Searching for an optimal withdrawal clause for the European Union[1]

By *Robert Zbíral*

I. Introduction

"No people and no part of a people shall be held against its will in a political association that it does not want."[2]

"Nobody wants to speak about divorce on the wedding day."[3]

The tension between liberty of the individual to choose their own destiny and their obligations to others has been an everlasting question of numerous philosophical disputations. Each side calls very powerful arguments to its support, and the definite answer is nowhere to be attained. Nowadays the world is so interdependent that John Donne's phrase "no man is an island" has never been more truthful. It is simply not possible to apply a libertarian concept of total freedom with a free option to leave any state if it does not serve me well. We do not have unoccupied lands on Earth anymore. On the other hand, contemporary life is highly individualistic, and if we return to the epigraph above, it is quite likely that on your wedding day your best friend would not be your best man, but your lawyer drafting a foolproof pre-nuptial agreement.

In political philosophy and science, the dilemma is transferred to a level of state. Is there a right for subunits of a bigger entity to secede? From the Civil War in the United States, the decolonization process and the right of self-determination, to the breakdown of multinational states in Eastern Europe, the controversial discussion never ends.[4] If we move one step further, secession is not related only to states, but also to international organizations.[5] After World War Two, thousands of interna-

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[2] *Ludwig von Mises,* Nation, State, and Economy, New York 1983, p. 34.

[3] Popular saying, usually attributed to Abraham Lincoln.

[4] Among the most influential books discussing the various aspects of secession on a general level, see *Allen Buchanan,* Secession: The Morality of Political Divorce from Fort Sumter to Lithuania and Quebec, Boulder 1991; *Lee C. Buchheit,* Secession: The Legitimacy of Self-Determination, New Haven 1978.

[5] In the rest of our paper, we use the term "withdrawal" or "exit" in relation to the European Union. The term "secession" is in our view more appropriate for leaving a unitary state

tional organizations were established and membership in them became vital for states in order to express their voice in world affairs. While in many cases joining and leaving such organizations has not posed any difficulties, in some cases an exit is considered problematic.[6]

The European Union is a prime example of this kind. According to Andrew Moravcsik "the EU has been and remains the most successful voluntary international organization in world history."[7] But is it really voluntary? Is it possible to leave the Union? These are very important questions that need to be answered. Unfortunately, the subject of withdrawal is in our opinion underdeveloped in European studies, especially in comparison with similar topics such as enlargement. Critics might object that no state has ever withdrawn from the Union, so why waste time? We may counter that enhanced cooperation has never been used either, and there are numerous contributions discussing it. But we should not generalize. Especially among German scholars the question of exit has attracted significant attention,[8] whereas English-speaking sources are much scarcer. Yet in other states, withdrawal is like a taboo. For example, in the Czech Republic the only material discussing exit is one textbook on European law[9] and even the experts are spreading myths about the subject.[10]

The research on withdrawal from the Union is not only a theoretical exercise. Even if we exclude the banal maxim that nothing lasts for ever, there have been few moments in the history of Union where withdrawal of a member state was, if not imminent, at least under consideration. We can mention France in 1965, Britain

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or federation than for leaving an international organization, even though it is of a *sui generis* type.

6 Among the most important ones, the United Nations, the World Health Organization and UNESCO (before reform of its Constitution in 1950s) do not have any provision on withdrawal in their founding documents. See in more detail *Nathan Feinberg,* Unilateral Withdrawal from an International Organization, in: British Yearbook of International Law 39 (1963), p. 189 (194 – 211).

7 *Andrew Moravcsik,* Europe without Illusions, Paper presented at the Third Spaak Foundation – Harvard University Conference Brussels, 6 – 8 September 2002, p. 2.

8 Apart from further cited sources, see for example *Juli Zeh,* Recht auf Austritt, Zeitschrift für Europarechtliche Studien 7 (2004), p. 173; *Ulrich Everling,* Sind die Mitgliedstaaten noch Herren der Verträge? in: Rudold Bernard, Völkerrecht als Rechtsordnung, Festschrift für Hermann Mosler, Berlin 1983, p. 173; *Claus-Dieter Ehlermann,* Mitgliedschaft in der Europäischen Gemeinschaft – Rechtsprobleme der Erweiterung, der Mitgliedschaft und der Verkleinerung, in: Europarecht 19 (1984), p. 113.

9 *Luboš Tichý,* Evropské právo, Praha 2006, p. 82. There are only two sentences on the topic.

10 See the opinion of the prominent Czech economist Libor Ševčík, who knowingly said when critically assessing the Czech accession to the EU: "Every proper organisation has in its founding document a clause on withdrawal." *Libor Ševčík,* Teoretické a praktické dopady vstupu do EU, Plzeň 2003, p. 17; in a recent article for a Czech magazine Týden, its Brussels correspondent labelled exit from the Union as an "easy endeavour". Nikdo vás tu nedrží, in: Týden, 12 March 2007, p. 60.

in 1974 / 1975 and 1982, Greece in 1981 or Denmark in 1992. Despite the belief of many that with deeper integration the states will be closer, the reality is quite different. Probably never in the past has the future of the European Union been more open than it is nowadays. The big-bang enlargement consisting of states that firmly insist on their recently acquired sovereignty, the diverging interests within a much more heterogeneous club of countries, the continuing disputes about the accession of Turkey, tax and social competition, war in Iraq and relations with the United States, the fate of the Constitutional Treaty – there is a widespread sense of crisis in the Union. A group of strongly eurosceptic states seems to have been forming, with the Czech Republic, Poland and Britain as its main representatives, and there is an effort to start coordinating actions in order to prevent a "pro-federal" development of the Union.[11] In certain member states parties openly supporting withdrawal are part of the government (Poland, Slovakia). The Maltese Labour Party has promised to withdraw if it wins elections, which is not a utopia in a bipartisan system. In Britain the openly hostile attitude of many members of Parliament towards the Union is well-known,[12] and in 2002 the House of Lords formed a commission that was to explore the utility of British membership and the possibility of withdrawal.[13] The general public is following the trend, support for the European Union is at its lowest level since its inception, and the eurosceptic parties performed strongly in the last elections to the European Parliament.[14] If we review the factors that theory cites as being the possible causes for secession, the majority of them are present in the Union.[15]

Exit from the Union is first and foremost a political decision and it is politics that would play the most important part. Realistically speaking, if any country decided to leave the Union, it is very unlikely that it would be barred from doing so. The Union does not have any means to impose its will by force, there are no common armed forces to rely on.[16] However, in practice the question of withdrawal also has legal aspects and any exit is likely to be pursued within the confines

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11 Witness the actions of Czech Prime Minister Mirek Topolánek. See *Johana Grohová*, Topolánek v Bruselu měnil tváře, in: MF Dnes, 7 March 2007, p. A8.

12 See in detail *Philips Cowley,* British Parliamentarians and European Integration, Party Politics 6 (2001), p. 463.

13 European Union (Implications of Withdrawal) Bill, HL Bill 44, 2002, 54 / 1. The results are to be released by the end of 2008.

14 In 2006, only 53 per cent of citizens thought membership in the Union was a good thing, on average much less support than at the beginning of integration. Standard Eurobarometer 66, December 2006, p. 6.

15 From the five factors that Cass Sunstein reviewed as the possible cause of secession, only one of them (injustice in the original acquisition) does not apply to the Union. See *Cass Sunstein,* Constitutionalism and Secession, University of Chicago Law Review 58 (1990), p. 633 (655 – 66); comparable list of causes is given by *Buchanan* (note 3), p. 29 – 75.

16 We can, however, ask a Faustian question: What would happen, for example, if a minority of citizens in one member state undemocratically seized power and pursued unilateral withdrawal?

of the law. There are several reasons behind this hypothesis. First, the Union is a "community based on the rule of law" where the importance of the rule of law in the integration process is undeniable.[17] Surely one can object that the leaving state does not have to follow the principles of an organization it dislikes, but no state can ignore the rules of the international community. The very existence of states is based on the recognition of international public law by all actors,[18] and states try to justify their political steps by means of legal reasoning, even if they could act single-handedly.[19] In the light of these facts, we can consider withdrawal as a structural coupling of law and politics (to use Luhmann's terminology), meaning that while withdrawal might be achieved by means of political power, the exercise of this power is subject to legal norms.[20]

The easiest and legally most certain way to administer withdrawal is through the exit clause in the basic document of the political community. Once the political decision to leave is taken, the whole process follows a legally predefined route with limited risks for both sides. The success of the endeavour is, however, dependent on the optimality of the withdrawal clause: if it is badly drafted, it can cause more damage than good. The subsequent contribution will concentrate on the objective of finding the appropriate withdrawal clause for the European Union. The first section briefly analyses the current situation where the Union has no such clause. The second section provides a schematic typology of withdrawal clauses and reviews numerous proposals from the history of integration about what the clause might look like, including the pros and cons of these proposals. As the European Convention decided to incorporate the clause into the Constitutional Treaty, we examine in more detail the discussions at the Convention on this issue. In the subsequent section, the advantages, disadvantages and legal inconsistencies of Article I-60 of the Constitutional Treaty are presented. The concluding part reflects the previous analysis, and tentative efforts are made to propose the concrete shape of an optimal withdrawal clause for the Union.

II. Withdrawal from the Union under the current conditions

There has been no precedent for a withdrawal of any unit from the Union. The two often cited examples, the case of Britain in 1975 and Greenland in 1985, are

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17 European Court of Justice, case 294 / 83, Les Verts [1986] ECR 1339, para. 27; *Ingolf Pernice,* Der Beitrag Walter Hallstein zur Zukunft Europas – Begründung und Konsolidierung der Europäischen Gemeinschaft als Rechtsgemeinschaft, WHI-Paper 9 / 01, Berlin 2001.

18 See the discussion on the concept of sovereignty in *Arved Waltemathe.* Austritt aus der EU, Frankfurt / Main 2000, p. 64 – 5.

19 *Kelvin Widdows,* The Unilateral Denunciation of Treaties Containing No Denunciation Clause, in: British Yearbook of International Law 53 (1982), p. 83 (94).

20 Luhmann's analogy is borrowed from *Hauke Brunkhorst,* The Legitimation Crisis of the European Union, in: Constellations 13 (2006), p. 165 (168).

not applicable. In the former instance, the British government organized a referendum on whether to remain in the Community, and in June 1975 the majority of the British public supported the continuing membership.[21] It is true that the remaining countries did not raise any objections to the referendum, indeed the question of lawful exit was not raised by any institution in the Community. But these actors wisely opted to wait for the result, for why open a can of worms if there is a possibility of keeping it closed? Why disturb the nationalist British public by claiming "you cannot leave"? In the end, the tactic paid off. The case of Greenland needs more elaboration. Greenland became part of the Community in 1973 with the accession of Denmark, of which it was an integral part. It received Home Rule in 1979 and in a referendum in 1981 the majority of Greenlanders voted for withdrawal from the Community. The Commission expressed its regrets about the decision and a group of members of the European Parliament protested, but the member states negotiated an agreement with Denmark and unanimously changed the founding Treaties in order to allow the withdrawal. Greenland was granted the status of overseas countries and territories.[22] There are three basic reasons why the example of Greenland is not a precedent for unilateral withdrawal. First, the exit was based on the agreement reached by all the member states and an appropriate amendment of the treaties. Second, Greenland was not a party of the Treaties, so legally the situation resembled more the territorial limitation of the material scope of the European law. Lastly, with its geographic and economic position, Greenland is not comparable to any "core" units of the Union.

There are several ways to approach the legal basis for withdrawal in the current situation. One of them starts with the old dictum that exit from a federation or unitary state shall be prohibited, but an exit is possible from looser entities such as confederations.[23] If we correctly identify what kind of entity the Union is, we may find an answer as to the legality of withdrawal. The problem is that the categories of federation / confederation are not very clear and the Union cannot easily be squeezed into such concepts even though they are broad and vague. In our view, a better method is to examine withdrawal from the viewpoints of various legal systems valid in the European Union. Subjects in the Union find themselves in a complex law environment. There are three partly autonomous, but closely interrelated and sometimes overlapping law systems: national law, European law and public international law. Of course, they have mutual dynamics, but it is impossible to render any levels of hierarchy among them comparable to the relationship, for example, between national constitutional and national ordinary law. The systemic relations between the three systems depend more on the attitude of the evaluator

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21 See in more detail *Robert Irving,* The United Kingdom Referendum, June 1975, in: European Law Review 1 (1976), p. 3.

22 See in more detail *Friedl Weiss,* Greenland's Withdrawal from the European Communities, in: European Law Review 10 (1985) p. 173 (177 – 182).

23 Famous theses on this issue include those by Carl Schmitt, Georg Jellinek and Hans Kelsen. For a summary view see *Feinberg* (note 6), p. 213 – 214.

than on the intrinsic qualities of the systems themselves.[24] The most accepted perspective is the one of mutual respect and tolerance.[25] In the subsequent analysis, we address the question of withdrawal in the three legal systems without any prejudice to their positions in the systemic web, but at the same time we try to retain at least the basic logic of the mutual relations.[26]

It is well known that none of the founding Treaties (Treaty on European Union: TEU; Treaty establishing the European Community: TEC) contains any provision about their denunciation. This is quite unusual in international treaties, but it is not an exception.[27] Article 312 TEC (formerly Article 240 TEC) provides: "This Treaty is concluded for an unlimited period."[28] There are passionate debates on what this sentence means for the nature of the Union and the exit option, but even by using every imaginable method of interpretation we could not provide the definite answer.[29] The most likely explanation is that the drafters of the treaties did not wish to make the organization indissoluble but at the same time unilateral exit was to be prohibited. If we take in account the wording of other parts of the treaties, the objective and nature of the integration and the jurisprudence of the European Court of Justice, we might conclude that unilateral withdrawal based on European law is meant to be highly problematic.[30] The Commission confirmed this view and argued that there was no basis in European law for exit.[31] On the other hand, withdrawal with the unanimous support of other member states was not to be legally contested. Although there are opposing views,[32] it is widely accepted that if the amendment procedure of the treaties (nowadays Article 48 TEU) is properly followed, the parties are free to change the treaties at will, including the alteration in membership.

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24 For a thorough (yet still introductory) elaboration see *Daniel Bethlehem,* International Law, European Community Law, National Law: Three Systems in Search of a Framework, in: Naryti Koskenniemi, International Law Aspects of the European Union, The Hague 1998, p. 169.

25 See in general contributions in *Marlene Wind / Joseph Weiler,* European Constitutionalism beyond the State, Cambridge 2003.

26 We accept this method is controversial and does not answer the question in full, but suffices for the objectives of this paper.

27 It is estimated that about one fifth of treaties establishing international organizations do not provide a right to withdraw. *Widdows* (note 19), p. 98.

28 The same for TEU in Article 51.

29 For an overview see *Albrecht Weber,* in: Hans von der Groeben / Jürgen Schwarze, Kommentar zum Vertrag über die Europäische Union und zur Gründung der Europäischen Gemeinschaft, Band 4, 6. Aufl., Baden-Baden 2004, Art. 312 EGV para. 1 – 3.

30 A detailed examination is offered by *Waltemathe* (note 18), p. 29 – 50.

31 Reply to written question no. 1321 / 81. OJ C 82, 4 April 1982, p. 5; reply to oral question no. 59 / 1998, OJ C 113, 11 April 1998, p. 26.

32 For example Werner Thieme cited by *Prodromos Dagtoglou,* How Indissoluble is the Community? in: Prodromos Dagtoglou, Basic Problems of the European Community, Oxford 1975 , p. 258 (259).

International public law is generally applicable for all subjects of the international community, including the Union and its member states. However, despite the fact that the founding Treaties are acts of international law, the ambivalent relationship between European and international law is well-known. The European Court of Justice (like many scholars) considers the Union to be a "self-contained regime",[33] where the rules of international law are relevant only in cases where no European *lex specialis* is available. But as European law is silent on withdrawal, it is worth examining how international law treats withdrawal and how its provisions could be used in the Union. The most important document in this respect is the Vienna Convention on the Law of Treaties (VCLT), which was signed in 1969 and entered into force in 1980. The VCLT is to be applied on all treaties establishing international organizations, without prejudice to any relevant rules of the organization (Article 5 VCLT). It is true that the Community, as well as certain member states, are not parties of the Convention[34] and that the TEC was ratified before the VCLT became valid, but this does not pose a big problem as the VCLT codifies customary international law applicable to treaty relations.[35] The validity of the VCLT rules for the European Union was also affirmed by the Court of First Instance.[36]

The VCLT contains several articles that deal with the termination of treaties. Article 54 lit. a) VCLT establishes that any treaty might be terminated or withdrawn from in conformity with the provisions of that treaty – a provision not applicable in the Union. At the same time, according to Article 54 lit. b) VCLT, withdrawal is allowed by consent of all parties, which confirms the hypothesis of the possibility of consensual withdrawal from the Union. Article 56 VCLT sets out the conditions for withdrawal from a treaty containing no provision on this issue. According to Article 56 para. 1 lit. a) VCLT, a treaty might be renounced if the parties intended to (implicitly) admit the possibility. Here we return to the intention of the drafters of the TEC, the problem being that the *travaux préparatoires* are not available and thus the interpretation of the text of the founding Treaties must suffice, with an indefinite result as presented above. A right of withdrawal may be also implied from the nature of the treaty (Article 56 para. 1 lit. b] VCLT), but the doctrine of international law had different kind of treaties in mind when this Article

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33 The term was used by *Michael Hofstötter,* Suspension of rights by international organisations: The European Union, the European Communities and other international organisations, in: Vincent Kronenberger, The European Union and the International Legal Order: Discord or Harmony? The Hague 2001, p. 21 (40).

34 The list of countries that are parties to the VCLT is available at http: //www.walter.gehr.net/frame24.html (visited 11 March 2007).

35 According to the doctrine, "it can confidently be asserted that legal advisers will nowadays turn to the Convention for guidance when confronted with difficult or controversial points of treaty law." *Ian Sinclair,* The Vienna Convention on the Law of Treaties, Manchester 1984, p. 252.

36 T-115 / 94 *Opel Austria v Council* [1997] ECR II-39.

was drafted.[37] The treaty might be terminated by any of its parties because of a material breach by other parties (Article 60 para. 2 VCLT, principle of *exception non adimpleti contractus*) or the impossibility of the performance of objectives of the treaty (Article 61 VCLT, principle of *ad impossiblia nemo tenetur*), but these general provisions are not applicable for the Union as the founding Treaties themselves provide many specialized tools for dealing with these concerns.[38] Lastly, Article 62 VCLT expresses the old doctrine of fundamental change of circumstances (*clausula rebus sic stantibus*). Some experts argue that this could be the basis for unilateral withdrawal from the Union,[39] on the other hand the *clausula* is one of the most contentious questions in international law and there has been no recent assertion of it in a court case or diplomatic exchange.[40] Even when we disregard this common view, the use of this doctrine in the case of the European Union is highly problematic because of the nature of integration and the existence of the instruments the founding Treaties provide to accommodate almost any change of circumstances.[41] This brief examination indicates that although the rules of international law (notably the VCLT) regarding the termination of treaties are applicable to the Union, they cannot provide a right to unilateral withdrawal from this organization.

Unlike European and international law, national law might under certain circumstances provide a platform for withdrawal. Here we set foot on the shaky ground of the relationship between national constitutional law and European (or international) law. Of course, if we address the issue through the lenses of the European Court of Justice and accept the unreserved supremacy of European law over national law, our inquiry will end here. The reality is not so simple, as the well-known jurisprudence of some national constitutional courts indicates. But why and when should national law prevail over European law and make withdrawal possible? With a certain amount of imagination, we can deduce the right from Article 6 para. 3 TEU: If the Union does not properly respect the national identity of its

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37 Use of art. 56 VCLT is generally a very controversial issue, not only in case of the European Union. For a critical review see *Widdows* (note 19), p. 106 – 114.

38 See in more detail *Meinhard Hilf,* in: Hans von der Groeben, Kommentar zum EU-/EG-Vertrag, Band 5, 5. Auflage, Baden-Baden 1997, Art. 240 EGV para. 12; on the impossibility of using the doctrine *exception non adimpleti contractus* in the Union, see cases 90 – 91/63 *Commission v Luxembourg and Belgium* [1964] ECR 625.

39 For example, if the citizens of the member state decided to withdraw from the Union in a referendum. *Sara Berglund,* Prison or Voluntary Cooperation? The Possibility of Withdrawal from the European Union, in: Scandinavian Political Studies 29 (2006), p. 147 (152).

40 *John K. Setear,* An Iterative Perspective in Treaties: A Synthesis of International Relations Theory and International Law, in: Harvard International Law Journal 37 (1996), p. 139 (209); it must, however, be admitted that the doctrine of *rebus sic stantibus* is accepted by the European Court of Justice, see case C-162/96 *Racke v Hauptzollamt Mainz* [1998] ECR I-3655, para. 24, 53 – 5.

41 The generally accepted position considers the use of *rebus sic stantibus* in the Union as highly problematic. For a detailed discussion see *Waltemathe* (note 18), p. 130 – 44.

member states, they could, after exploiting all other avenues, eventually leave the Union.[42] Others apply the theory of residual sovereignty – the state binds itself to international obligations, but if its statehood or existence is threatened, it has a right to rescind its obligations, simply because the core of its statehood cannot be transferred to another entity or the state ceases to exist.[43] Member states' constitutions construct the basis for participation in the integration process differently. There is a wide range of dualistic or monistic approaches, and we also have to take in account the jurisprudence of constitutional courts. Generally speaking, the interpretation of the majority of constitutions would permit withdrawal from the Union, in some states very easily, in some of them only in exceptional circumstances.[44] In the Czech Republic, the Constitutional Court in a recent judgment confirmed that upon accession the Czech Republic transferred certain competences to the Union, but the transfer was not to touch the formal and material core of the Czech Constitution, specifically its Article 9 para. 2 – 3, which protects the fundamental attributes of the democratic state.[45]

The present legal situation vis-à-vis withdrawal from the Union is complex. Even though the treaties are silent on the issue, consensual withdrawal is possible. Unilateral exit is probably prohibited under European as well as international law, but in the view of the majority of scholars it might be pursued as the *ultima ratio* step on the basis of national constitutional laws. While there are certain benefits to this solution (see below), in legal terms the ambiguity is not acceptable. It was argued in the introduction that withdrawal is in practice not a totally impossible endeavour and that it has been considered several times since the start of integration, therefore we should not pretend the issue does not exist. The acceptable solution is an inclusion of an optimum withdrawal clause in the primary law of the Union.

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42 *Philippe Manin,* Les Communautés Européennes – L' Union Européenne, Paris 1998, p. 76.

43 For a detailed debate see *Friedemann Götting,* Die Beendigung der Mitgliedschaft in der Europäischen Union. Baden-Baden 2000, p. 109 – 112; selected doctrines of international law provide "inherent" reasons why states might leave the treaties unilaterally, see *Feinberg* (note 6), p. 212 – 214; other scholars claim that the residual sovereignty doctrine could not be used for the denunciation of treaties, see *Michael Akehurst,* Withdrawal from International Organization. Current Legal Problems 32 (1979), p. 143.

44 Space precludes a thorough examination of the situation in each member state, for a detailed overview of "old" 15 member states, see *Waltemathe* (note 18), p. 102 – 171; for new members, see *Anneli Albi,* EU Enlargement and the Constitutions of Central and Eastern Europe, Cambridge 2005, p. 67 – 137.

45 Part VI, B, fourth paragraph, of Pl. ÚS 50 / 04 (sugar quotas) from 8 March 2006. In English available at http: //test.concourt.cz/angl_verze/doc/p-50 – 04.html (visited 3rd February 2007).

III. Historical proposals for withdrawal clauses for the Union and the debate during the preparation of the Constitutional Treaty

Before we start to examine concrete historical proposals for the withdrawal clauses in relation to the European integration process, it could be useful to sketch a simple theoretical framework illustrating how the withdrawal clauses could be structured. The doctrine of international law classifies several ideal ways in which a withdrawal from a treaty might be structured. Some will argue that the use of models from international law is inappropriate for the Union, but upon closer inspection the sceptic sees that the list contains all the imaginable possibilities that even a unitary state may encounter. The options are as follows:[46]

1. treaties that allow withdrawal at any time;
2. treaties that preclude withdrawal for a fixed number of years, calculated either from the date the agreement enters into force or from the date of ratification by the state;
3. treaties that permit withdrawal only at fixed time intervals;
4. treaties that allow withdrawal only on a single occasion, identified either by a time period or upon the occurrence of a particular event;
5. treaties which require automatic withdrawal upon the state's ratification of a subsequently negotiated agreement;
6. treaties that are silent as to withdrawal;
7. treaties that preclude withdrawal at any time.

It is obvious that the character of the Union and its founding Treaties hinders the use of certain points. Specifically, Type 2 is hardly imaginable, because it is not compatible with the process of continuing and deepening integration. The approach of the Type 2 treaty is usually to prohibit a withdrawal in order to achieve the immediate objective of the treaty, and after the success of the endeavour the withdrawal is granted.[47] Some other types are similarly inconceivable, but at least theoretically feasible. Under Type 3, which is an opposite of Type 2, withdrawal may be granted for a certain time period after the ratification of the treaty or after

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[46] Based on *UN Office of Legal Affairs,* Final Clauses of Multilateral Treaties Handbook, New York 2003, p. 109 – 12; *Council of Europe,* Model Final Clauses for Conventions and Agreements Concluded within the Council of Europe, available at http: //conventions.coe.int/Treaty/EN/Treaties/Html/ClausesFinales.htm (visited on 5 March 2007); for a discussion see *Laurence Helfer,* Exiting Treaties, Virginia Law Review, vol. 91 (2005), p. 1579 (1596 – 1599).

[47] Examples of such a treaty might be military alliances against an immediate threat. See Article 13 of the North Atlantic Treaty, which guarantees the possibility of unilateral withdrawal only after 20 years of the Treaty's duration. Available at http: //www.nato.int/docu/basictxt/treaty.htm (visited on 5 March 2007).

the state's accession to the treaty. "Trial membership" is, however, not recommendable in the case of the European Union, where the rules of its functioning and operation are well-established and can hardly surprise any prospective members. The Type 4 clause allows optional withdrawal on a certain occasion that is precisely defined in the treaty, Type 5 demands obligatory withdrawal when the party ratifies another treaty which is incompatible with the previous one. Both latter Types are imaginable for the Union, as we will see below.

In the light of the presented facts, the arrangement of withdrawal in the Union has to resemble Types 1, 4, 5, 6 or 7. Each of these options might give the Union a slightly different flavour. Type 7 will transform the Union into a federal state where the final arbiter of sovereignty issues is represented by the central unit. Type 6 emulates the current situation and will keep both its negatives and positives. Type 1 reserves the unilateral right of withdrawal for each party of the treaty and guarantees the primacy of the state in the process. Type 4 provides shelter for a range of options. It also depends how we define the term "single occasion": either we understand it *stricto sensu,* as an incident that happens only once, or we accept a broader meaning and include defined events that repeat in time. The latter denotation has more practical usability for the Union, the "particular event" might be represented, for example, by amendments to the treaty adopted by a majority of members, which would allow (or oblige) the non-assenting state(s) to leave the Union. Finally, under the Type 5 scenario selected member states may decide to sign and ratify a completely new treaty which would for example heavily advance the integration, while at the same time they would automatically withdraw from the current treaties.[48]

Withdrawal clauses in the above-mentioned schematic list might be supplemented by further requirements, such as notice of withdrawal, obligation to provide substantive reasons for exit or the requirement of conclusion of agreement between the withdrawing country and the organization. These conditions may significantly modify the basic framework. But as there are numerous adjustments of this kind, we abstain from discussing them here generally. Even without that, it is obvious that there is a wide variety of possible ways to draft a withdrawal from a treaty with totally different consequences for the treaty and its parties, so careful consideration must be given to the question of which of them to use in order to provide the best option for the nature of the treaty and its objectives.

In order to find the proper withdrawal clause for the Union, we start with the historic proposals that dealt with the question. Despite the fact that the founding

[48] Type 5 may also have another structure: the state automatically ceases to be a member of the Union if it terminates being a member of another treaty not directly related to the integration. This construction was used by the European Constitutional Group, under Article XXX section 5 of its draft: any member state that will cease to be a member of the Council of Europe shall cease to be a member of the Union. The text of the draft is available at http: // admin.fnst.org/uploads/1207/legal_text.pdf (visited on 8 March 2007).

Treaties underwent numerous changes, not once during the intergovernmental conferences has the issue of a withdrawal clause been seriously discussed. Therefore we must turn to "unofficial" propositions. Many of them were drafted by the European Parliament. In 1984, by a vast majority, the Parliament adopted the Draft Treaty establishing the European Union, which was prepared by a team led by a famous federalist, Altiero Spinelli.[49] Spinelli is said to have proclaimed that "the European Union should not be a prison",[50] but the draft itself contains no clause on withdrawal. Nonetheless, its Article 82 stipulates that if the Draft Treaty is ratified by a majority of member states with two thirds of Community population, member states that ratified will meet and by common accord decide how the treaty enters into force. This wording does not constitute a very clear attitude to ratification, but it seems to suggest that the non-ratifying states would be left behind in the old Community, while the rest would move forward and establish the European Union.[51] In 1990, the Parliament intervened in the negotiations of the Maastricht Treaty and issued a resolution proposing guidelines for a draft constitution for Europe. Article 33 of the guidelines resembles the Spinelli draft and lays down that the constitution will enter into force only in states that ratify it, but this avant-garde group will have to safeguard close ties with non-ratifying countries.[52] Both drafts combine two approaches: while they are silent on withdrawal after the draft is ratified (Type 6), at the same time there is a clear disassociation from the Treaties. Those countries that ratify will be involved in "constitutional rupture",[53] implying withdrawal from the integration Treaties valid at that time (Type 5 exit clause). Of course, this approach is highly debatable, not only under European but also international law (compare Articles 30 and 59 VCLT).

In February 1994, the Institutional Affairs Committee of the European Parliament prepared another draft of the Constitution of the European Union (Oreja-Herman draft). According to Article 47, the Constitution will enter into force after ratification in a majority of member states representing four-fifths of the total po-

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49 *European Parliament,* Resolution on the Draft Treaty establishing the European Union, in: Bulletin of the European Communities, February 1984, p. 8. The text of the Draft Treaty itself is available in the same source at p. 9 – 22.

50 Cited by Jens-Peter Bonde in CONV 277 / 02, p. 21. All documents marked CONV are available from a website of the European Convention (http: //european-convention.eu.int/doc_register.asp?lang=EN&Content=DOC).

51 For the various theoretical scenarios of how the Draft Treaty may enter into force see *Joseph Weiler / James Modrall,* The Creation of the European Union and its Relation to the EEC Treaties, in: Roland Bieber, An Ever Closer Union: A critical analysis of the Draft Treaty establishing the European Union, Brussels 1985, p. 161.

52 *European Parliament,* Resolution on the European Parliament's guidelines for a draft constitution for the European Union, A3 – 165 / 90, also published in OJ C 231, 17 September 1990, p. 91.

53 Term borrowed from *Bruno de Witte,* The process of ratification and the crisis options: A legal perspective, in: Deirdre Curtin, The EU Constitution: The best way forward? The Hague 2005, p. 21 (25).

pulation. The countries that do not ratify shall choose between leaving the Union or remaining there on the basis of the new Constitution. With those states that decide to withdraw, a specific agreement granting preferential status must be concluded.[54] At first sight this provision looks similar to the previous ones, but closer examination reveals that it constitutes an example of the Type 4 situation. The ratifying states are advancing the integration under current Treaties and those who are in the minority have to face the difficult decision. Clearly, the construction is quite contradictory – if the Constitution is a continuation of the founding Treaties, it has to be amended in compliance with the provisions of these treaties.[55] Some scholars have claimed that Article 47 of the draft gave a free right of withdrawal from the Union,[56] but in our view withdrawal is limited only to one occasion – the ratification of the Constitution.[57] All the proposals of the European Parliament remain silent on the issue of withdrawal (Type 6) and thus, like the current Treaties, implicitly reject a right of withdrawal at any time (Type 1). Innovative solutions are offered for the difficulties encountered during the ratification process, but with outstanding legal issues under both *acquis* and international law. There is also a certain trend towards radicalization in the proposals: while the Spinelli draft leaves the final step of ratification to a political decision,[58] the 1990 guidelines divide the ratifying and non-ratifying countries into two groups *ex lege.* The Oreja-Herman draft goes even further, forcing the state that does not agree with a radical amendment of the current Treaties to leave the Union.

Innovative reforms of the treaties were not only drafted by the European Parliament, some inspiring proposals also emerged from academic circles. In 1993, a group of scholars called the European Constitutional Group published a draft of the Constitution for the European Union, and its Article XXX contained a complex provision on secession.[59] It was to be guaranteed to each member state, the only condition being a one-year prior notification. This construction clearly mirrors the Type 1 withdrawal clause. Of even greater interest are the further details within Article XXX. During the one-year period after the notice is given, only

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54 *European Parliament,* Resolution on the Constitution of the European Union (A3 – 0064 / 94), published in OJ C 61, 28 February 1994, p. 155.

55 Specifically, Article 48 TEU, which requires, among other conditions, ratification by all member states. According to the jurisprudence of the European Court of Justice, the Treaties could be modified only through their revision procedures, not, for example, by the common accord of member states outside the Treaties. See e.g. case 43 / 75 *Defrenne* [1976] ECR 455, para 57 – 58.

56 E.g. *Luis Maria Diez-Picazo,* A Constitution for the European Union, EUI Working Paper RSC no. 95 / 9, Florence 1995, p. 32.

57 The draft does not provide any provisions on future amendments, so we could not ascertain if the same construct applies repeatedly.

58 "... member states that have ratified will meet and decide by common accord how the treaty enters into force".

59 We use the term "secession" here as it was the official expression used in the draft. For the text of The Constitution of the European Union see note 48.

the legal acts valid at the time of notice shall continue to be in force for the withdrawing state, and the remaining states shall not adopt any act that would discriminate against the withdrawing or withdrawn country. These provisions suggest that there does not have to be any agreement between the leaving country and the remaining states (or the Union), but that mutual relations have to be based on a principle of non-discrimination. If we also take in account the Article on derogation,[60] the European Constitutional Group draft seems to project the Union as a flexible organization where the states may single-handedly decide on what part of the integration process they want to participate in. A similar withdrawal clause can be found in a draft prepared by the Economist magazine in 2000, where Article 20 simply states: "A member state may leave the Union at any time."[61] The wording of the Article reflects the unusual minimalism of the whole draft,[62] and in our view it is too simplistic and leaves too many questions unanswered. In the same year, a more thorough proposal was presented by a working group of experts from the European University Institute in Florence. This document does not touch on the issue of withdrawal.[63] All the drafts reviewed so far have one thing in common – they had only a very limited impact on the actual changes to the founding Treaties and thus can serve only as theoretical points of departure for our analysis in the conclusion.

The situation changed in the first years of the new millennium, when the major actors in the Union demanded serious action in order to bring the European Union closer to its citizens. In December 2002, the European Council at its meeting in Laeken established the European Convention, a quasi-constitutional body of politicians from both Union institutions and member states. The objective of the Convention was to explore the future development of the Union and to propose solutions for making the Union more effective and democratic, including the possibility of preparing a new constitutional document for Europe.[64] Although the Laeken Declaration asked the Convention to consider many important issues, the option to introduce a withdrawal clause was not one of them. In the end, the Convention agreed on a draft of the Constitutional Treaty which incorporates the right of withdrawal from the Union. In the remaining part of this section, we would like to review the debate held on this point at the Convention, not only because it might supply some additional ideas about the "best" withdrawal clause, but also because the events from the drafting process are important for a future interpretation of the final document.[65]

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60 Article XXIX of the European Constitutional Group draft includes the opportunity for each member state to derogate any secondary legislation of the Union it does not like.

61 A Constitution for the European Union, Economist, 28 October 2000, p. 17 – 22.

62 It has only 21 mostly very short articles.

63 *European University Institute,* Basic Treaty of the European Union – Draft. Florence 2000.

64 Annex 1 to the Presidency Conclusions – Laeken, SN 300 / 1 / 01, p. 19 – 25.

At the beginning we must admit that despite its immense importance, the question of withdrawal unfortunately did not meet with the attention it deserved and no specialized working group or discussion circle was established on this topic.[66] Therefore, our examination must rely on the proposals from the Presidium, the amendments put forward by the members of Convention to these draft proposals and several additional contributions from the conventioneers. It is quite regrettable that only very basic minutes from the Presidium and Plenary debates are available.[67]

From the start of the discussions, numerous conventioneers presented their proposals for what the future document should look like. Several of them discussed the question of withdrawal and offered various solutions. One of the most influential drafts was prepared by the group of experts hand-picked by the President of the Commission, Romano Prodi. It received the codename Penelope and was released in December 2002.[68] Although this document did not express the official view of the Commission, it indicated its priorities for the Convention process. Penelope treats the issue in a quite similar way to the European Parliament's proposals discussed above, but it tries to answer their problematic points. It contains a complex two-step procedure for ratification that is meant to avoid the constitutional rupture with the current Treaties; however, if unanimity is not achieved, a five-sixths majority will suffice, and the non-ratifying states are deemed to have left the Union. The relations between the leaving state(s) and the Union shall be governed by international law.[69] After the draft becomes ratified, the right for unilateral withdrawal is not specified (Type 6), save for the state that does not agree with the amendments to the Treaty, which might be adopted by a five-sixths majority (Article 101 / 1 / b Penelope). According to Article 103 Penelope, an agreement between the withdrawing state and the Union is assumed, but if it is not concluded within six months, the state may withdraw nonetheless.[70] Finally, the withdrawing

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65 For more on the importance of the drafting process for the interpretation of constitutions, see *Jeffrey Goldsworthy,* Interpreting Constitutions: A Comparative Study, Oxford 2006, especially p. 126 – 7, 284.

66 The working groups and discussion circles omitted the question altogether, even within their thematic orientation. It is not clear why this odd situation came about. In our view, the Presidium considered the topic to be too controversial and did not want to open it up in great detail (a similar decision was taken with the institutional questions).

67 The European Parliament used to make the verbatim debates of the Plenaries available, but they no longer seem to be accessible at its website.

68 The text of Penelope is available at http: //europa.eu.int/futurum/documents/offtext/const 051202_en.pdf (visited 12 March 2007). For an analysis of the document see *Alfonso Mattera,* Pénélope: projet de constitution de l'Union européenne, Paris 2003.

69 See Agreement on the entry into force of the Treaty on the Constitution of the European Union, available at http: //europa.eu.int/futurum/documents/offtext/const051202_en.pdf (p. B, C, D) (visited 12 March 2007). This construction, of course, signifies that the constitutional rupture is still possible.

70 For an additional two years after withdrawal without agreement, the rights and obligations of the Union and the state shall be governed by the laws applicable at the date of with-

state may continue to be a party of the European Economic Area. Penelope, as a strongly pro-federal draft, combines the Type 4 and Type 6 withdrawal clauses, but adds certain interesting innovations.

Other proposals presented to the Convention had less classy backing (or names), but also include very interesting attitudes to withdrawal. The representative of the British government Peter Hain submitted a draft prepared by a group of scholars led by Professor Alan Dashwood.[71] Article 27 of the draft establishes a right for every member state to withdraw from the Union, the sole condition being to inform the Council. Subsequent paragraphs deal with details, but only in relation to the adjustments within the Union, which have to be agreed on unanimously. This Type 1 withdrawal grants member states a completely unrestrained right to leave, even without any waiting period. On the other hand, it requires a unanimous agreement between the states remaining in the Union, so it is possible that the exit of one state may cause great difficulties for the European Union.[72]

While the proposal by Dashwood puts the withdrawing state in a much stronger position, the Union dominates in other contributions. An example is the submission by Robert Badinter.[73] He offers a comprehensive account of withdrawal in Article 80 of his draft. It stipulates that while any member state may renounce the treaty, the following conditions must be met:

- the state may withdraw only if the decision is made in accordance with its constitutional provisions,
- the European Council decides when the withdrawal takes effect,
- there shall be an agreement concluded between both parties, taking in account the possible consequences of the withdrawal for the interests of the Union, and the withdrawing state is responsible for any loss suffered by the Union,
- in the case of disputes or the absence of agreement, the European Court of Justice is the judicial body to decide.[74]

Evidently, withdrawal will be extremely difficult and will lead to huge costs to any withdrawing state. The proposal is also too ambiguous in important parts, most notably in its definition of the term “loss”. Not only do we not know what is sub-

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drawal. The withdrawing state bears responsibility for covering all the costs that natural or legal persons may demand on its territory due to withdrawal.

71 Draft is available in CONV 345/02, the withdrawal clause and commentary at p. 46–47.

72 Every withdrawal will require a renegotiation of the constitution with the obvious threat to the status quo. In the commentary Dashwood indicates that the changes would not require ratification by the states, but it is not clear what leads him to this conclusion when amendments to the constitution must be ratified (see Article 25 of the draft).

73 Draft is available in CONV 317/02, the withdrawal clause at p. 50.

74 It will probably also decide on actions filed by natural and legal persons affected by the withdrawal (the wording of the article is not clear on this).

sumed under this term (loss to the Union budget, all the states, other subjects?), it also raises other questions. Is it the loss of the current economic balance between the leaving state and the Union, the cumulated loss to the Union from accession, or even future losses (calculating opportunity costs)? One could argue that the unresolved concerns are to be settled by the European Court of Justice, but because it is the institution of one of the parties that is in dispute, the right to fair process would be compromised. Similar to Badinter's formulation is the draft by Andrew Duff, which also supports withdrawal (Article 2 para. 4 of Duff's proposal), but only on terms agreed with the Union. The agreement will have to be concluded by the same process as the amendment of the Constitution, including setting up the Convention (Article 18 of Duff's proposal) and ratification in all member states. It offers the withdrawing state the status of associate membership, whereby certain parts of the constitution may apply to this state even without membership (Article 2 para. 3 of Duff's proposal).[75] The third proposal with comparable content was prepared by member of the European Parliament Jo Leinen.[76] All three proposals are still Type 1 clauses, but only according to a formal classification. In reality they are almost Type 7 constructions, because the conditions of exit are dependent on the agreement. Therefore, we cannot properly speak of a unilateral withdrawal, it is a withdrawal by common consent. It must be also noted that these drafts combine Type 1 / Type 7 withdrawal clauses with the Type 4 clause, which is a little controversial, for what will happen if a certain state does not ratify the draft (or rejects its amendment) and the Union does not offer a sufficiently attractive agreement? Suddenly the situation reverses, and it is the Union that has to make concessions in order to break the status quo.

Let us briefly examine other relevant suggestions that surfaced in the starting phase of the Convention. Jens-Peter Bonde argued that if the Union and the leaving country are not able to reach agreement, the conditions could be set by the International Court of Justice in The Hague.[77] While several drafts did not deal with the question of withdrawal (Type 6),[78] it is surprising that none of the proposals we consulted openly forbids the withdrawal from the Union (Type 7).

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75 Draft is available in CONV 234 / 02, the relevant clauses at p. 3, 7.

76 Leinen was not member of the Convention, but his contribution is important, as he was President of the Parliament's Committee for Constitutional Affairs and President of the Union of European Federalists. His draft is available at http: / / www.europa.eu / constitution / futurum / documents / offtext / doc231002_en.pdf (visited 13 March 2007), the relevant articles are at p. 12 (art. 57 para. 2: withdrawal) and p. 24 (art. 94 para. 2: withdrawal of states that do not ratify the constitution).

77 CONV 277 / 02, p. 21. This suggestion might solve the problem of who is authorized to decide on the outstanding issues (see above about the European Court of Justice). However Bonde's approach is not available either, and according to Article 34 para. 1 of the Statute of the International Court of Justice, only states may be parties in cases before the Court. The only possibility would be to have a dispute between all the remaining countries of the Union and the leaving state, but those states can hardly make any agreements outside the scope of the Union's primary law.

In October 2002, the hitherto preparatory phase was over and the Presidium presented its first preliminary draft of the Constitutional Treaty with a tentative structure and the contents of the most important part of the text. Under the heading of Article 46, it said: "This article would mention the possibility of establishing a procedure for voluntary withdrawal from the Union by decision of a Member State, and the institutional consequences of such withdrawal."[79] The expression "would mention the possibility" is quite strange if we compare it with other Articles, which predominantly start with "this Article … establishes … sets out … would set". It seems the Presidium did not push the issue too forcefully. Despite the uncertainty, it was a Type 1 withdrawal clause, because the decision to withdraw was to be made by the leaving state only. It is not evident who introduced the exit clause, or why it was introduced. It was probably proposed by a representative of the Commission in the Presidium, Michel Barnier,[80] and at the same time strongly supported by the President of the Convention, Giscard d'Estaing.[81] According to Giscard, it was logical to include a right to withdraw because the Constitution would have an unlimited life.[82] This reasoning is not exactly convincing: the current treaties have the same quality and do not allow withdrawal. A more likely explanation is that the Presidium wanted to please the eurosceptic group at the Convention in order to facilitate the final consensus.[83]

After the revelation of the October preliminary draft, there were other issues on the agenda and it seems that both Plenary and Presidium meetings did not extensively discuss the topic of exit. It resurfaced again in April 2003, when the Presidium presented to the Convention a detailed draft of Articles 43 – 46 of the Constitutional Treaty.[84] The diction of Article 46 retains the Type 1 approach from the October version with an elaborate description of the procedure. The member state may withdraw only in accordance with its constitutional conditions,[85] it has to notify the Council, who shall consequently negotiate and conclude (by a qualified majority) the withdrawal agreement in the name of the Union. Even if the agreement is not reached, the member state is free to leave the Union two years after notification. In its comments on Article 46, the Presidium asked the Convention to

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78 E.g. CONV 495 / 03 (Freiburg draft); CONV 325 / 1 / 02 REV 1 (draft presented by Elmar Brok); CONV 335 / 02 (Paccioti draft, but it is possible to ratify with a majority, then there is a political decision about how to proceed).

79 CONV 369 / 02, p. 17.

80 Claim made by Jens-Peter Bonde, one of the prominent conventionnels. CONV 277 / 02, p. 20.

81 *Jean-Victor Louis,* Union Membership: Accession, Suspension of Membership Rights and Unilateral Withdrawal. Some Reflections, in: Ingolf Pernice / Jiří Zemánek, A Constitution for Europe: The IGC, the Ratification Process and Beyond, Baden-Baden 2005, p. 231 footnote 31.

82 *Peter Norman,* The Accidental Constitution, Brussels 2005, p. 58.

83 *Norman* (note 82), p. 178.

84 See CONV 648 / 03.

85 This seems to be inspired by Badinter's draft (CONV 317 / 02).

consider the necessity of agreement (indicating it was not to be a condition), the legal consequences of withdrawal without agreement, and decision-making procedures for concluding the agreement.[86]

The reaction of conventioneers confirmed the controversy surrounding the article. 35 proposals for amendments were submitted with the participation of almost all the members of the Convention.[87] The prevailing opinion by far was to delete Article 46 (10 proposals backed by altogether 41 members), suggesting the continuation of the current state of affairs (Type 6). Several proposals wished to limit the withdrawal only for special events, notably the amendment of the Constitution (Type 4). Yet numerous members wanted withdrawal made conditional on the presence of an agreement (Type 1 / Type 7). The rest accepted a Type 1 construction, but asked for procedural clarifications, such as who is responsible for damages caused by exit, the introduction of a waiting period in case the state wanted to rejoin and, of course, variations on what institutions should conclude the agreement for the Union and by what majority they could do this. Only three members suggested the exit should be made less stringent by shortening the "automatic withdrawal period" to one year. On 25 April 2003, the issue was for the first time discussed openly at the Plenary session and attracted most attention on that date.[88] Selected speakers expressed their concern about a weakened Union where the provision could be used as a permanent threat (Pervenche Beres: "a super right of veto"), compared the Union to a loose organization (Carola Puwak: "like some kind of open house", Huver Haenel: "the EU is not a Piccadilly Circus", Manual Lobo Antunes: "instead of an ever closer Union, we would have an ever more nebulous Union"), expressed worries about the future of euro (Gijs de Vries: "the existence of a permanent debate in some states on continued membership of the Union would undermine the euro's credibility"), and feared the clause might serve as a weapon for eurosceptics (Jürgen Mayer: "constant unrest in some national parliaments"). Some, on the other hand, welcomed the exit option and argued with the free will of the states to choose their destination (Neil McCormick: "people should know that they are part of a voluntary Union and that there is a way out. This is not meant to encourage euroscepticism"). The debate also centred on the question of withdrawal without agreement and called for special provisions (Luis Marinho: "there would be private law implications").[89]

As we see, there was hardly any consensus in the Convention on the topic in question, but the tight time frame prevented any serious reconsiderations. In late

86 CONV 648 / 03, p. 9.

87 The summaries of proposals for amendments are available in CONV 672 / 03, p. 10 – 12, 17 – 18. We unfortunately did not have a chance to look at the complete text of them.

88 42 conventioneers intervened in the debate. For a list see CONV 693 / 03, p. 16.

89 The quotes are extracted from a background record of the debate provided by the Parliament. It is available at http: //www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT +PRESS+BI-20030429 – 1+0+DOC+XML+V0//EN&language=EN#to p (visited 15 March 2007).

May, the Presidium published a revised text of Part I of the Constitution, Article 46 was renumbered as Article 59 and certain changes were made.[90] The European Council replaced the Council as the institution responsible for setting up the guidelines for negotiations with the withdrawing country, but the agreement was still to be concluded by the Council with the consent of the Parliament. According to the Presidium, this reacted to proposals from the Convention and strengthened the withdrawal procedure. The European Council could decide to extend the negotiations beyond the two-year period.[91] Lastly, a new paragraph was added specifying that if the withdrawn state opted to rejoin the Union, its request was to be subject to the same procedure as of all other countries.[92] This time the draft attracted far fewer proposals for amendment and only five conventioneers demanded that it be deleted.[93] If we compare this figure with the one from April, clearly the majority of dissenters had in the meanwhile come to accept the Type 1 withdrawal clause.[94] The May version, without any modification, became Article 59 (of Part I) of the Draft Treaty establishing a Constitution for Europe (TCE), which was consequently handed over to the Italian Presidency and intergovernmental conference.[95]

As is well known, the intergovernmental conference did not proceed without difficulties, the member states argued about numerous issues and the negotiations temporarily broke down in December 2003. But while the issues of weight distribution in qualified majority voting in the Council or the size of the Commission could be blamed for most contentions, the exit clause was hardly mentioned in the discussions. Minor changes were proposed by the Secretariat of the Intergovernmental Conference, the most important of them being to delete the phrase that the withdrawal must be in accordance with the constitutional provisions of the leaving state.[96] The group of legal experts led by Jean-Claude Piris did not support this removal, but recommended certain minor additions.[97] Input from the member

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90 For a text of the draft, see CONV 724/1/03 REV 1, the relevant part is at p. 130 – 132.

91 For a critique of this step see further note 135.

92 Some commentators consider the last change as an inconvenience for the withdrawing state, as an "immediate reinstitution of the arm's length relationship between members and non-members" without any automatic right to rejoin or associate membership. *Jo Shaw,* Legal and Political Sources of the European Constitution, in: Northern Ireland Legal Quarterly 55 (2004), p. 214 (233). In our view, this interpretation is not automatic. Another probable explanation is that the paragraph prevents any deliberate discrimination against the state that wants to rejoin by the Union or its member states. If the country has already met the conditions for accession in the past, it shall not have any problems fulfilling them again.

93 See CONV 779/03, p. 32.

94 About 22 of them still requested to make the withdrawal conditional by concluding an obligatory agreement. CONV 779/03, p. 32.

95 CONV 850/03, Article 59 TCE at p. 46.

96 CIG 4/1/03 REV 1, p. 126. All documents marked CIG are available from a Council website at http://www.consilium.europa.eu/cms3ªpplications/Applications/igc/doc_register.asp?content=DOC&lang=EN&cmsid=900 (visited 16 March 2007).

states was minimal, and our examination of the documents from the conference indicates that only Greece made a bid to remove the article altogether, but it was not accepted.[98] The final version of the now renumbered Article I-60 TCE draws heavily on the Convention's version, but also reflects the comments from Piris' group. The qualified majority needed for the conclusion of the withdrawal agreement was newly defined and a higher threshold was selected (compare Article I-25 para. 1 – 2 TCE). Article I-60 TCE states:

Voluntary withdrawal from the Union

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

2. A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article III-325(3). It shall be concluded by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.

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

4. For the purposes of paragraphs 2 and 3, the member of the European Council or of the Council representing the withdrawing Member State shall not participate in the discussions of the European Council or Council or in European decisions concerning it.

A qualified majority shall be defined as at least 72 % of the members of the Council, representing the participating Member States, comprising at least 65 % of the population of these States.

5. If a State which has withdrawn from the Union asks to rejoin, its request shall be subject to the procedure referred to in Article I-58.

IV. Some negative and positive aspects of Article I-60 TCE

The inclusion of a withdrawal clause in the primary law of the Union is, in our view, one of the main changes in comparison with the current treaties. In this chap-

97 CIG 50 / 03, p. 63 – 4.

98 CIG 37 / 03, p. 18.

ter, we do not describe the process of withdrawal according to the wording of Article I-60 TCE,[99] we instead discuss the generally positive and negative aspects of the Type 1 withdrawal clause for the Union. In the second part, we concentrate on legal inconsistencies of Article I-60 TCE that may cause difficulties in the future. This analysis will provide us with material for our efforts to set out an optimal withdrawal clause for the European Union.

The most important reason by far for including the exit clause is the notion of integration as a voluntary process. Indeed, the Union is not a prison and the "member states did not submit to a self-propelling automatism of irreversible integration by accession".[100] Although it is seemingly paradoxical, the right to exit is a democratic element that in the end may make integration more palatable for the eurosceptics and other opponents of the Union. We can argue thus: the centre (Union) guarantees every state the right to leave; now when there is this right, you live in a more consensual democratic community, and so you have less legitimate reason to leave our entity.[101] The democratic dimension of the Type 1 withdrawal clause was noted several times at the Convention. It must be emphasized that even if the Constitutional Treaty is eventually adopted, the EU will not become a unitary state or a fully-fledged federation from which exit is impossible. The importance of member states for integration was reaffirmed in many places in the text of the Constitutional Treaty.[102]

Closely related to the claim expressed in the previous paragraph is the argument that the clause counterbalances the otherwise federating effects of the Union's law supremacy, the principle now specifically expressed in Article I-6 TCE. This line of thinking can be found in a judgment by the Spanish Constitutional Court: in its opinion, the sovereignty of the Spanish people "is always ultimately assured by Article I-60 of the Treaty, a true counterpoint to its Article I-6, and which allows the primacy declared in the latter article to be defined in its true dimension, which may not override the exercise of a withdrawal, which remains reserved for the sovereign, supreme, will of the Member States".[103] But it is not only the member

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[99] See in detail *Thomas Bruha / Carsten Nowak,* Recht auf Austritt aus der Europäischen Union? in: Archiv des Völkerrechts 42 (2004), p. 1 (7 – 8); *Marie-Therese Gold,* Voraussetzungen des freiwilligen Austritts aus der Union nach Art. I-60 Verfassungsvertrag, in: Matthias Niedobitek / Simone Ruth (eds), Die neue Union – Beiträge zum Verfassungsvertrag, Berlin 2006, p. 55 (56 – 59); *Raymond Friel,* Providing a Constitutional Framework for Withdrawal from the EU: Article 59 of the Draft European Constitution, in: International Constitutional Law Quarterly 53 (2004), p. 407 (424 – 427).

[100] Paul Kirchhof quoted by *Gunnar Beck,* The problem of Kompetenz-Kompetenz: A conflict between Right and Right in which there is no praetor, in: European Law Review 30 (2005), p. 42 (61).

[101] Paraphrase of *Andrei Kreptul,* The Constitutional Right of Secession in Political Theory and History, in: Journal of Libertarian Studies 17 (2004), p. 39 (53).

[102] See *Anneli Albi / Peter Van Elsuwege,* The EU Constitution, national constitutions and sovereignty: an assessment of a "European constitutional order", in: European Law Review 29 (2004), p. 741 (753 – 754); also *Bruha / Nowak* (note 99), p. 16 – 17.

states' sovereignty that is defended against the ultimate primacy of the Constitutional Treaty; the withdrawal clause protects the Union as well and makes it more autonomous, as it supposes that if any state is not able (or willing) to follow the primacy principle, it is free to leave.[104] The exit clause then ultimately solves the problem of two legal orders (national and European) with its own rules of recognition and interpretation, or to quote Gunnar Beck: "a conflict between right and right in which there is no praetor".[105] Using a metaphor developed by Joseph Weiler,[106] there would be no need anymore for using a Mutual Assured Destruction doctrine threat between the European Court of Justice and the national high (constitutional) courts. If any such member state's court proclaims some aspects of integration incompatible with the national constitution and there is no political will to address the matter, the state withdraws from the Union.

Economic theories have contributed substantially to the development of thinking about secession (withdrawal), including the case of the European Union. The general idea is that the Union is too big and heterogeneous to function effectively and does not correspond to an optimal integration area. The withdrawal clause and opt-outs are important tools for mitigating inefficiencies.[107] Concretely, the functioning of the principle of subsidiarity can be improved: the right of withdrawal may serve as an instrument against continuing centralization and competences will be allocated at the appropriate level of government. Furthermore, every member state nowadays attempts to get as much funding as possible from the Union without efficiency considerations, and redistribution is not always Pareto optimal. Of course, the use of an exit option can have positive effects only if it is credible for other member states; in economic terms, this means that after a detailed cost-bene-

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103 Declaración del Pleno del Tribunal Constitucional, DTC 1 / 2004, 13 December 2004, para 4. Available at http: //www.tribunalconstitucional.es/jurisprudencia/Stc2004/DTC2004 – 001.html (visited 17 March 2007).

104 *Ricardo Alonso Garcia,* The Spanish Constitution and the European Constitution: the script for a virtual collision and other observations on the principle of primacy, in: German Law Journal 6 (2005), p. 1001 (1019 – 1020).

105 *Beck* (note 100), in the title.

106 See, for example, *Joseph Weiler,* European Democracy and Its Critique: Five Uneasy Pieces, 1995, available at http: //www.jeanmonnetprogram.org/papers/95/9501ind.html #IV (visited 17 March 2007).

107 The subsequent part is based on the following sources: *Detmar Doering,* Friedlicher Austritt: Braucht die Europäische Union ein Sezessionsrecht? 2002, available at http: // www.cne.org/pub_pdf/Doering_Friedlicher_Austritt.pdf (visited 17 March 2007); *Susanne Lechner,* A right of withdrawal in the Constitution: Are member states going to make use of it? International Conference in Siena 28 October 2005, available at http: //www.sigov.si/ zmar/conference/2005/papers/Lechner.pdf (visited 17 March 2007); *Wolf Schäfer,* Withdrawal Legitimised? On the Proposal by the Constitutional Convention for the Right of Secession from the EU, 2004, available at http: //www.hsu-hh.de/schaefer/index_EKUrfaoIKj 35UYRU.html (visited 17 March 2007). The concept of "opt-outs" is not discussed here, although it could be a more frequent and appropriate tool than withdrawal in search of optimal integration areas in the Union.

fit analysis, the costs of leaving are found to be lower than the profits resulting from this step. The problem remains, however, that the calculations of the benefits of membership in the Union are very complicated and can only be approximate.[108] Also, the overall result will be greatly influenced by the after-exit form of the interaction between the Union and the leaving state. On the other hand, it is still possible that even the existence of a possibility of withdrawal will bring about the positive outcomes projected by economic theories. In a similar vein, the exit may bring more efficiency to the negotiations in the Union and prevent the infamous joint-decision trap, in which the rule of unanimity without a withdrawal option generates sub-optimal policy outcomes.[109]

Last but not least, the new clause will clarify the current legally ambiguous situation, since it acknowledges that withdrawal from the Union cannot be forcibly barred, but there is no easily accessible provision by means of which we can pursue exit. We cannot agree with the opinions claiming that a withdrawal clause will protect the Union from a costly "secession war" in the future, because contemporary Europe cannot be compared to the United States in 19th century,[110] but the clause definitely does provide a firmer legal basis to rely on. As we shall see in the next section, there should not be too much room for interpretation or adjudication in such important matters, also because there is no independent body to resolve the resulting disputes. An exit clause solves certain practical questions as well: for example, a state that wants to withdraw and is prevented from doing so by others can either leave the Union single-handedly with disastrous consequences or can choose to follow the strategy of radioactive or veto-culture membership,[111] in both latter cases eventually paralyzing the functioning of the Union.[112]

The objections to an unrestrained Type 1 withdrawal clause in the Constitutional Treaty have at least a qualitative and quantitative value similar to the positive as-

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108 The existing calculations confirm the complexity of the issue. In the case of Britain, one study concluded that withdrawal would result in an economic loss: *Nigel Pain / Garry Young,* The macroeconomic impact of UK withdrawal from the EU, in: Economic Modelling 21 (2004), p. 387 (405 – 406); yet others have considered exit beneficial for Britain, see e.g. *Patrick Minford,* Should Britain Leave the EU? An Economic Analysis of a Troubled Relationship, Cheltenham 2005, passim.

109 See *Fritz Scharpf,* The Joint-decision Trap: Lessons from German Federalism and European Integration, in: Public Administration, vol. 66 (1988), p. 239 (especially 265 – 271).

110 For an opinion stressing the importance of an exit option as a safety valve against a "secession war" see *Robert Mc Gee,* Some Comments on the Draft EU Constitution's Exit Proposal, 2003, available at http: / / www.adamsmith.org / cissues / exit-proposal.htm (visited 18 March 2007).

111 For a discussion on the two concepts, see *Joseph Weiler,* Alternatives to Withdrawal from an International Organization: The Case of the European Economic Community, in: Israel Law Review 20 (1985), p. 282 (288 – 294).

112 The practical benefits of Article I-60 TCE are emphasized by *Jochen Herbst,* Observations on the Right to Withdraw from the European Union: Who are the "Masters of the Treaties", in: German Law Journal 6 (2005), p. 1755 (1759 – 1760).

pects already discussed. Against the symbolic concept of the clause as a democracy principle stands the paradox that the Constitutional Treaty, which shall "upgrade" the Union to a new level of integration, contains the exit clause. As indicated in the review of the Convention's debate, there have been fears that the Union will become a regular intergovernmental organization instead of a subject with special mission.[113] In our view, this criticism is a little overstated and primarily comes from convinced federalists. As has been noted several times, one should not draw definite conclusions on the nature of the Union only from the existence of a withdrawal clause.[114]

A very serious problem brought about by the existence of an exit clause is the possible use of this exceptional instrument in the Union's decision-making process. The threat is quite simple – a state that is not happy about a particular decision will inform the other states of its intention to withdraw if its desire is not met. Article I-60 TCE was labelled as a re-creation of the Luxembourg accord[115] or a super veto.[116] In particular, the bigger countries that form the cornerstones of integration (e.g. Germany, France) play an especially prominent role, and the Union and other member states could not afford to lose them.[117] In our view, it is not entirely correct to compare the clause to the Luxembourg compromise. There the veto had to be justified in substantive terms, and it could be used only if vital national interests were at stake, while procedurally there were no limitations.[118] Article I-60 TCE, by contrast, has reversed these parameters: no explanation is required for taking this step, but certain (although not insurmountable) procedural criteria have to be followed. It is obvious that the invocation of withdrawal is not a mere veto, and because of the related immense consequences, any blackmailing by exit would be efficient only if other member states found the threat credible. This is highly unlikely if all politicians behave rationally and the stakes are not too high. Reflecting on the first condition, Essi Eerola and his colleagues suggested the hypothesis that the voters may elect stubborn politicians who will be able to extract more concessions from the Union by credibly threatening withdrawal.[119] The second criterion

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113 For an expert critique in this sense, including a review of literature with a similar viewpoint, see *Bruha / Nowak* (note 99), p. 14 – 16.

114 *Jean-Victor Louis* (note 81), p. 232.

115 *Jan Klabbers / Päivi Leino,* Death by Constitution? The Draft Treaty Establishing a Constitution for Europe, in: German Law Journal 4 (2003), p. 1294 (1299).

116 See above the quotation by Pervenche Beres at the Convention.

117 On the argument that the clause favours big countries compare *Raymond Friel,* Secession from the European Union: Checking out of the Proverbial "Cockroach Motel", in: Fordham International Law Journal 27 (2004), p. 590 (638 – 639).

118 In 1982, Britain's efforts to invoke the Compromise were dismissed by other states as the issue in question was only a proxy one not related to "Britain's national interest"? See *Anthony Teasdale,* Life and Death of the Luxembourg Compromise, in: Journal of Common Market Studies 31 (1993), p. 567 (570 – 571).

119 The hypothesis was confirmed by mathematical models. Stubborn politicians such as Charles de Gaulle, Margaret Thatcher or Silvio Berlusconi were able to refuse even positive

is not dismissible either, for there are very important decisions in the Union when the stakes are high, the multi-annual financial frameworks being just one example. We must also keep in mind that the threat of withdrawal may be just pre-emptively felt in the corridors and not to be invoked explicitly.[120]

In the theory of international law, one of the often cited benefits of a withdrawal clause is that it gives states an option of escape from an agreement that does not meet their initial expectations. In other words, states will be prepared to commit to more audacious agreements if they know there is a way out.[121] On the other hand, if exit is too easy, the parties of the treaty may not be willing to invest in the agreement at all, because the set objectives are usually tied to the number and composition of the parties.[122] In the Union, this danger probably prevails over the aforementioned benefit. We have already discussed the nature of the Union: its objectives and tools ask for very close cooperation, and the projects such as the internal market or Monetary and Economic Union demand credible commitments from all participating states.[123] It is, however, still conceivable that the option of future exit may facilitate an agreement, mainly during the difficult negotiations on treaty amendment.

Continuing the argumentation from the previous paragraph, unilateral withdrawal may bring unforeseeable practical difficulties for the Union, and in no other sphere is it more evident than in the impact on the fate of one of the Union's main achievements – the single currency. This fear was already expressed in the cited speech by Gijs de Vries at the Convention. Markets are nowadays influenced by the smallest concerns and the withdrawal or even the threat of exit[124] from the Union (and consequently Monetary Union) by any member state could seriously endanger the stability of the euro with dire effects on the economies of all states

payoffs if they did not get the desired result. See *Essi Eerola,* Citizens Should Vote on Secession, in: Topics in Economic Analysis & Policy 4 (2004), p. 1 (6 – 8).

120 To continue using the metaphors of Joseph Weiler, we could move from the historic shadow of the veto to the contemporary shadow of the vote – see *Joseph Weiler,* The Transformation of Europe, in: Yale Law Journal 100 (1991), p. 2403 (2461) – to the future shadow of the exit.

121 See generally *Alan Sykes,* Protectionism as a Safeguard: A Positive Analysis of the GATT Escape Clause with Normative Speculation, in: University of Chicago Law Review 58 (1991), p. 255.

122 The dilemma is as follows: "How can we distinguish a nation's principled assertion of a right to withdraw from a relationship that has turned out badly from an opportunistic attempt to appropriate benefits that were created for a collective good?" *Paul Stephan,* The New International Law – Legitimacy, Accountability, Authority, and Freedom in the New Global Order, in: University of Colorado Law Review 70 (1999), p. 1555 (1583).

123 According to the theory of liberal intergovernmentalism, the credibility of commitments has been the principal reason why states decided to pool and delegate sovereignty to the Union. *Andrew Moravcsik,* The Choice for Europe, London 2003, p. 485 – 489.

124 We think that a rumour about a possible threat of withdrawal would be sufficient to create panic on the markets if the conditions are ripe for it.

with the single currency.[125] In the words of René Smits: "A mature monetary union 85 is firmly rooted in the will to belong together, for an unlimited period of time."[126] In this sense, the Type 1 withdrawal clause in the European Union is not compatible with the nature of Monetary Union and a solution must be found in order to avert the very likely monetary crisis.

Lastly, there is the question of the subjective rights of the citizens and legal persons. Although it is overstretched to claim that the citizens themselves are holders of the European integration process,[127] together with the member states they form the subjects of integration (see art. I-1 / 1 TCE). The Union grants a wide array of rights and other advantages to citizens and corporations, including the four fundamental freedoms of the internal market. Clearly, as a result of withdrawal the rights might be terminated, with enormous losses and a subsequent legal vacuum, at least if a comprehensive agreement is not reached.[128] In the light of this, opinions have been expressed that the wording of Article I-60 TCE is unconstitutional as it does not allow for the participation of citizens.[129] The argument could be articulated more abstractly. The European Union constitutes another level of government in addition to states and regions, which check and control one another and provide rights for their inhabitants. If withdrawal occurs, the European component will be removed and the individual freedoms of citizens will probably be reduced. Also, the federal (European) level fights against protectionism on its territory, which might not be the case for a withdrawn state. In summary, withdrawal might be used as a tool of the majority to infringe the rights of minorities.[130]

Apart from these generally positive and negative aspects of the Type 1 withdrawal clause, the wording of Article I-60 TCE is legally sloppy and leaves too many loose ends. The reference to the national constitutional provisions in Article I-60 para. 1 TCE has been heavily criticized, because firstly it goes against the notion of voluntary withdrawal, and secondly, it is not clear who would decide whether

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125 See also the analysis Euroland: Euro at Risk, published by the Morgan Stanley investment bank in 2004.

126 *René Smits,* The European Constitution and EMU: an Appraisal, in: *Common Market Law Review* 42 (2005), p. 425 (465).

127 *Armin von Bogdandy / Stephan Bitter,* Unionsbürgerschaft und Diskriminierungsverbot. Zur wechselseitigen Beschleunigung der Schwungräder unionaler Grundrechtsjudikatur. in: Charlotte Gaitanides et al. (eds), Europa und seine Verfassung, Festschrift für Manfred Zuleeg zum siebzigsten Geburtstag, Baden-Baden 2002, p. 309.

128 See for more detail *Bruha / Nowak* (note 99), p. 17 – 21.

129 *Brunkhorst* (note 20), p. 171.

130 For a comprehensive review of these points see *Thomas Apolte,* Secession Clauses: A Tool for the Taming of an Arising Leviathan in Brussels? in: Constitutional Political Economy 8 (1997), p. 57. Apolte uses the example of Quebec: its secession from Canada was meant not as a defence against an oppressive Canada, but as a tool to close Quebec off from Canada, thus restricting the free exchange between individuals in Quebec and Canada (p. 66).

the constitutional rules were being followed.[131] In our view, there is a second explanation – the phrase is meant to express the freedom of the act of withdrawal: it is not to be bound by any limitations except those in the constitution of that member state itself.[132] The agreement presupposed by Article I-60 TCE should be regarded in the light of this perception. While the conclusion of an agreement is highly recommended and without it many practical and theoretical difficulties arise, we cannot agree with opinions articulated in the literature that the agreement is possibly a condition for withdrawal.[133] It is acceptable to interpret law *praeter legem,* but hardly *contra legem,* and Article I-60 TCE (as well as comments by the Presidium of the Convention) is very clear in this respect.[134] But if we accept this logic, we must ask why have a provision on agreement if it is not necessary? Everybody understands that exit with agreement is better than without it, and the need to have this maxim expressed in the text itself is superfluous. Even more intriguing is the fact that from the wording of Article I-60 TCE the notice of withdrawal is not legally binding and the state could take it back at any time before the actual withdrawal happens.[135] There is thus a minimal risk involved in the notice of exit, opening the avenue for exploiting this otherwise *ultima ratio* step as a tool in an ordinary decision-making process with the already mentioned risks. Another illogical development is that the withdrawing state can fully participate in the negotiations on and adoption of legislative acts in the Council during the waiting period, the only exception being the negotiation of the exit agreement.[136] Lastly, it is very likely that the withdrawal of any state would require changes in the Constitutional Treaty with all the procedural requirements (including ratification in the remaining member states) related to the process, but the Constitutional Treaty does not contemplate this situation.

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131 Compare the discussion in *Gold* (note 99), p. 61 – 63; compare also the proposal by a group of legal experts at the intergovernmental conference (above).

132 See also the discussion in second section of this paper concluding that the ultimate right for withdrawal is to be found under present conditions in the constitutions of the majority of member states.

133 Marie-Therese Gold inferred the necessity of agreement from the principles of solidarity, rights of citizens and loyal cooperation. *Gold* (note 99), p. 65 – 72.

134 Similarly also *Dimitris Triantafyllou,* Le projet constitutionnel de la Convention européenne, Bruxelles 2003, p. 132; *Henri de Waele,* The European Union on the road to a new legal order – the changing legality of Member State withdrawal, in: Tilburg Foreign Law Review 12 (2005), p. 169 (180); *Friel* (note 99), p. 426.

135 Moreover, the two-year waiting period could be prolonged by the unanimous decision of the European Council, so it is not unlikely that the process of withdrawal (not always ending in ultimate withdrawal) may last many years.

136 Why is the withdrawing state barred from negotiations on the agreement (we do not claim it should participate in the vote on the agreement)? Does it mean the Union will present a take-it-or-leave-it type of agreement, with obvious consequences for the acceptance of the much-needed agreement?

V. Conclusion: In search of an optimum withdrawal clause for the Union

International law theory uses several forms of ideal withdrawal clauses. We have reviewed their presence in the published draft proposals on the European constitution and in the previous section we presented in more detail the advantages and disadvantages of the Type 1 clause contained in the Constitutional Treaty. Using the thus acquired knowledge as a basis, we now attempt to construct the optimal withdrawal clause for the European Union. In the following table we offer the comprehensive list of all the historical drafts and show what attitude to withdrawal was selected as optimal by each proposal.

Table 1

Proposals for the European Constitution (1984 – 2004) and the nature of withdrawal clauses

	Any time (1)	Any time (1) agreement required	Single occasion (4)	Constitutional rupture (5)	Silent (6)
Spinelli draft				+	+
Parliament's resolution 1990				+	+
Oreja-Herman draft			+		+
European Constitutional Group draft	+				
Economist draft	+				
European University Institute draft					+
Penelope draft			+		+
Dashwood draft	+				
Badinter draft		+	+		
Duff draft		+	+		
Leinen draft		+	+		
Freiburg draft					+
Brok draft					+
Paccioti draft					+
Convention draft	+				
Constitutional Treaty	+				

Note: For a more detailed description of the Types of withdrawal clauses see p. ■.

The majority of constitutional drafts propose the Type 6 withdrawal clause, which is a continuation of the present approach of the founding Treaties. It is true that this solution has proved successful. The lack of any specific provision makes the withdrawal more costly, increases the will of member states to invest in integration, and strengthens the Union and its main projects such as Monetary Union. Certain strands in constitutional theory also defend the hypothesis that permitting secession / withdrawal from the federation / organization weakens the entity and undermines its proper functioning.[137] These are powerful arguments, but in our view it is not recommendable to continue with the current practice for various reasons. First, as we concluded in the analysis in the second section of this paper, silence about withdrawal does not signify prohibition of withdrawal (Type 7), and if withdrawal is possible even without the exit clause, the benefits mentioned above diminish. Formal models argue that the constitutions should be silent on withdrawal or ban it only if the entity can believably enforce this adjustment,[138] which is not the case with the Union. Lastly, when the exit option was included in the Constitutional Treaty, any further document without it could be interpreted as meaning that withdrawal from the Union is prohibited.[139] Once the toothpaste is out of the tube, it is very hard to squeeze it back in. The concept of constitutional rupture (Type 5), contained in two proposals, is so problematic legally and politically that we cannot recommend its application in any form.[140]

If we accept the concept of integration as a voluntary process, there is no other option than to grant the right of withdrawal at any time (Type 1). Formal models and game theories support this view. According to one study, if the parties have complete information and aim to develop a corresponding complete constitution that would account for almost every possible future contingency, the text should include the provisions on withdrawal, otherwise any break up could be too costly.[141] Indeed, any founding treaty (constitution) of the Union falls into the category of complete constitution. Another formal model claims that when the number of entities that could withdraw is higher than three, the clause should always be part of the founding document.[142] Some representatives of constitutional theory advance numerous arguments for the incorporation of an exit option.[143] At the same time, our analysis confirmed that unilateral withdrawal without any conditions will cause serious disruption for the functioning of the Union, endanger the

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137 See the critique by *Sunstein* (note 15), passim.

138 *Yan Chen / Peter Ordeshook,* Constitutional Secession Clauses, Social Science Working Paper 859, Pasadena 1993, p. 12 – 15.

139 House of Lords, Session 2002 – 3, 41st report, HL Paper 169, p. 24.

140 Similar views were presented by *Weiler / Modrall* (note 51), p. 170 – 174.

141 See *Massimo Bordignon / Sandro Brusco,* Optimal secession rules, in: European Economic Review 45 (2001), p. 1811 (1828).

142 *Chen / Ordeshook* (note 138), p. 13.

143 E.g. *Daniel Weinstock,* Constitutionalizing the Right to Secede, in: The Journal of Political Philosophy 9 (2001), p. 182.

position of the withdrawing member state and result in huge losses for citizens and companies in all countries. Three drafts try to avoid this situation by requiring agreement as a condition for exit (Type 1 / Type 7), but they do not specify what should be the content of the agreement and how to force both sides to accept it, not to mention that an obligatory agreement strips voluntary withdrawal of its meaning.

In our view, the resolution of the tension between the problems inflicted by unilateral withdrawal and the right to such an exit is to be found in a dual attitude to withdrawal. Two exit clauses should be included in the constitutional text. The first option, we might call it *hostile withdrawal,* could be very brief: "Any member state may leave the Union in accordance with the rules of international public law. The withdrawing state shall not become the member of the Union again." If any country uses this clause, it means it has decided to leave the Union without any agreement, the process of withdrawal and its conditions are ruled by the VCLT, and any remaining obligations of both parties towards each other or citizens may be resolved at the European Court for Human Rights.[144] The second approach to exit, here called *gentle withdrawal,* presupposes exit under mutual agreement. This is not an innovative proposal, but we consider it very important that at least the basic framework of the future relationship between the two parties is fixed beforehand by the constitutional text itself and is not open for negotiation. This predetermined core is represented by the participation of the leaving state in the European Economic Area and, if it has the euro as its currency, also by a duty to continue to use the euro for at least five years, including the requirement to respect the criteria of the Stability and Growth Pact. It is also given that both parties will not discriminate against each other in any way in the future. Any other issues are to be subject to negotiation, but even if the agreement is not reached on details, the state may still use the gentle withdrawal under the presented predetermined conditions. Institutionally, it would be fair if the citizens of the withdrawing state were consulted in a referendum.[145] Under these conditions, the withdrawal might enter into force quite soon after notification, although probably not immediately as in the case of the hostile exit.[146]

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144 Article 65 para. 2 VCLT establishes a three-month period between notification and withdrawal, and we consider the timeframe sufficiently short to draft special provisions on the functioning of the Union during the waiting period.

145 Given the opposition of some member states' constitutional framework to referendums, we do not have a firm view on this point. For a more thorough discussion on the impact of a referendum, see *Eerola* (note 119), passim.

146 In our opinion, the waiting period could be limited to two years, and it is important that even in case of gentle withdrawal the notification could not be taken back, except after unanimous agreement by all member states. The withdrawing state will not participate in any decision-making during the waiting period and no new European legislation will be enforced in this country, of course with the exception of Acts with European Economic Area relevance.

The negatives and positives of both options are evident. The first case solves the situation when a member state wants to repossess absolute sovereignty and to distance itself from the Union, even at the risk of incurring enormous costs. This corresponds approximately to the current perception of withdrawal as an *ultima ratio* step. It is clear that any such move is highly unlikely to happen, because in most cases the losses for the leaving state will be much higher than for the Union. Hostile exit is useless as a tool for blackmail, because hardly anybody would trust the credibility of such a drastic and irreversible move. The gentle withdrawal makes exit quite easy for both sides, while at the same time the process receives a firm shape with predictable outcomes. Ongoing participation of the leaving state in the internal market through the European Economic Area guarantees that the most important rights of citizens and corporations will not be affected and that trade links will be retained. The continuing use of the euro ensures the stability of the currency, but unlike the functioning of the internal market, the practical realization would be challenging. We can scarcely imagine that the leaving state would maintain the right to participate in the eurozone's decision-making, but it would still have to follow the policy of the European Central Bank.[147] On the other hand, the country can profit from euro stability. Because the loss of monetary tools and the limits on the use of fiscal tools caused by the introduction of the single currency represent one of the main reasons why a member state could opt for leaving the Union, there is a possibility of ceasing to use the euro, but only after sufficiently long period of time has elapsed, so the markets can prepare for the new situation and limit the risks and the speculation.[148] Because legislative acts of the Union related to the internal market will remain valid in the leaving state, the gentle withdrawal conditions are applicable primarily to answer problems such as unjust redistribution or dissatisfaction with selected common policies (CAP, CFSP), not in order to renew sovereignty in full as in the case of hostile exit. It is, of course, questionable if any state in Europe can nowadays operate in a mode of full sovereignty.

Five proposals from our list contain the Type 4 withdrawal clause, according to which it is sufficient to amend the constitution only with the assent of a majority of member states. The non-assenting countries have a choice between the withdrawal from a reformed Union or staying in even despite their disagreement with the amended text. Amendment procedures are meta-rules that guarantee the self-re-

147 Even participation in the General Council of the European Central Bank is unlikely. Yet the loss of voice would be comparable to the situation in the internal market sector, where the members of the European Economic Area have not encountered any big problems with this attitude. Although it is not directly comparable, the euro is a legal currency in several states (e.g. Bosnia and Herzegovina) which are not members of the eurozone.

148 If the state aims to be relieved of euro constraints immediately, there is still the option of a hostile exit.

149 *Günter Frankenberg,* The Return of the Contract: Problems and Pitfalls of European Constitutionalism, in: European Law Journal 6 (2000), p. 257 (270).

flexivity of the constitution, and they set the composition of *pouvoir constituant* legitimized to influence the process of reforming the founding document.[149] It is beyond the scope of this contribution to decide if the constitution of the Union should permit its change by majoritarian rules. On the one hand, the current criteria for amendment definitely favour a status quo and limit progress towards "an ever closer union", and as the problems with the ratification of recent changes to the Treaties have confirmed, it is almost impossible to achieve successful ratification in so many member states.[150] On the other hand, as has already been indicated above, the Union is still mainly an organization of states; it "is not a product of an autonomous *pouvoir constituant européen*85but an expression of a *volonté constituante* of the Member States".[151] It is likely that the amendments to the constitution by majority (coupled with a *de facto* obligation for dissenting state[s] to withdraw) would change the nature of the Union much more than the sole withdrawal clause. In our view, a proper balance between the two poles must be found. The tentative proposal would be to divide the constitutional text into two parts: the core (hard) part and the "normal" rules.[152] While the former shall be amended only by unanimity, the modification of the remaining parts shall be adopted by a high majority (say five-sixths of the member states),[153] if any state is out-voted and does not want to follow the changed constitution, it may use the gentle exit option.[154]

The question of withdrawal is one of the most important issues the contemporary Union has to resolve, because the hitherto fairly unproblematic mixture of deepening and enlarging has reached its limits. The present legal provisions covering exit are either non-existent or too complex for their practical usability. In scientific circles, the topic unfortunately does not attract sufficient attention, and the few published contributions concentrate on analysis of the *de lege lata* situation or reflect on the concrete wording of Article I-60 TCE. The fate of the Constitutional Treaty is unclear at this moment, and it is probable that either the text will be renegotiated or a completely new document will be prepared. In both cases there is

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150 The unanimous decision-making does not form a pinnacle of democracy. In the words of James Madison, it is perverse if one-sixtieth of the population can block the will of the rest. See Federalist Papers no. 40, available at http://usgovinfo.about.com/library/fed/blfed40.htm (visited 21st March 2007). It must be noted that in the Union the will of the rest might be blocked by a majority of several thousand people in one member state (e.g. Malta).

151 *Julianne Kokott / Alexandra Ruth,* The European Convention and its Draft Treaty establishing a Constitution for Europe: Appropriate answers to the Laeken questions? in: Common Market Law Review 40 (2003), p. 1315 (1320).

152 Taking the example of the Constitutional Treaty, Part I and II would be core rules, Part III "normal" ones.

153 This dual amendment procedure was already proposed by the "rapport des sages" in 1999. See *Richard von Weizsäcker,* The Institutional Implications of Enlargement, Brussels 1999, p. 12.

154 It is worth mentioning that amendment by majority is possible, for example, in the Charter of the United Nations (Article 108 of the Charter).

a chance to propose a better form of withdrawal clause than the one represented by Article I-60 TCE. Based on the qualitative analysis of historical draft proposals for the Union constitution, a review of the debate at the Convention and an examination of the pros and cons of Article I-60 TCE, our paper lays down guidelines for designing what might be the optimal withdrawal clause. The best solution will be to have two options – a hostile exit, or a gentle exit. Only then is the inevitable tension between the process of voluntary integration and the disastrous consequences of unilateral exit without any agreement alleviated.