



## ARTICLES

# COMPARING THE PRACTICE OF ACCESSION TO AND WITHDRAWAL FROM THE EUROPEAN UNION: COMMONALITIES IN PRINCIPLES AND PROCEDURES?

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ABSTRACT: This *Article* assesses the practice of withdrawal in the light of the practice of admission and highlights the numerous commonalities between the two practices. The analysis shows that most of the principles underlying the accession conditions underpin the exit from the EU, contributing to the enhancement of the values on which the EU legal system is rooted. Moreover, the techniques Member States make recourse to during the admission procedure, to strengthen their control over membership, were also used in Brexit, fostering intergovernmentalism in the process of European integration.

KEYWORDS: accession to the EU – withdrawal from the EU – Brexit – Copenhagen criteria – supranationalism – intergovernmentalism.

## I. INTRODUCTION

The Lisbon Treaty devoted an express provision of the TEU to withdrawal from the European Union.<sup>1</sup> As a consequence of this reform endowing EU Member States with the right

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<sup>1</sup> On art. 50 TEU see AF Tatham, ‘Don’t Mention Divorce at the Wedding, Darling!: EU Accession and Withdrawal after Lisbon’ in A Biondi, P Eeckhout and S Ripley (eds), *EU Law after Lisbon* (OUP 2012) 128; M Puglia, ‘Art. 50’ in A Tizzano (a cura di), *Trattati dell’Unione europea* (Giuffrè Editore 2014) 338; T Tridimas, ‘Article 50: An End Game Without an End?’ (2016) *King’s Law Journal* 297. Scholars were divided on the existence of the right to withdraw from the EU before the Lisbon Treaty. For a summary of this debate see A Wyrozumska, ‘Article 50 [Voluntary Withdrawal from the Union]’ in HJ Blanke and S Mangiameli (eds), *The Treaty on European Union (TEU). A Commentary* (Springer 2013) 1388.



to withdrawal,<sup>2</sup> the TEU regulates both facets of membership therefore implying how to become a member of the Union and how to put an end to that legal status.

This *Article* argues that there are several commonalities between admission and withdrawal. Some of these commonalities are crystal clear and stem from the rules the TEU lays down.

The first hallmark is their procedural nature for both are framed in stages which are connected to each other. Art. 49 and art. 50 TEU contain just a few rules on the substantial conditions and focus on the path States have to follow in order to enter or leave the EU. Although the reforms of the founding Treaties have inserted the reference to the values on which art. 2 TEU grounds the EU into the original laws on admission, accession has kept its procedural nature since the regulation on the procedure embodies the core of the law as a whole.

The procedural approach to accession was retained by the Convention<sup>3</sup> and then by the negotiators of the Lisbon Treaty in drafting the new provisions on withdrawal. The Court of Justice of the European Union (CJEU) stressed the procedural nature of withdrawal in *Wightman*, holding that one of the objectives art. 50 TEU is intended to attain is that of “establishing a procedure to enable such a withdrawal to take place in an orderly fashion”.<sup>4</sup>

The central role of the agreement in both art. 49 TEU and art. 50 TEU is the second feature which is common to admission and withdrawal, despite the divergent function and nature of the two agreements and their legal relationship with the aim of the

<sup>2</sup> Case C-621/18 *Andy Wightman and Others v Secretary of State for Exiting the European Union* ECLI:EU:C:2018:999 para. 56 stated that art. 50 TEU aims at “enshrining the sovereign right of a Member State to withdraw from the European Union”. See also RJ Friel, ‘Providing a Constitutional Framework for Withdrawal from the EU: Article 59 of the Draft European Constitution’ (2004) ICLQ 425; J Herbst, ‘Observations on the Right to Withdraw from the European Union: Who are the “Masters of the Treaties”?’ (2005) German Law Journal 1755; P Athanassiou, ‘Withdrawal and Expulsion from the EU and the EMU: Some Reflections’ (European Central Bank Legal Working Papers 10-2009) 25; H Hofmaister, “Should I Stay or Should I Go?” – A Critical Analysis of the Right to Withdraw from the EU’ (2011) ELJ 592; M Vellano, ‘Commento Art. 50 TUE’ in F Pocar and MC Baruffi (eds), *Commentario breve ai Trattati sull’Unione europea e sul funzionamento dell’Unione europea* (CEDAM 2014 second edition) 150; C Closa, ‘Interpreting Article 50: Exit and Voice and... What about Loyalty?’ (EUI Working Paper RSCAS 71-2016) 6; C Hillion, ‘Le retrait de l’Union européenne. Une analyse juridique’ (2016) RTDE 721.

<sup>3</sup> On the law on withdrawal in the Treaty establishing a Constitution for Europe see T Bruha and C Nowak, ‘Recht aus der Europäischen Union?’ (2004) Archiv des Völkerrechts 1; L Grosclaude, ‘La clause de retrait du Traité établissant une Constitution pour l’Europe: réflexions sur un possible marché de dupes’ (2005) RTDE 533; R Mehdi, ‘Brèves observations sur la consécration constitutionnelle d’un droit de retrait volontaire’ in P Demaret, I Govaere and D Hanf (eds), *30 Years of European Legal Studies at the College of Europe / 30 ans d’études juridiques européennes au Collège d’Europe: Liber Professorum 1973/74 – 2003/04* (PIE-Peter Lang SA 2005) 113; A Vahlas, ‘Appartenance à l’Union européenne’ in V Constantinesco, Y Gautier and V Michel (eds), *Le Traité établissant une Constitution pour l’Europe* (Presses Universitaires de Strasbourg 2005) 270; JV Louis, ‘Le droit de retrait de l’Union européenne’ (2006) Cahiers de droit européenne 293; P Van Nuffel, ‘Appartenance à l’Union’ in G Amato, H Bribosia and B De Witte (eds), *Genèse et destinée de la Constitution européenne/Genesis and Destiny of the European Constitution* (Bruylant 2007) 280; F Spagnoli, ‘Una “clausola di secessione” per l’Unione europea? L’Art. 1-60 del Trattato Costituzionale’ (8 June 2018) Forum di Quaderni costituzionali [www.forumcostituzionale.it](http://www.forumcostituzionale.it).

<sup>4</sup> *Andy Wightman and Others v Secretary of State for Exiting the European Union* cit. para. 56.

procedures. If on one hand admission agreement between the Member States and the acceding countries is necessary to be admitted into the EU, on the other hand, departure from the EU takes place also if no agreement has been concluded between the EU and the withdrawing state. The exit from the EU follows the lapse of the two-year time from the notification of the intention to withdraw or, the expiry deadline consented by the European Council pursuant to art. 50 para. 3.<sup>5</sup> Although the withdrawal agreement is not mandatory,<sup>6</sup> art. 50 TEU gives it utmost importance and aims at favouring a compromise. To achieve these results, the TEU imposes a duty to negotiate upon the EU<sup>7</sup> and regulates the role of the institutions in negotiating and concluding such a treaty. Brexit, in fact, showed the importance of the withdrawal agreement because it could be functional to the interests of the country that decided to leave the Union and contribute to the attainment of the objectives it pursues. The supporters of the “hard Brexit” made a step back, setting aside the no-deal solution.<sup>8</sup>

The key role agreements play, in both admission and withdrawal procedures, is to be found in the wide scope and complexity of the *acquis communautaire* as well as in the strict connections EU law creates between Member States, and citizens, and workers, and businesses, and stakeholders.

However, the set of rules art. 49 and art. 50 TEU envisage did not lay down a comprehensive and exhaustive regulation of the procedures they set up. The incomplete nature of the legal regime on admission and withdrawal is the third feature which is common to

<sup>5</sup> R Mehdi, ‘Commentaire à l’article I-60?’ in L Bourgogue-Larsen, A Levade and F Picod (eds), *Commentaire article par article du traité instituant une Constitution pour l’Europe* (Bruylant 2007) 746; L Daniele, ‘Brevi note sull’accordo di recesso dall’Unione europea ai sensi dell’art. 50 TUE’ in E Triggiani and others (eds), *Dialoghi con Ugo Villani* (Cacucci Editore 2017) 727.

<sup>6</sup> AF Tatham, ‘Don’t Mention Divorce at the Wedding, Darling!: EU Accession and Withdrawal after Lisbon’ cit. 152. *Contra*, A Łazowski, ‘Withdrawal from the European Union and Alternatives to Membership’ (2012) ELR 526.

<sup>7</sup> C Hillion, ‘Leaving the European Union, the Union Way. A Legal Analysis of Article 50 TEU’ (August 2016) SIEPS [www.sieps.se](http://www.sieps.se) 5; 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* (CUP 2017) 223 argues that the withdrawing State is obliged to cooperate with the Union because of the duty of loyalty pursuant to art. 4(3) TEU. A Łazowski, ‘Be Careful What You Wish for: Procedural Parameters of EU Withdrawal’ in C Closa (ed.), *Secession from A Member State and Withdrawal from the European Union* (CUP 2017) 236 holds that it is uncertain whether the obligation to negotiate could be deduced from the principle of loyal cooperation. As we see things the issue is not regulated by EU law but rather by international law so that the withdrawing state enjoys the freedom to assess whether or not a negotiation is consistent with the achievement of its objectives. On the relationship between withdrawal from the EU and the principle of loyal cooperation see F Casolari, *Leale cooperazione tra Stati membri e Unione europea* (Editoriale Scientifica 2020) 170.

<sup>8</sup> PR Polak, ‘EU Withdrawal Law After Brexit. The Emergence of a Unique Legal Procedure’ in J Santos Vara, RA Wessel and PR Polak (eds), *The Routledge Handbook on the International Dimension of Brexit* (Routledge 2021) 64 argues that pursuant to the principle of loyal cooperation the withdrawing State is under the obligation to assist the Union in carrying out the task of agreeing a withdrawal treaty.

accession and withdrawal.<sup>9</sup> Art. 49 and art. 50 TEU outline the general framework of both procedures and their fundamental stages, but do not solve all of the problems which are involved in admission or withdrawal. As a consequence, there is the need to adjust the shortcomings of the existing laws.

This framing of the Treaty provisions has not only raised the issue of the application of international law within EU law,<sup>10</sup> but has also given great possibilities to practice in facing the challenges of each round of enlargement or departure.

Member States of the EU and its institutions have in fact been availing themselves of the margins of manoeuvring emerging from the rules of the Treaty to shape the substantial features as well as the procedure of admission and withdrawal.

The wide development of practice to integrate the law on substantial facets and procedural arrangements is the fourth mark which is common to admission and withdrawal.

Further commonalities emerge from the comparison between the practice which has been shaping admission and the practice which moulded withdrawal. In this perspective, this *Article* will take into consideration the Withdrawal Agreement between the EU and the UK (WA)<sup>11</sup> as far as the provisions it encompasses highlight the features of withdrawal from the EU.

The assessment shows that most of the principles underlying the accession conditions underpinned Brexit, contributing to the enhancement of the values on which the EU legal system is rooted. Despite the said upshot, this *Article* argues that the practice on admission has enhanced the intergovernmental character of the process of European integration since Member States strengthened their control over membership availing themselves of the technique they made recourse to within the admission procedure.

## II. THE “PRINCIPLES” COMMON TO ADMISSION TO AND WITHDRAWAL FROM THE EUROPEAN UNION

European States willing to become members of the EU are obliged to fulfil an array of conditions which were not established by the Treaty provisions. Such conditions were

<sup>9</sup> RJ Friel, 'Providing a Constitutional Framework for Withdrawal from the EU' cit. 426; H Hofmaister, "'Should I Stay or Should I Go?'" cit. 595; A Łazowski, 'Withdrawal from the European Union and Alternatives to Membership' cit. 526; who argues that some parts of the EU accession *acquis* can be applied to withdrawal *mutatis mutandis*; P Nicolaidis, 'Withdrawal from the European Union: A Typology of Effects' (2013) Maastricht Journal of European and Comparative Law 209; C Hillion, 'Accession and Withdrawal in the Law of the European Union' in A Arnulf and D Chalmers (eds), *Oxford Handbook of European Law* (OUP 2015) 138. *Contra* L Daniele, 'Brevi note sull'accordo di recesso dall'Unione europea ai sensi dell'art. 50 TUE' cit. 726-727.

<sup>10</sup> F Casolari, 'Il recesso dall'Unione europea: per una lettura dell'art. 50 TUE tra diritto sovranazionale e diritto internazionale' (2019) RivDirInt 1006; M Evola, 'L'art. 50 TUE tra autointegrazione ed eterointegrazione del diritto dell'Unione europea (2020) Studi sull'integrazione europea 113.

<sup>11</sup> Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community [2012].

imposed on candidate States in the practice of accession. Only later did the Copenhagen European Council give them formal recognition.<sup>12</sup>

The practice following the Copenhagen European Council has identified further conditions. The 1995 Madrid European Council stressed the need for setting up administrative structures that could implement the *acquis communautaire*.<sup>13</sup> Furthermore, the European Council tailored specific conditions to the Western Balkans' applications for membership, taking into account the problems arising from their candidatures such as good neighbourliness.

## II.1. THE PRINCIPLE OF DEMOCRACY

Practice has grounded admission and withdrawal on principles which are substantial in nature. Some of these principles define the two procedures.<sup>14</sup>

The political conditions for accession pursue the aim of urging candidates for membership to adhere to the basic values of the EU – democracy, Rule of law, respect for fundamental rights – and to prevent their admission from undermining the process of European integration.<sup>15</sup>

The first element of correspondence between accession and withdrawal is to be found in the principles lying behind the Copenhagen political criteria, for they are the hallmark of the UK's withdrawal from the European Union.

The EU institutions and the Member States committed themselves to respect the outcome of the UK's EU membership referendum because of the democratic nature of the decision British voters adopted.

<sup>12</sup> European Council, *Conclusions of 21-22 June 1993* [www.consilium.europa.eu](http://www.consilium.europa.eu) para. 13. The European Council stated that membership requires that the aspirant countries demonstrate: stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities; the existence of a functioning market economy, as well as the capacity to cope with competitive pressure and market forces within the Union; the ability to take on the obligations of membership, including adherence to the aims of political, economic and monetary union. M Cremona, 'Accession to the European Union: Membership Conditionality and Accession Criteria' (2001) *PolishYIL* 219; F Hoffmeister, 'Earlier Enlargements' in A Ott and K Inglis (eds), *Handbook on European Enlargement. A Commentary on the Enlargement Process* (T.M.C. Asser Press 2002) 90; C Hillion, 'The Copenhagen Criteria and Their Progeny' in C Hillion (ed.), *EU Enlargement: A Legal Approach* (Hart Publishing 2004) 17; AF Tatham, *Enlargement of the European Union* (Kluwer Law International 2009) 202.

<sup>13</sup> European Council, *Conclusions of 15 and 16 December 1995 – Part III* [www.europarl.europa.eu](http://www.europarl.europa.eu).

<sup>14</sup> AF Tatham, 'Towards the Formulation of the "Brussels Criteria"'. The values and principles underlying EU withdrawal and their application in future contexts' in Wessel and PR Polak (eds), *The Routledge Handbook on the International Dimension of Brexit* (Routledge 2021) 13 distinguishes the orderly withdrawal as a foundational concept of withdrawal, the criteria for the withdrawal decision, the main negotiating principles and the main criteria as distilled from the Withdrawal Agreement.

<sup>15</sup> On the relationship between admission to the EU and EU values see D Kochenov, 'The Acquis and its Principles: The Enforcement of the "Law" versus the Enforcement of "Values" in the EU' in A Jakab and D Kochenov (eds), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (OUP 2017) 13.

The European Parliament President Martin Schulz and EP political group leaders made statements to the press on 24 June 2016 highlighting that the referendum was the expression of the sovereign will of British voters.<sup>16</sup> In the same perspective the European Parliament in the Resolution adopted on 28 June 2016 stated that “the *will* expressed by the people must be entirely and fully respected”.<sup>17</sup> The fundamental role of democracy in the UK decision-making process leading to Brexit is also stressed in the joint statement of the presidents of the EU political institutions making reference to the wish of British people that was expressed “in a free and democratic process”.<sup>18</sup>

The connection between ensuring an orderly withdrawal and democracy, also marks Member States’ attitude towards the UK in the immediate aftermath of the referendum.<sup>19</sup>

They, in fact, emphasized that the referendum embodies “the will expressed by a majority of the British people”, in the Statement following the informal meeting of the Heads of State or government of the 27 Member States, the President of the European Council and the President of the Commission which took place on the 29th June 2016 (hereinafter the June 2016 Informal Meeting).<sup>20</sup>

Such an attitude towards Britons’ decision to exit the EU is not confined to the realm of politics, but it makes it clear that democracy is a principle inspiring withdrawal.

The UK need for reassuring its partners on the respect for democracy, confirms this outcome. The British Prime Minister remarked that the decision to exit the EU bears on the value of democracy in the letter of notification of the intention to withdraw. The letter recalled that “the people of the United Kingdom voted to leave the EU and the United Kingdom Parliament confirmed the result of the referendum by voting with clear and convincing majorities in both of its Houses” and concluded that the notification gives “effect to the democratic decision of people of the United Kingdom”.<sup>21</sup>

<sup>16</sup> European Parliament, *President Schulz and Political Leaders’ Statements on UK Referendum Outcome* [www.europarl.europa.eu](http://www.europarl.europa.eu). C Curti Gialdino, ‘Oltre la Brexit: brevi note sulle implicazioni giuridiche e politiche per il futuro prossimo dell’Unione europea’ (2016) [www.federalismi.it](http://www.federalismi.it) 7 has carried out an analysis of the different statements the EU institutions and its Member States released on the outcome of the UK’s withdrawal from the EU referendum.

<sup>17</sup> Resolution P8\_TA(2016)0294 of the European Parliament of 28 June 2016 on the decision to leave the EU resulting from the UK referendum (2016/2800(RSP)), Preamble 1. Italics of the author.

<sup>18</sup> European Council, *Joint Statement by Martin Schulz, President of the European Parliament, Donald Tusk, President of the European Council, Mark Rutte, Holder of the Presidency of the Council of the EU, Jean-Claude Juncker, President of the European Commission* [euipo.europa.eu](http://euipo.europa.eu).

<sup>19</sup> Joint Declaration by the Chancellor of the Federal Republic of Germany, the President of the French Republic and the President of the Council of Ministers of the Italian Republic [www.governo.it](http://www.governo.it). See also Common Statement by the Foreign Ministers of Belgium, France, Germany, Italy, Luxemburg and the Netherlands, 26 June 2016.

<sup>20</sup> European Council, *Informal meeting at 27 of 29 June 2016 - Statement* [www.consilium.europa.eu](http://www.consilium.europa.eu) para. 1.

<sup>21</sup> Letter of 29 March 2017 from the Prime Minister of the United Kingdom to the President of the European Council, 1. The contrast between the British government and British Parliament on the

A further reference to the relationship between exiting the EU and the democratic nature of the process leading to the decision to withdraw is to be found in the judgment delivered by the CJEU in the *Wightman* case. The Court stressed that the EU is grounded on the fundamental premiss that each Member State shares with all of the other Member States, and recognises that those Member States share with it, the values of liberty and democracy. As a consequence of this premiss, Member States cannot be forced to accede to the European Union, nor to withdraw from it against their will.<sup>22</sup> In the reasoning of the Court, the different approach leading to the inevitability of withdrawal, once the decision to withdraw has been notified, would be inconsistent with the values of liberty and democracy. The approach would thus entail to “force the withdrawal of a Member State which, having notified its intention to withdraw from the European Union *in accordance with its constitutional requirements and following a democratic process*, decides to revoke the notification of that intention through a democratic process”.<sup>23</sup>

## II.2. THE RESPECT FOR THE *ACQUIS COMMUNAUTAIRE*

The second element of correspondence between the practice of admission and the practice of withdrawal is the equation between respect for the *acquis communautaire* and membership of the Union.

The Copenhagen European Council stated that European States’ admission into the EU presupposes the ability to take on the obligations of membership, including adherence to the aims of political, economic and monetary union. The rationale lying behind this accession criterion, is to prevent admission of new members from slowing down the pace of the process of integration, or to dismantle the unity of the EU legal system.<sup>24</sup>

Although in the reverse perspective, the duty to safeguard the *acquis communautaire* also characterized the withdrawal procedure. Practice made it clear that exiting the EU entails losing the rights which are connected to membership and prevents withdrawing States

competence to adopt the decision to withdraw has to be considered in the same perspective. On this point, see JV Louis, ‘Négocier le Brexit’ (2017) Cahiers de droit européen 9.

<sup>22</sup> *Andy Wightman and Others v Secretary of State for Exiting the European Union* cit. paras 63 and 65.

<sup>23</sup> *Ibid.*, para. 67. Italics of the author. C Hillion, ‘This Way, Please!’ cit. 218 points out that the decision to exit the Union has to conform to the common values art. 2 TEU enshrines. On the role of democracy in Brexit see AF Tatham, ‘Towards the formulation of the “Brussels criteria”’ cit. 20.

<sup>24</sup> As this author sees things, there is no contradiction between the practice we described above and the most recent developments of the admission procedure. The European Council which took place in December 2004, Presidency Conclusions para. 23, established that “long transitional periods, derogations, specific arrangements or permanent safeguard clauses, i.e. clauses which are permanently available as a basis for safeguard measures, may be considered” in framing future negotiating frameworks for areas such as freedom of movement of persons, structural policies or agriculture. This decision purports to achieve the same aims of the decisions on withdrawal: protecting the Union’s interests and the unity of the EU legal system since the latter is functional to the former.

from choosing between rights to hold or obligations to comply with and rights to resign and obligations not to fulfill.

The Heads of State and Government set the aim of the orderly withdrawal during the Informal Meeting held in June 2016 and defined the EU's approach towards withdrawal negotiations, in order to ensure that the *acquis communautaire* cannot be separated from membership. They also stated that access to the Single Market requires acceptance of all four freedoms.<sup>25</sup> The same principle was reaffirmed at the following Informal Meeting of the Heads of State or Government of the 27 Member States, as well as the Presidents of the European Council and the European Commission which took place in December 2016 (hereinafter the December 2016 Informal Meeting).<sup>26</sup>

The Guidelines the European Council adopted on April 2017 developed the principles laid down in the June 2016 and December 2016 Informal Meetings and stressed the need for preserving the interests of the Union in negotiating the withdrawal agreement.

The European Council pointed out that the integrity of the Single Market “excludes participation based on a sector-by-sector approach. A non-member of the Union, that does not live up to the same obligations as a member, cannot have the same rights and enjoy the same benefits as a member”.<sup>27</sup>

The UK recognised that the EU is bound to guarantee the unity of its legal system, preventing third countries from enjoying the rights EU law confers upon Member States. The UK Prime Minister pointed out that “the United Kingdom does not seek membership of the single market: we understand and respect your position that the four freedoms of the single market are indivisible and there can be no ‘cherry picking’”.<sup>28</sup>

The link between membership and *acquis communautaire* is not put into question by the laws the WA encompasses on the transition period aiming at ensuring the application of EU rules to the UK although it has become a third country.<sup>29</sup> It is necessary to consider that an abrupt withdrawal from the Union is to affect the rights of citizens, and workers, and businesses and other stakeholders thus jeopardising certainty and predictability

<sup>25</sup> European Council, *Informal meeting at 27 of 29 June 2016 – Statement* cit. para. 4. On the relevance of the integrity of the common market see NN Shuibhne, ‘The Integrity of the EU Internal Market’ in F Amtenbrink (ed.), *The Internal Market and the Future of European Integration* (CUP 2019) 549.

<sup>26</sup> European Council, *Informal meeting of the Heads of State or Government of 27 Member States, as well as the Presidents of the European Council and the European Commission, 15 December 2016 – Statement* www.consilium.europa.eu p.1.

<sup>27</sup> European Council, Special meeting of the European Council (Art. 50), 29 April 2017, Guidelines, para. 1, Core Principles www.consilium.europa.eu. The European Parliament adopted the same approach in its Resolution P8TA(2017)0102 of 5 April 2017 on negotiations with the United Kingdom following its notification that it intends to withdraw from the European Union (2017/2593(RSP)), para. 10 www.europarl.europa.eu.

<sup>28</sup> Letter of 29 March 2017 from the Prime Minister of the United Kingdom to the President of the European Council cit. 4.

<sup>29</sup> On the transition period see T Lock, ‘In the Twilight Zone. The Transition Period in the Withdrawal Agreement’ in J Santos Vara, RA Wessel and PR Polak (eds), *The Routledge Handbook on the International Dimension of Brexit* (Routledge 2021) 30.

stemming from EU law.<sup>30</sup> This is the rationale for the WA and the transitional arrangements the EU and the UK agreed on in the perspective of the future conclusion of a further treaty regulating their relationships. Although not mandatory for the withdrawing state, the conclusion of the withdrawal agreement is consistent with the interest of either parties. However, in ensuring legal certainty and legitimate expectations the WA fosters some of the principles of the EU legal system thus contributing to the enhancement of the founding values of the EU. The same conclusion has to be referred to those provisions of the WA which purport the protection of citizens' rights. The matter has been of concern of both, the EU and the UK. In the letter of notification of the intention to withdraw, the Prime Minister of the United Kingdom highlighted that "the hearth of our talks are the interests of our citizens."<sup>31</sup> The EU made it clear since the beginning that citizens' rights were one of those legal items the withdrawal agreement had to cover. In the Directives for negotiation of the agreement, the Council stated that

"the Agreement should safeguard the status and rights derived from Union law at the withdrawal date, including those the enjoyment of which will intervene at a later date (e.g. rights related to old age pensions) as well as rights which are in the process of being obtained, including the possibility to acquire them under current conditions after the withdrawal date (e.g. the right of permanent residence after a continuous period of five years of legal residence which started before the withdrawal date). This should cover both EU27 citizens residing (or having resided) and/or working (or having worked) in the United Kingdom and United Kingdom citizens residing (or having resided) and/or working (or having worked) in one of the Member States of the EU27. Guarantees to that effect in the Agreement should be reciprocal and should be based on the principle of equal treatment amongst EU27 citizens and equal treatment of EU27 citizens as compared to United Kingdom citizens, as set out in the relevant Union *acquis*. Those rights should be protected as directly enforceable vested rights for the life time of those concerned".<sup>32</sup>

<sup>30</sup> The EU and the UK highlighted the need to ensure certainty and predictability. The negotiating Guidelines the European Council adopted in April 2017 stressed that "the United Kingdom's decision to leave the Union creates significant uncertainties that have the potential to cause disruption, in particular in the United Kingdom but also, to a lesser extent, in other Member States. Citizens who have built their lives on the basis of rights flowing from the British membership of the EU face the prospect of losing those rights. Businesses and other stakeholders will lose the predictability and certainty that come with EU law. It will also have an impact on public authorities." In the same vein, the UK Prime Minister outlined in the letter of notification of the intention to withdraw the UK intention to bring forward legislation addressing specific issues relating to withdrawal "with a view to ensuring continuity and certainty, in particular for businesses".

<sup>31</sup> Letter of 29 March 2017 from the Prime Minister of the United Kingdom to the President of the European Council cit. 4.

<sup>32</sup> Communication COM/2017/0830 final Recommendation for a Council Decision supplementing the Council Decision of 22 May 2017 authorising the opening of negotiations with the United Kingdom of Great Britain and Northern Ireland for an agreement setting out the arrangements for its withdrawal from the European Union. Directives XT 21016/17 ADD 1 REV 2 from the General Secretariat of the Council to Delegations of 22 May 2017 for the negotiation of an agreement with the United Kingdom of Great Britain and

The provisions the WA envisages are consistent with the need to guarantee legal certainty since they ensure the exercise of the rights EU and UK citizens were vested with pursuant to EU laws (art. 13 and 14 WA) or enable EU and UK citizens to become holders of those rights which were based on the previous exercise of the rights EU law conferred upon them such as the right of permanent residence (art. 15 WA).

Furthermore, as it has been rightly observed,<sup>33</sup> the protection of citizens' rights is anchored to the EU principles of social solidarity and non-discrimination. As regards social solidarity, the WA extended its application to UK citizens residing in one of the EU countries<sup>34</sup> through reciprocity. Non-discrimination is expressly provided for in art. 12 WA which prohibits discrimination on grounds of nationality in the host State and the State of work in respect of the persons falling within the scope of the Agreement.

In securing the rights EU law establishes, the WA did not break the connection between membership and *acquis communautaire*, but played the same role of this feature which is common to accession and withdrawal: fostering the supranational character of the EU through the enhancement of the principles on which it is grounded.

### II.3. THE PRINCIPLE OF GOOD NEIGHBOURLINESS

A third element of correspondence between the principles on accession and the principles on withdrawal relates to good neighbourliness. The hint at prospective members' obligation to develop good neighbour relationships, in the assessment of the Greek application,<sup>35</sup> has given rise to a practice widening the array of political criteria European States are called on to fulfil to enter the Union, The Corfu European Council held that the preparation of Central and Eastern Countries admission "will be helped by the development of good neighbourly relations, which will be the subject of the stability pact".<sup>36</sup> The application of the condition of good neighbour relationships marked the 2004 big enlargement<sup>37</sup> and has been marking the assessment of the Western Balkans States' applications for membership.<sup>38</sup>

Northern Ireland setting out the arrangements for its withdrawal from the European Union [www.consilium.europa.eu](http://www.consilium.europa.eu) para. 20. See also European Commission, Position Paper on 'Essential Principles on Citizens' Rights' (12 June 2017) [ec.europa.eu](http://ec.europa.eu) para 1.

<sup>33</sup> AF Tatham, 'Towards the formulation of the "Brussels criteria"' cit. 20.

<sup>34</sup> E Spaventa, 'Mice or Horses? British Citizens in the EU 27 after Brexit as "Former EU Citizens"' (2019) ELR 589.

<sup>35</sup> Communication COM(76) 30 final from the European Commission of 20 January 1976.

<sup>36</sup> European Council Conclusions of 24-25 June 1994 para. II lett. d.

<sup>37</sup> KE Smith, 'The Evolution and Application of EU Membership Conditionality' in M Cremona (ed.), *The Enlargement of the European Union* (OUP 2003) 121; K Inglis, 'EU Enlargement: Membership Conditions Applied to Future and Potential Member States' in A Ott and K Inglis (eds), *The Constitution for Europe and an Enlarging Union: Unity in Diversity?* (Europa Law Publishing 2005) 244; AF Tatham, *Enlargement of the European Union* cit. 218.

<sup>38</sup> On the accession of Western Balkans States see C Pippan, 'The Rocky Road to Europe: The EU's Stabilisation and Association Process for the Western Balkans and the Principle of Conditionality' (2004) *European Foreign Affairs Review* 219; S Blockmans, *Tough Love: The European Union's Relations with the Western Balkans* (T.M.C. Asser Press 2007); S Blockmans, 'Raising the Threshold for Further EU Enlargement:

Imposing good neighbour relationships and the peaceful settlement of international disputes is intended to prevent admission of new members from undermining the cohesion of the EU and its working as a consequence of political conflicts in which newcomers are involved.

The same need occurs in withdrawal from the EU since the disentanglement from the rights and obligations of the EU could jeopardize the stability of the Union and give rise to political disputes between the EU Member States and the withdrawing country, or to troubling situations in some Member States. This is the reason why the European Council April 2017 Guidelines called the negotiators to find “imaginative solutions” that would not endanger the peace process on the island of Ireland. The call stemmed from the consideration that “the Union has consistently supported the goal of peace and reconciliation enshrined in the Good Friday Agreement in all its parts, and continuing to support and protect the achievements, benefits and commitments of the Peace Process will remain of paramount importance”.<sup>39</sup>

The European Parliament adopted a similar attitude, urging the negotiators to find a congruous compromise with the 1998 Good Friday Agreement.<sup>40</sup>

The binding nature of the principle is confirmed, once again, by the UK’s position since the letter of notification makes reference to the UK government consciousness that withdrawal could harm the peace process in Ireland and affirms its willingness “to make sure that nothing is done to jeopardise the peace process in Northern Ireland, and to continue to uphold the Belfast Agreement”.<sup>41</sup>

Process, Problems and Prospects’ in A Ott and E Vos (eds), *Fifty Years of European Integration. Foundations and Perspectives* (T.M.C. Asser Press 2009) 204; A Rizzo, ‘L’Unione europea e i Paesi dei Balcani occidentali nella prospettiva dell’allargamento’ (2011) *Il Diritto dell’Unione europea* 445; I Ingravallo, ‘Osservazioni sulle prospettive di allargamento dell’Unione europea ai Balcani occidentali’ in E Triggiani and others (eds), *Dialoghi con Ugo Villani* (Cacucci Editore 2017) 567. On the relationship between good neighbourliness and admission see P Van Elsuwege, ‘Good Neighbourliness as a Condition for Accession to the European Union: Finding the Balance between Law and Politics’ in D Kochenov and E Basheska (eds), *Good Neighbourliness in the European Legal Context* (Brill Academic Publishers 2015) 215.

<sup>39</sup> Special meeting of the European Council (Art. 50) cit. para. 11.

<sup>40</sup> Resolution P8\_TA(2017)0102 of the European Parliament of 5 April 2017 on negotiations with the United Kingdom following its notification that it intends to withdraw from the European Union (2017/2593(RSP)), lett. O. and para. 20. The Council developed the European Council’s Guidelines on the relationship between Ireland and the UK in Council decision of 22 May 2017 authorising the opening of negotiations with the United Kingdom of Great Britain and Northern Ireland for an agreement setting out the arrangements for its withdrawal from the European Union. Directives for the negotiation of an agreement with the United Kingdom of Great Britain and Northern Ireland setting out the arrangements for its withdrawal from the European Union cit. para. 14 stating that “the Union is committed to continuing to support peace, stability and reconciliation on the island of Ireland. Nothing in the Agreement should undermine the objectives and commitments set out in the Good Friday Agreement in all its parts and its related implementing agreements; the unique circumstances and challenges on the island of Ireland will require flexible and imaginative solutions”.

<sup>41</sup> Letter of 29 March 2017 from the Prime Minister of the United Kingdom to the President of the European Council cit. 5.

Practice clarified that the principle of good neighbourliness imposes the duty to find an arrangement within the withdrawal agreement in order to ensure that no political quarrels destabilising the European Union or its Member States follow the exit of the withdrawing country. The Protocol on Ireland/Northern Ireland provides full regulatory alignment between the EU and Northern Ireland in customs matters and related areas of the single market with the aim of safeguarding the 1998 Good Friday Agreement. Art. 1(1) of the Protocol establishes that it is “without prejudice to the provisions of the 1998 Agreement in respect of the constitutional status of Northern Ireland and the principle of consent, which provides that any change in that status can only be made with the consent of a majority of its people”. In the same vein, art.1(3) provides that the protocol is necessary “to protect the 1998 Agreement in all its dimensions”.

The correspondence between admission and withdrawal is not limited to the principles on substantial conditions that were highlighted above but concerns their procedural arrangements.

### III. THE EMERGENCE OF INTERGOVERNMENTALISM IN THE ADMISSION AND WITHDRAWAL PROCEDURES

The procedures of admission and withdrawal have a different degree of complexity pursuant to the Treaty rules.

Art. 49 TEU frames accession to the EU into two stages. The first stage focuses on the eligibility of applicant States to which solely the EU institutions take part in. The main actors of the second stage are the Member States and the applicant countries. They negotiate the accession treaty and ratify it. The treaty is a source of primary law so that it can modify the TEU and the TFEU.

The framework of withdrawal is simpler than the accession framework since art. 50 TEU vests the European Council, the Council and the European Parliament with the task to carry out the activities to conclude the withdrawal agreement. This treaty is subordinate to the TEU and the TFEU so that it cannot reform primary law.<sup>42</sup>

The CJEU held that the withdrawal procedure

“consists of, first, notification to the European Council of the intention to withdraw, secondly, negotiation and conclusion of an agreement setting out the arrangements for withdrawal, taking into account the future relationship between the State concerned and the European Union and, thirdly, the actual withdrawal from the Union on the date of entry into force of that agreement or, failing that, two years after the notification given to the

<sup>42</sup> On the differences between the accession treaty and the withdrawal treaty see A Łazowski, ‘Be Careful What You Wish for’ cit. 239.

European Council, unless the latter, in agreement with the Member State concerned, unanimously decides to extend that period".<sup>43</sup>

Despite the existing differences, common features define the procedures of admission and withdrawal which give Member States a leading role in their working.

### III.1. THE INTERPLAY BETWEEN LAW AND PRACTICE

The first of these features is to be found in the framework of the two procedures that are the result of the combination of the Treaty provisions and the practice Member States have been shaping through the decisions they took in Summits, Informal Meetings or within the European Council.

The interplay between law and practice in accession goes back to the Summit of the Heads of States or Government of the Member States which took place in The Hague in 1969. The Heads of State or Government expressed "their agreement to the opening of negotiations between the Community on the one hand and the applicant States on the other" and entrusted the Communities' institutions with the task of negotiating with the applicant States.<sup>44</sup> The decision mixed the supranational approach of the ECSC Treaty with the intergovernmental approach of the EEC Treaty and EURATOM Treaty.<sup>45</sup> Art. 98 ECSC Treaty allocated the power to determine the terms and conditions of accession to the Council, which had to act unanimously after obtaining the opinion of the High Authority, and left no role to the Member States.<sup>46</sup> Notwithstanding the involvement of the Council and the Commission, the procedure the EEC and EURATOM Treaties envisaged was intergovernmental in nature since art. 237 EEC Treaty and art. 205 EURATOM Treaty established that the Member States and the applicant State negotiate the conditions for the latter being admitted and the adjustments to the Treaties stemming from the entry of the newcomer.<sup>47</sup> The decisions the Heads of States or Government took in The Hague

<sup>43</sup> Case C-327/18 PPU *Minister for Justice and Equality v RO* ECLI:EU:C:2018:733 para. 46; *Andy Wightman and Others v Secretary of State for Exiting the European Union* cit. para. 51.

<sup>44</sup> Communiqué of the meeting of Heads of State or Government of the Member States at The Hague (1-2 December 1969).

<sup>45</sup> On the different stance of the Treaties founding the three Communities and the practice which has developed the provisions on accession they contained see D Kochenov, 'EU Enlargement Law: History and Recent Developments: Treaty-Custom Concubinage?' (22 April 2005) European Integration Online Papers eiop.or.at 7.

<sup>46</sup> Art. 98 ECSC Treaty (1951) stipulated that "any European State may apply to accede to this Treaty. It shall address its application to the Council, which shall act unanimously after obtaining the opinion of the High Authority; the Council shall also determine the terms of accession, likewise acting unanimously. Accession shall take effect on the day when the instrument of accession is received by the Government acting as depositary of this Treaty".

<sup>47</sup> Art. 237 EEC Treaty (1957) and art. 205 EURATOM Treaty (1957) were phrased in the same manner and provided that "[a]ny European State may apply to become a member of the Community. It shall address its application to the Council which, after obtaining the opinion of the Commission, shall act by means of a unanimous vote. The conditions of admission and the amendments to this Treaty necessitated thereby shall be the

in 1969 bolstered the intergovernmental nature of the procedure, despite the participation of the institutions in the negotiations of the accession treaty.

In the framework of the provisions of the founding Treaties, admission aimed at establishing the conditions for entering the Communities, but the objective of the procedure has been widened in the different rounds of enlargement. During the negotiations with Greece, Portugal, and Spain the procedure has supported the process of democratization the three countries were carrying out. In the perspective of enlargement towards Central and Eastern European countries the 1994 Essen European Council outlined the so-called pre-accession strategy,<sup>48</sup> a series of legal and financial instruments that were enacted in order to channel aspirant States into membership and urge them to adopt the reforms the EU requires to fulfil the accession criteria. To put it bluntly, the accession procedure promoted applicant States' compliance with the admission conditions. The European Union has been making use of soft law and hard law instruments to foster States' efforts in the attainment of that objective. The 1997 Luxembourg European Council refined the pre-accession strategy adopting the enhanced pre-accession strategy and creating the status of States candidate to admission.<sup>49</sup>

The European Council envisaged the instruments the EU had to avail itself of and the conditions applicant States had to comply with to move from one stage to the following of the admission procedure.

The EU retained the recourse to pre-accession in dealing with Western Balkans States' candidatures for membership and bolstered Member States' leverage on the use of conditionality. The 2000 Santa Maria da Feira European Council set up a new step in the path towards the EU giving rise to the potential candidate State status,<sup>50</sup> while the 2003 Thessaloniki European Council approved the Thessaloniki Agenda for Western Balkans and established a link between the Stabilisation and Association Process, the conditionality it laid down and membership of the EU.<sup>51</sup>

Withdrawal is similar to admission because the procedure in Brexit was moulded by practice which made it different from the proceedings the Treaty provisions sketch.<sup>52</sup>

subject of an agreement between the Member States and the applicant State. Such agreement shall be submitted to all the contracting States for ratification in accordance with their respective constitutional rules."

<sup>48</sup> European Council Conclusions of 9 and 10 December 1994 Annex IV. M Maresceau, 'The EU Pre-Accession Strategies: A Political and Legal Analysis' in M Maresceau and E Lannon (eds), *The EU's Enlargement and Mediterranean Strategies* (Palgrave Macmillan 2001) 1; M Maresceau, 'Pre-accession', in M Cremona (ed.), *The Enlargement of the European Union* (OUP 2003) 9.

<sup>49</sup> European Council Conclusions of 12-13 December 1997 paras 1-36. K Inglis, 'The Pre-accession Strategy and the Accession Partnerships' in A Ott and K Inglis (eds), *Handbook on European Enlargement. A Commentary on the Enlargement Process* (T.M.C. Asser Press 2002) 103.

<sup>50</sup> European Council Conclusions of 19 and 20 June 2000 para. 67.

<sup>51</sup> European Council Conclusions of 19 and 20 June 2003 paras 40-43.

<sup>52</sup> On the procedure see PR Polak, 'EU Withdrawal Law After Brexit' cit. 58.

The arrangements for negotiating with the UK were set by the December 2016 Informal Meeting and later endorsed in the Guidelines the European Council laid down in April 2017.<sup>53</sup>

Furthermore, the European Council decided to widen the scope of the negotiations on the withdrawal agreement beyond the rules art. 50 TEU envisages. The April 2017 Guidelines identified the issues to negotiate in order to achieve the orderly withdrawal, which is the aim the June 2016 Informal Meeting established. In the following December 2017 Guidelines, the European Council decided to extend negotiations to transitional arrangements<sup>54</sup> and the latest Guidelines the European Council adopted on March 2018 established a set of principles “with a view to the opening of negotiations on the overall understanding of the framework for the future relationship”.<sup>55</sup>

### III.2. THE ROLE OF THE EU POLITICAL INSTITUTIONS

The second common feature stems from the roles each actor plays within accession and withdrawal.

The European Council runs a leading role in both proceedings and adopts the most important political decisions on the progress within the two, while the Commission plays a technical role and the European Parliament contribution is not central since it acts within the limits the European Council sets up.

Moving from the admission procedure it has to be observed that the European Council decides on the eligibility of acceding States, the fulfilment of the accession criteria, the aspirant States’ move from one status to the other, the political principles inspiring the negotiating directives, the terms of the final agreement on admission before the Council and the European Parliament approve the treaty.

The European Commission carries out a plethora of activities which are technical in nature such as drafting the Annual Reports on candidates to assess their progresses in complying with the conditions for admission, and supporting the Council in negotiating the terms for entering the Union. The Commission acts within the limits established in the political mandate the European Council and the Council conferred on it and enjoys no autonomy in the exercise of its tasks. The European Parliament runs political control on the different stages of the procedure, but its prerogatives pursuant to art. 49 TEU are limited in fact as a consequence of the role the European Council plays.

<sup>53</sup> Special meeting of the European Council (Art. 50) cit. para. 28.

<sup>54</sup> European Council (Art. 50) meeting of 15 December 2017, Guidelines. On the transitional arrangements see C Curti Gialdino, ‘Dal discorso fiorentino del Primo Ministro May al quinto round delle trattative per il recesso e le future relazioni tra il Regno Unito e l’Unione europea’ (15 October 2017) *Ordine internazionale e diritti umani* 475; P Eeckout and O Patel, ‘Brexit Transitional Arrangements: Legal and Political Considerations’ (20 November 2017) UCL European Institute Brexit Insights Series [www.ucl.ac.uk](http://www.ucl.ac.uk); M Dougan, ‘An Airbag for the Crash Test Dummies? EU-UK Negotiations for a Post-Withdrawal “Status Quo” Transitional Regime Under Article 50 TEU’ (2018) *CMLRev* 57.

<sup>55</sup> European Council (art. 50) of 23 March 2018, Guidelines para. 5.

In the UK withdrawal, the December 2016 Informal Meeting decided that the Council had to appoint the Commission as the EU negotiator.

The European Council defined the EU negotiating position, adopting the Guidelines and updating them in the following December 2017 and March 2018 Guidelines.<sup>56</sup> The European Council Guidelines were developed by the Directives for Negotiations which were laid down by the Council circumscribing the negotiation mandate conferred on the Commission. Furthermore, the European Council expressed its political endorsement of the text of the agreement the EU and the UK negotiated before the consent of the European Parliament and the approval of the Council.

The appointment of the Commission as the EU negotiator fostered its role with what foreseen by art. 50 TEU. It is also worth to remind that the Commission drafted the proposals of the negotiating directives the Council adopted<sup>57</sup> although the Treaty provisions do not entrust it with this task. Despite such improvements, the role of the Commission is technical in nature in the withdrawal procedure too and restrained within the boundaries the activity of the European Council marked. On one side, the Guidelines established the political framework within which the Commission drafted its proposals on the negotiating directives and negotiated the withdrawal agreement. On the other, the procedural arrangements tended to bolster the States' grip on the withdrawal negotiations. To achieve the said aim the December 2016 Informal Meeting decided that the negotiators' team had to integrate a representative of the Council's Presidency while representatives of the President of the European Council had to participate, in a supporting role, in all negotiation sessions alongside the representative of the Commission.<sup>58</sup>

The December 2016 Informal Meeting set two further limits on the role of negotiator the Commission was allocated to. The first limit stems from the dedicated working party that assisted the Council and Coreper to ensure that negotiations were conducted in line with the European Council guidelines and the Council negotiating directives, and provided guidance to the negotiator.<sup>59</sup> The second limit is related to the duty of the Union's negotiator to "systematically" report to the European Council, the Council and its preparatory bodies.<sup>60</sup>

<sup>56</sup> The European Council stated in the April 2017 Guidelines that it would remain permanently seized on the matter and update the guidelines in the course of negotiations.

<sup>57</sup> Commission Recommendation for a Council Decision COM(2017) 218 final of 3 May 2017 authorising the Commission to open negotiations on an agreement with the United Kingdom of Great Britain and Northern Ireland setting out the arrangements for its withdrawal from the European Union; Recommendation for a Council Decision COM(2017) 830 final of 20 December 2017 supplementing the Council Decision of 22 May 2017 authorising the opening of negotiations with the United Kingdom of Great Britain and Northern Ireland for an agreement setting out the arrangements for its withdrawal from the European Union.

<sup>58</sup> European Council, *Informal meeting of the Heads of State or Government of 27 Member States, as well as the Presidents of the European Council and the European Commission, 15 December 2016* cit. para. 3.

<sup>59</sup> *Ibid.* para. 4.

<sup>60</sup> *Ibid.* para. 3.

Furthermore, the procedural arrangements of the December 2016 Informal Meeting bear some relevance in assessing the role of the European Parliament in Brexit. The institution has carried out activities art. 50 TEU does not envisage,<sup>61</sup> trying to contribute to the definition of the principles ruling the withdrawal from the Union and the negotiating position of the EU through the adoption of several resolutions.<sup>62</sup> In so doing, the European Parliament benefitted from the decisions of the December 2016 Informal Meeting which adopted the following procedural solutions: *i)* the involvement of representatives of the institution in the preparation of the European Council's meetings; *ii)* the hearing of the President of the European Parliament at the beginning of the meetings of the European Council; *iii)* the exchange of views between the President of the European Council and the European Parliament before and after each meeting of the General Affairs Council. The said procedural arrangements also called the Union negotiator to keep the institution representing the EU citizens closely and regularly informed throughout the negotiation.<sup>63</sup> Notwithstanding the said practice, the consent of the European Parliament on the withdrawal agreement was limited by the previous approval of the draft text by the European Council.<sup>64</sup>

### III.3. THE APPLICATION OF CONDITIONALITY

The recourse to conditionality is the third common feature, but its assessment needs a preliminary remark on the object of conditionality and the related way in which the term is used in this *Article*. States have no right to accession to the EU, but the Treaty confers the right to withdraw upon Member States. As a consequence, the EU is empowered to subject only admission to conditionality. The conditions the EU availed itself of throughout the Brexit negotiations referred to the conclusion of the withdrawal agreement. In this framework, conditionality as a common feature of accession and withdrawal concerns the techniques and mechanisms the EU puts into place either in admission or withdrawal to achieve a stronger position *vis-à-vis* its counterparts in negotiating the conditions for entering or exiting the Union.

<sup>61</sup> D Harvey, 'What Role for the European Parliament under art. 50 TEU?' (2017) ELR 585.

<sup>62</sup> European Parliament Resolution (2017/2593(RSP)) cit.; European Parliament Resolution P8\_TA-PROV(2017)0361 of 3 October 2017 on the state of play of negotiations with the United Kingdom (2017/2847(RSP)); European Parliament Resolution P8\_TA-PROV(2017)0490 of 13 December 2017 on the state of play of negotiations with the United Kingdom (2017/2964(RSP)); European Parliament Resolution P8\_TA-PROV(2018)0069 of 14 March 2018 on the framework of the future EU-UK relationship (2018/2573(RSP)); European Parliament Resolution P9\_TA-PROV(2019)0016 of 18 September 2019 on the state of play of the UK's withdrawal from the European Union (2019/2817(RSP)).

<sup>63</sup> European Council, *Informal meeting of the Heads of State or Government of 27 Member States, as well as the Presidents of the European Council and the European Commission, 15 December 2016 – Statement* cit. paras 6-7.

<sup>64</sup> On the relationship between the widening of the role of the European Council and the institutional balance art. 50 TEU sets up see M Starita, 'Il ruolo del Consiglio europeo nella Brexit' (2019) *Il diritto dell'Unione europea* 571. For criticism on such a practice see M Gatti, 'Article 50 TEU: A Well-Designed Secession Clause' (2017) *European Papers* www.europeanpapers.eu 171.

The evolution we briefly described above about the admission procedure from a proceeding pursuing the aim of establishing the conditions for becoming a member of the European Communities into a procedure intended to promote compliance with admission conditions, urged the European Union to make use of mechanisms of conditionality.<sup>65</sup> The “pre-accession strategy” the Essen European Council launched was functional to the achievement of that aim for it entailed an engagement of the EU in order to monitor fulfilment of the accession conditions. The EU enacted several changes in order to adapt the admission procedure to the new objectives it was called on to attain such as: *i*) the introduction of suspension clauses in case of non-compliance with the values of the EU in the agreements with aspirant States;<sup>66</sup> *ii*) the reform of economic assistance;<sup>67</sup> *iii*) the control of the Commission over acceding States through annual reports.<sup>68</sup> The 1997 Luxembourg European Council enhanced that strategy envisaging the “accession partnerships”. They are acts the EU adopted to distinguish between brief, medium and long term priorities in candidate States’ progressing towards the eventual membership of the Union.

The use of conditionality in this arrangement of the proceedings bolstered the role of the European Council since it decided on States’ fulfilment of the accession conditions and on the connected move from one stage to the following in the path towards accession.

The conditionality framework the EU shaped in the 2004 enlargement was retained in the subsequent admission procedures involving Western Balkans and Turkey. Moreover, these procedures are not only based on the same instruments of the previous

<sup>65</sup> On the use of conditionality in admission to the EU see E Gateva, *European Union Enlargement Conditionality* (Palgrave Macmillan 2015).

<sup>66</sup> Agreement between the European Economic Community and the Republic of Estonia on trade and commercial and economic cooperation [1992]; Agreement of 21 December between the European Economic Community and the Republic of Latvia on trade and commercial and economic cooperation [1992]; Agreement between the European Economic Community and the European Atomic Energy Community, of the one part, and the Republic of Lithuania, of the other part, on trade and commercial and economic cooperation [1992]; Europe Agreement of 19 December 1994 establishing an association between the European Communities and their Member States, of the one part, and the Republic of Bulgaria, of the other part. E Lannon, K Inglis and T Haenebalcke, ‘The Many Faces of EU Conditionality in Pan-Euro-Mediterranean Relations’ in M Marescau and E Lannon (eds), *The EU’s Enlargement and Mediterranean Strategies* (Palgrave Macmillan 2001) 104.

<sup>67</sup> Regulation (EEC) 3906/89 of the Council of 18 December 1989 on economic aid to the Republic of Hungary and the Polish People’s Republic; Regulation (EEC) 1764/93 of 30 June 1993 of the Council amending Regulation (EEC) No 3906/89 on economic aid for certain countries of central and eastern Europe. A Mayhew, ‘Enlargement of the European Union: Analysis of the Negotiations with the Central and Eastern European Candidate Countries’ (Sussex European Institute Working Paper December 2000).

<sup>68</sup> Communication COM(95) 163 of 3 May 1995 from the Commission, Preparation of the Associated Countries of Central and Eastern Europe for Integration into the Internal Market of the Union. M Marescau and E Montaguti, ‘The Relations between the European Union and Central and Eastern Europe: A Legal Appraisal (1995) CMLRev 1327; P Muller-Graff, ‘Legal Framework for Relations Between the European Union and Central and Eastern Europe: General Aspects’ in M Marescau (ed.), *Enlarging the European Union. Relations between the EU and the Central and Eastern Europe* (Addison-Wesley Longman Ltd 1997) 37.

procedures, but make also use of mechanisms that were set up in order to enhance the control of Member States over the procedure as a whole.<sup>69</sup>

The first of these new mechanisms is embodied by the benchmarks the Council, acting by unanimity on a proposal by the Commission, defines to subject the opening and closing of negotiating chapters to the ability of the States involved to meet them. In case of failure in complying with the established benchmarks negotiating chapters will not be opened or negotiating chapters provisionally closed will be reopened.<sup>70</sup> Consequently, the pace of negotiations is connected to candidate countries' ability to deliver on reforms, while the appreciation of the fulfillment of benchmarks is in the hands of the Member States acting within the European Council.

The second new mechanism is the suspension of accession negotiations the EU can decide if the candidate State infringes the values of democracy, rule of law, liberty, respect for human rights and fundamental freedoms.<sup>71</sup> The suspension the Council establishes will be based on a previous decision of the European Council.

In both cases, the European Council acts by consensus so that each Member State enjoys the right of veto.

The withdrawal negotiations were subject to conditionality for the Member States availed themselves of the same techniques on which they framed the admission procedure. As for withdrawal the use of conditionality is of great significance for the withdrawing state might just wait for the expire of the time limit art. 50 TUE provides for.

The EU did not accept the UK proposal for running both the negotiations on the withdrawal agreement and those on future relationships. In the Guidelines adopted in April 2017, the European Council stated that "we must proceed according to a phased approach giving priority to an orderly withdrawal"<sup>72</sup> and decided that the agreement on the future relationships between the EU and the UK could be negotiated only after the conclusion of the withdrawal agreement.<sup>73</sup> This stance was based on the claim that "the main purpose of the negotiations will be to ensure the United Kingdom's orderly withdrawal so as to reduce uncertainty and, to the extent possible, minimise disruption caused by this abrupt change".<sup>74</sup>

<sup>69</sup> See C Hillion, 'The Creeping Nationalisation of the EU Enlargement Policy' (November 2010) SIEPS [www.sieps.se](http://www.sieps.se).

<sup>70</sup> European Council Conclusions of 16/17 December 2004 para. 23; European Council Conclusions of 14/15 December 2006 paras 4-7. See also Communication COM(2006) 649 of 8 November 2006 from the Commission to the European Parliament and the Council, Enlargement Strategy and Main Challenges 2006 – 2007, 10. S Blockmans, 'Consolidating the Enlargement Agenda for South Eastern Europe' in S Blockmans and S Prechal (eds), *Reconciling the Deepening and the Widening of the European Union* (T.M.C. Asser Press 2009) 83.

<sup>71</sup> Council of the European Union of 3 October 2005, Negotiating Framework with Croatia para. 12.

<sup>72</sup> European Council, Special meeting of the European Council (Art. 50) of 29 April 2017 cit. 1.

<sup>73</sup> *Ibid.* para. 5.

<sup>74</sup> *Ibid.* para. 4. On the phased approach see E Bernard and C Hillion, 'La préparation européenne du Brexit. Le cadre des négociations' in C Bahurel, E Bernard and M Ho-Dac (eds), *Le Brexit: enjeux régionaux, nationaux et internationaux* (Bruylant 2018) 37 and 51 ff.

As a consequence of the phasing of the negotiations, the European Council pointed out that “in accordance with the principle that nothing is agreed until everything is agreed, individual items cannot be settled separately”.<sup>75</sup> To say in a nutshell, negotiating chapters are only provisionally closed and can be reopened.

In the same vein, the European Council held that it will monitor the progress of negotiations and “determine when sufficient progress has been achieved to allow negotiations to proceed to the next phase”.<sup>76</sup> Taking into consideration the connection between the withdrawal agreement and the future relationships art. 50 TEU establishes, the European Council affirmed that

“an overall understanding on the framework for the future relationship should be identified during a second phase of the negotiations under Article 50 TEU. We stand ready to engage in preliminary and preparatory discussions to this end in the context of negotiations under Article 50 TEU, as soon as the European Council decides that sufficient progress has been made in the first phase towards reaching a satisfactory agreement on the arrangements for an orderly withdrawal”.<sup>77</sup>

Following this approach, the assessment of the progresses of negotiations led the December 2017 European Council to adopt new Guidelines for time was ripe to “move to the second phase related to transition and the framework for the future relationship”.<sup>78</sup> The European Council, however, called the negotiators to complete the work on withdrawal issues and warned the UK on the temporary nature of the agreement already reached since “negotiations in the second phase can only progress as long as all commitments undertaken during the first phase are respected in full and translated faithfully into legal terms as quickly as possible”.<sup>79</sup>

The European Council retained the same stance in deciding to open the third stage of negotiations to address the overall understanding of the framework for the future relationship in the Guidelines delivered on March 2018.<sup>80</sup>

The brief description of the two procedures makes it clear that the exercise of discretionary power in applying conditionality was transposed from the practice of admission into the practice of withdrawal to achieve the same aim: leaving Member States a certain margin for manoeuvring and pursue national interests since decisions are taken by consensus.

At the end of the day, the arrangements of the admission and withdrawal proceedings have enhanced the role of the European Council compared to the role the Treaty provisions establish.

<sup>75</sup> European Council, Special meeting of the European Council (Art. 50) of 29 April 2017 cit. para. 2.

<sup>76</sup> *Ibid.* para. 4.

<sup>77</sup> *Ibid.* para. 5.

<sup>78</sup> European Council (Art. 50) meeting of 15 December 2017, Guidelines para. 1.

<sup>79</sup> *Ibid.*

<sup>80</sup> European Council (Art. 50) of 23 March 2018, Guidelines para. 1 in which it is stated that “negotiations can only progress as long as all commitments undertaken so far are respected in full”.

#### IV. MAKING INTERGOVERNMENTALISM PREVAIL OVER SUPRANATIONALISM

The brief assessment of admission and withdrawal highlights that both of them are not just regulated by the rules the TEU lays down, since their function depends also on the practice that has shaped them.

The combination of Treaty provisions and practice urges us to consider admission and withdrawal in the larger perspective of the role of the latter in EU law.

In that perspective, both procedures are part and parcel of a wider phenomenon involving different areas of the EU legal system: the integration of the rules of the Treaties by practice. The important role practice has been playing in the legal order of the European Union is the consequence of the need to fill up existing lacunae of the laws in force. Furthermore, practice ensures flexibility and the continuous adjustment of rules that the dynamic nature of the process of European integration entails.<sup>81</sup>

The CJEU has adopted a narrow approach towards practice ruling that it cannot run counter to the Treaties so that Member States' practice as well as EU institutions' practice derogating from the rules the Treaties lay down has been found in breach of EU law.<sup>82</sup> The Court's attitude towards practice is related to the statement that the founding Treaties, unlike ordinary international treaties, established a new legal order.<sup>83</sup>

Despite the hostility stemming from this consistent case law, the CJEU made use of practice in order to construe EU law in the judgment delivered in the *Ecowas* case.<sup>84</sup> In its reasoning, the Court referred to several policy documents that were adopted either by

<sup>81</sup> JP Jacqué, 'La pratique des institutions communautaires et le développement de la structure institutionnelle communautaire' in R Bieber and G Ress (eds), *Die Dynamik des Europäischen Gemeinschaftsrechts – The Dynamics of EC Law* (Nomos 1987) 377; O Porchia, 'Il diritto non scritto nel funzionamento delle istituzioni dell'Unione europea' in P Palchetti (ed), *L'incidenza del diritto non scritto sul diritto internazionale ed europeo* (Editoriale Scientifica 2016) 349.

<sup>82</sup> Case C-59/75 *Pubblico Ministero v Flavia Manghera and others* ECLI:EU:C:1976:14 para. 21; case C-43/75 *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena* ECLI:EU:C:1976:56 paras 56-58; case C-141/78 *French Republic v United Kingdom of Great Britain and Northern Ireland* ECLI:EU:C:1979:225 paras 7 and 11; case C-68-86 *United Kingdom of Great Britain and Northern Ireland v Council of the European Communities* ECLI:EU:C:1988:85 para. 24 and 38; case C-327/91 *French Republic v. Commission of the European Communities* ECLI:EU:C:1994:305 para. 36; case C-417/93 *European Parliament v Council of the European Union* ECLI:EU:C:1995:127 paras 10-11; case C-426/93 *Federal Republic of Germany v. Council of the European Union* ECLI:EU:C:1995:367 para. 21; case C-41/95 *Council of the European Union v European Parliament* ECLI:EU:C:1995:431 paras 23 and 26; case C-271/94 *European Parliament v Council of the European Union* ECLI:EU:C:1996:133 para. 24; case C-444/11 *P Team Relocations NV and Others v European Commission* ECLI:EU:C:2013:464 para. 82; case C-227/14 *P LG Display Co. Ltd and LG Display Taiwan Co. Ltd v European Commission* ECLI:EU:C:2015:258 para. 67; case C-28/12 *European Commission v Council of the European Union* ECLI:EU:C:2015:282 para. 42.

<sup>83</sup> Case C-26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* ECLI:EU:C:1963:1, p. 12; Opinion 2/13 *Accession of the European Union to the ECHR* ECLI:EU:C:2014:2454 para. 157.

<sup>84</sup> Case C-91/05 *Commission of the European Communities v Council of the European Union* ECLI:EU:C:2008:288.

the Council or by different institutions acting jointly with the aim of establishing the dividing line between the Common Foreign and Security Policy and Community Development Cooperation.<sup>85</sup> The judgment shows the Court readiness to consider practice an interpretative tool in line with the rule art. 31(3)(b) VCLT envisages.<sup>86</sup>

Furthermore, it can be argued that the approach of the Court towards practice overriding Treaties' provisions does not bar the admissibility of practice which is *preter legem* in nature for it integrates the laws in force.<sup>87</sup>

This is the general framework against which to assess the practice of admission and withdrawal that was described above.

The minimum content of the Treaty provisions on accession and withdrawal is only one of the reasons for integrating the written rules on conditions and procedural arrangements by practice.

Admission and withdrawal are political in nature because they affect the process of European integration urging Member States and the EU institutional framework to adapt the making of entry and leaving the club to the specific needs of candidates or withdrawing countries.

Moreover, admission and withdrawal are located in a grey area between EU law and international law. Such a position within the EU legal system is a further reason for subjecting either admission or withdrawal to mechanisms of adjustment which are widespread in international law.<sup>88</sup>

Practice has transformed admission into a procedure pursuing the intertwined aims of safeguarding the values the EU relies upon and promoting their acceptance by aspirant States. In the case of Brexit, the EU conceived the withdrawal agreement to conclude with the UK as an instrument functional to the protection of its interests and values.<sup>89</sup>

<sup>85</sup> See PJ Kuijper, 'The European Courts and the Law of Treaties: The Continuing Story' in E Cannizzaro (ed.), *The Law of Treaties Beyond the Vienna Convention* (OUP 2011) 266.

<sup>86</sup> Art. 31(3)(b) VCLT provides that "there shall be taken into account together with the context [...] any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation".

<sup>87</sup> O Porchia, 'Il diritto non scritto nel funzionamento delle istituzioni dell'Unione europea' cit. 356. In the same vein, case C-133/06 *European Parliament v Council of the European Union* ECLI:EU:C:2007:551, Opinion of AG Poiares Maduro, paras 26-36. For a different point of view see R Baratta, 'Diritto e prassi evolutiva dell'Eurogruppo' (2015) *Il Diritto dell'Unione europea* 515 who argues that social rules become legal rules only if the Court of justice assesses their validity. On custom in the EU legal order see P Pescatore, *L'ordre juridique des Communautés européennes: étude des sources du droit Communautaire* (Bruylant 2006) 174; T Blanchet and J Keller-Nöellet, 'Peut-on parler de « coutume » en droit de l'Union européenne?' in I Hachez and others (eds), *Les sources du droit revisitées, Vol. 1, Normes internationales et constitutionnelles* (Presses de l'Université Saint-Louis 2011) 207; P Marcisz, *Custom in European Union Law* (2012) *Studia Juridica LIV* Universitas Warszawski 141.

<sup>88</sup> The development of practice raises the problem of its legal nature. It is out of the scope of this *Article* to assess the said issue with which this Author is to deal in a future research paper.

<sup>89</sup> European Council, Special meeting of the European Council (Art. 50) of 29 April 2017 cit.1.

The enhancement of the EU values in admission and withdrawal shows that practice has been filling up the lacunae of the rules the Treaties envisage and no infringement of primary law stemmed from its enactment. As a consequence, practice has been restricted to integrating the Treaty provisions so that it appears to be consistent with the case law of the CJEU. Grounding the admission and withdrawal procedures on the values of democracy, rule of law, protection of fundamental rights, equality, good neighbour relationships, non-discrimination could be considered as a contribution to the strengthening of supranationalism in the process of European integration.<sup>90</sup>

In the opinion of this author, the main outcome of the practice that has been enacted within the framework of admission and withdrawal is making intergovernmentalism prevail over supranationalism since the Member States bolster their control over the two procedures acting through the European Council which has worked mainly as a conference of States.

Notwithstanding the reform of the institutional framework the Lisbon Treaty introduced (art. 13 TEU), the European Council is still hybrid in nature so that it could act as an institution of the European Union or as a Summit of the Heads of State or Government of the Member States.<sup>91</sup> This is the reason why there is the need for establishing in each case if the activities the European Council carried out and the decisions it took are related to its institutional nature or if they are to be attributed to its being an international conference.

The decisions on enlargement of the European Union are still part of the definition of the general political directions and priorities of the Union action so that in taking them the European Council acts as an international conference. Furthermore, in the assessment of compliance with the admission criteria and conditionality requirements Member States are vested with the right of veto, for the decisions of the European Council are adopted by consensus, which is the traditional way of working of international conferences. It has to be added that Member States enjoy a wide margin of discretion. The recent veto France opposed to the opening of admission negotiations with Albania and North Macedonia is the last act of intergovernmentalism in accession to the EU.<sup>92</sup>

<sup>90</sup> C Hillion, 'Withdrawal under Article 50 TEU: An Integration-Friendly Process' (2018) CMLRev 49 argues that the UK withdrawal contributed to the constitutionalization of the EU legal order. In the same vein, S Lattanzi, 'La costituzionalizzazione della procedura di recesso alla luce della Brexit (2020) Studi sull'integrazione europea 668. For a constitutional reading of art. 50 TEU see P Eeckhout and E Frantziou, 'Brexit and Article 50 TEU: A Constitutionalist Reading' (UCL European Institute Working Paper 2016); ME Bartoloni, 'La disciplina del recesso dall'Unione europea: una tensione mai sopita tra spinte "costituzionaliste" e resistenze "internazionaliste"' (29 May 2016) Rivista AIC [www.rivistaaic.it](http://www.rivistaaic.it) highlights the tension between constitutionalizing EU law and anchoring it into international law that is embedded in the laws on withdrawal; J Vidmar, 'Unilateral Revocability in *Wightman*: Fixing Article 50 with Constitutional Tools' (2019) EuConst 374.

<sup>91</sup> On the hybrid nature of the European Council see U Villani, *Istituzioni di diritto dell'Unione Europea* (6th edn, Cacucci Editore 2020) 164.

<sup>92</sup> L Cvetanonoska, 'North Macedonia Won't be Joining the EU Anytime Soon. Did the EU Lose its Peak Leverage?' (14 November 2019) The Washington Post [www.washingtonpost.com](http://www.washingtonpost.com).

Art. 50 TEU enshrines the role of the European Council as an EU institution. Nevertheless, Brexit has witnessed the reinforcement of the role of the European Council and its working not only as an institution of the EU, but also as an international conference of states.

In fact, the European Council has in time proceeded both as formal or informal meetings. Moreover, the European Council has adopted formal acts as well as acts which are not provided for by the Treaties, and all the decisions were taken by consensus.<sup>93</sup>

Member States laid down the framework of withdrawal negotiations in the Statements of the June and December 2016 Informal Meetings even before the UK filed the withdrawal notification. The first meeting defined the aim of the orderly withdrawal, while the second emphasized the need for the integrity of the Single Market. Both of these principles were developed by the Guidelines the European Council adopted. The disentanglement of the UK from the commitments of membership in an orderly manner is also the rationale for the Council's assessment of art. 50 TEU as a law conferring an all-encompassing competence upon the Union to cover in the withdrawal agreement "all matters necessary to arrange the withdrawal".<sup>94</sup>

Moreover, the procedural arrangements the December 2016 Informal Meeting established created an unprecedented control of Member States over the conduct of the negotiations of EU international agreements.<sup>95</sup>

The Guidelines on negotiations are to be connected to the political impetus the European Council gives the Union, so that they are related to its international conference's nature, although they are contained in a formal act the Treaty provides for.

In assessing the nature of the European Council within the withdrawal procedure it is also worth to remind that the recourse to conditionality strengthened the Member States leverage on the course of negotiations because the Guidelines neither specify the criteria of the assessment nor lay down the threshold for moving forward throughout the procedure. As a consequence, the European Council enjoyed a wide margin of discretion in taking the decisions concerning the pace of negotiations, while the practice of consensus enabled each Member State to veto any decision.

The outcome of this practice has to be outlined taking into consideration the legal framework art. 49 and art. 50 TEU lay down.

Unlike the admission procedure in which the accession agreement is an international treaty the Member States conclude with the incoming countries after negotiations within an intergovernmental conference, art. 50 TEU establishes that the withdrawal agreement is an agreement the EU enters into with the withdrawing States. The reference to some

<sup>93</sup> On the emergence of both natures during Brexit see M Starita, 'Il ruolo del Consiglio europeo nella Brexit' cit. 570.

<sup>94</sup> Council decision of 22 May 2017 cit. ANNEX para. 5.

<sup>95</sup> See PR Polak, 'EU Withdrawal Law After Brexit' cit. 62.

of the provisions art. 218 TFEU lays down is consistent with the nature of the agreement as an EU agreement.

The control Member States exercised on the negotiations of the withdrawal agreement with the United Kingdom has shifted the balance between supranationalism and intergovernmentalism the Treaty envisages towards the second approach.<sup>96</sup>

Adopting an intergovernmental approach is consistent with the nature of the issue admission and withdrawal deal with: the membership of the EU. The decisions on admission are the expression of Member States' sovereignty for they concern the composition of the EU. In the same vein, Member States are interested in regulating the way in which withdrawal takes place and the relationships with the state exiting the Union. Moreover, the connection between sovereignty and membership is to be found in the opposite perspective of the candidate or withdrawing states since sovereign powers are entrenched in the application for entering the European Union or in the decision to leave it. As regards this latest issue, the CJEU in the *Wightman* case stated that the decision to exit the European Union "is for the Member State alone to take [...] and depends solely on its sovereign choice".<sup>97</sup>

Moreover, the practice on admission and withdrawal has to be evaluated against a more extensive trend of intergovernmentalism in the process of European integration.<sup>98</sup> There are several examples of this trend such as: *i*) the activity the European Council carried out to face the debt crisis, because it mainly acted as an international conference of States;<sup>99</sup> *ii*) the decision of the Heads of State or government within the European Council on a new settlement for the UK;<sup>100</sup> *iii*) the EU-Turkey Statement of 18 March 2016,<sup>101</sup> which clarified that the use of international instruments "may shift the centre of gravity to the Member States".<sup>102</sup> The European Council has recently bolstered the process at

<sup>96</sup> *Contra* C Hillion, 'Withdrawal under Article 50 TEU' cit. 36 who argues that the procedure is embedded in the institutional framework of the European Union since the influence of the Member States is channelled through the European Council which acted as an institution of the EU.

<sup>97</sup> *Andy Wightman and Others v Secretary of State for Exiting the European Union* cit. para. 50.

<sup>98</sup> E Cannizzaro, *Il diritto dell'integrazione europea* (3rd edn, Giappichelli Editore 2018) 7 ff.

<sup>99</sup> M Starita, 'Il Consiglio europeo e la crisi del debito sovrano' (2013) RivDirInt 385.

<sup>100</sup> European Council, *Conclusions of 18-19 February 2016. A new settlement for the United Kingdom within the European Union* [www.consilium.europa.eu](http://www.consilium.europa.eu). On the European Council Conclusions see S Peers, 'The Draft UK/EU Renegotiation Deal: Is It "Legally Binding and Irreversible"?' (10 February 2016) EU Law Analysis [europeanlawanalysis.blogspot.com](http://europeanlawanalysis.blogspot.com); G Rossolillo, 'Patti chiari, amicizia lunga: l'accordo sullo status del Regno Unito nell'Unione europea' (29 February 2016) SIDIBlog [www.sidiblog.org](http://www.sidiblog.org); P Eleftheriadis, 'On the New Legal Settlement of the UK with the EU?' (12 February 2016) *Verfassungsblog* [verfassungsblog.de](http://verfassungsblog.de); E Pistoia, 'Brexit: Should They Stay...?' (15 June 2016) SIDIBlog [www.sidiblog.org](http://www.sidiblog.org).

<sup>101</sup> EU-Turkey Statement of 18 March 2016, in European Council Press Release 144/16 of 18 March 2016.

<sup>102</sup> E Cannizzaro, 'Disintegration through Law?' (2016) European Papers [www.europeanpapers.eu](http://www.europeanpapers.eu) 6. On the legal nature of the Statement see case T-192/16 *NF v European Council* ECLI:EU:T:2017:128; case T-193/16 *NG v European Council* ECLI:EU:T:2017:129; case T-257/16 *NM v European Council* ECLI:EU:T:2017:130; joined cases C-208/17 P and 210/17 P, *NF and Others v European Council* ECLI:EU:C:2018:705. See further, O Corten and M Dony, 'Accord politique ou juridique: Quelle est la nature du "machin" conclu entre l'UE et la Turquie en matière d'asile?' (10 June 2016) EU Immigration and Asylum Law and Policy [eumigrationlawblog.eu](http://eumigrationlawblog.eu); M Gatti, 'La Dichiarazione

stake through the declaration on the implementation of Regulation 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget since it affects the independent role of the Commission and jeopardizes the effective application of the rules the Regulation enacted.<sup>103</sup>

In this scenario, admission and withdrawal foster intergovernmentalism in the process of European integration as a whole,<sup>104</sup> limiting the significance of the bolstering of the Union's values within both procedures.

UE-Turchia sulla migrazione: un trattato concluso in violazione delle prerogative del Parlamento? (11 April 2016) Eurojus rivista.eurojus.it; L Marotti, M Marchegiani, 'La natura giuridica dell'accordo in ambito migratorio tra l'Unione europea e la Turchia' (2016) *Diritto, immigrazione, cittadinanza* 59; S Peers, 'The Draft EU/Turkey Deal on Migration and Refugees: Is it Legal?' (16 March 2016) EU Law Analysis eulawanalysis.blogspot.com; E Cannizzaro, 'Denialism as the Supreme Expression of Realism: A Quick Comment on NF v. European Council' (2017) *European Papers* www.europeanpapers.eu 251; M Jackowski, 'Conventional Rights of Migrants in the Agreement between the European Union and Turkey of 18 March 2016' in J Iliopoulos-Strangas and others (eds), *Migration: New Challenges for Europe, for State Sovereignty and for the Rule of Law and the Welfare State* (Nomos 2017) 59; G Fernández Arribas, 'The EU-Turkey Statement, the Treaty-Making Process and Competent Organs. Is the Statement an International Agreement?' (2017) *European Papers* www.europeanpapers.eu 303; B Nascimbene and I Anrò, 'La tutela dei diritti fondamentali nella giurisprudenza della Corte di giustizia: nuove sfide, nuove prospettive' (2017) *Rivista italiana di diritto pubblico comunitario* 355; D Vitiello, 'La dimensione esterna della politica europea' in M Savino (ed), *La crisi migratoria tra Italia e Unione europea* (Editoriale Scientifica 2017) 331; F Casolari, 'L'insostenibile "leggerezza" della soft law: sul ricorso a strumenti informali nella gestione della dimensione esterna del contasto all'immigrazione irregolare da parte dell'Unione europea' in *Liber Amicorum Angelo Davì. La vita giuridica internazionale nell'età della globalizzazione* (Editoriale Scientifica 2017) 1422; G Syropoulou, 'The EU Charter of Fundamental Rights and Asylum Procedures in View of the Recent Developments in Greece Following Implementation of the EU-Turkey Statement' in A Crescenzi, R Forastiero and G Palmisano (eds), *Asylum and the EU Charter of Fundamental Rights* (Editoriale Scientifica 2018) 121.

<sup>103</sup> E Cannizzaro, 'Neither Representation nor Values? Or, "Europe's Moment" – Part II' (2020) *European Papers* www.europeanpapers.eu 1101.

<sup>104</sup> On the relationship between supranationalism and intergovernmentalism see U Villani, 'Metodo comunitario e metodo intergovernativo nell'attuale fase dell'Unione europea' (2019) *Studi sull'integrazione europea* 259.