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European Membership Clauses and Constitutional Hurdles to Withdrawal

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Abstract

Considering the interpretation of Article 50 TEU provided in the aftermath of Brexit, this article delves into the steps required as a matter of domestic constitutional law before the procedure of withdrawing from the European Union can commence. It examines the question of whether the Member States could trigger the exit process by a simple majority decision through ordinary law or whether it is necessary to go through constitutional reform. This research assumes that countries equipped with European membership clauses can proceed to notify their intention to withdraw only after repealing such clauses through a constitutional amendment. The Italian example is analysed in depth to provide concrete evidence.

Keywords: constitutional hurdle to withdrawal, constitutional amendment, EU post-Brexit, EU membership clauses, constituent decisions, withdrawal from the EU.

A Introduction

The conditions or rules to EU Member States' withdrawal from the EU differ from the rules regarding the termination of membership in international organizations:[1] the procedure to be followed for withdrawal according to Article 50 of the Treaty on European Union (TEU) is a crucial and constitutionally relevant process in the European institutional and legal framework. Prior to the Lisbon Treaty, it was commonly believed that the lack of an exit clause didn't mean that the European Community had an unlimited duration.[2] Nevertheless, the Treaty's provision on withdrawal dissipated this ambiguity, and now most scholars agree that international customary law is definitely no more applicable to the matter, given the special nature of EU law as underlined by the consistent case law of the European Court of Justice (also, ECJ).

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1 See J.H.H. Weiler, 'Alternatives to Withdrawal from an International Organization: The Case of the European Economic Community', in *Israel Law Review*, 20(2-3), 1985, 282-298.

2 P.D. Dagtoglou, 'How Indissoluble Is the Community?', in P.D. Dagtoglou (ed.), *Basic Problems of the European Community*, Basil, Blackwell, 1975, 258.

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Since the seminal judgments of *Costa v. Enel* and *Van Gend & Loos*,[3] the autonomy of the European construction became a solid principle that exists with regards not only to each Member State but also to the international legal order.[4]

The Court specifies in its reasoning that such autonomy resides on the unique constitutional framework of the EU, which 'encompasses the founding values set out in Article 2 TEU, … the general principles of EU law, the provisions of the Charter, and the provisions of the EU and FEU Treaties'. By virtue of this, the hypothesis that withdrawal is governed exclusively by EU law, instead of international customary or Treaty law, is undisputable.[5]

During the 1950s, even as the building of the European institutional architecture was gaining momentum and political solemnity, many countries – such as Italy[6] – ratified the founding Treaties with ordinary law for contingent reasons. This has proven to be an easy argument for those scholars stating that, by applying the principle of symmetry, an ordinary act of Parliament would be appropriate and sufficient to initiate the withdrawal process.[7]

This article aims to analyse the steps required as a matter of domestic constitutional law before the procedure of withdrawing from the EU can commence. It delves into the question of whether the Member States could trigger the exit process by a simple majority decision through ordinary law or whether it is necessary to go through constitutional reform.

The main assumption of this research is that countries equipped with European membership clauses can proceed to notify their intention to withdraw only after

3 ECJ, Judgment of 5 February 1963 in *Case C-26/62*, *Van Gend en Loos v. Nederlandse Administratie der Belastingen*.

4 This was lastly confirmed by the opinion 1/17 of the Court of Justice released on the Comprehensive Economic and Trade Agreement (CETA). ECJ, Request for an opinion submitted by the Kingdom of Belgium pursuant to Article 218(11) TFEU, Opinion 1/17, 2017/C 369/02.

5 See, inter alia, ECJ, Judgment of 10 December 2018 in *Case C-621/18*, *Wightman and Others*, para. 45; ECJ, Judgment of 6 March 2018 in *Case C-284/16*, *Achmea*, para. 33; ECJ, Judgment of 18 December 2014, Opinion 2/13, *Accession of the EU to the ECHR*, para. 165 to 167 and the case law cited. B. de Witte, 'European Union Law: How Autonomous is Its Legal Order?', in *Zeitschrift für öffentliches Recht*, 2010, 141 ss.; M. Klamert, 'The Autonomy of the EU (and of EU Law): Through the Kaleidoscope', in *European Law Review*, 42(6), 2017, 815-830.

6 When Italy co-founded the European Communities with five other countries, the first problem was to decide how to proceed with the implementation of the founding Treaties in the domestic legal order: some scholars said that, given the political and institutional relevance of the process, only a constitutional law could have given effect to those Treaties in the domestic legal order. Others assumed that pursuant to Article 80 of the constitution an ordinary act of Parliament would have been sufficient, using the normal procedure for the authorization to ratify and implement international treaties. See S. Bartole, *Interpretazioni e trasformazioni della Costituzione repubblicana*, Bologna, Il mulino, 2004, 278; M. Miele, 'L'esecuzione nell'ordinamento italiano degli atti internazionali istitutivi della comunità europea e dell'Euratom', in *Diritto Internazionale*, 1, 1961; T. Perassi, *La Costituzione e l'ordinamento internazionale*, Milano, Giuffré, 1952. This latter option prevailed so the Treaty establishing the European Coal and Steel Community was implemented by Law No. 766/1952. As for the EEC Treaty and the Euratom Treaty, they were both implemented by Law No. 1203/1957. Consequently, despite the critics of some commentators, the Treaties were incorporated into the domestic legal order with the same ranking as that of primary law.

7 R. Bin, 'Italexit? Come si potrebbe fare (se si può fare)', in *Quaderni costituzionali*, 4, 2018, 813-830, at 823.

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repealing such clauses through constitutional revision. Other types of European clauses could in theory be side-lined during such a process, causing only a minor contradiction with the foreseen new legal dimension, but the clauses pertaining to membership are clearly not compatible with the initiative to withdraw and, if still in force, they would be the parameters of an open violation to the constitution. The Italian example is investigated in depth to provide concrete evidence for the fact that even if membership is not expressly mentioned in the constitution, it is safeguarded by solid provisions embedding a general principle of European integration.

I will demonstrate that an ordinary law can be passed only during the second stage designed by Article 50 TEU, requiring that an agreement is formed to obtain domestic ratification. In this case, some statutory instrument could (or could not immediately) include a clause repealing the 'order of execution' of the EU Treaties, to cancel their legal value.

On the contrary, passing an ordinary law at an earlier stage is less acceptable. The right to initiate the withdrawal, before the stipulation of any agreement, shall be supported by the strong willpower of the Parliament and enshrined in constitutional law. As a matter of fact, a shared feature in European constitutionalism is that almost all EU Member States' constitutions require a more solid majority than the simple one for constitutional revision. In most cases, we are talking about a two-third majority (Hungary, Finland, Germany, Spain). Sometimes, a three-fifth majority is necessary (Czech Republic, France, Greece, Slovakia), complementing a possible confirmatory referendum (Latvia, Luxembourg, Poland, Slovenia), or even the act of dissolving the Parliament (Denmark, Netherlands, Sweden).

In line with that, this article affirms that a constitutional revision entailing the elimination of the EU membership clauses, when present, is the only viable procedure to legitimately activate Article 50 TEU because only such revision would imply overcoming the main constitutional hurdles to withdrawal.

In the more general framework of the 27 existing Member States, the Italian example is discussed as particularly paradigmatic for the reason that, besides the fact that Italy is a founding member, its legal basis for European integration has since given rise to significant doctrinal disputes, then appeased by the Constitutional Court. The cause of this divergence of orientations is to be traced back to its rooted linguistic ambiguity, which lacks any explicit reference to the EU.

Therefore, for reasons to be examined, asserting that Italy would have to repeal this clause, should it wish to leave the EU, logically implies that other countries, having more explicit membership clauses, *a fortiori* would have to proceed in the same way. It follows that among the 'constitutional requirements' needed to leave the EU, the main one would be to meet the qualified majority for constitutional revision.

In a nutshell, this article aims to identify and evaluate the doctrinal problems surrounding a hypothetical decision to leave the EU. To this purpose, Section B recalls the history, nature, and effect of the right to withdraw under Article 50 TEU; Section C seeks to clarify which 'constitutional requirements' are necessary to serve the notice to withdraw; Section D makes a comparative overview of the constitutional amendments related to the European integration process; Section E

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illustrates the Italian case, explaining why its European clause has been so problematic; Section F discusses the main hypothesis of the article and tries to explain why it is preferable to proceed through constitutional revision instead of ordinary law. In the end, conclusions are drawn on the importance of the principle of European integration in the national constitutions.

B History, Nature, and Effect of Article 50 TEU

Article 50 TEU is the Treaty provision framing the withdrawal or 'secession' process from the EU,[8] and it does so in a very skeletal manner, thus causing considerable academic attention.[9] Its first paragraph provides that 'any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements'. This sentence is of the greatest importance because it sets the perimeter of the first step in the withdrawal process. A State must abide by its own domestic constitutional rules to make a valid decision and notify the Council of its intention to withdraw from the EU as set forth in TEU's Article 50(2).

The Treaty procedure requires, then, the beginning of negotiations in order to prepare the agreement for withdrawal. According to Article 50(2), these negotiations must follow the guidelines specifically set up by the European Council and then further agreements must be concluded to shape the future relationship of the exiting country with the EU. Besides these basic indications, the process is entirely left at the bar of the negotiating parties.

The subsequent step of the procedure is described in paragraphs 3 and 4, which regulate the cessation of the application of the Treaties to the State about to leave the EU. This part of the provision specifies that for the same purpose the Member in question shall not participate in the discussions and decisions concerning it.

Finally, the last part of the Article (para. 5) deals with the possibility that a State asks to re-join the EU; however, there is no coming back from withdrawal. The ordinary accession procedure, as provided in Article 49 TEU, applies in its entirety from the beginning.

8 For an overview, see F. Erlbacher, 'Article 50', in M. Kellerbauer, M. Klamert & J. Tomkin (eds.), *The EU Treaties and the Charter of Fundamental Rights: A Commentary*, Oxford, Oxford University Press, 2019, 319-331.

9 P. Craig, 'The Process: Brexit and the Anatomy of Article 50', in F. Fabbrini (ed.), *The Law & Politics of Brexit*, Oxford, Oxford University Press, vol. 1, 2017, at 49; P. Athanassiou, 'Withdrawal and Expulsion from the EU and EMU: Some Reflections', in *Legal Working Paper Series No. 10*, ECB, 2009; H. Hofmeister, '"Should I Stay or Should I Go?" – A Critical Analysis of the Right to Withdraw from the EU', in *European Law Journal*, 16(5), 2010, 589-603; C. Hillion, 'Leaving the European Union, the Union Way: A Legal Analysis of Article 50 TEU', in *European Policy Analysis*, Swedish Institute for European Policy Studies, 8, 2016, 1-12; C. Hillion, 'This Way, Please! A Legal Appraisal of the EU Withdrawal Clause', in C. Closa (ed.), *Secession from a Member State and Withdrawal from the European Union*, Cambridge, Cambridge University Press, 2017, 215-233; E. Frantziou & P. Eeckhout, 'Brexit and Article 50 TEU: A Constitutionalist Reading', in *Common Market Law Review*, 54, 2017, 695-733; M. Gatti, 'Article 50 TEU: A Well-Designed Secession Clause', in *European Papers*, 2, 2017, 159-181; M. Gatti, 'Il diritto a terminare unilateralmente la procedura di recesso dall'Unione europea: note a margine della sentenza Wightman', in *Federalismi.it*, 17, 2020, 26-56.

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Before delving into possible changes in the interpretation in light of Brexit's precedent, we shall recall the genesis of Article 50.[10] A right to 'voluntarily withdraw from the EU' – as it was called – was never envisaged before the draft Treaty establishing a constitution for Europe, signed in 2004 but failed.[11] Yet, this right was implicitly intended to exist, using arguments from international law.[12] Article 59.1 of the 2003 draft Treaty adopted this claim when stating that 'any Member State may decide to withdraw from the European Union in accordance with its own constitutional requirements'.[13]

It was criticized for giving rise to an 'unfettered'[14] unilateral right, leading to some sort of 'regressive, gradual disintegration' of the EU, while others underlined that this clause – later incorporated in the Treaty of Lisbon in the renumbered Article 50 TEU – was not against the rationale of European integration. It was limiting unilateralism by introducing a legal orderly procedure that could have avoided a de facto secession.[15]

The innovation introduced by Article 50 TEU has had an impact on a long-standing debate on the Treaty-terminating power[16] and affected on-going State processes in which claims of secession were underway.[17] Outdated studies were more dedicated to investigating the topic from the international law perspective.[18] Drawing from them, the first scholars engaging on the question of withdrawal from the European Economic Communities elaborated divergent conclusions.[19] Some would say seceding shall be a discretionary decision pertaining

10 G. Amato, H. Bribosia & B. de Witte, *Genèse et destinée de la Constitution européenne: commentaire du traité établissant une constitution pour l'Europe à la lumière des travaux préparatoires et perspectives d'avenir*, Bruxelles, Bruylant, 2007.

11 Draft Treaty establishing a Constitution for Europe, in Official Journal C 169, 18/07/2003, 1-105.

12 R.J. Friel, 'Providing a Constitutional Framework for Withdrawal from the EU: Article 59 of the Draft European Constitution', in *The International and Comparative Law Quarterly*, 53(2), 2004, at 407.

13 But three different approaches were broached in the discussion for the withdrawal mechanisms: the one of State primacy, federal primacy, and federal control. To read more of this partition, see A.F. Tatham, '"Don't Mention Divorce at the Wedding, Darling!": EU Accession and Withdrawal after Lisbon', in A. Biondi, P. Eeckhout & S. Ripley (eds.), *EU Law after Lisbon*, Oxford, Oxford University Press, 2012, at 148.

14 Hofmeister, 2010, at 599.

15 Gatti, 2017, at 161.

16 N. Singh, *Termination of Membership of International Organisations*, London, Stevens & Sons, 1958; N. Feinberg, 'Unilateral Withdrawal from an International Organization', in *British Yearbook of International Law*, 39, 1963, 189-219; M. Akehurst, 'Withdrawal from International Organisations', in *Current Legal Problems*, 32, 1979, at 143.

17 For the simple reason that most sovereign States do not admit secession as a legal means for a portion of territory to be independent. See C. Closa (ed.), *Secession from a Member State and Withdrawal from the European Union: Troubled Membership*, Cambridge, Cambridge University Press, 2017.

18 See U. Villani, 'Recesso (diritto internazionale)', in F. Calasso (ed.), *Enciclopedia del diritto*, vol. XXXIX, Milano, Giuffrè, 1988, 45 ff.; L.R. Helfer, 'Exiting Treaties', in *Virginia Law Review*, 91, 2005, 1579-1648.

19 J.A. Hill, 'The European Economic Community: The Right of Member State Withdrawal', in *Georgia Journal of International and Comparative Law*, 12(3), 1982, 335-357; Weiler, 1985, at 282. In favour of withdrawal, albeit with certain caveats, are B. Beutler et al., *Die Europäische Union – Rechtsordnung und Politik*, Baden-Baden, Nomos Verlag, 1993.

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to sovereign States, while others preferred stating that the silence of the Treaties precluded any unilateral act to abandon the Communities unless in breach of the mutual supranational obligations.

The first jurisprudence of the European Court of Justice (also, ECJ) denied the legality of extrication from Treaties' obligations. In the order A*cciaierie San Michele SpA* (in liquidation) v. *High Authority of the ECSC*,[20] the Court of Luxembourg stated that 'it is clear from the instruments of ratification, whereby the Member States bound themselves in an identical manner, that all States have adhered to the treaty on the same conditions, definitively and without any reservations other than those set out in the supplementary protocols, and that therefore any claim by a national of a Member State questioning such adherence would be contrary to the system of community law'.

Despite having set this principle of coherence in the Communities' legal order, nothing interfered with the United Kingdom submitting the people a decision to remain in or leave the EU with the Referendum Act 1975.[21] Not even the precedent of Greenland's exit, gaining independence from Denmark, raised concerns of contrariness with the Treaties.[22]

The introduction of this article through the Treaty of Lisbon acknowledges that the Member States are the 'Masters of the Treaties'.[23] In fact, two extreme options were explored for the drafting of the withdrawal clause. The first one can be summarized as the 'State-centered version'[24] and the second one the 'Union-centered' version.[25]

The State-centred version sought to allow the State to send a simple but formal notification of withdrawal.[26] According to Article 27 of the Cambridge proposal, the Council 'meeting in the composition of Heads of State or Government and

20 ECJ, Judgment of 22 June 1965 in *Case 9/65*, *Acciaierie San Michele SpA (in liquidation) v. High Authority of the ECSC*, 30.

21 This initiative was pursued by the Labour Government, but their MPs alongside the Conservatives rejected the proposal supporting the Remain front, winning by two-thirds of the votes cast.

22 Other less studied precedents concern Algeria, asserting its independence from France in 1962, and Saint-Barthelemy, a French Overseas Collectivity that changed its territorial status in 2012 to gain more autonomy. See S. Berglund, 'Prison or Voluntary Cooperation? The Possibility of Withdrawal from the European Union', in *Scandinavian Political Studies*, 29(2), 2006, 147-167; K.K. Patel, 'Something New under the Sun? The Lessons of Algeria and Greenland', in B. Martill & U. Staiger (eds.), *Brexit and Beyond: Rethinking the Futures of Europe*, London, UCL Press, 2018, at 116 ff.; D. Kochenov, 'The Application of EU Law in the EU's Overseas Regions, Countries, and Territories after the Entry into Force of the Treaty of Lisbon', in *Michigan State International Law Review*, 20(3), 2012, at 734.

23 J. Herbst, 'Observations on the Right to Withdraw from the European Union: Who Are the "Masters of the Treaties"?', in P. Dann & M. Rynkowski (eds.), *The Unity of the European Constitution*, Berlin-Heidelberg, Springer, 2006, at 383 ff. For the timing of the adoption of the exit right, see M. Huysmans, 'Enlargement and Exit: The Origins of Article 50', *European Union Politics*, 20(2), 2019, at 159.

24 See European Convention, CONV 345/1/02, REV 1, *Contribution by Mr. P. Hain, member of the Convention*, 16 October 2002, available online at https://data.consilium.europa.eu/doc/document/CV-345-2002-REV-1/en/pdf (accessed on 9 September 2022), also called the 'Cambridge draft'.

25 R. Schütze, *European Union Law*, Cambridge, Cambridge University Press, III ed., 2021, at 290 ff.

26 *Ibidem*.

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acting by unanimity' would have had to 'determine … the institutional adjustments to this Treaty that such withdrawal entails'.

The Union-centred option, enclosed in what was known as the 'Penelope draft',[27] submitted the right to withdrawal to specific limitations: the fact that 'in accordance with its constitutional requirements' the Member State was not able to adopt a revision following the ratification of the new 'EU Constitution' would have implied its right to decide to leave the Union within two years from such reform (Article 103[1] of the proposal).[28]

The final wording of the Article (then set at no. 50) is the result of a compromise between the various opposing versions and nuances. It does not confer a unilateral unconditional right to withdrawal: only the decision to notify the intention to withdraw pertains exclusively to the sovereign country. Subsequently, Article 50 designs a procedure that, far from being intergovernmental, rather involves coordinated negotiations within the Union and its institutions, thus confirming the composite nature of the EU constitutional architecture as a *Verfassungsverbund*.[29] As much as the single Member State does not play a part in the dialogue with the exiting country, or it does so very indirectly.[30]

Significantly, the problem of the representation of the EU is solved by the *renvoi* to Article 218(3) of the Treaty of the Functioning of the European Union (TFEU), which spells out the negotiation procedure for third countries' agreements. It is common that withdrawal agreements are negotiated by the Commission, acting under mandate in the quality of a spokesman, and concluded by the Council, by a qualified majority, with the consent of the European Parliament.[31] During the Brexit process, however, the Union negotiating team comprised not only experts from the Commission but also from the Council and the European Council.

27 See François Lamoureux's Working Group to the Preliminary Draft European Constitution, 4 December 2002, available online at www.cvce.eu/en/obj/penelope_draft_contribution_to_a_preliminary_draft_european_constitution_4_december_2002-en-d8e2c7a6-3da4-43e4-beb2-3740b6437fee.html (accessed on 9 September 2022).

28 The wording of Art. 103(1) (French version) states that: «Lorsqu'une révision de la Constitution est entrée en vigueur et qu'un État membre n'a pas pu adopter cette révision conformément à ses règles constitutionnelles, cet État a le droit de demander, à l'issue d'un délai de deux ans après l'entrée en vigueur de cette révision, son retrait de l'Union. Dans ce cas, l'Union engage des négociations avec l'État membre concerné en vue de la conclusion d'un accord régissant leurs relations futures».

29 I. Pernice, 'Multi-level Constitutionalism and the Treaty of Amsterdam: Constitution Making Revisited?', in *Common Market Law Review*, 36, 1999, 703 ff.

30 In the 'Guidelines following the United Kingdom's notification under Article 50 TEU' provided by the European Council on 29 April 2017, the Union specified it would conduct negotiations in a unified position and 'so as not to undercut the position of the Union, there will be no separate negotiations between individual Member States and the United Kingdom on matters pertaining to the withdrawal of the United Kingdom from the Union' (para. 2).

31 This follows the interpretation given in ECJ, Judgment of 2 June 2005 in *Case C-266/03, Commission of the European Communities v. Grand Duchy of Luxemburg*, para. 62.

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Even after the codification of such 'EU exit right' through Article 50, withdrawal was still ruled out as an option never meant to be used,[32] as one of its drafters, Giuliano Amato, clarified.[33] Although Article 53 TEU solemnly affirms that the 'Treaty is concluded for an unlimited period', Brexit showed that Article 50 was not ornamental.[34]

C Clarification of the National 'Constitutional Requirements' to Serve Notice

Given the debate surrounding its inception, we have seen that Article 50 TEU now lays down a procedure that does not consist of hierarchical subordination to the EU institutions; neither does it provide unilateral authority to the exiting State. We must, therefore, agree that we are facing a heterocratic procedure in which the institutions, on the one hand, and the exiting State on the other, act on an equal footing. The 'constitutional compactness' of the members of the Union front requires further explanation of the meaning of these national constitutional requirements.

In fact, the most significant – but rather vague – phrase of Article 50 TEU sets out that a Member State might withdraw from the Union, 'according to its own constitutional requirements'.[35] On the surface, this entails that there is not a uniform procedure: each State will have to abide by its domestic rules.[36] But we can infer that the common constitutional traditions of all Member States are very likely to provide a homogeneous solution or some sort of 'transnational standard': the necessity of a constitutional revision to allow such a remarkable decision.

The shared constitutional traditions are an element reiterated many times in the Treaties, so there is no doubt that the EU legislator, by acknowledging 'the central role of national constitutions',[37] allows the interpenetration between bundles of different legal orders. One main example is Article 4(2) TEU, foreseeing

32 The so-called exit clause was introduced by the Treaty of Lisbon, which entered into force in 2009, to counterbalance the shift from unanimous to qualified majority decision-making. Such a design was conceived with the ten newly admitted Member States in mind, who were offered an 'exit strategy' to provide a constitutional safety net to their lack of veto. Huysmans well-theorized heterogeneity-veto argument could also apply to the Treaty of Lisbon, reaffirming the sovereign claim of the MS through the unprecedented outlining of a right to withdraw. Huysmans, 2019, at 155 ff.

33 Amato *et al*., 2007. C. Hooton & J. Stone, 'Brexit: Article 50 Was Never Actually Meant to Be Used, Says Its Author', in *The Independent*, 27 July 2016, available at https://www.independent.co.uk/news/uk/politics/brexit-eu-referendum-britain-theresa-may-article-50-not-supposed-meant-to-be-used-trigger-giuliano-amato-a7156656.html.

34 F. Croci, 'I rapporti tra il recesso dall'Unione europea e l'obiettivo della "ever closer union"', in *Federalismi.it*, 17, 2020, 57-80.

35 Frantziou & Eeckhout, 2017, at 707.

36 S. Lechner & R. Ohr, 'The Right of Withdrawal in the Treaty of Lisbon: A Game Theoretic Reflection on Different Decision Processes in the EU', in *European Journal of Law and Economics*, 32(3), 2011, at 359.

37 L. Besselink *et al*., *National Constitutional Avenues for Further EU Integration*, European Parliament, DG for Internal Policies, Policy Department C, 2014, at 8.

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that the Union shall respect (among other things) the national political and constitutional 'identities'.

Another example is provided by Article 6(3) TEU, stating that fundamental rights and freedoms are safeguarded not only by the 1950 Convention of Rome but also by the 'constitutional traditions common to the Member States'. Such rights shall constitute 'general principles of the Union's law'.

Article 42(2) TEU requires accordance with the 'respective constitutional requirements' of Member States for every EU decision concerning the common security and defence policy. Article 48(4) and (6) TEU lay out the ordinary and simplified revision procedure for the Treaties and both procedures demand that Member States comply with the 'respective constitutional requirements' necessary for the approval of the amendments. Ratification following the constitutional requirements, lastly, appears in the second part of Article 49 TEU, which determines the rules for the approval of the accession agreement for a new Member State, as well as in Article 54(1) TEU on the ratification of the Treaties.[38]

In light of this brief analysis, it is fundamental to assess which specific 'constitutional requirements' need to be internally met by the departing State to formally notify the EU of its intention to open the withdrawal negotiations. Indeed, the notification under Article 50 produces several legal effects: it bars the State concerned from discussions and decisions about withdrawal; it launches the negotiations to reach a withdrawal agreement, and, above all, it elapses the two-year timeframe established for the accomplishment of the whole procedure, after which the State will cease to be a member. Consequently, it is fundamental to identify the exact legal time when the two-year period starts producing effects.

This moment, which coincides with the formal notification, cannot be indefinitely and arbitrarily procrastinated by conducting 'informal' negotiations as this would be against the principle of sincere cooperation. The last sentence of Article 4, para. 3, TEU, obliges the Member States to 'facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardize the attainment of the Union's objectives'. In our view, the duty of loyalty does not imply that the decision to depart should be made with haste: nevertheless, the State should not hesitate with the sole purpose of gaining benefit in negotiations.

In regards to the question of who is entitled to choose to depart and how is it a matter of domestic constitutional law, it should be noted that in the *Lissabon Urteil* the German *Bundesverfassungsgericht* outlines how the right to withdraw

38 A last minor reference is in Art. 55 TEU reading that Treaties may be translated in any other languages enjoying an official status according to the State's 'constitutional order'. Other references on constitutional requirements are present in TFEU, namely in Art. 25.2 regarding the possibility of protecting new rights or the strengthening of the rights listed in Art. 20, to be approved by Member States in accordance with their respective constitutional requirements; Art. 218 on the decision for the accession of the EU to the ECHR; Art. 223 concerning provisions for the election of the Parliament, whereby the decision by the Council needs to be approved by Member States; Art. 262 containing provisions to confer jurisdiction to the EU Court of Justice in certain disputes; Art. 311 regarding provisions on the system of own resources of the Union; Art. 357 on the ratification of the Treaty in accordance with the 'respective constitutional requirements' of the Contracting Parties.

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stems from the sovereignty of every Member State.[39] It follows, for the Court, that 'the current state of development of the European Union does not transgress the boundary towards a State within the meaning of international law.' And this vision is confirmed by the fact that the majority of the references to the constitutional requirements appear in the TEU with regards to the ratification procedures or decisions on security and defence: all aspects related to State's sovereignty.[40]

This renders the preliminary question of constitutional compliance much more complex. For the UK, it was Brexit itself that brought along profound constitutional changes in an uncodified Constitution, as the said 'requirements' were established contentiously and systemized in the *Miller* case.[41]

Some authors, in fact, support the thesis of a 'double compliance', both with Article 50 TEU and the internal constitutional mechanisms.[42] It was brilliantly underlined how this twofold compliance might create a paradox.[43] On the one hand, the EU institutions, namely the European Council, might legitimately refuse to acknowledge a notification under Article 50, should it not respect Articles 2 and 49 TEU.[44] The enshrined values of democracy, the rule of law, freedom, solidarity, and equality, stemming from the two provisions should implicitly inform any national decision being so important that a notification conveyed after curtailing the power of the Parliament or the judiciary should be unacceptable. However, ironically, 'based on Article 7 TEU, a State that seriously and persistently breached the values of Article 2 TEU could ultimately have its membership right to withdraw withheld in order to protect the rights and interests of other Member States, and those European citizens potentially affected by the putative withdrawal'.[45]

In the Italian doctrine, a relevant positioning is that of Roberto Bin, pointing out that this double compliance may devise an Escherian stairway, an impossible phenomenon in the withdrawal procedure.[46] In other words, the legal validity of a Member State's political decision to activate the process of leaving the EU would be subject to a legal decision of a European institution, clearly overlapping with the political decision that started the procedure. Also, the European Court of Justice could be the apex judge of a system where each Member State 'risks' that its own

39 German Federal Constitutional Court, Judgment of 30 June 2009 in *2 BvE 2/08*, para. 329. See P. Faraguna, 'Limiti e controlimiti nel Lissabon-Urteil del Bundesverfassungsgericht: un peso, due misure', in *Quaderni costituzionali*, 1, 2010, 75-100.

40 Or we would better say, post-sovereignty. See N. MacCormick, *Questioning Sovereignty: Law, State, and Nation in the European Commonwealth*, Oxford, Oxford University Press, 1999.

41 M. Gordon, 'Brexit: A challenge for the UK constitution, of the UK constitution?', in *European Constitutional Law Review*, 12(3), 2016, at 411; C. Martinelli, 'I presupposti del referendum e i cleavages costituzionali aperti dalla Brexit', in *Diritto Pubblico Comparato ed Europeo*, 3, 2016, at 803.

42 Hillion, 2016, 2ff.

43 M.E. Bartoloni, 'La disciplina del recesso dall'Unione Europea: una tensione mai sopita tra spinte "costituzionaliste" e resistenze "internazionaliste",' in *Rivista AIC*, 2, 2016, 1-12.

44 Tatham, 2012, at 128. For Bartoloni, 2016, at 6, this point is contentious.

45 Hillion, 2016, at 3, which continues by specifying that 'if the State intending to withdraw were to bypass the European Council's negative stance on the notification, or indeed ignore the EU rules of withdrawal more generally, it would not only risk damaging its international reputation at a time it would need it most, but it could also open the possibility for natural or legal persons to claim compensation in the courts if they had suffered damages as a result'.

46 Bin, 2018, at 819.

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domestic requirements are submitted, as a last resort, to the judicial review of a supranational court, potentially erosive of national sovereignty. This outcome is sharply side-lined by the German Court, which, in *Lissabon Urteil*, makes clear that 'Article 50.1 Lisbon TEU merely sets out that the withdrawal of the Member State must take place 'in accordance with its own constitutional requirements'. Whether these requirements have been complied with in the individual case can, however, only be verified by the Member State itself, not by the European Union or the other Member States' (para. 330). For Bin, any ECJ pronouncement would only be 'political', lacking any legal force but key if the withdrawal is conducted in a conflicting environment, especially when a popular referendum is absent.

Consequently, a relevant point to be clarified here relates to the question of determining which ones are the procedural avenues for perfecting the choice of leaving the EU. The first question concerns the identification of the competent State authority to initiate its withdrawal. Traditionally, the executive power has the prerogative over international affairs under the scrutiny of the Parliament. Withdrawal by a mere governmental decision has been dismissed by the important precedent of Brexit that can help us evaluate the most viable option in our case. Although some commentators were propending towards the governmental prerogative,[47] based on the British unwritten constitutional conventions, we prefer to agree with the argument that the entitlement to manage foreign affairs is superseded by the necessity of an act of Parliament. This is more evident because the executive may not repeal fundamental rights, including the ones enshrined in the EU Charter of Fundamental Rights, without an act of Parliament expressly providing for that effect.

If there is a lesson to be taken from the *Miller* case it is, indeed, that a governmental decision to withdraw was possible only after obtaining the consent of the Parliament.[48] Just as the Parliament needs to authorize the ratification of a Treaty, symmetrically, it would need to consent to a withdrawal from it.

A second question concerns the type of legislation required to activate the withdrawal process. To discuss this, it is necessary to bring into the discussion the notion of European Clauses.

D EU Membership Clauses in the Continental Constitutions

Unlike the UK, all continental Member States benefit from written constitutions, and most of them, with few relevant exceptions that will soon be discussed, contain the so-called European clauses. Such clauses can be referred to as provisions in

47 M. Elliott, 'On Why, as a Matter of Law, Triggering Article 50 Does Not Require Parliament to Legislate', in *Public Law for Everyone*, 30 June 2016, available online: https://publiclawforeveryone.com/2016/06/30/brexit-on-why-as-a-matter-of-law-triggering-article-50-does-not-require-parliament-to-legislate/.

48 See the Judgment of 2017 from the UK Supreme Court in *case UKSC 2016/0196*, *R (on the application of Miller and another) (Respondents) v Secretary of State for Exiting the European Union (Appellant)*. F. Sgro, 'Il caso "Brexit": qualche considerazione sulla sovranità parlamentare e sul sistema delle fonti nell'ordinamento costituzionale britannico dopo la sentenza della Supreme Court of the United Kingdom', in *Federalismi.it*, 5, 2017, 1-34.

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national constitutions that mention European Union for various purposes. In 2005, Monica Claes typified such provisions in specific categories: some concern the mere issue of membership (transfer of powers or enabling provisions); some pose 'substantive or procedural conditions to the State's participation in European integration', and some regulate 'the manner in which national representatives or delegates in the European institutions are to be appointed'.[49] This whole set can be named, for Claes, '*allez*-provisions'. They oppose the '*retour*-provisions', concerning the constitutional rank and force of EU law, the internal institutional consequences of EU membership, and other specific provisions (often contradictory to the EU legal order).

For the purpose of this article, I will mostly consider what can be called the EU membership or integration clauses having an 'enabling function', meaning those provisions that authorize the limitation of sovereignty necessary for the EU membership, or either way consent to the required transfer of power. These norms could operate as substantive constitutional obstacles or hurdles to withdrawing from the EU: any initiative taken by the Member State to depart from the Union could not succeed before its removal from the constitutional legal order. The other types of European clauses may, to the contrary, have less stringent force in opposing the constitutional legitimacy of a Member State's request to withdraw.

Most of the EU Member States have in their constitutions a provision allowing them to assign specific powers to institutions of public international law under certain conditions (France, para. 15 of the Preamble to the 1946 Constitution;[50] Germany, Article 24(1) of the 1949 Basic Law;[51] Netherlands, Article 92, 1953;[52] Italy, Article 11, 1948[53]). These generic provisions allowed that some of them acquire membership to the EU during an initial stage, since they signified the openness of the constitution to international forms of cooperation.

The federal-inspired transformation that came into force with the 1992 Treaty of Maastricht entailed that Member States insert a more consistent textual reference, but only two out of the six founder constitutions were amended to adapt them to the new distribution of powers between the EU and at the national level of each of its Member States.[54] In France, while the Constitution of the Fourth Republic authorized the President of the Republic to ratify the Treaties of the European Communities with the consent of the Parliament, the 1958 Constitution of the Fifth Republic had to be extensively adjusted. A series of amendments were introduced in 1992 with the new Articles 88-1 to 88-4, creating a new title on 'the

49 M. Claes, 'Constitutionalizing Europe at Its Source: The "European Clauses" in the National Constitutions: Evolution and Typology', in *Yearbook of European Law*, 24(1), 2005, at 81.

50 'Subject to reciprocity, France shall consent to the limitations upon its sovereignty necessary to the organization and preservation of peace.'

51 'The Federation may, by a law, transfer sovereign powers to international organisations.'

52 'Legislative, executive and judicial powers may be conferred on international institutions….'

53 See note 61 for the Italian version and the corresponding main text for the English translation.

54 Claes, 2005, at 100; A. Albi, *EU Enlargement and the Constitutions of Central and Eastern Europe*, Cambridge, Cambridge University Press, 2005.

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European Communities and the European Union' in the constitution.[55] After this first revision, the French Constitution was changed five more times in order to align its structure to the developing European architecture.

Germany is the second noteworthy example: its Basic Law (*Grundgesetz*) never tackled the topic of EU membership until the ratification of the Treaty of Maastricht, when a constitutional reform enhanced the text by inserting a key article: the *Integrationklausel*. Article 23 commits Germany to participate in the development of the EU, both at the central level and at the federal State's level. To this end, the consent of the *Bundesrat* is required for transferring sovereign powers to the supranational institutions.

It was commented that despite the two reforms being conducted in parallel both in France and in Germany, there was no reciprocal influence in the drafting of the two integration clauses.[56]

As for the other founding States, while Luxembourg and the Netherlands only have a provision allowing to vest the exercise of sovereign powers to 'institutions of international law'[57] or 'international institutions',[58] the Belgian Constitution does not include a specific membership clause; however, in the 1970s, the legislator was forced for domestic reasons to introduce new articles regulating national issues with regards to European elections (Article 8 and 168 *bis*) and a new Article 168 on the revision of the Treaties, in addition to the more traditional 'transfer of sovereignty clause', identified with Article 34. Last, the Italian case is peculiar and requires discussion in a specific paragraph, given its lacking a specific membership clause and having an ambiguous constitutional basis.

By looking at the timing of the European amendments in the 21 other Member States acceding the community after its foundation, it should be noted, as a general rule, that most of them altered their constitutions previous to their accession. Exceptions can be found for Greece, Spain, Finland, and Cyprus.

Out of the four, only Finland has a strong EU Membership Clause which is posterior to the accession. In fact, in 1995, the constitution adopted a minimalist approach to integration: this was possible thanks to the institution of the 'exceptive enactments' allowing to adopt a law in conflict with the content of the constitution without the need to amend it. So, EU accession was possible through an exceptive enactment supported by a two-third parliamentary majority (Act No. 1540 of 1994). Meanwhile, the use of derogation to the constitution was subject to limitations. The new 2000 Constitution had to wait until 2012 to be amended with

55 French Constitutional Law No. 92/554, 25 June 1992, adding to the constitution the new Title 'On European Communities and the European Union'.

56 D. Grimm, M. Wendel & T. Reinbacher, 'European Constitutionalism and the German Basic Law', in A. Albi & S. Bardutzky (eds.), *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law*, The Hague, Asser Press, 2019, at 416.

57 Art. 49*bis* of the Luxemburgish Constitution was inserted in 1956 after the ratification of the European Coal and Steel Community (ECSC) Treaty and the European Defence Community (EDC) Treaty. This Constitution, however, always kept a minimalist approach towards European integration.

58 Art. 92 of the Dutch Constitution was introduced in 1953 in light of the accession to ECSC and EDC and in anticipation of further European integration.

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a clause (Chapter 1, sect. 1, para. 3) stating in its last part that 'Finland Is a Member State of the European Union'.

As for Cyprus, the 1960 Constitution, revised in 2006, two years after its EU accession, now contains Article 1A that expressly refers to the obligations stemming from it being 'a Member State of the European Union'.

Greece has a weaker EU Membership Clause. Twenty years after its accession, prompted by the economic crisis, the Greek legislator amended Article 28, containing a general provision of transfer of powers to international organizations, by adding an 'interpretative clause' that reads that 'Article 28 constitutes the foundation for the participation of the Country in the European integration process'.

The Spanish picture is more complicated. In the 1978 Constitution, what is now recognized as the European clause was inserted during the Maastricht process, meaning six years after the country's accession.[59] However, such clause (Article 93) refers to 'supranational organizations', lacking any express reference to the EU. Another item bridges the gap: Article 135, which was purposedly introduced in the Spanish constitution in 2011, has an unambiguous mention of the EU, though it does not deal with membership but with budgetary issues.

In brief, we can classify the 27 Member States into four main categories:

a Countries having a solid membership clause: Bulgaria, Croatia, Cyprus, Estonia, Finland, France, Germany, Hungary, Ireland, Latvia, Lithuania, Malta, Portugal, Romania, Slovakia, and Sweden.
b Countries having a weaker membership clause: to the described cases of Greece and Spain it should be added, as mentioned, Italy.
c Countries having only a traditional clause allowing the transfer of powers to international institutions: the Czech Republic, Denmark, Luxembourg, Netherlands, Poland, and Slovenia.
d Countries having other EU clauses, though not referring explicitly to European membership: Austria and Belgium.

It can logically be inferred that for those countries having a solid membership clause, any initiative to withdraw would require a constitutional revision to remove or amend the provision that would constitute an insurmountable obstacle to the exit procedure. See the case of Slovakia. Article 7.2 of the 1992 Constitution reads that 'The Slovak Republic may, by an international treaty ratified and promulgated in a manner laid down by law, or based on such treaty, transfer the exercise of a part of its rights to the European Communities and European Union…'. Furthermore, the same Article expressly provides on the case of withdrawing from the EU. The first paragraph spells out that 'The Slovak Republic may enter a State union with other States upon its free decision. The decision on entering a State union with other States, or on withdrawal from this union, shall be made by a constitutional law which must be confirmed by a referendum'. There is no doubt

59 P.P. Tremps, 'Artículo 93: La integración en la Unión Europea', in *Comentarios a la Constitución española*, 2.2, 2018, 296-311.

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that the procedure is crystal clear: Parliament shall pass constitutional law on withdrawal, and a special referendum shall confirm the decision.

To the contrary, for countries having only a traditional clause on the transfer of the exercise of sovereign powers – and no reference to the EU – it is more likely that notwithstanding any other specific constitutional hurdle in the legal order of the exiting country, such a rule could not prevent a withdrawal decision to be demanded. Even if the norms in question were inserted to pave the way to the accession, as some *intentio legislatoris* show, this information cannot acquire legal relevance. The total absence of EU membership is, furthermore, considered by some scholars as an issue to be addressed by any desirable future constitutional revision.[60]

Countries having other EU clauses are more 'protected' in the sense that, even though there is not a specific membership clause, their constitutions are sometimes fully equipped with an ad hoc 'European Union Title', as is the case for Austria or, be that as it may, they have a set of provisions on Union issues, as in the case of Belgium.

As is evident from this summary reconstruction, the most problematic countries are those under the aforesaid (b) category, that is, countries with weak membership clauses (see para 13 under Section D of this article 'EU Membership Clauses in the Continental Constitutions'). It is therefore time to discuss the particular case of Italy.

E European Clauses in the Italian Constitution: A Problematic Example

Despite being one of the founding members of the EU, Italy didn't carry out any formal constitutional recognition of the EU until 1999/2001. The legal basis for the Italian EU membership has always been considered as Article 11 of the Italian Constitution. It spells out that Italy agrees 'to the limitations of sovereignty that may be necessary to a world order ensuring peace and justice among the Nations'. In its second sentence, it provides that 'Italy shall promote and encourage international organizations furthering such ends'.[61] This can be defined as a traditional international law clause.

Underpinning the EU membership on such a provision encountered some problems. By referring to the *travaux préparatoires* of the constitution,[62] some claimed that Article 11 was conceived having in mind the participation of Italy in the United Nations. The argument can easily be disputed because in the same preparatory documents the rejection of an amendment proposed by MP Lussu

60 See H. Krunke & T. Baumbach, 'The Role of the Danish Constitution in European and Transnational Governance', in A. Albi & S. Bardutzky (eds.), 2019, at 271.

61 The Italian version states as follows: 'L'Italia ripudia la guerra come strumento di offesa alla libertà degli altri popoli e come mezzo di risoluzione delle controversie internazionali; consente, in condizioni di parità con gli altri Stati, alle limitazioni di sovranità necessarie ad un ordinamento che assicuri la pace e la giustizia fra le Nazioni; promuove e favorisce le organizzazioni internazionali rivolte a tale scopo.'

62 See, e.g., Assemblea Costituente, Commissione per la Costituzione, Prima Sottocommissione, *Resoconto sommario della seduta del 3 dicembre 1946*, 452 ss.

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aimed at inserting an explicit reference to European integration was justified by the fact that participation in international organizations at the global level was not intended as a hurdle to any integration at the regional level.[63] In other words, the historical context was favourable to the promotion of the international dimension of Italy, a State that, having lost the war, had to be re-legitimized in the eyes of the international community. But it is important to remark how, during the Committee and plenary debates, the founding fathers thought that distinguishing a European organization from an international organization would have been pleonastic.[64] Also, it is to be considered that the constitution came into force on 1 January 1948, but the foundations of the process of European integration were laid only on 9 May 1950, with the Schuman Declaration.[65]

Even by putting aside all the historical interpretative elements from Article 11, some scholars from the past adduced that an insurmountable problem was the generic wording, lacking the clearness required to be a full-fledged legal underpinning.[66] In the years directly after the constitution entered into force, Article 11 was simply labelled as 'programmatic', meaning that it laid out an ambitious path for the State's future action and foreign policy, but no more than that.[67] The reference to 'peace' and 'justice' was feeding this interpretation, as these values were seen as utopistic.

Consequently, the coercive legal dimension of Article 11 was long hidden behind a thick curtain of conflicting interpretations.

Furthermore, it lacked any express allusion to Europe. For this reason, a comparative study on European integration clauses fancied a different and 'more concrete constitutional basis'[68] than the usual one: Article 117(1) of the Italian Constitution.

This norm was introduced by Constitutional Law No. 3/2001 amending Title V on the territorial dimension of the State and incorporating five new constitutional references to the EU. It shall be noted that a first and minor amendment was introduced a few years before: Constitutional Law No. 1/1999 amended Article 122(2) by adding the mention of the European Parliament, concerning the regime of electoral incompatibilities.[69]

Instead, Article 117(1) could have legitimately sought at being a fundamental provision for EU integration, stating that 'legislative powers shall be vested in the

63 M. Luciani, 'La Costituzione e gli ostacoli all'integrazione europea', in *Politica Del Diritto*, 4, 1992, at 566.

64 Bartole, 2004, at 278; L. Gianniti, 'I costituenti e l'Europa', in *Federalismi.it*, 16, 2018, at 1 ff.; A. Guazzarotti, 'Legalità senza legittimazione? Le "clausole europee" nelle costituzioni degli Stati membri dell'UE e l'eccezione italiana', in *Costituzionalismo.it*, 3, 2019, at 25.

65 N. Catalano, 'Portata dell'art. 11 della Costituzione in relazione ai trattati istitutivi delle Comunità Europee', in *Il Foro Italiano*, 1, 1964, at 465.

66 Accordingly, this doctrine purported the necessity to amend the constitution and insert a specific legal basis for what were back then Communities. See L. Paladin, *Le fonti del diritto italiano*, Bologna, Il mulino, 1996, 439.

67 Luciani, 1992, at 589.

68 Besselink *et al*., 2014, at 147.

69 Art. 122(2) specifies that regional councilman or regional members of the executives cannot be at the same time members of the European Parliament.

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State and the Regions in compliance with the Constitution and with the constraints deriving from EU legislation and international obligations'.[70] Comments following the enactment of the reform enthusiastically declared that EU law was switching from an accommodating constitutional 'coverage' to an undisputable, full-fledged 'recognition'.

However, as we shall see shortly, from the beginning lawyers have downplayed its potential,[71] referring to the genuine intention of the legislator as orientated not to a recognition of a principle of integration between the two systems but, more discreetly, to the clarification of the modalities of the division of competences between the State and the regional level. This was also later confirmed by a judgment of the Constitutional Court (*Case No. 227/2010*) backing the downgrading of the Article while maintaining the firm and unfailing assumption of the centrality of Article 11.

In light of this, it is easy to explain why the position expressed by Besselink *et al*. (see above) is less convincing than the traditional one. In an obvious way, the purpose of Article 117.1 is narrower than Article 11, being limited to establishing a criterion for the legislative competence between levels of governance. Furthermore, Article 117.1 was framed in the context of a reform on the distribution of competencies between State and territorial authorities: undeniably, from a dogmatic standpoint, Article 117.1 is not there to specifically allow additional limitations on sovereignty. Rather, its function is to introduce a constitutional safeguard to the principle of primacy of European law with regard to regional and national legislations.[72]

As said, a consistent case law of the Constitutional Court clarified that the most suitable legal basis for European integration is Article 11.[73] The first ruling concerning the relationship between the internal legal order and the one emanating from the European Community is the seminal *Case No. 14/1964*, reassuring the doctrine on the fact that limitations of national sovereignty might have been arranged with ordinary law implementing the Treaties. This, however, does not affect the rules concerning the hierarchy of the sources of law since Article 11 of the Constitution did not vest the implementing legislation of the European Treaties with a constitutional value, superior to ordinary domestic law.

70 Besides that, we need to account also Art. 117.2 (a), that vests the State with the exclusive legislative power concerning 'foreign policy and international relations of the State; relations between the State and the European Union; right of asylum and legal status of non-EU citizens'; Art. 117.3, which reads that 'concurring legislation applies to …: international and EU relations of the Regions'; Art. 117.5, stating that regions and autonomous provinces have a specific role in the implementation of the EU legislation and that they take part to the decision-making process in the areas falling into their competences; and Art. 120.2, governing the substitutive powers of the State in case the regions or the autonomous provinces 'fail to comply with international rules and treaties or EU legislation'.

71 C. Pinelli, 'I limiti generali alla potestà legislativa statale e reginale e i rapporti con l'ordinamento internazionale e con l'ordinamento comunitario', in *Foro italiano*, 7-8, 2001, 194 ss.

72 See L. Torchia, 'I vincoli derivanti dall'ordinamento comunitario nel nuovo Titolo V della Costituzione', in *Le Regioni*, 6, 2001, 1203-1212.

73 Critical, M. Esposito, 'Considerazioni sugli effetti (ri)organizzativi della l. cost. n. 1/2012', in *Osservatorio AIC*, 5, 2019, at 81. Thinks that the interpretation now common of Art. 11 is rather 'an *Umdeutung*', a unilateral 'reinterpretation'.

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In another key judgment, *No. 183/1973*, the Constitutional Court held that Article 11 would have to be considered empty of its content if constitutional law is required to approve every limitation of sovereignty.

Accordingly, the nature of Article 11 is not only substantial but also procedural, because it exonerates the Parliament from the need to initiate a constitutional amendment procedure. For this reason, Zagrebelsky wittily underlined that Article 11 has replaced the 'order of execution' of the Treaties, which is now logically incorporated into the interpretation of this provision.[74] Furthermore, in *Case No. 232/1975* the Constitutional Court said that, as far as Italy is concerned, the allocation of regulatory power to the organs of the European Communities, correspondingly limiting the national level, finds a solid basis in Article 11 of the Constitution. This legitimizes the restraint of national sovereignty in favour of the Communities regarding the exercise of legislative, executive, and jurisdictional functions. The important 'controlimiti' doctrine,[75] concerning the compliance of the EU law with the fundamental principles of the domestic constitutional framework, is further polished by *Case No. 170/1984*. The Court, reaffirming the prevalence of the ECC regulation when conflicting with acts of Parliament, specifies that the internal legal provisions contrary to the community regulation cannot be considered null or ineffective. Rather, they are constitutionally illegitimate, for violation of Article 11 of the Constitution, since this norm is the constitutional parameter activated to uphold the violation of the principles established in the Treaties of Rome.

The fundamental parametric value of Article 11 is maintained also after the 2001 constitutional reform introduced Article 117.1. In *Case No. 227/2010* on the EU arrest warrant, the referring judges evoke this new parameter. To the contrary, the Constitutional Court replies that the question of constitutionality can be scrutinized having regard also to the constitutional parameters not formally invoked. It is by virtue of Article 11, placed not without significance and consequences among the fundamental principles of the Charter, that the European Communities, now the European Union, is empowered to exercise regulatory powers instead of Member States in certain matters, within the limits of the principle of attribution. This parameter remains the most important one also in the landmark order of 23 November 2016 *Case No. 24/2017*, an episode of what is

74 G. Zagrebelsky, *Manuale di diritto costituzionale*, I, Torino, Giappichelli, 1990, at 129.

75 This doctrine owes its authorship to P. Barile, 'Il cammino comunitario della Corte', *Giurisprudenza Costituzionale*, 3, 1973, 2406-2419. For the 'contro-limiti', besides the conspicuous literature on the 'Taricco Saga' (on which, at least, M. Bonelli, 'The *Taricco* Saga and the Consolidation of Judicial Dialogue in the European Union: CJEU, C-105/14 *Ivo Taricco and Others*, ECLI:EU:C:2015:555; and C-42/17 *M.A.S.*, *M.B.*, ECLI:EU:C:2017:936 Italian Constitutional Court, Order No. 24/2017', in *Maastricht Journal of European and Comparative Law*, 25, 2018, 357), see *ex multis* also A. Celotto & T. Groppi, 'Diritto UE e diritto nazionale: primauté vs controlimiti', in *Rivista italiana di diritto pubblico comunitario*, 6, 2004, 1309-1384; R. Chieppa, 'Nuove prospettive per il controllo di compatibilità comunitaria da parte della Corte costituzionale', in *Il Diritto Dell'Unione Europea*, 12, 2007, at 493; A. Bernardi, *I controlimiti. Primato delle norme europee e difesa dei principi costituzionali*, Napoli, Jovene, 2017, *passim*; C. Pinelli, 'Controlimiti e Principi Supremi', in *Giurisprudenza Costituzionale*, 1, 2019, 491-499; D. Pellegrini, *I controlimiti al primato del diritto dell'Unione europea nel dialogo tra le Corti*, Firenze, Firenze University Press, 2021.

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known to be the 'Taricco Saga'.[76] Here, the Court further expands the meaning of Article 11, emphasizing how it is the keystone of Italian participation in the European integration process.

To complete the picture, it should be noted that there are also a few other references to the EU besides the ones from the 2001 revision. Constitutional Law No. 1/2012, aimed at introducing the principle of budgetary compliance, modified Article 97 which now reads that 'general government entities, in accordance with European Union law, shall ensure balanced budgets and the sustainability of public debt'. The same law also revised Article 119(1), stating the need for municipalities, provinces, metropolitan cities, and regions to ensure 'compliance with the economic and financial constraints imposed under European Union law'.

In short, there are seven other explicit references to the EU, besides Article 11. The question of which of these is the ultimate European clause is ill-formulated since there is no need to identify a primary norm out of a set of equally ranked constitutional norms: their combination secures a rock-solid basis for the Italian membership in the EU from different standpoints.

Despite the unwavering position of the Italian Constitutional Court, new calls for an amendment of the constitution regarding Italian participation in European integration are always tabled.[77]

F Why a Constitutional Revision Instead of a Simple Law of Authorization?

Let us make it plausible that if we demonstrate that in Italy, even though the EU Membership Clause can be extricated only by means of interpretation, a constitutional revision would be a necessary 'Constitutional requirement' to comply with, so it follows that in countries where these membership clauses are more decisive and clear, the legislator could not proceed without repealing them.

76 See Italian Constitutional Court, Order No. 24/2017, commented by M. Bonelli, 'The *Taricco* Saga and the Consolidation of Judicial Dialogue in the European Union: CJEU, C-105/14 *Ivo Taricco and Others*, ECLI:EU:C:2015:555; and C-42/17 *M.A.S.*, *M.B.*, ECLI:EU:C:2017:936 Italian Constitutional Court, Order No. 24/2017', *Maastricht Journal of European and Comparative Law*, 25, 2018, 357; G. Piccirilli, 'The "Taricco Saga": The Italian Constitutional Court Continues Its European Journey: Italian Constitutional Court, Order of 23 November 2016 No. 24/2017; Judgment of 10 April 2018 No. 115/2018 ECJ 8 September 2015, Case C-105/14, Ivo Taricco and Others; 5 December 2017, Case C-42/17, M.A.S. and M.B.', *European Constitutional Law Review*, 14, 2018, 814. See also P. Faraguna, 'Unamendability and Constitutional Identity in the Italian Constitutional Experience', *European Journal of Law Reform*, 21, 2019, 329.

77 This is a sensitive issue that is still debated today around the wording of the same Art. 11. For instance, in the XVIII Legislature of the Italian Parliament several proposals were offered. Some of these require that further limitations of sovereignty be accepted with a more elaborate procedure. See, for instance, A.S. 968, XVIII Leg., MP Zanda, *Modifica all'articolo 11 della Costituzione in materia di partecipazione dell'Italia all'Unione europea [Amendment to Article 11 of the Constitution concerning Italy's participation in the European Union]*, 28 November 2018 and A.S. 44, XVIII Leg., MP Quagliariello, *Introduzione della clausola di sovranità rispetto al diritto dell'Unione europea [Introduction of the sovereignty clause in EU law]*, 23 March 2018. See Y.M. Citino, 'I tentativi di revisione delle modalità di partecipazione dell'Italia all'Unione Europea' [Attempts to revise Italy's participation in the European Union], in *Rivista AIC*, 3, 2022, 162-186.

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Suffice it to note that, in such a multifaceted framework, there are still few scholars who believe that since in other Member States the constitutional bonds to the EU seem more stringent, in Italy the ambiguity of the European references in the constitution would imply, *a contrario*, the possibility to take a step back from the Union without even needing a constitutional reform.[78] According to this strand of thought, the explicit references to the EU in the constitution could still make sense despite the beginning of the withdrawal procedure, while others, like Article 122(2) of the Italian Constitution, would just become nonsense, but couldn't help barring any initiative to give away membership. From this, it can be deduced that only once the procedure under Article 50 TEU is perfected would it be appropriate to readjust the constitution to re-expanded sovereignty. No prior action would, however, be necessary according to this line of reasoning.

The risk involved if one moves from a reading of Article 11 only as an authorizing norm, and not also as an entrenched provision underpinning the EU in the constitution, is such that the legal system would lose its connotation as an order integrated with that of the EU. Instead, it would signify that, despite all the lofty intentions, both legal systems are interrelated only in a contingent and reversible manner.

By contrast, it is more persuasive to read the principle of European integration as something historically embedded in the Member States' constitutions. A convincing explanation concerning the Italian Constitution can be discovered by looking at the evolution of its 'post-totalitarian' nature, shared with other post-World War II European constitutions[79] but with its own specificity.

Without needing to chronicle the complex theories of State sovereignty, however, it is necessary to account for the political and ideological background of the Italian case, leaning on the demand to re-establish State authority upon democratic underpinnings.

This construction implies, on the one side, that the main pillars of sovereign power are Article 1, endowing people with sovereignty, and Article 139, entrenching in the constitution the Republican principle. On the other side, sovereignty can be limited by the necessity to legitimize Italy being accepted and participating in the international community, something which gave leeway to the principle of openness to internationalism, peace, and justice. Article 11's polyvalent scope, consequently, incorporates the political compromise that lies behind the whole constitution, conventionally established between all the political families that

78 Bin, 2018, at 822, which alleges that the proposal for a constitutional reform to repeal the European clauses, put forward by far-right parties, is 'pointless'.

79 Germany, Greece, Portugal, and Spain are also post-totalitarian constitutions. Art. 1.2 of the 1975 Greek Constitution lays 'popular sovereignty' as the foundation of government. The 1976 Portuguese Constitution refers to sovereignty in the first three articles: it rests both with 'the people' and 'the Republic'. The 1978 Spanish Constitution vests the Spanish people with sovereignty. Curiously, in Germany, there is no provision for popular sovereignty. The people of Germany are not explicitly entitled to sovereignty: the preamble figuratively grants them constituent power. Sovereign powers are given to the Lander (Art. 30) and sovereignty is mentioned again in the European clause.

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constituted the antifascist liberation parties (the so-called Comitati di Liberazione Nazionale – CLN).[80]

State sovereignty and international openness were both accompanying Italy's striving to be welcomed in a global commonwealth of Nations. One served as a check on the other, and their equilibrium was always considered critical to avert the tyranny of fascism. Italy's commitment to European integration as a Founder State was a strong reassurance and a clear warning against any possible antidemocratic or illiberal backlash.[81]

In essence, it is clear that, from a bare reading, the vague wording in Article 11 would not prevent the formulation of an exit intention. Rather, it makes the provision open to a wide range of interpretations. However, this would go against its spirit and the evolution of its deep meaning, which now seems established in the constitutional case law and practice.[82] One could say, almost provocatively, that while the domestic counter-limits doctrine has often used the argument of constitutional identity, the reverse of the coin is epitomized by Article 11 entrenching an equally important principle of 'European constitutional identity'[83] – a barrier to any unlawful withdrawal request.

Such evidence could also be retrieved for other Member States, sharing a common historical background; however, for the sake of brevity, we must refer to the literature that has already dealt with such topics.[84]

Beyond the historical argument, there are also strong legal arguments in favour of the revision of the principle of European integration only through constitutional law. Broadly speaking, we can quickly discard the theory that relies on a 'principle of symmetry', whereby if the ratification took place by means of ordinary law, similarly it would be possible to instruct the repeal of the Treaty by a simple law.

Indeed, as already anticipated, the approval of the European Treaties by ordinary law was enacted through a simple bill not because of a legal constraint but rather because of some historical contingencies. Reverting to brand new constitutional law would not have been possible for two joint reasons:[85] first, it was politically impossible to meet the two-third majority prescribed by Article 138 for

80 See G. Martinico, 'Constitutionalism, Resistance, and Openness: Comparative Law Reflections on Constitutionalism in Postnational Governance', in *Yearbook of European Law*, 35(1), 2016, 318-340, which highlights how the openness towards the external dimension of the Italian Constitution was deeply linked to the antifascist connotation of the historical period.

81 B. Caravita, 'Le trasformazioni istituzionali in 60 anni di integrazione europea', in *Federalismi.it*, 14, 2017, 1-9; M. Cartabia, 'Commento All'art. 11', in R. Bifulco, A. Celotto & M. Olivetti (eds.), *Commentario Alla Costituzione*, Torino, Utet, 2006, 264; Gianniti, 2018, 264-305; A. Guazzarotti, 'Sovranità e integrazione europea', in *Rivista AIC*, 3, 2017, 1-12; A. Manzella, 'La Costituzione italiana come Costituzione "europea": 70 anni dopo', in *Nuova Antologia*, 3, 2018, 40-47.

82 G. Itzcovich, *Teorie e ideologie del diritto comunitario*, Torino, Giappichelli, 2006, 361.

83 Something that is not overlapping with the parallel concept of 'European sovereignty', analysed from an EU-centred perspective. See T. Verellen, 'European Sovereignty Now? A Reflection on What It Means to Speak of "European Sovereignty"', *European Papers*, 5(1), 2020, 307-318.

84 The most comprehensive is Albi & Bardutzky (eds.), 2019, *passim*.

85 See N. Lupo, 'Clausole "europee" implicite ed esplicite nella Costituzione italiana', in *Federalismi.it*, 4, 2022, at 490.

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constitutional revision. Second, for the same reason, Article 75 of the constitution on the referendum was still not implemented: a constitutional reform could not have been subject to a confirmative referendum before 1970 when eventually the referendum bill was approved.

According to a second argument, the necessary nature of a constitutional modification appears to be more than clear given the Court's established case law. We already said that, in Order No. 24/2017, the Constitutional Court defines Article 11 as the 'keystone' between Union law and national law. Hence, if this principle were to be erased by sub-constitutional legislation, its supreme value would be utterly disregarded. The ordinary legislator would therefore fail to realize the goals of fairness, peace, and justice enshrined in the norm.

Another judgment to be mentioned is No. 296/2017, whereby the Court admits that the Charter of Fundamental Rights of the European Union is an integral part of the collection of rights recognized by the Italian Constitution. Consequently, given this intertwinement a certain extent of osmosis is required between the two systems, characterizing them with a supreme constitutional value: a disintegration of this entanglement could not be accomplished by a simple ordinary law because it would touch the most valuable set of rights and freedoms, whose European citizens are equally entitled to.

Before concluding, we shall consider one last argument. The presence of several articles – directly or indirectly mentioning the European Union – attests to the existence of stratified constitutional protection involving the strengthening of the principle of European integration. For the multiple reasons explained, this article argues that this principle could not be lawfully removed by a simple majority.

G Withdrawal Is a Solemn Constitutional Decision to Be Taken with Extreme Care

Even though, from a purely formal point of view, the Parliament is not bound by any interpretation and therefore has full discretion (or 'sovereignty', à la Dicey) in decision-making, it does not have an arbitrary will: implicit constitutional limitations erect a solid perimeter for the possible choices of the Parliament. This unlocks the image of 'institutional responsibility' in deliberative democracies.[86] Such a perimeter was too blurry in the United Kingdom's experience, whose constitutional framework was 'absent', thus facilitating a political withdrawal.[87]

Instead, in the continental tradition, some provisions of the constitution are endowed with a supreme value, a sort of golden aura that protects the highest principles from a whimsical historical or political momentum. We have seen throughout this analysis that the principle of European integration is entrenched in the Italian legal order and that the whole system is deeply intertwined in the supranational architecture, in a deeper and more significant way than any other

86 T. Horsley, 'Constitutional Functions and Institutional Responsibility: A Functional Analysis of the UK Constitution', in *Legal Studies*, 42(1), 2022, 99-119.

87 M. Gordon, 'Referendums in the UK Constitution: Authority, Sovereignty and Democracy after Brexit', in *European Constitutional Law Review*, 16(2), 2020, 213-248.

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international organization. This shall suffice to be convinced that such an entrenchment can be demonstrated at least for countries grouped under categories (a), (b), and (d). A supplement of research could provide significant arguments also for countries listed under the category (c) (see para 13 under Section D of this article 'EU Membership Clauses in the Continental Constitutions').

By the same token, I have hypothesized that dismantling this complex legal building would require a cumbersome and lengthy procedural effort. Accordingly, this article has ascertained that more effort should and could be borne by courts, which may act as constitutional checks to counter any strictly majoritarian decision, ensuring that parliamentary sovereignty is always guided by the values and culture of its society.