



Brugge

College of Europe
Collège d'Europe



Natolin

Is Withdrawal from the European Union a Manageable Option? A Review of Economic and Legal Complexities.

Phedon Nicolaides



DEPARTMENT OF
EUROPEAN ECONOMIC STUDIES

Bruges European Economic Policy Briefings

28 / 2013

About the author:

Phedon Nicolaides is Director and Jan Tinbergen Chair in the Department of European Economic Studies at the College of Europe in Bruges, where he teaches several courses. He is also Senior Fellow at Maastricht University and Academic Director of Lexxion Publishing. Professor Nicolaides has published extensively on European integration, competition policy and state aid, and policy implementation. He is on the editorial boards of several journals.

Address for correspondence:

Professor Phedon Nicolaides: phedon.nicolaides@coleurope.eu

Acknowledgements:

I am grateful to Simon Duke, Dominik Hanf and Roxana Sandu for comments on a previous draft. The usual disclaimer applies.

Is Withdrawal from the European Union a Manageable Option?

A Review of Economic and Legal Complexities

Phedon Nicolaidis

Abstract

Withdrawal from the EU is no more a taboo subject. However, the process by which it can happen is unclear and potentially complex. The purpose of this paper is to show that a withdrawing Member State will not only rid itself from the constraints and obligations of EU rules, but it will also have to re-invent many policies and institutions to fill the gap left by the non-application of EU rules.

The paper examines closely the case of the UK and Scotland and concludes that outright exit is not the best option for a withdrawing Member State. The best, but possibly the least feasible, option is an intermediate arrangement falling between full membership and complete separation from the EU. The exact position between the two extremes can only be determined by the exit negotiations and will be influenced by the political climate that will prevail at that time.

While the final destination of an acceding country is well known [full adoption of the obligations of EU membership], the exiting country will be embarking on a trip with unknown destination and full of surprises.

JEL-codes: F15, O52, P48

Key words: Withdrawal from the European Union, accession negotiations, UK, Scotland

“the voyage is a long one,
full of adventure, full of discovery”
C. Kavafy, Ithaca

1. Introduction

With the coming into force of the Treaty of Lisbon on 1 December 2009, Member States of the European Union have formally acquired right to leave the Union. Until 2009, the EU had a provision on entry of new Members but not on exit of existing Member States. Not having a withdrawal clause is not unusual but it is not the norm either.¹ Other treaties such as those that establish NATO and the WTO have clauses on voluntary withdrawal (as did the WEU under Article XII of the Modified Brussels Treaty, which also contained provisions on disbanding of the WEU itself).

Whether Member States were free or not to withdraw before 2009 is a matter of contention. It would have been very difficult for the EU and the Member States to stop another Member State from leaving the Union if there were overwhelming popular support in the latter in favour of leaving the Union. After all, legitimacy stems from the will of the people and the Union prides itself for being based on democratic principles [Articles 2 & 6 TEU].

According to the Vienna Convention on the Law of International Treaties, 1969, withdrawal has in principle to be provided explicitly in the first place. Moreover, withdrawal has to take place in line with the relevant rules [Article 54].

However, the Vienna Convention also provides that a contracting party may withdraw from a treaty which does not have a withdrawal clause when all parties to the treaty agree. Normally, a three-month notice is required. In addition, the Convention does recognize the possibility that a contracting party may withdraw unilaterally from a treaty that has no exit clause due to a **“fundamental change in circumstances”** which “constituted an essential basis of the consent of the parties to be bound by the treaty” [Article 62]. States may withdraw without the agreement of the other parties to a treaty if the parties intended to allow the possibility of **denouncing the treaty or withdrawing from it, or if “a right of denunciation or withdrawal may be implied by the nature of the treaty.”** [Article 56] When a state

¹ See Jan Klabbers, Åsa Wallendahl (eds), *Research Handbook on the Law of International Organizations*, (Cheltenham: Edward Elgar, 2011).

withdraws in this context it must give at least 12 months of notice. Again, the WEU, Article XII is a good example.

It appears then that if an EU Member State wanted to withdraw before 2009, it would have found suitable justification. The question is why the withdrawal clause was inserted into the Treaty on the European Union. Indeed the explanatory notes in the files of the Convention that prepared the constitutional treaty that was the precursor to the Treaty of Lisbon indicate that there was the view that the right of withdrawal could be exercised even in the absence of an explicit provision to that effect. The EU was an organization of “freely cooperating nations” and based on “consent”.

It was also thought that the withdrawal of a Member State from the Union could not be made conditional upon the conclusion of a withdrawal agreement. This apparently is the reason that, according to Article 50 TEU, withdrawal can take effect in any event two years after notification. Otherwise the withdrawing Member State could be held in negotiations indefinitely by opposing Member States. The possibility for extending the period by mutual consent was intended to encourage the drafting of a withdrawal agreement that could establish a new form of relationship between the EU and the withdrawing Member State and regulate their bilateral affairs after exit.

It is one thing to provide for the possibility of exit and a totally different thing to put it into practice. The purpose of this paper is to consider the complexity and consequences of organized exit from the EU. It argues that it is both conceptually difficult and unpredictable – a leap in the dark. It sketches the complexity of withdrawal by juxtaposing the process and goals of entry into the EU with the possible process and aims of exit. In addition to coping with the economic effects of exit, the paper also explains that leaving the EU is likely to create a legal lacuna in the withdrawing Member State. Although Article 50 refers to non-application of EU law [the “**Treaties shall cease to apply**”], withdrawal will in all probability require extensive re-legislation and the building of new institutions and procedures on policy-making and policy enforcement.

Exit will be very much like the voyage described in Cavafy’s poem, Ithaca. It will be full of adventure and discovery. However, it is unlikely to be long or smooth.

2. The relevant Treaty provisions

The procedures for acceding and withdrawing to the European Union are defined in Article 49 and 50, respectively, of the Treaty on the European Union, as revised by the Treaty of Lisbon.²

Article 49 (the “entry” clause)

“Any European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union. The European Parliament and national Parliaments shall be notified of this application. The applicant State shall address its application to the Council, which shall act unanimously after consulting the Commission and after receiving the consent of the European Parliament, which shall act by a majority of its component members. The conditions of eligibility agreed upon by the European Council shall be taken into account.

The conditions of admission and the adjustments to the Treaties on which the Union is founded, which such admission entails, shall be the subject of an agreement between the Member States and the applicant State. This agreement shall be submitted for ratification by all the contracting States in accordance with their respective constitutional requirements.”

Article 50 (the “exit” clause)

“1. Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.

2. A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.

3. The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.

² See consolidated version in OJ C 326, 26 October 2012.

4. For the purposes of paragraphs 2 and 3, the member of the European Council or of the Council representing the withdrawing Member State shall not participate in the discussions of the European Council or Council or in decisions concerning it. A qualified majority shall be defined in accordance with Article 238(3)(b) of the Treaty on the Functioning of the European Union.

5. If a State which has withdrawn from the Union asks to rejoin, its request shall be subject to the procedure referred to in Article 49.”

3. Entry procedure

Although there is no secondary legislation laying down specific rules to govern the process of accession to the EU, after seven rounds of enlargement, a well-established practice is in place. This practice is significantly more complicated than what Article 49 TEU suggests. It can be divided into 10 separate stages of varying length and complexity and which can be summarised as follows:³

1. Submission of application in the form of a letter addressed to the Presidency of the Council. The applicant country has to be European and democratic.
2. The Council considers the merits of the application and then instructs the **Commission to issue an opinion or “avis”**.
3. The Commission services may take several months or even years to prepare the avis. Commission officials carry out many visits to the applicant country and **scrutinise its laws and policies. The Commission’s assessment is based on** principles defined by the European Council and especially the Copenhagen European Council of 1992. All avis have the same structure. They examine the suitability of the applicant and its capacity to assume the obligations of membership, they identify particular problems and necessary reforms that have to be undertaken by the candidate before entry into the EU and they consider the impact on the EU and how the EU may adjust to increased membership. For example, the Commission may recommend an increase in structural funds to accommodate the needs of new members who may be poorer than existing members.

³ For a detailed analysis see Phedon Nicolaides et al, *A Guide to the Enlargement of the European Union (II): A Review of the Process, Negotiations, Policy Reforms and Enforcement Capacity*, (Maastricht: European Institute of Public Administration, 1999) and Phedon Nicolaides and Sylvia Raja Boean, *Guide to the Enlargement of the European Union: Determinants, Process, Timing, Negotiations*, (Maastricht: European Institute of Public Administration, 1997).

4. The Commission submits its avis to the Council with a recommendation to open or not accession negotiations. There have been occasions where the Commission did not recommend immediate launch of accession negotiations [e.g. Greece 1979, Cyprus and Malta 1993].
5. The Council approves unanimously the avis of the Commission and instructs the Commission to initiate the process of negotiations. The applicant country is **elevated to the status of a "candidate"**.
6. Candidates become eligible to receive pre-accession financial assistance to adjust their economies and prepare for accession to the EU.
7. When the accession negotiations begin they are divided into two stages. The screening stage and the negotiation stage proper. During the screening stage, the Commission presents detailed reviews and explanations of the acquis. The acquis, EU practice and issues concerning institutional matters are divided into negotiating chapters. Currently there are 36 such chapters. The last chapter covers institutional matters which concern, for example, the number of votes that the candidate may have in the Council or the number of MEPs. The negotiation stage is also divided into two sub-stages. In the first sub-stage, the candidate presents its laws and policies to the Commission and explains what needs to be done to ensure compliance with the requirements of primary and secondary EU law. On the basis of these presentations, the Commission prepares reports assessing the degree of compliance of the candidate country and submits these reports to the Council. The Member States in the Council then hold meetings with the candidate. These are the formal negotiating sessions but in reality hardly any negotiating takes place. Article 49 gives the impression that the Council and the candidate, as equal partners, consider how the acquis may be changed to accommodate the candidate. This cannot be further from reality. The candidate is expected to accept the whole acquis as it stands. At most, the candidate may **request some temporary exceptions or "derogations" where adjustment to the acquis is too costly or takes time**. Once agreement is reached, negotiating chapters are closed. Most hard negotiations are left for last and they concern money – how much the candidate will receive from the structural funds and the common agricultural policy. During these stages, the Commission also prepares annual progress reports.
8. After the conclusion of the negotiations, the Commission submits to the Council a second avis with a recommendation for approval of the agreed terms of entry.
9. The Council decides unanimously, after the European Parliament gives its consent and then the Treaty of Accession is drafted.

10. After the Treaty of Accession is signed, it is submitted for ratification to the parliaments of the Member States and the candidate country, according to their constitutions [some countries also require popular referendums]. The Treaty of Accession also makes the necessary adjustment to the existing EU Treaties.

It is obvious that entry into the EU is complex. It touches on almost everything that a country does and affects directly or indirectly almost all its laws and policies. It can also be lengthy. For example, Cyprus and Malta applied in July 1990 and finally admitted into the EU in May 2004. By contrast, Finland applied in 1992 and entered in 1995.

4. Exit procedure

With the exception of Greenland in 1985, the EU has no experience in managing the exit of a Member State. The case of Greenland offers no guidance because of its dependence on Denmark and its almost exclusive reliance on fish. Nothing of substance had to be changed in the Treaties when Greenland left. Moreover, hardly anything had to be put in place to govern the post-exit relations of Greenland with the EU because Greenland interests are still represented via Denmark and Greenland's major concern was to exercise exclusive rights over fisheries. Everything else did not matter much.

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

1. The withdrawing Member State notifies the European Council [instead of the Council].
2. The European Council issues guidelines on the basis of which the Council negotiates the terms of exit and future relationship between the EU and that Member State.
3. The negotiations are conducted by the EU according to recommendations by the Commission and the Council decides by a qualified majority after receiving the consent of the European Parliament.

Article 50 TEU adds three important qualifications. First, if no agreement is reached **within two years, the Treaties "cease to apply" to** the withdrawing Member State unless the European Council and that Member State unanimously decide to extend the period.

Second, the withdrawing Member State does not participate in the decisions of the European Council or Council that concern it. That is, the Council acts by qualified majority of the remaining Member States.

Third, if that Member State wishes at a future point to rejoin the EU, it will have to follow the entry procedure in Article 49 TEU.

There is little academic literature on Article 50 TEU. This is not surprising because until the UK voiced its intention to re-negotiate the terms of its membership, the withdrawal provision was considered to be no more than a theoretical option. Most of the existing literature is also speculative.⁴

5. Differences between entry and exit

It appears that Article 50 defines a fairly simple procedure in comparison to the procedure laid down in Article 49. For example, there is no requirement for ratification. But this appearance is misleading for the following reasons.

First, the political climate is likely to be very different. The negotiations will not be conducted in the usual mood of optimism that has prevailed in most enlargements. There will be bitterness on both sides.

Second, after seven enlargements there is a fairly established practice concerning accession to the EU, despite the absence of secondary legislation. Because of complete absence of experience with withdrawal, it is more likely that the procedure will be disputed by both sides. This almost certainly will add to the acrimony surrounding the decision of a Member State to leave the Union.

Third, acceding countries have much less negotiating power than the EU. After all, they are the ones knocking on the door of the EU. A withdrawing country is likely to have less interest in satisfying EU demands. Negotiating power depends both on what you can offer and on what the other side wants. A country that wants little has

⁴ See Phoebus Athanassiou, *Withdrawal and Expulsion from the EU and EMU: Some Reflections*, European Central Bank, Legal Working Papers Series, no. 10, December 2009; Jochen Herbst, **Observations on the Right to Withdraw from the European Union: Who are the "Masters of the Treaties"?** *German Law Journal*, 2005, vol. 6(11), pp. 1755-1760; Hannes Hofmeister 'Should I Stay or Should I Go?'—A Critical Analysis of the Right to Withdraw from the EU, *European Law Journal*, 2010, vol. 16(5), pp. 589–603; Adam Łazowski, *How to withdraw from the European Union? Confronting hard reality*, CEPS, 16 January 2013; Adam Łazowski, **Withdrawal from the European Union and Alternatives to Membership**, *European Law Review*, 2012, vol. 37(5), pp.523-540.

a lot of negotiating power, *ceteris paribus*, simply because it can afford to walk away from the negotiating table. Therefore, a country that initiates the procedure for withdrawal must have concluded that it becomes better off outside the EU and does not need the EU. Then the EU will not be able to exert much influence. The only bargaining chip that the EU will have at its disposal will concern the post-exit relationship that the withdrawing Member State would want to establish with the EU.

Fourth, the negotiating power of the withdrawing country is likely to be even stronger by the fact that if there is no agreement within two years, EU Treaties automatically cease to apply to that country. A withdrawing country will eventually get at least the second-best of what it wants [assuming that the first-best is a convenient post-exit relationship]. By contrast, the accession process has no binding deadlines. The EU can delay the entry of a candidate country until it secures the concessions or the compliance it wants. But it cannot delay the exit of a country which does not respond to EU demands.

Fifth, conceptually it is difficult to define the object of withdrawal negotiations. To understand this conceptual difficulty, it is instructive to consider for a moment the purpose of the accession negotiations. In reality accession negotiations have a well-established aim: to determine that the candidate country accepts and is capable of complying with all the obligations of membership. These obligations are well understood and precise. They are laid down in primary and secondary legislation. Notwithstanding their political importance, the true negotiations play only a minor part in the whole process because they come at the very end of a lengthy process, they last only a few weeks and they largely concern just two issues: money and votes. Whereas accession negotiations have a clear final destination, **withdrawal negotiations do not. As Article 50 TEU provides, the negotiations “take account of the framework for [the withdrawing country’s] future relationship with the Union”.** But no one can know in advance what such relationship may be. It can range from MFN status to a simple free trade agreement, to membership of the European Economic Area or to a new higher form of privileged partnership with the EU. Moreover, as will be explained in detail in the next section, withdrawal can pose particularly difficult problems to the withdrawing country itself. This is because when EU law ceases to apply to it, there will be a legal lacunae. It is not obvious how it can be filled. In some cases, the withdrawing country may very well decide to keep EU rules it has already transposed in its domestic law. In some other cases, it will necessarily take time for the withdrawing country to replace EU law. In the interregnum there can be instances of legal ambiguity or conflict. Such issues are

bound to affect the process, content and time length of exit negotiations, as the withdrawing country tries to secure a smooth transition from the status of full Member State to its preferred alternative.

Sixth, exit will likely leave behind legacy issues. When a country accedes to the EU, it is obliged to adjust all its agreements with third countries so that there is no conflict between its bilateral obligations with those countries and its EU obligations. For example, an acceding country may not offer more privileged treatment to the products or companies of third countries than what it offers to EU products and companies. Equality is the expected standard of treatment. But when a country leaves the EU, such equality will no longer be required. Presumably the treatment that EU products, companies and nationals receive in the withdrawing country will be a matter of negotiation and will mirror the treatment that its products, companies and nationals will receive in the EU. The rights of established national and companies may be grandfathered while no such rights are extended to new arrivals.

Seventh, when an acceding country adjusts its international agreements with third countries the purpose of the adjustment is ex ante clear. It is alignment with the *acquis*. When a country leaves the EU and it will not be bound by EU law, first of all, it is not clear whether it also withdraws from international agreements negotiated on its behalf by the EU. Perhaps, mixed agreements [i.e. those signed by both the EU and Member States] will continue to apply. But those, in which only the EU is a signatory party, will probably have to be re-negotiated. In this case, the withdrawing country may want to maintain the status quo or grab the opportunity to escape from the obligations created by such agreements. At any rate, third countries will also have to give their consent and, in case of disagreement, the withdrawing country may not be able to count on the support of the EU.

Eight, the role of the Commission in the accession process is pivotal while in the exit process appears to be marginal. The accession process is largely managed by the Commission: from its initial *avis*, to the monitoring of the progress of the candidate country, to the conduct of the negotiations, to the preparation of the negotiating briefs for the EU, to its final *avis*. By contrast, Article 50 TEU makes no mention of the Commission. It only refers to the procedure in Article 218(3) TFEU which states **that the Commission** "shall submit recommendations to the Council, which shall adopt a decision authorising the opening of negotiations and, depending on the subject of the agreement envisaged, nominating the Union negotiator or the head of **the Union's negotiating team.**" **The Commission** is limited to submitting

recommendations, rather than being consulted as in Article 49, and it may not even negotiate on behalf of the EU as it normally does for other kind of negotiations. With **the Commission's role foreseen to be more** circumscribed, the question is who will safeguard the interests of the Union as a whole and who will prepare the common positions of the Member States.

Ninth, Article 50 provides that the withdrawing Member State does not participate in the decisions of the European Council or Council that concern it, but is silent on the role of the MEPs from the withdrawing country. Given that they are elected directly by the people, presumably they will represent the interests of the people and, in principle, may even express views opposing those of their own government. A similar question mark hangs over the role of the officials in EU institutions who are nationals of the withdrawing country. In theory, they act independently. However, will they be excluded from any negotiations to prevent potential conflict of interest?

These differences indicate that exit negotiations will be fraught with difficulty. There will be many issues of disagreement and dispute and many possibilities for conflict. Even ignoring political problems, the exit negotiations present a challenge of a much larger magnitude simply because of the largely undefined nature of the post-exit relationship between the EU and the withdrawing Member State. The purpose of the next section is precisely to consider in greater detail the issues that are likely to confront a withdrawing Member State at it proceeds to the post-exit status.

6. Is exit easier than entry?

In addition to the differences identified above, it appears that, for a number of reasons explained below, exit is procedurally and easier than entry for the country in question. This is in stark contrast to the substantive difficulty of exit, whose various aspects are analysed in the following section.

First, the role of the Commission is minimal. Whereas under Article 49 TEU, the **Commission provides opinions ("avis") on the suitability of the candidate country and on the impact of its accession on the functioning of the Union itself**, in Article 50 TEU, the Council decides without having to consult the Commission. Article 50 TEU envisages that the Commission only provides recommendations with respect to the **"opening of negotiations" according to the procedure in Article 218(3) TFEU**. During **past accession negotiations, initial and final "avis" of the Commission and the**

periodic progress reports very much set the tone of the negotiations, the framework within which Member States acted and specific requirements that had to be satisfied by the candidate country. In the absence of such guidance and agenda setting, withdrawal negotiations should be procedurally easier, but not necessarily more effective or better managed.

Second, whereas the Commission has always negotiated with candidate countries on behalf of the EU, Article 50 TEU refers to Article 218(3) TEFU which provides that **the Council nominates the "Union negotiator"**. So, it is possible that the negotiator may not be the Commission. This raises a question mark as to who will protect the interests of the Union as a whole. It may be easier for Member States in the Council to stitch an agreement with the withdrawing country.

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

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

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

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

It appears from the brief comparison of entry and exit procedures that exit is in theory easier than entry. There are fewer and lower hurdles to overcome and Member States do not seem to be as rigorously constrained by the guidance of the Commission. Perhaps the reason for this apparent ease is that a Member State that is determined to leave the EU cannot ultimately be prevented from doing so.

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

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

7. The challenges for the withdrawing Member State

For whatever reason a Member States decides to leave the EU, it will face a number of challenges. These challenges are largely caused by the fact that, as explained in the previous section, exit from the EU is tantamount to embarking on a trip in an uncharted territory.

The first such challenge will be to identify the nature and extent of the links that it would want to maintain with the EU after its exit. Article 50 TEU, by referring to a **“future relationship”**, alludes to the possibility that withdrawal does not have to be full and absolute. The withdrawing country may neither seek nor is obliged to sever all ties with the EU. But there is no blueprint for alternatives to full membership. At present, there are varying categories and levels of relationships between the EU and third countries. The closest and most involved links are those established by the European Economic Area. However, nothing prevents a withdrawing country from seeking a higher or lower relationship or even a mixture of different types of relationships [e.g. EEA minus Schengen plus military cooperation].

A second challenge is the replacement of EU law in the withdrawing country. For some issues, it will not have to do anything. For example, it will not have to provide statistics to Eurostat, it will not have to submit the programmes which are required in the framework of macroeconomic coordination or it will not have to send annual reports to the Commission on the amount of state aid it grants. Moreover, in the case of EU rules which are applied through enabling national law, as for example in the case of transposed directives, the withdrawing country may decide to leave everything in place. But for regulations which are directly applicable, explicit decisions will have to be made. This issue of legal lacuna is examined in more detail in the next section.

A third major challenge will be the assessment of the economic impact of exit. Since every study on the effects of accession to the EU has shown that membership is overall beneficial both to the new member and the rest of the EU, it is not unreasonable to expect that exit may have a net negative impact. This of course will very much depend on the nature of the post-exit relationship. But at any rate the

withdrawing Member State will need to know the economic repercussions of exit so that it can implement remedial policies. For example, a non-insignificant economic difference between entry and exit from the EU is the presence or better the absence of EU institutions in the local economy. While before entry the effects of having an EU agency are not taken into account, when a Member State leaves the EU the effects of a concomitant departure of EU agencies cannot be ignored. For example, if the UK leaves the EU it may lose the European Medicines Agency, the European Banking Authority and the European Police College. The presence of EU agencies in Member States means a source of employment, a source of income, a place of research and continuous upgrading of labour skills.

The fourth challenge will be the management of the budgetary impact of exit from the EU. Naturally, if a country leaves the EU it will not have to contribute to the budget of the Union. This, however, should not be a forgone conclusion as it will also depend on the nature of the post-exit relationship with the EU. For example, Norway is not a member of the EU, yet it contributes to the funding of structural **programmes in the new Member States through the "EEA facility"**. Ignoring such post-exit arrangements, the obvious impact of withdrawal will be zero payments to the EU and, at the same time, zero receipts from the EU. If the withdrawing country is a net contributor, this outcome may be deemed to be beneficial. If on the contrary, it is a net recipient, the outcome may be detrimental. Moreover, the withdrawing country will then have to decide whether to maintain the benefits that its farmers receive from the common agricultural policy, the funding that its poor regions obtain from structural funds and the research subsidies that its companies **get from the EU's framework research programmes. Even an opponent** of the CAP such as the UK, will face the dilemma of what to do with its farming sector. Cutting support abruptly will not be an attractive political option.

A fifth challenge for the withdrawing country will be to develop its own policy with respect to third countries in policy fields such as trade where the EU enjoys exclusive competence. Certainly, it will have to decide whether to assume all of the obligations that emanate from agreements between the EU and third countries and secure them through the negotiation of bilateral agreements with those third countries. Given that the EU has probably the largest network of trade agreements in the world, the task for the withdrawing country will be daunting. But in other fields too there will be need for either re-negotiation or establishment of completely new agreements [e.g. air transport rights negotiated by the EU]. Ironically, withdrawal from the EU will certainly require adjustment of bilateral links with non-EU countries.

A sixth challenge will be the establishment of new rules and forms of cooperation with the EU where there are genuine public goods shared by EU Member States or where there are significant cross-border externalities. The point here is not whether a withdrawing country would want to maintain close economic and political links with the EU. Rather, it is about the management of resources that will necessarily have to be done even after exit from the EU and the tackling of problems that cannot be avoided even after withdrawing from the EU. The examples that immediately spring to mind are fisheries, atmospheric pollution and ceilings on CO2 emissions, cross-border interconnection of trans-European transport, energy and communication networks, battling of money laundering, arms trafficking and other forms of cross-border illegal activities.

A seventh challenge will confront especially a withdrawing Member State that is in the Eurozone and has the euro as its legal tender. In all probability it will have to replace the euro with its own currency. It may revert back to the currency it had before adopting the euro or it may introduce a totally new currency. Whatever it does it will not be easy. Indeed, with no doubt whatsoever the most daunting challenge will be the timing of the introduction of its new currency. The markets will not wait two or more years until the withdrawal negotiations are concluded. The assets of a Member State with AAA rating such as Finland will immediately appreciate. At the other extreme, a Member State with C rating such as Greece will see an immediate depreciation of its assets and capital flight. Then capital controls will have to be introduced as in Cyprus in March 2013. Exit of a Member State from the Eurozone is an unplannable event. No matter how such exit is managed, the withdrawing Member State will also have to buttress its monetary institutions. Although all Eurozone members have national central banks, they do not carry out monetary policy as this is currently the exclusive competence of the European Central Bank. The central bank of the withdrawing Member State will have to be empowered to make decisions in monetary policy. In addition, its institutional capacity may have to be strengthened with the establishment of independent monetary policy bodies such as the Monetary Policy Committee of the Bank of England.

In summary, Article 50 implies that withdrawal means that EU law simply ceases to apply. But as it is shown in this section withdrawal will create many other headaches and will necessitate many other tasks. The purpose of the next section is to consider in more detail one of those tasks: the replacement of EU law and EU-mandated institutions and procedures.

8. Non-application of EU law or emergence of a legal lacuna?

Article 50 TEU provides that **the Treaties “shall cease to apply to the State in question”**. **Since the** main purpose of the Treaties is to create rights and obligations for Member States, it is reasonable to surmise that if they cease to apply, the withdrawing Member State will lose the rights it has of access to and equal treatment by other Member States and will be relieved of the obligation to offer unhindered access to and treat without discrimination other Member States, their products, companies and nationals. The purpose of this section is to consider the broad consequences of the termination of the application of EU law in the withdrawing Member State.

It is rather obvious that once the treaties cease to apply to it, the withdrawing Member State will not have to abide by the principles of free movement, free establishment, non-discrimination, etc. These are the instruments used by the Treaties to build an integrated market. The withdrawing Member State will then be free to exclude products, nationals and companies from other Member States, provided it has not been negotiated otherwise in a post-exit arrangement and provided the treatment it accords to EU products and nationals is compatible with WTO rules. It is, however, highly unlikely that it would be to its benefit to erect barriers around its economy.

Although foreign nationals and companies will lose their automatic right of entry, the question that arises is what happens when EU rules become non-applicable to domestic situations as well. In the case of directives which are transposed into domestic law, the applicability of that law may continue even after withdrawal from the EU. There is nothing in Article 50 TEU to prevent a withdrawing Member State from keeping EU law that it has already transposed into its domestic legal order. However, EU law is also applicable through regulations that have a direct effect and do not require prior transposition. In this case, a legal lacuna may be created. This will be most acute in those fields that the EU enjoys exclusive competence. The withdrawing Member State will have to consider whether and how to fill the gap. The following two examples illustrate the problem.

In the field of state aid, Article 108(3) TFEU and Regulation 659/99 require public authorities to notify all new state aid to the Commission for approval. No Member State has any national authority responsible for authorising aid precisely because the

Commission has exclusive power to assess the compatibility of aid with the internal market. If a Member State leaves the EU, it will not have to comply with EU state aid rules, but it will have to decide whether to allow its public authorities to compete against each other via state aid. If it would decide to impose a conditional prohibition such as that of Article 107(1) TFEU, then it would have to designate an authority to take over the role of the Commission and would still have to decide whether to adopt rules on compatibility which are similar to those of Commission guidelines.

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

Admittedly, given the exclusive competence of the EU in the field of trade and competition, it is rather natural that withdrawal from the EU will create a legal vacuum. But such legal fissures will appear in all policies which are implemented through regulations.

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

In conclusion, a Member State contemplates withdrawal from the EU when it is dissatisfied with the balance of rights of obligations of membership. Yet, in a rather paradoxical way, the likelihood of exit will be determined to a large extent by the strength of the relationship that the withdrawing Member State will be able to maintain with the EU after it leaves the EU. As the case study in the next section demonstrates, complete severance of all ties is the least desirable option.

9. Economic impact and credible economic policy management: Why independence is not necessarily advantageous

The likely economic impact of withdrawal from the EU will certainly have a decisive influence on the conduct and outcome of withdrawal negotiations. As the case studies below reveal, a withdrawing Member State is likely to want to keep the benefits from EU membership [e.g. access to the internal market] and discard costly or cumbersome obligations [e.g. contributions to the budget, auditing by EU institutions / reporting to EU institutions]. It is impossible to know at this stage how successful a withdrawing Member State can **be at such "cherry picking"**. That will depend on multiple factors such as its negotiating power [e.g. size], the concessions it is willing to make and the nature of the post-exit relationship it would want to maintain with the EU.

The economic impact of withdrawal itself is likely to be determined to a large extent by market expectations concerning both the formal contents of a withdrawal agreement and the post-exit economic policies that will be pursued by the withdrawing country. In some respects this impact will be the opposite of that of entry into the EU. Just as markets reacted positively in many cases of prospective entry into the EU, in the case of withdrawal they may react negatively even before withdrawal is completed.

For example, even before the new Member States formally acceded to the EU, their economies boomed on the crest of a large influx of foreign direct investment. That investment was fuelled by optimism that the economic policies of the then prospective Member States would become both more liberal and more predictable as a result of EU membership. Foreign investors felt more confident because they could petition EU institutions such as the Commission if their interests were harmed or could invoke directly applicable EU law to protect those interests.⁵

Independent policy making may in some circumstances be a boon but the possibility that it can turn out to be a bane cannot be lightly dismissed. What markets want above all is credible policy making: actually delivering what is promised. Credibility in policy making and policy management may be thought of as a function that is directly related to the degree of accountability of a public authority [i.e. the more

⁵ Jacques Pelkmans and Jean-Pierre Casey, *EU Enlargement: External Economic Implications*, April 2003, College of Europe, BEEP briefing no. 4.

accountable a public authority is, the more credible its policy] but only partly related directly to the degree of independence of that authority. This is because, on the one hand, an authority with little independence may be excessively constrained and not being able to deliver what it promises while, on the other, an authority with too much independence may act at will without being subject to any effective sanctions.⁶ Too much independence can be a bad for credibility as too little independence.

A withdrawing country may gain formal policy-making independence but may lose policy credibility because EU institutions will have much less influence over its policies and because it will be constrained to a much smaller degree by EU rules. It may also prove difficult for a country, that will find itself in a legislative flurry and will be busy establishing new institutions, to put in place at the same time effective accountability mechanisms and identify the right degree of institutional independence for its policy making authorities. Even if in principle new policy-making institutions and procedures are properly designed, they will need time to prove their worth. In the meantime, markets may react with excessive pessimism.

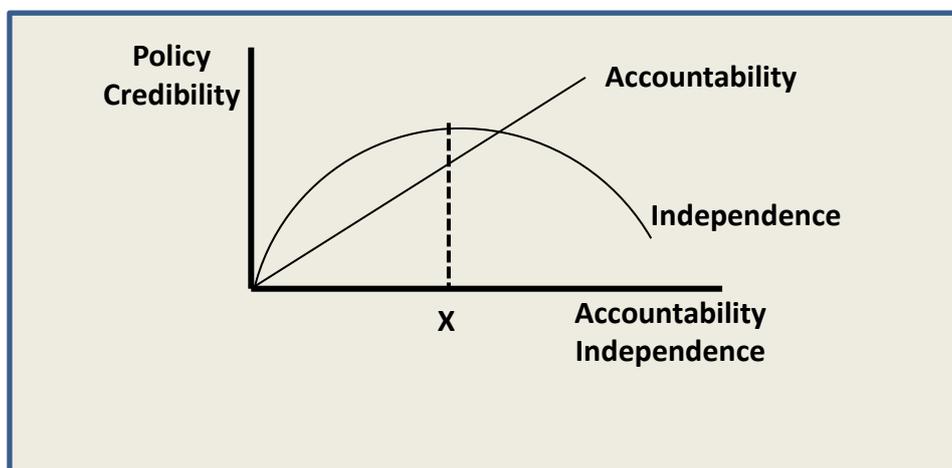
Assume that we can measure institutional accountability and independence and their relationship with policy credibility. We may reasonably surmise that accountability has a direct, one-to-one relationship with credibility; that is, the more accountable an organisation, the more credible it is. However, the relationship between independence and credibility is not so straight forward. At low levels of independence an organisation is not very credible because it is influenced by other extraneous factors. Similarly, at high levels of independence, an organisation may not be more credible because it can act at will. However, for middle levels of independence an organisation may be more credible because its actions become more predictable – less influence by others and less acting on whim.

Figure 1 depicts these relationships and indicates why policy credibility can be difficult to achieve. The right balance of accountability and independence is an empirical issue of trial and error. If the withdrawing country happens to be on the **left of "X"** [which is the degree of independence that generates the maximum level of credibility], then some degree of additional independence can prove to be

⁶ For more detailed analysis of these issues see Phedon Nicolaides, *Microfoundations of Policy Implementation: Towards European Best Practices*, (London: Routledge, 2013) and Phedon Nicolaides, *Economic Integration and the Structure of National Institutions*, *Intereconomics*, 2012.

beneficial to it. If, however, it happens to be to the right of "X", then any additional independence may result in less credible policy making.

Figure 1: Policy Credibility



The importance of policy credibility, institutional independence and at the same time binding constraints have been amply stressed in the recent report of the Scottish Government on a future macroeconomic framework for Scotland in case of independence from the UK.⁷ Below are some indicative quotations from the report on the need for policy credibility, independence and binding rules.

"3.18 To deliver on these objectives, the work of the Fiscal Commission Working Group has been focussed around four key themes:

1. Credibility – the framework should deliver confidence for businesses, investors, financial markets and the people of Scotland. The design of a robust and transparent framework is essential to enable policy makers to take advantage of the discretion and autonomy that independence would bring.
2. Sustainability – the framework should be affordable and support sustainable development – in the widest possible sense – over the medium to long-term.
3. Stability – the framework should provide coherent and predictable macroeconomic policies. It should also retain sufficient flexibility to respond to short-term pressures and unforeseen events.

⁷ Scottish Government, *Fiscal Commission Working Group - First Report - Macroeconomic Framework*, (Edinburgh, February 2013). It can be accessed at: <http://www.scotland.gov.uk/Resource/0041/00414291.pdf>

4. Autonomy – the framework should seek to provide the maximum degree of policy autonomy. It should also be sufficiently dynamic to evolve over time to meet **changing economic conditions or preferences.**” [p. 26]

“5.85 For rules to be credible, it is recognised that they must also offer some flexibility in the event of unpredictable events. It is advantageous to have clearly defined ‘escape clauses’ which set out the circumstances under which this flexibility will operate. This avoids charges of manipulation of the rules.” [p. 90]

“5.87 Experience has shown that rules are generally most effective when there are effective discipline devices in place and when there are transparent mechanisms to monitor compliance. The lack of independent oversight is one of the reasons why the previous UK Government’s fiscal rules were seen to lack credibility.” [p. 90]

“5.95 By providing independent oversight they can improve the credibility of the macroeconomic framework and give confidence to markets.” [92]

The debates in Scotland on future independence and in Brussels and Frankfurt on future monetary, financial and fiscal rules, have highlighted the importance of credible policy making and independent and accountable institutions. A Member State that withdraws from the EU will have an uphill struggle to persuade markets that it will use its newly acquired independence credibly. The eventual economic impact of exit from the EU will very much depend on how convincing will be its pre-exit commitments and post-exit achievements.

10. Case study I: Withdrawal of the United Kingdom from the EU

On 23 January 2013, the British Prime Minister, David Cameron, spoke about his **intention to renegotiate the terms of the UK’s membership. He said that he would** then put the results to a referendum. If British people reject the new arrangements, the UK will have to leave the EU. The UK, therefore, has become the first Member State to officially consider the prospect of withdrawal from the EU. The purpose of this section is to examine how the present UK government envisages that such withdrawal may take place.

But first, it is instructive to take note of how the UK has approached the issue concerning its membership. It does not regard it as a “take-it-or-leave-it” **decision**. It is trying to adjust the terms of its engagement with the EU before it gives formal notice of withdrawal. Such a possibility is neither provided, nor prohibited by Article 50. After his speech, Mr Cameron was reported to have contacted several EU leaders to garner support for his idea of renegotiating the terms of membership through broader treaty reform. It is reasonable to surmise that the reason for preferring treaty reform to outright exit is because adjusted membership is a superior option to non-membership, **not only for the benefits of unobstructed access to the EU’s internal market, but also for the fact that members have a seat at the decision-making table so that they can influence the future evolution of the EU and the shape of its policies – something that outsiders cannot do.**⁸

Indeed the speech acknowledges that exit is a painful option: loss of access to the internal market, no say on EU rules and loss of international standing. As Mr Cameron observed, “if we leave the EU, we cannot of course leave Europe. It will remain for many years our biggest market, and forever our geographical neighbourhood. We are tied by a complex web of legal commitments. Hundreds of thousands of British people now take for granted their right to work, live or retire in any other EU country. Even if we pulled out completely, decisions made in the EU would continue to have a profound effect on our country. But we would have lost all **our remaining vetoes and our voice in those decisions. ... Continued access to the Single Market is vital for British businesses and British jobs. ... We would have to think carefully too about the impact on our influence at the top table of international affairs. There is no doubt that we are more powerful in Washington, in Beijing, in Delhi because we are a powerful player in the European Union. That matters for British jobs and British security. It matters to our ability to get things done in the world.**”

If exit is a harmful option, much has been written in the press about the supposedly “true” intentions of Mr Cameron. Undoubtedly, like every leader who makes a major European speech, he had two audiences in mind: the European and domestic. It is outside the purpose of this paper to examine the role of the speech in domestic

⁸ It is telling that **some of the most credible critics of the UK’s membership justify their views on the supposedly small benefits from free trade within the internal market and the supposedly large costs from external trade barriers and the common agricultural policy.** See Brian Hindley, Martin Howe, *Better Off Out? The benefits or costs of EU membership*, Revised edition, (London: Institute of Economic Affairs, 2001).

British politics. Domestic politics are ignored here. Also ignored is the possible negotiating strategy of the UK. The speech was only the opening move in a long process. Like in all negotiating situations, it sets out maximalist objectives some of which will not be achieved. The purpose of this section is to take at face value those points of Mr Cameron's **plan which relate to withdrawal and analyse** what they reveal about the options of a Member State wishing to leave the Union.

Mr Cameron justifies the possibility of seeking withdrawal on the grounds that EU is becoming irrelevant to British people and that the EU is losing democratic legitimacy. He claims that there are three challenges facing Europe:

"First, the problems in the Eurozone are driving fundamental change in Europe. Second, there is a crisis of European competitiveness, as other nations across the world soar ahead. Third, there is a gap between the EU and its citizens which has grown dramatically in recent years. And which represents a lack of democratic **accountability and consent. If we don't address these [three] challenges, ... the British people will drift towards the exit.**"

These few sentences suggest that any Member State that would want to leave the Union would claim that membership undermines its prosperity and that what is decided in Brussels is either not subject to sufficient democratic control or far removed from the concerns of its citizens. Irrespective of whether such claims are true or not, the only relevant issue would be the claimed irrelevance of the EU.

In his speech, Mr Cameron also outlines the process of obtaining popular mandate, negotiating with the EU and putting the result to plebiscite. That process has four stages as follows. First, at the next general elections in 2015, the government will seek to obtain popular mandate to initiate negotiations with the EU. Second, if elected, it will pass special legislation for that purpose. Third, negotiations with the EU will **take place. And fourth, the results will be put to referendum.** "And when we have negotiated that new settlement, we will give the British people a referendum with a very simple in or out choice. To stay in the EU on these new terms; or come out altogether. It will be an **in-out referendum.**"

Interestingly, Mr Cameron does not refer to ratification by parliament. Perhaps this is regarded as self-**evident in the UK's legal system. While Article 49 explicitly refers to ratification, Article 50 does not.** But since withdrawal of a Member State means change in the treaties, ratification will be necessary, according to Article 48 TEU, for other Member States too.

If the “new settlement” is rejected by the referendum, the UK does not envisage rejoining the EU at a later point. “If we left the European Union, it would be a one-way ticket, not a return.” So, the last sentence of Article 50, which refers to rejoining the EU, may be useful to some but certainly not every Member State that decides to withdraw.

Lastly and perhaps most importantly, the speech demonstrates in quite stark terms the ranking of options facing a Member State that may contemplate withdrawal from the EU. The preferred option is to remain in a suitably adjusted EU (call this option 1). The second-best option is to negotiate favourable terms for a preferential post-membership relationship with the EU (option 2). Exit with no access to the EU, or rather only MFN access, is the worst option (option 3). After outlining his vision for the future of the EU and how to achieve it, Mr Cameron defines his ranking of choices for Britain as follows: “I believe the best way to do this will be in a new Treaty ... My strong preference is to enact these changes for the entire EU, not just for Britain. But if there is no appetite for a new Treaty for us all then of course Britain should be ready to address the changes we need in a negotiation with our European partners.”

These preferences can be summarised as follows:

Adjusted membership (option 1) > exit with privileged access (option 2) > status quo > exit with no access (option 3).

In view of this ranking, it is worth considering before concluding this paper what a withdrawing Member State may hope to obtain from exiting the EU. What does the behaviour of the UK so far indicate? In other words is the option of exit which is now formally allowed by Article 50 a useful option?

Since it is not possible to gauge **the UK’s** true intentions, we have to go by what is stated in **Mr Cameron’s** speech. In a nutshell, he wants the internal market and he would be happy with intergovernmental cooperation on other issues. He also understands the usefulness of being able to shape EU rules, so he does not wish the UK to become like Norway or Switzerland with access to the internal market but without a seat at the table. So the EEA is not a post-exit option, at least for now, for the UK.

Mr Cameron explicitly rejects restrictive labour markets, excessive regulation, interference in justice and home affairs. He wants to protect the pre-eminence of

the City as a financial centre, more favourable environment for SMEs, a reformed fisheries policy and smaller EU institutions. These are not in themselves unreasonable demands and reform to the liking of the UK is not beyond the realm of possibility.

Although it is rather unlikely that he will succeed in getting other Member States to agree to more intergovernmentalism, he may achieve general changes in some policies and he may obtain some specific exceptions for Britain. Perhaps the idea of the referendum is to pacify Eurosceptics in the UK and at the same time put pressure on other Member States to make concessions on policy reform. Perhaps all the talking of withdrawal is a ruse.

If the Member States are not willing to agree to option 1 (because it means weakening common rules rather than strengthening them as many Member States currently want), then the realistic choices for the UK are narrowed down to three: option 2, the status quo and option 3. Since option 3 is the least preferred outcome, it follows that exit negotiations are likely to focus on how much of its current privileges the UK will be allowed to retain and how much of its current obligations the UK will be able to discard. In a nutshell, it seems that withdrawal, if it ever occurs, will not be so much about outright exit but about finding a new type of association with the EU.

If this ranking of options is generalised in a game-theoretic framework it leads to some interesting results. Assume that a Member State that considers withdrawing from the EU calculates its possible pay-offs as follows:

Conciliatory bargaining:

1: if the EU also bargains softly and is willing to accommodate it [the EU here loses -1 because it has to deviate from its common principles];

0: if the EU does not give in [the EU here does not gain or lose anything].

Hard bargaining:

2: if the EU makes concessions [the EU then loses -1];

-3: if the EU is intransigent and the Member State in the end leaves without any post-exit agreement [the EU also loses -2 from the exit of that Member State].

A pay-off matrix can then be constructed that reflects these expected gains and losses.

Withdrawing Member State	EU		
		Conciliatory	Intransigent
	Conciliatory	1, -1	0, 0
	Intransigent	2, -1	-3, -2

It can be seen that if the EU adopts a conciliatory stance, the dominant option for the withdrawing Member State is to bargain hard [it gains 2]. By contrast, if the EU bargains hard, then the withdrawing Member State prefers to be conciliatory [gains nothing]. The same reasoning applies to the EU. The outcomes are given by the shaded rectangles. We see that the dominant strategy of each side depends on the first move of the other side. But in this case, the withdrawing Member State can force the first move of the EU by making a pre-commitment. If it announces that it will bargain hard, for example, it will be in the interest of the EU to be conciliatory and accommodate its requests.

In fact this is what the UK may have sought to achieve by announcing that the results of the negotiations with the EU on a new relationship would be put to a popular referendum. Given the rather anti-EU mood in the UK, the UK government must extract from the EU significant concessions if it is to win the referendum. It has signalled to the EU that its back is against the referendum wall and no concessions should be expected from its side. **The ball now is in the EU's court.**

11. Case study II: Opting out of justice and home affairs

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

The issue of contention concerns about 130 acts of cooperation on police and criminal matters. If the UK opts out it will not be subject to the jurisdiction of the Court of Justice or the enforcement powers of the European Commission. On 23 April 2013, the House of Lords EU Committee published a report entitled *EU police and criminal justice measures: The UK's 2014 opt-out decision*. It states that "the decision on the opt-out is one of great significance, with far-reaching implications not only for the UK but also for the other Member States and the EU as a whole. Cross-border cooperation on policing and criminal justice matters is an essential element in tackling security threats such as terrorism and organised crime in the twenty-first century."⁹

Not surprisingly, those in favour of the opt out based their arguments on the need for the UK to protect its autonomy both in terms of future policy development and in terms of judicial independence. Those in favour of staying in stressed, on the one hand, the benefits of cooperation with other EU countries in terms of enhanced security and the "benefits of legal clarity and the stronger and more consistent application of EU measures across the EU" from being subject to the jurisdiction of the Court of Justice.¹⁰ On the other, they warned of the harm that would be suffered in case of opting out from the loss of influence over EU decisions on police and criminal matters.

Regardless of the validity and relative significance of these different points of view, for the purposes of this paper three issues are of more direct relevance. First, the Committee concluded "that the concerns of proponents of opting out, in particular as regards the role of the CJEU, were not supported by the evidence we received and did not provide a convincing reason for exercising the opt-out. We have failed to identify any significant, objective, justification for avoiding the jurisdiction of the CJEU over the pre-Lisbon PCJ measures in the UK and note that the Government appeared to share that view in respect of the number of post-Lisbon PCJ measures to which they have opted in. Indeed, we believe that the CJEU has an important role to play, alongside Member States' domestic courts, in safeguarding the rights of citizens and upholding the rule of law."¹¹

The last two quotations lend support to the view that uniform interpretation and application of EU law is beneficial to Member States. However, indirectly they also

⁹ UK House of Lords, EU Committee, *EU police and criminal justice measures: The UK's 2014 opt-out decision*, p.7.

¹⁰ Op. cit. p. 7.

¹¹ Op. cit. p. 8.

indicate that the Committee believed that irrespective of whether the UK would choose to remain in or leave this area of EU law, it could not stop the Court of Justice from interpreting EU law and that its interpretations would affect the UK as well regardless of whether it was in or out. In the event that the UK would opt out, UK courts would still have to consider the case law of the Court of Justice and avoid conflicting interpretations concerning similar situations. This underlines the fact that withdrawal from the EU does not necessarily mean that the legal system of the withdrawing country will be able to ignore the evolution of EU case law.

Indeed the second issue in the work of the House of Lords EU Committee that is of direct relevance to this paper is that its report also considers the various options that would be open to the UK in case of an opt out. Some of them require the introduction of autonomous UK rules. This also underlines the fact that non-application of EU law will in reality require re-legislation.

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

12. Case study III: Procedural issues: The referendum on possible withdrawal of Scotland from the United Kingdom

In an ironic twist of fate, at the same time that the UK is contemplating withdrawal from the EU, the Scottish government is advocating withdrawal from the UK. Even more ironic and more revealing are the arguments used by the British Prime Minister to persuade Scots that they would fare better if they remained in the union with England. But, first, to his credit, Mr Cameron has accepted to be bound by the will of the Scottish people as it will be expressed in a referendum scheduled for the Autumn of 2014.

In a statement that was published on the website of the Prime Minister's office on 10 February 2013, Mr Cameron argued that Scotland was better off by having two

governments: A Scottish that dealt with local issues and a UK that dealt with cross-border and international issues. This division of competences, which in the case of the EU is embedded in Article 5(3) TEU on subsidiarity, is of course the functioning principle of the EU itself.

Mr Cameron also wrote that "Scotland within the UK has a system of government that offers the best of both worlds. Why swap Scottish MPs, Scottish Cabinet Ministers and Scots throughout UK institutions, for one Scottish Ambassador in **London?**" He pointed out the obvious benefits of Scotland being involved in common decision-making in Westminster. Withdrawal means loss of influence.

Given the complexity and multi-level interdependence between regions and countries, it is very unlikely that a country or a large-enough region like Scotland can be better off by positioning itself at any of the two extremes of either no degree of self-governance or complete independence.¹²¹³ This reinforces a point made in the previous section that whether a country eventually withdraws will depend on the kind of post-exit arrangements it can negotiate: how much of its obligations it can discard without losing too much of its rights.

Mr Cameron concludes the statement by tackling a procedural issue. He declares that **"as one of Scotland's two governments, the UK Government has a duty to help inform people with hard facts. So we'll be providing expert-based analysis to explain Scotland's place within the UK and how it might change with separation"**. This reveals a structural weakness in Article 50. No one is either explicitly responsible or given the right to put the case in favour of remaining an EU Member State to the citizens of the withdrawing country. Although the EU would try to preserve its

¹² The prospect and possible effects of Scottish independence have already been analysed in several publications and reports. These publications have a substantial speculative element because no one knows the extent of future independence or the terms of the post-independence relationship with the rest of the UK. What is, however, interesting but not surprising is that both the public debate and the academic analysis have focused on issues that very much mirror those that are bound to be the subject of any negotiations on withdrawal from the EU. As an example, here is a list of topics examined in the House of Lords Report on the *Economic Implications for the UK of Scottish Independence* that was published on 10 April 2013: Single market, trade, inward investment, regulation & taxation, division of assets and liabilities, North Sea oil & gas, currency options and consequences, financial regulation, fiscal policy, international economic implications, the European Union, international tax treaties. In addition, the House of Lords Report examined defence issues and the fate of military installations in Scotland. See also the analysis in Andrew Goudie (ed), *Scotland's Future: The Economics of Constitutional Change*, (Dundee: Dundee University Press, 2013).

¹³ In this connection, it should also be added that other Member States of the EU also face similar situations as for example Spain and Catalonia. See Jordi Matas et al, *The Internal Enlargement of the European Union: Analysis of the Legal and Political Consequences for the European Union in the Case of a Member State's Secession or Dissolution*, (Barcelona: Centre Maurits Coppieters, 2011).

integrity, the withdrawing country could regard any EU attempt to inform its domestic debate as unwarranted interference. This is another indicator of the acrimonious climate that may surround a withdrawal.

13. Conclusions

Although withdrawal from the EU is now formally possible, the process by which it can happen is unclear and potentially complex. A withdrawing Member State will not only rid itself from the constraints and obligations of EU law, but it will also have to re-legislate to fill the gap left by EU law.

While the objective of entry into the EU is known and fairly well-defined, the objective of withdrawal is not. It depends on the post-exit relationship that the withdrawing Member States negotiates with the EU. In this respect, the outcome will be shaped by the wishes of the two sides and their relative bargaining power.

The case of the UK and Scotland suggests that outright exit is not the best option for a withdrawing Member State. The best, but possibly the least feasible, option is an intermediate arrangement falling between full membership and complete separation from the EU. The exact position between the two extremes can only be determined by the exit negotiations and will be influenced by the political climate that will prevail at that time.

The case of the UK and Scotland also reveals that the public debates that are bound to take place on both sides of the negotiating divide will not be balanced. Unlike the debate in Scotland in which the UK government feels free and perhaps obliged to make contributions, the withdrawing Member State is unlikely to welcome counter-arguments put by EU officials or politicians from other Member States. The debate will be vigorous but will not be impartial. Once the lid of the withdrawal box is opened, it will be difficult to close it and harness the exit forces that it will unleash.

List of ‘Bruges European Economic Policy’ Briefings (BEEP)

BEEP briefing n° 28 (May 2013), [Is Withdrawal from the European Union a Manageable Option? A Review of Economic and Legal Complexities](#), by Phedon Nicolaides.

BEEP briefing n° 27 (May 2013), [A Contribution to The Study of Global Competition for Talent: the determinants of student mobility and its consequences for the internationalization of the labor market](#), by Mélanie Voin and Marcel Gérard.

BEEP briefing n° 26 (January 2013) [Financial Engineering Instruments and their Assessment Under EU State Aid Rules](#), by Phedon Nicolaides.

BEEP briefing n° 25 (December 2012), [The Economics of Single Market Regulation](#), by Jacques Pelkmans.

BEEP briefing n° 24 (November 2012), [Why Is Sovereign Debt Restructuring a Challenge? The Case of Greece](#), by Joanna Kulpa.

BEEP briefing n° 23 (January 2012), [Coltan from Central Africa, International Trade and Implications for Any Certification](#), by Raimund Bleischwitz, Monika Dittrich and Chiara Pierdicca

BEEP briefing n° 22 (February 2011), [Single eComms Market? No SuchThing...](#), by Jacques Pelkmans

BEEP briefing n° 21 (December 2010), [The Financial Crisis and the Future of the Eurozone](#), by Paul De Grauwe

BEEP briefing n° 20 (July 2009), [Towards a New \(European Research\) Deal. The case for Enhanced Fiscal Policy Coordination on Research and Innovation](#), by Loris Di Pietrantonio

BEEP briefing n° 19 (September 2008), [The Policy Framework for the Promotion of Hydrogen and Fuel Cells in Europe, A Critical Assessment](#), by Raimund Bleischwitz and Nikolas Bader

BEEP briefing n° 18 (September 2007), [How Social is European Integration?](#), by Jacques Pelkmans.

BEEP briefing n° 17 (September 2007), [The Sustainability Impact of the EU Emissions Trading System on the European Industry](#), by Raimund Bleischwitz, Katrin Fuhrmann and Elias Huchler.

BEEP briefing n° 16 (March 2007), [Services in European Policies](#), by Luis Rubalcaba.

BEEP briefing n° 15 (July 2006), [European Industrial Policy](#), by Jacques Pelkmans.

BEEP briefing n° 14 (March 2006), [Has the European ICT Sector a Chance to be Competitive?](#) by Godefroy Dang Nguyen & Christian Genthon.

BEEP briefing n° 13 (February 2006), [Testing for Subsidiarity](#), by Jacques Pelkmans

BEEP briefing n° 12 (November 2005), [La gestion de la transition vers la monnaie unique et l'établissement de la crédibilité de l'euro](#), by Jean-Claude Trichet.

BEEP briefing n° 11 (September 2005), [Does the European Union Create the Foundations of an Information Society for all?](#), by Godefroy Dang Nguyen & Marie Jollès.

BEEP briefing n° 10 (January 2005), [A 'Triple-I' Strategy for the Future of Europe](#), by Raimund Bleischwitz.

BEEP briefing n° 9 (December 2004), [The Turkish Banking Sector, Challenges and Outlook in Transition to EU Membership](#), by Alfred Steinherr, Ali Tukel & Murat Ucer.

BEEP briefing n° 8 (October 2004), [The Economics of EU Railway Reform](#), by Jacques Pelkmans & Loris di Pietrantonio.

BEEP briefing n° 7 (June 2004), [Sustainable Development and Collective Learning: Theory and a European Case Study](#), by Raimund Bleischwitz, Michael Latsch & Kristian Snorre Andersen

BEEP briefing n° 6 (January 2004), [Can Europe Deliver Growth? The Sapir Report and Beyond](#), by Jacques Pelkmans & Jean-Pierre Casey.

BEEP briefing n° 5 (April 2003), [Efficient Taxation of Multi-National Enterprises in the European Union](#), by Stefano Micossi, Paola Parascandola & Barbara Triberti.

BEEP briefing n° 4 (April 2003), [EU Enlargement: External Economic Implications](#), by Jacques Pelkmans & Jean-Pierre Casey.

BEEP briefing n° 3 (March 2003), [Mutual Recognition, Unemployment and the Welfare State](#), by Fiorella Kostoris Padoa Schioppa.

BEEP briefing n° 2 (December 2002), [Mutual Recognition in Goods and Services: an Economic Perspective](#), by Jacques Pelkmans.

BEEP briefing n° 1 (October 2002), [Economic Implications of Enlargement](#), by Jacques Pelkmans.

List of ‘Bruges European Economic Research’ Papers (BEER)

BEER paper n° 25 (December 2012), [Social Capital and Individual Happiness in Europe](#), by Andrés Rodríguez-Pose and Viola von Berlepsch.

BEER paper n° 24 (June 2012), [Mutual Recognition: economic and regulatory logic in goods and services](#), by Jacques Pelkmans.

BEER paper n° 23 (June 2012), [Bertrand Competition with an Asymmetric No-discrimination Constraint](#), by Jan Bouckaert, Hans Degryse, and Theon van Dijk.

BEER paper n° 22 (November 2011), [Can Policy Make Us Happier? Individual characteristics, socioeconomic factors, and life satisfaction in Central and Eastern Europe](#), by Andrés Rodríguez-Pose and Kristina Maslauskaitė.

BEER paper n° 21 (October 2011), [Do Clusters Generate Greater Innovation and Growth? An Analysis of European Regions](#), by Andrés Rodríguez-Pose and Fabrice Comptour.

BEER paper n° 20 (March 2011), [Market Efficiency in the EU ETS - An outlook for the third trading period](#), by Mirzha de Manuel Aramendía.

BEER paper n° 19 (January 2011), [Exports and Firm Productivity. The effect of US steel safeguards](#), by Victoria Purice.

BEER paper n° 18 (October 2010), [Interconnector Investment for a Well-functioning Internal Market. What EU regime of regulatory incentives?](#), by Lionel Kapff and Jacques Pelkmans.

BEER paper n° 17 (July 2010), [Product Market Reform in EU Countries - Are the methodology and evidence sufficiently robust?](#), by Jacques Pelkmans.

BEER paper n° 16 (March 2010), [The Determinants of Investment in Information and Communication Technologies](#) by Paolo Guerrieri, Matteo Luciani and Valentina Meliciani.

BEER paper n° 15 (December 2009) [Informational Barriers to Energy Efficiency – Theory and European Policies](#) by Lars-Morten Andersen and Raimund Bleischwitz

BEER paper n° 14 (December 2008), [EU Policies and Cluster Development of Hydrogen Communities](#) by Raimund Bleischwitz, Nikolas Bader, Anne Nygaard Madsen and Per Dannemand Andersen.

BEER paper n° 13 (April 2008), [Economic Approaches of the Internal Market](#), by Jacques Pelkmans.

BEER paper n° 12 (March 2008), [Cartels: the Probability of Getting Caught in the European Union](#), by Emmanuel Combe, Constance Monnier and Renaud Legal.

BEER paper n° 11 (June 2007), [Regional Business Cycle Synchronization in Europe?](#), by Lourdes Acedo Montoya and Jakob de Haan.

BEER paper n° 10 (March 2007), [Family Types and the Persistence of Regional Disparities in Europe](#), by Gilles Duranton, Andrés Rodríguez-Pose and Richard Sandall.

BEER paper n° 9 (February 2007), [Analysing the Contribution of Business Services to European Economic Growth](#), by Henk Kox and Luis Rubalcaba.

BEER paper n° 8 (November 2006), [The Determinants of Country Risk in Eastern European Countries. Evidence from Sovereign Bond Spreads](#), by Kiril Strahilov.

BEER paper n° 7 (November 2006), [Regional business cycles and the emergence of sheltered economies in the southern periphery of Europe](#) by Andrés Rodríguez-Pose and Ugo Fratesi.

BEER paper n° 6 (November 2006), [The 2005 Reform of the Stability and Growth Pact: Too Little, Too Late?](#), by Fiorella Kostoris Padoa Schioppa.

BEER paper n° 5 (October 2006), [R&D, Spillovers, Innovation Systems and the Genesis of Regional Growth in Europe](#), by Andrés Rodríguez-Pose and Riccardo Crescenzi.

BEER paper n° 4 (July 2006), [Mixed Public-Private Enterprises in Europe: Economic Theory and an Empirical Analysis of Italian Water Utilities](#), by Alessandro Marra.

BEER paper n° 3 (November 2005), [Regional Wage And Employment Responses To Market Potential In The EU](#), by Keith Head & Thierry Mayer.

BEER paper n° 2 (May 2005), [Technology diffusion, services and endogenous growth in Europe. Is the Lisbon Strategy still alive?](#), by Paolo Guerrieri, Bernardo Maggi, Valentina Meliciani & Pier Carlo Padoan.

BEER paper n° 1 (November 2004), [Education, Migration, And Job Satisfaction: The Regional Returns Of Human Capital In The EU](#), by Andrés Rodríguez-Pose & Montserrat Vilalta-Bufí.