure: while the withdrawal procedures of other international organisations emphasise the sovereignty of their member states, Article 50 TEU introduces novel elements, with specific purposes: (a) The obligation to negotiate a withdrawal agreement, which is aimed at preventing the legal uncertainty caused by a “no deal” scenario; (b) The EU’s direct participation in the negotiation, which has the objective of avoiding parallel negotiations between the withdrawing state and all the other member states.

Ensuring an “orderly” withdrawal may be described as a specific objective of the EU’s withdrawal procedure and an example of the EU’s autonomy. Although the Court acknowledges the existence of this objective *in abstracto*, it does not use it to interpret Article 50 TEU. Had it done so, it might have reached the same conclusion as the Council and the Commission: allowing a withdrawing member state to revoke unilaterally its notification paves the way “for abuse by the Member State concerned to the detriment of the European Union and its institutions.”

The right to revoke unilaterally the notification enables the withdrawing state “to unilaterally stop the withdrawal process and subsequently trigger it again with a fresh notification, thereby clearly circumventing the need for unanimity in the European Council for the prolongation of the two-year period foreseen in Article 50(3) TEU”.

Thanks to the right to revoke unilaterally its notification, recognised in *Wightman*, a withdrawing member state might now bypass the autonomous rules of Article 50 TEU, which should have ensured an “orderly” withdrawal from the European Union. The UK did not revoke its notification, but some British politicians supported the use of a “tactical revocation”. It is perhaps “extremely difficult for tactical revocations to proliferate”, as the Advocate General suggests, but it is by no means impossible.

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70 *Wightman* (n 2), para. 39.
72 For instance, former Chancellor Ken Clarke argued that “if you revoke [the notification], which we can do as we wish, and then proceed with negotiations […] then, you can invoke it again once you’ve made sufficient process”, see M. FREI, “Ken Clarke Tells Matt Frei Why Article 50 Should Be Revoked”, *LBC*, 5 January 2019.
73 AG Opinion *Wightman* (n 1), para. 156.
5. Conclusion

Article 50 TEU is a complex provision, which has its roots in international law and in the EU legal order. This provision underlines the sovereign right to withdrawal of the member states and, in this respect, is not different from similar provisions in the foundational treaties of other international organisations. Article 50 TEU nonetheless provides for a unique withdrawal procedure that embodies the Union’s autonomy. The two sides of Article 50 TEU thus mirror the ambivalent nature of the European Union, part international organisation, part federation.

In the Wightman judgment, the Court of Justice acknowledged the Janus-faced nature of Article 50 TEU but underlined the international roots of this provision. This choice might be understandable from a political perspective, as it gave a positive message to the public opinion of the United Kingdom: the EU is not a prison or an empire, as the “leavers” claim, but an organisation based on the sovereignty of the member states. The decision to withdraw from the Union (or not) is for the member states’ alone to take.

However, one might doubt whether the Court stroke the right balance between national sovereignty and EU autonomy in Wightman. The Lisbon Treaty has introduced an original procedure with a specific purpose: enabling orderly withdrawals from the Union. By reading Article 50 TEU in light of international law, the Court arguably undermined the EU’s autonomy – the same autonomy it has buttressed for decades – and paved the way for abuses of the withdrawal procedure. Ten years after the Lisbon Treaty, an orderly withdrawal of the member states can no longer be taken for granted.