

EURATOM AND BREXIT: COULD THE UNITED KINGDOM MAINTAIN ONE FOOT IN THE EUROPEAN UNION? CURRENT SCENARIOS AND FUTURE PROSPECTS OF BRITISH WITHDRAWAL FROM THE EAEC

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Summary: The paper focuses on the very topical issue of conclusion of the membership of the State, namely the United Kingdom, in European integration structures. The question of termination of membership in European Communities and European Union has not been tackled for a long time in the sources of European law. With the adoption of the Treaty of Lisbon (2009), the institute of 'unilateral' withdrawal was introduced. It's worth to say that exit clause was intended as symbolic in its nature, in fact underlining the *status* of Member States as sovereign entities. That is why this institute is very general and the legal regulation of the exercise of withdrawal contains many gaps. One of them is a question of absolute or relative nature of exiting from integration structures. Today's "exit clause" (Art. 50 of Treaty on European Union) regulates only the termination of membership in the European Union and is silent on the impact of such a step on membership in the European Atomic Energy Community. The presented paper offers an analysis of different variations of the interpretation and solution of the problem. It's based on the independent solution thesis and therefore rejects an automatism approach. The paper and topic is important and original especially because in the multitude of scholarly writings devoted to Brexit questions, vast majority of them deals with institutional questions, the interpretation of Art. 50 of Treaty on European Union; the constitutional matters at national UK level; future relation between EU and UK and political bargaining behind such as all that. The question of impact on withdrawal on Euratom membership is somehow underrepresented. Present paper attempts to fill this

gap and accelerate the scholarly debate on this matter globally, because all consequences of Brexit already have and will definitely give rise to more world-wide effects.

Keywords: United Kingdom, Brexit, European Integration, Euratom.

1. Euratom – its specifics and relation to United Kingdom

With the establishment of the *European Coal and Steel Community* (ECSC) in 1951, the process of European integration marks its first major achievement. For the first time, the six founding Member States¹, although in a specific and limited sector, decided to renounce a part of their sovereignty in favor of the then ECSC. Shortly thereafter, the failed attempt to extend cooperation to a common European defense project² risked making the ECSC unique in the panorama of the supranational collaborations of the old continent.

The *Interministerial Conference of the ECSC*, held in Messina in June 1955, instead relaunched the march of community integration: ‘the spirit of Messina’ convinced the Six to establish in 1956 a preparatory committee charged with preparing a report on the creation of a European common market, presided over by one of the ‘founding fathers’³. The committee went further, presenting two options, both united by the desire to give new life to the community project: the creation of a common market and the establishment of an atomic energy community. The *Treaties of Rome* of 25th March 1957 officially determined the birth of both: the *European Economic Community* (EEC) and the *European Atomic Energy Community* (EAEC or Euratom).

With the aim of coordinating Member States’ nuclear energy research programs and ensuring their peaceful use, the Treaties conferred unlimited duration to the Euratom, unlike what happened for the ECSC, whose duration was determined in fifty years.

- 1 Belgium, France, Italy, Luxembourg, Netherlands and West Germany.
- 2 The *Treaty establishing European Defense Community* (EDC), negotiated and signed in Paris in 1952, never entered into force by virtue of the refusal of the French National Assembly to ratify it, due above all to an inherent flaw with the new Community. In fact, by adhering to the EDC, States would not have been limited to submit to a common authority a particular economic sector, although important, such as coal and steel, but they would have transferred to a supranational body one of the essential attributes of national sovereignty: the task of defend the national territory with armed force. This transfer would have led to a radical and immediate loss of sovereignty for the Member States, contravening the real philosophy of Europe, so called ‘of small steps’, consecrated in the *Schuman Declaration*.
- 3 The expression was attributed by historiography to a group of seven politicians who played an important role in the launch of the European construction process: the Italians Alcide De Gasperi and Altiero Spinelli; the French Jean Monnet and Robert Schuman; the Luxembourgish Joseph Bech; the German Konrad Adenauer; the Belgian Paul-Henri Spaak. The historic website of the European Union cites a broader «diverse group of people who held the same ideals: a peaceful, united and prosperous Europe», including, in addition to the seven already mentioned, Winston Churchill (United Kingdom), Walter Hallstein (Germany), Sicco Leendert Mansholt (Netherlands) and Jan Willem Beyen (Netherlands).

The formal independence of the EAEC has resisted the several revisions of the Treaties, which have intervened in over fifty years of European history, demonstrating that the Member States have always considered it an autonomous and independent 'organization'. Therefore, although the members belonging to Euratom are currently the same ones as those ones belonging to European Union and the *Merger Treaty*⁴ has changed its executive structure, depriving it of a autocephalous structure, Euratom still maintains a separate legal personality from the Union.

2. UK withdrawal from Euratom: requirements and conditions

For these reasons, Euratom enjoys a privileged, and at the same time controversial, position in the 'Brexit Affair'⁵. Just the ontological autonomy of the EAEC with respect to the EU raised the first concerns about the applicability of Art. 50 TEU also to the *Euratom Treaty*. Even before the denunciation of the withdrawal by the British PM Theresa May⁶, it was asked whether the procedure for withdrawal from the Union pursuant to Art. 50 TEU intrinsically included also the exit from Euratom, or if this necessitated a specific notification of the will of withdrawing, or, again, if Art. 50 TEU could not be applied analogically to the *EAEC Treaty*, which was concluded for an unlimited period, thus reopening the age-old question about the possibility of withdrawing from an international organization that does not explicitly provide for any exit from a Member State⁷.

- 4 The *Brussels Treaty* takes the name from the belgian capital where it was signed on 8th April 1965. It came into force on 1st July 1967, thus combining the three executive bodies of the *European Coal and Steel Community* (ECSC), the *European Economic Community* (EEC) and the *European Atomic Energy Community* (Euratom) into a single institutional structure.
- 5 For a general study on the topic, see CIRCOLO, Andrea; HAMULAK, Ondrej; BLAZO, Ondrej. Art. 50 TUE – How to understand the 'right' of the Member State to Withdraw from the European Union?, in Ramiro Troitiño D., Kerikmäe, T., Chochia, A (eds.), *Brexit – History, Reasoning and Perspectives*, Zurich, 2018, 199. See KISS, Lilla, Nóra. General Issues of Post-Brexit EU Law, in *European Studies – the Review of European Law, Economics and Politics*, 2017, vol. 4, pp. 220–227. For interesting analysis of alternatives see also STEHLIK, Václav. Brexit, EEA and the free movement of workers: structural considerations on flexibility, in *International and Comparative Law Review*, 2016, vol. 16, no. 2, pp. 145–156.
- 6 Article 50 TEU was activated on 29th March 2017, following the judgment of the Supreme Court and acting in accordance with the mandate given by Parliament, thus officially starting negotiations for the withdrawal of the United Kingdom from the European Union.
- 7 For more on the issue involved, see BEGHÈ LORETI, Adriana. *Il recesso dalle organizzazioni internazionali*, Milan, 1967; KOROWICZ, Marek Stanislaw. *Organisations internationales et souveraineté des états membres*, Paris, 1961; MIGLIAZZA, Alessandro, *Il fenomeno dell'organizzazione e la comunità internazionale*, Milan, 1959; MONACO, Riccardo. *Lezioni di organizzazione internazionale*, Turin, 1965; NIZARD, Lucien., *Le retrait de l'Indonésie des Nations Unies*, in *Annuaire français de droit international*, 11, Paris, 1965; PERASSI, Tomaso. *Lezioni di diritto internazionale*, Padua, 1959; SERENI, Angelo Piero. *Diritto Internazionale*, Milan, 1960; SINGH, Nagendra. *Termination of Membership of International Organizations*, London, 1958; ZANGHI Claudio, *Diritto delle organizzazioni internazionali*: Terza edizione, Turin, 2013.

First of all, Art. 106a of the *Euratom Treaty*⁸ immediately dissolves some doubts, inserting Art. 50 TEU in the list of those of the two founding Treaties and the operation applicable to the EAEC Treaty.

Furthermore, a report presented by His Majesty's Government to the British Parliament⁹ would not seem to leave any further dissimilar interpretation: the withdrawal of the United Kingdom concerns both the European Union and Euratom. Although the two organizations find their legal basis in different Treaties, the functions entrusted to them are exercised by the same institutions¹⁰. Moreover, the *European Union (Amendment) Act* 2008 clarifies that, in British law, references to the EU are equally applicable to Euratom¹¹.

The notification letter containing the will to withdraw from the Union, which formalized the activation of Art. 50 TEU, fully reiterated what was previously indicated in the *White Paper*: '[...] I hereby notify the European Council of the United Kingdom's decision to withdraw from the European Atomic Energy Community. References in this letter to the European Union should be included in the European Atomic Energy Community'¹². The British Government therefore formalized, in the same letter, a double notification of withdrawal.

8 «1. Article 7, Articles 13 to 19, Article 48(2) to (5), and Articles 49 and 50 of the Treaty on European Union, and Article 15, Articles 223 to 236, Articles 237 to 244, Article 245, Articles 246 to 270, Article 272, 273 and 274, Articles 277 to 281, Articles 285 to 304, Articles 310 to 320, Articles 322 to 325 and Articles 336, 342 and 344 of the Treaty on the Functioning of the European Union, and the Protocol on Transitional Provisions, shall apply to this Treaty; 2. Within the framework of this Treaty, the references to the Union, to the 'Treaty on European Union', to the 'Treaty on the Functioning of the European Union' or to the 'Treaties' in the provisions referred to in paragraph 1 and those in the protocols annexed both to those Treaties and to this Treaty shall be taken, respectively, as references to the European Atomic Energy Community and to this Treaty; 3. The provisions of the Treaty on European Union and of the Treaty on the Functioning of the European Union shall not derogate from the provisions of this Treaty». *Consolidated version of the Treaty establishing the European Atomic Energy Community*, OJ C 327, 26th October 2012, 1–107.

9 HM Government, *White paper: the United Kingdom's exit from and new partnership with the European Union*, London, 2017, 44.

10 From the entry into force of the *Merger Treaty* in 1967, the executive power is entrusted to the Commission.

11 This has been definitely confirmed in a 'considering' included in the recent *Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community*, as endorsed by leaders at a special meeting of the European Council on 25th November 2018: see *infra*. See also, respectively, the text of Articles 1 ('Objective') and 7, para 2 WA: «This Agreement sets out the arrangements for the withdrawal of the United Kingdom of Great Britain and Northern Ireland ('United Kingdom') from the European Union ('Union') and from the European Atomic Energy Community ('Euratom'); «Unless otherwise provided in this Agreement, any reference to the Union shall be understood as including Euratom».

12 May, Teresa. *Prime Minister's letter to Donald Tusk triggering article 50*, in *gov.uk*, London, 29th March 2017.

The solution proposed by Downing Street was confirmed by the Joint Report concluded by the negotiators of both parties on 8th December 2017, with which the first phase of negotiations for the UK withdrawal from the European Union ended positively¹³. Despite the *caveat* «nothing is agreed until everything is agreed», the agreement reached constituted an important step forward in the implementation of the procedure under Article 50 TEU. The parties, while reserving the right to make some adaptations that might prove necessary later, reached a common position on some points considered essential in the negotiations, including Euratom.

The Joint Report dedicated paragraph 89 to the issue, focusing mainly on the future system of prevention and safety of the British nuclear industry: the United Kingdom will have to guarantee equivalent standards in the future to those set out in the *Euratom Treaty*, albeit outside the Union and the EAEC («a future regime providing coverage and effectiveness equivalent to existing Euratom arrangements»).

3. The recent Withdrawal Agreement draft and the Euratom related issues

The hope was that the official Withdrawal Agreement, following the last Joint Report, would have defined this future relational framework between the parties, whose prospect had already been outlined by the joint report above¹⁴.

In fact, the ‘Euratom issue’ has proved to be one of the most problematic affairs of the whole Brexit, as it raises considerable questions just about the future relationship between the United Kingdom and the Union, as well as several con-

13 For a more in-depth look at the topic, allow us to relate to CIRCOLO, Andrea, Brevi note sulle conclusioni del primo accordo di recesso: Brexit deal, in *rivista eurojus.it*, 2017.

14 The absence of strict indications about the content of the withdrawal agreement in Art. 50 TEU appears to be an ‘ideological *lacuna*’, and not a ‘technical’ one: the aim is to enhance the aforementioned principle of sincere cooperation *ex* Art. 4, para 3 TEU, since everything can be inserted in the agreement so as to fully adapt it to the will of the parties, from the most minimal one (e.g., just a transitional regulation) to the most complete one. Indeed, a joint reading of Art. 50 and Art. 4, para 3 TEU (to which, it is good to remember, the withdrawing State is still subjected) should, therefore, further reduce the viability of the ‘pathological’ hypothesis of unilateral termination, resulting this theoretically possible but unrealistic, as the spirit of the treaties is aimed at promoting cooperation between the parties, even in the management of a withdrawal between them. Nevertheless, the legal constraint of this expressed principle should not be overestimated: it cannot be excluded that the withdrawing State no longer feels obliged to comply with legislation which, materially, no longer belongs to it. In short, it’s up to the parties, always and in any case, and to the concrete interest of them that the withdrawal of a Member State is configured, in any case and regardless of existing regulations and procedures that can be used, such as an honest compromise, founded on renunciations and concessions on both sides. That’s why the *Withdrawal Agreement* can and must represent a crucial moment for the future of the withdrawing State and of the Euratom.

cerns about the resistance of the British nuclear sector to the shock of withdrawal¹⁵.

The draft agreement, presented on 14th November 2018, partially disappointed these expectations¹⁶.

First of all, the parties have prepared a 'transition or implementation period' valid from the moment of entry into force of the agreement until the date of 31st December 2020 (Article 126 WA). If the European Parliament had repeatedly limited this period to a maximum of three years, the Commission has always intended to negotiate a transition that does not go beyond the 31st of December 2020, the expiry date of the 2014–2020 Multiannual Financial Framework (MFF)¹⁷. During this transitional period, Union law remains applicable to the United Kingdom for anything not regulated within the aforementioned agreement ('*status quo* transition', Article 127 WA).

It is essential to point out that there are very few references inside the agreement to the immediate regulation of the British nuclear sector and, more generally, to the relations between the UK and the Euratom, showing that the tight deadlines and the complexity of the issue convinced the parties to postpone its definition to the transition period subsequent to the withdrawal¹⁸.

In this regard, the Withdrawal Agreement dedicates to the subject articles 79–85 of Title IX ('Euratom related issues').

- 15 *Ex multis*, see the *Notice to stakeholders withdrawal of the United Kingdom and the Euratom acquis*, published by the European Commission on ec.europa.eu, 25th September 2018: «In view of the considerable uncertainties, in particular concerning the content of a possible withdrawal agreement and related repercussions, stakeholders engaged in the nuclear field are reminded of legal repercussions which need to be considered when the United Kingdom becomes a third country»
- 16 *Commission to EU27*, 14 November 2018, TF50 (2018) 55, *Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, as agreed at negotiators' level on 14 November 2018*, in ec.europa.eu; *Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, as endorsed by leaders at a special meeting of the European Council on 25 November 2018*, in gov.uk.
- 17 See European Parliament resolutions of 5th April 2017 *on negotiations with the United Kingdom following its notification that it intends to withdraw from the European Union* (2017/2593(RSP)), para 28, and of 13th December 2017 *on the state of play of negotiations with the United Kingdom* (2017/2964(RSP)), para 12].
- 18 With reference to this, see *The Political declaration setting out the framework for the future relationship between the European Union and the United Kingdom*, also subject to ratification, that accompanies the Withdrawal Agreement. This has been endorsed by the parties in order to «set out the framework for the future relationship between the European Union and the United Kingdom. It provides instructions to negotiators that will deliver a future relationship by the end of 2020 covering an economic partnership, a security partnership and agreements on areas of shared interest» (in gov.uk)

While Art. 79 WA just clarifies the meaning of some definitions, paragraph 1 of Art. 80 WA provides the sole responsibility of the United Kingdom for all ores, source materials and special fissile materials covered by the Euratom Treaty and present on its territory at the end of the transition period (for the the responsibility for spent fuel and radioactive waste, see Art. 85 WA). In particular, the Union will cease to be the ownership of the special fissile materials present in UK's territory in the moment of the end of the transitional period (Art. 83, paras 1 and 2 WA), as of the equipment and the other property related to the provision of safeguards (Art. 84 WA). During the transition, the material will keep on being used by both the parties according to the *acquis* of the Union (Art. 83, para 3 WA). Consequence of the withdrawal equally mandatory appears that one of Art. 80, para 2 WA that establishes the obligation to ensure the compliance of the British nuclear sector to the «international obligations arising as a consequence of its membership of the International Atomic Energy Agency or as a consequence of the Treaty on the Non-Proliferation of Nuclear Weapons or any other relevant international treaties or conventions to which the United Kingdom is a party» (see also Art. 82 WA).

As suggested in the joint report at the end of 2017, Art. 81 WA lays down the duty of the United Kingdom to implement a safeguards regime that offers «equivalent effectiveness and coverage as that provided by the Community in the territory of the United Kingdom».

4. Euratom and United Kingdom: what kind of future *liaisons*?

As just seen above, the official draft of the Withdrawal Agreement leaves open different perspectives. At this stage, several are the scenarios that can be envisaged about the definition of the future configurable relationships between the United Kingdom, on the one hand, and Euratom and the EU on the other, as the WA doesn't lay down almost nothing binding on it.

4.1. The 'all or nothing' scheme

According to a first approach, defined as 'all or nothing', once the withdrawal procedure from the Union and the Euratom has been completed, no form of collaboration would be established between the latters and the United Kingdom. The occurrence of this scenario is not necessarily due to the failure to reach an agreement: infact, the withdrawal agreement can also simply establish a temporary discipline, in collaboration with the Euratom, that regulates the transition just for a limited period of time, without stating anything about the future relations between the withdrawing country and the latter (as partially made by the recent 'WA draft'). In this way, the agreement would just prevent the prejudices deriving from the *impasse* due to the absence of the regulation. That's why potentially more disastrous appears, instead, the impact on the British nuclear industry in case of total absence of a withdrawal agreement, also known as 'no

deal' scenario, that has to be evaluated, therefore, just as a *species* of the *genus* 'all or nothing' approach¹⁹.

However, most of the consequences of the Brexit from Euratom would coincide for both situations.

The UK Government should now finance additional costs for the implementation of an autonomous system to ensure safety standards; at the moment of the Brexit from the Euratom, the United Kingdom should also set up an appropriate framework to comply with its commitment to ensuring nuclear non-proliferation and the decomposition of radioactive waste, by carrying out continuous inspections: this is currently foreseen in the Union through a cost sharing and mutual control agreement. With reference to the free movement of workers, the Brexit announcement seized the unprepared scientific community and caused great concern, with researchers considering now to leave the United Kingdom²⁰. Furthermore, trade restrictions and freedom of workers could also have implications for construction costs and the planning of new projects (long negotiations could impose serious delays or even serious injury to the completion of new facilities, such as *Hinkley Point C*²¹). This could bring to the growth of the costs for the nuclear program and also to the risk that the UK cannot meet its targets to reduce greenhouse gas emissions²².

With regard to the supply of nuclear fuels, the *Euratom Supply Agency* currently grants equal access to nuclear raw materials to all Member States: for this reason, a significant increase in costs would occur because of the difficulty in finding the raw materials in question. The United Kingdom should therefore renegotiate some commercial contracts to secure the supply of nuclear fuels: it is questionable whether, outside the EU, it will have similar trading capacity²³.

19 In this sense, see HOFMEISTER, Hannes. 'Should I stay or should I go?' – A Critical Analysis of the Right to Withdraw from the EU, in *European Law Journal*, Wiley, 16, 5, New York, 2010, 600: «Withdrawal should be made contingent upon the successful conclusion of a detailed withdrawal agreement. This would guarantee an orderly process of withdrawal [...] avoiding the risk that parties may find themselves in a legal vacuum».

20 According to Steve Cowley, former CEO of the British Energy Authority, the possibility of losing EU funding could put at risk more than one thousand jobs.

21 In this regard, see paragraph 48 of the House of Lords report on 29th January 2018 (*infra*, section 4): «Dependence on EU workers is particularly acute in the nuclear energy sector. The evidence from EDF Energy is clear that without access to EU labour it will be difficult to complete construction of the new nuclear power facility at Hinkley Point».

22 The *Climate Change Act 2008* states that it is the duty of the government to take appropriate measures to reduce CO2 emissions by 80% compared to 1990 baseline by 2050. Failure to complete Hinkley Point and other nuclear facilities would undermine the decarbonisation of the British national Energy system: coal is currently considered the principal reason at the base of the air pollution.

23 «The UK will need to establish new Nuclear Cooperation Agreements (NCAs) in order to maintain its existing nuclear supply chains. The UK currently trades nuclear materials with many other countries: Government should prioritise developing new NCAs with those

With reference to the topic of the research on the nuclear fusion process, some experiments could be stopped or seriously delayed, causing a non-indifferent injury to its development. In fact, European Member States, citizens and businesses can submit an application to the Commission, in order to benefit from licenses for non-exclusive use on patents, temporary protection certificates, utility models or patent applications, which are owned by CEEA: opportunity, from this moment, completely excluded.

Furthermore, Euratom currently has about 20 nuclear cooperation agreements with third countries and organizations around the world, which the United Kingdom will have to renegotiate: those with the *International Atomic Energy Agency* (IAEA) and with the United States are of fundamental importance²⁴. Here too, the positive result of the negotiations seems far from obvious²⁵.

However, 'Brexit' from Euratom, the United Kingdom would now be free to not respect a series of constraints deriving from the provisions of the *Euratom Treaty*²⁶. Just to show one of them, the requirement for nuclear operators to inform the Commission of planned investments or projects, as provided by Article 41 of the *Euratom Treaty*, would no longer be in force for the British civil nuclear sector²⁷.

Moreover, the non stay in Euratom would mean no more continuing to be subjected to the Union's organs and action in the nuclear sector, first of all to the jurisdiction of the Court of Justice, as recalled by the aforementioned Article

with which nuclear trade would otherwise be illegal, such as the US, Canada, Japan and Australia. It is vital that the Government makes progress on developing new NCAs quickly. Given that these negotiations can only begin after the UK has satisfied the IAEA with regard to its safeguarding regime, it is essential for the Government to reach an agreement with the IAEA as soon as possible» (paras 172 and 173 of the aforementioned report). The need is considered of such importance as to push the Parliament to ask the Government to treat for the acquisition of nuclear material also with the countries with which, at present, it would be illegal to trade such products, such as Australia, Canada, Japan and the United States. Coming out of Euratom, in fact, the United Kingdom should renegotiate the *Non-Proliferation Treaty* (NPT), without which it could not be supplied with nuclear material by the aforementioned countries.

24 In this regard, see para 166 of the aforementioned *House of Lords' report*: «In order to maintain energy security it will be crucial to establish a domestic safeguarding regime that satisfies International Atomic Energy Agency (IAEA) requirements by the time the UK leaves Euratom. We are encouraged that both the Government and the Office for Nuclear Regulation (ONR) recognise the urgency of this and have taken steps to do so».

25 About that, see the report of the Nuclear Institute, *Brexit and the Euratom Treaty Issue*, London, 2017, 3: «In the absence of Euratom it will be harder to convince other States of our general ability to comply with international requirement».

26 HM Government, *Guidance for civil nuclear regulation if there's no Brexit deal*, in *gov.uk*, London, 23rd August 2018.

27 The kind of nuclear investments that require notification to the Commission are listed in Council Regulation (Euratom) 2587/1999, and the required content of the reports is set out in Commission Regulation (EC) 1209/2000.

106a of the *Euratom Treaty*; however, it is equally true that the decisions of the Court of Luxembourg rarely intervened on the subject of EAEC²⁸.

Currently, this hypothesis seemed to have already been avoided by the Joint Report of December 2017, which hoped for a future collaboration, and, recently, by the official WA draft, even if only for the regulated issues; however, as things stand at the moment, it is not said that the Withdrawal Agreement will be formally concluded by 29th March 2019: the conditions imposed by the European Union in the negotiations and the consequences of the exit don't make unthinkable the failure of the ratification by the United Kingdom and the possibility of a second *referendum* in order to remain inside the EU.

4.2. *The permanence of the United Kingdom in the Euratom: a configurable hypothesis?*

Just these last few reasons push to assess a second hypothesis: that the United Kingdom decides to remain in the EU or, at the same time, to remain in the Euratom, but to abandon the Union²⁹.

It is not clear if the withdrawal procedure can be interrupted once started. In the silence of the Art. 50 TEU, it was discussed whether the Member State concerned, during the negotiation and before the conclusion of the withdrawal agreement or of the two-year term from the notification, withdraws the latter and, consequently, drops the whole process.

In a Brexit related case³⁰, the British High Court has already ruled that the withdrawal decision, once manifested, cannot be revoked or asserted. In making the notification, the State that expresses the intention to withdraw must behave in good faith and must act in compliance with the obligation of sincere collaboration with the institutions, enshrined in Art. 4, para 3 TEU. In fact, the notification must be «taken seriously»: it – it is worth reiterating – «automatically opens a negotiation process of which the deadline is set, also with the indication of the legal effects that are automatically deployed beyond that deadline»³¹.

Nonetheless, this is an excessively rigid reconstruction, which does not take into account the broad discretion enjoyed by the State concerned. It presupposes

28 The causes brought before the Court concerning Euratom are less than fifty. Lastly, see *Eriksen E.A. v Commission*, order 12th January 2011, joined cases C-205/10 P, C-217/10 P and C-222/10 P; *Commission v United Kingdom*, 18th July 2007, C-155/06; *Industrias Nucleares do Brasil and Siemens*, 12th September 2006, joined cases C-123/04 e C-124/04.

29 Obviously, it would be right to suppose also the possibility that the United Kingdom could stop the Brexit for both the Euratom and the EU, but this hypothesis, currently, is considered as very far from reality.

30 High Court Of Justice, 3rd November 2016, *R (Miller) v the Secretary of State for exiting the European Union*, in judiciary.gov.uk.

31 CURTI GIALDINO, Carlo. Oltre la Brexit: brevi note sulle implicazioni giuridiche e politiche per il futuro prossimo dell'Unione europea, in *federalismi.it*, Rome, 13, 2016, 22.

that, starting from its manifestation to the European Council, the will to withdraw is crystallized. Article 50 TEU does not, however, preclude the retreat of the initial notification until the completion of the withdrawal, as there is nothing established on this matter. Part of the scholars, basing its opinion on the unilateral nature of the notification, therefore consider this hypothesis to be configurable.³² The United Kingdom, taking advantage of the *lacuna legis*, could formally retire the notification only for the part concerning Euratom, even without the consent of the Union negotiators; this does not prevent the withdrawal procedure from being suspended or canceled, if there is an agreement to that effect between the withdrawing State and the European Council, in the name of a mutual consent principle dear to our contractual tradition.

Recently, Advocate General Campos Sánchez-Bordona, in the Opinion to the *Wightman* case (C-621/18, 3rd December 2018) married this line of thinking, proposing that the Court of Justice should declare that Article 50 TEU allows the unilateral revocation of the notification of the intention to withdraw from the European Union. Drawing up a systematic analysis of Article 50 TEU, the AG deducted that «withdrawal from an international treaty, which is the reverse of a treaty-making power, is by definition a unilateral act of a State party and a manifestation of its sovereignty». Especially, it appears persuasive the argument according to which if the withdrawal decision is revoked in accordance with the departing Member State's constitutional procedures (in the same way as the notification of the intention to withdraw, Art. 50, para 1 TEU), its constitutional foundation will disappear; otherwise, «the rejection of revocation would in practice entail the forced exit from the EU of a State» which, according to the Court of Justice's recent case-law³³ and to Article 50, para 3 TEU, continues to be an EU Member State in all respects.

In the subsequent decision, the Court totally followed what had been proposed by the AG stating that «such a revocation confirms the EU membership of the Member State concerned under terms that are unchanged as regards its status as a Member State and brings the withdrawal procedure to an end»³⁴. Infact, if the right to revoke had to be subject to the unanimous approval of the European Council, as the Commission and Council proposed, the unilateral sovereign right to revoke would be transformed into a conditional right and, consequently, «would be incompatible with the principle that a Member State cannot be forced to leave the European Union against its will».

32 In this sense, see SHAW Jo, STEINBEIS Maximilian. Five Questions on Brexit to JO SHAW, in *Verfassungsblog*, 2016.

33 *RO*, 19th September 2018, C-327/18 PPU.

34 *Wightman*, 10th December 2018, C-621/18.

4.2.1. The House of Lords and the pro-Euratom report

In the light of what has been just focused, it must be analysed, furthermore, an interesting report³⁵ about Brexit by the *European Union Committee*³⁶ of the House of Lords: in the section dedicated to Euratom ('Chapter 9') there are numerous recitals that underline the countless benefits of the (past) belonging of the United Kingdom combined with Euratom³⁷ (for example, Euratom membership helped make the United Kingdom a world leader in the nuclear sector); the hope that British *post*-Brexit nuclear research will receive the same funding as the EAEC; the desire to continue, despite the exit from the Euratom, the European programs JET³⁸ and ITER, at the forefront of nuclear research³⁹.

But it is the final part of the report that is surprising: after referring to the opinion of several British scientists about the need to remain in the Euratom⁴⁰, the Committee concludes this chapter of the report with a veiled statement: «a form of associate membership of Euratom could be a means of maintaining nuclear research and development collaboration with the EU but, in the form

35 House of Lords, European Union Committee, *Brexit: energy security*, 10th Report of Session 2017–19, in *publications.parliament.uk*, 29th January 2018, 43–52.

36 *The European Union Committee* is appointed each session to scrutinise documents deposited in the House by a Minister, and other matters relating to the European Union. Regarding to Brexit, it is flanked by another select committee of the House of Commons, *The Exiting the European Union Committee*.

37 «The UK has benefited substantially from EU nuclear research programmes, contributing to its status as a world leader in nuclear research and development. It would be to the benefit of both the UK and the EU to maintain those research connections post-Brexit. We welcome the Government's commitment to continuing to fund nuclear research in the UK, whether or not EU funding is maintained. We recommend that the Government looks to maintain the post-Brexit viability of the Joint European Torus (JET), and ensures that the UK is able to participate in the International Thermonuclear Experimental Reactor (ITER) despite its withdrawal from Euratom» (paras 182 and 183).

38 Just the JET program, which provides the largest nuclear fusion experiment ever designed in history, is based in the Culham Center for Fusion Energy in Oxfordshire, United Kingdom. The only *Joint European Torus* involves about 350 scientists from 40 different countries.

39 «The Centre for Nuclear Engineering at Imperial College London was especially concerned with the long-standing future of UK leadership with the Joint European Torus (JET). [...] According to the NIA, The UK Atomic Energy Authority receives £50m from Euratom each year to operate JET [...] and employs 500 skilled workers. [...] For the UK to continue to have involvement in ITER and remain a leader in nuclear fusion, a new multilateral cooperation agreement must be negotiated. The Durham Energy Institute noted that membership of Euratom was not a pre-requisite for involvement with ITER, but argued that it would take time to build nation state level institutes to continue British participation in the project and this will be to our disadvantage» (paras 180 and 181).

40 «A number of witnesses argued that 'the best outcome for the nuclear industry in the UK and EU would be if the UK could remain within the *Euratom Treaty*', while the CBI asserted that 'the benefits of the UK's membership of Euratom should be maintained, [also] through continued membership'» (para 180).

currently held by Switzerland, it would not address the issues raised by the UK's departure that are critical to energy security. We also note that the United Kingdom's membership of Euratom is legally distinct from its EU membership, and that in the Prime Minister's Article 50 notification letter of 29th March 2017 a separate notification was made in respect of the United Kingdom's withdrawal from Euratom. This suggests that separate transitional arrangements may also be possible, if they are needed in order to mitigate the Brexit: energy security risk of a cliff-edge. We therefore call on the Government to review and report to Parliament on the possibility of a Euratom-specific transition period separate from the wider Brexit process».

The Select Committee did not ask the Government of His Majesty to analyse the possibility of 'withdrawing the withdrawal declaration' only for Euratom: a request of this kind, currently still lacking in fertile ground, would perhaps have appeared rushed. Also because, in the light of the recent reached agreement, the Government seems currently willing to continue on the line of contextual withdrawal. Nevertheless, the desire to separate the 'Euratom issue' from the withdrawal from the Union seems clear⁴¹.

To this it must be added the protests made by the British pro-European movements (above all, *Open Britain*) and the concerns of some British scientists who are attracted by the withdrawal of the United Kingdom from Euratom. The movement attributable to former British Prime Minister Blair laments the lack of explicit reference, within the *referendum*, to the exit of Euratom; the latter show that, as a member of Euratom, the United Kingdom currently has access to a regular and consistent supply of radioisotopes, vital in medicine for diagnostics, clinical pathology and treatments. The decision by the United Kingdom to leave Euratom would seriously endanger access to such material, and thus the functioning of the British national health system in relation to the aforementioned operations⁴².

4.3 The 'third country' solution and the Swiss model: pro et contra

According to a third hypothesis, however, the United Kingdom, once out of EU, could collaborate with Euratom as a third country: according to Art. 101, para 1 of the *Euratom Treaty* «the Community may, within the limits of its powers and jurisdiction, enter into obligations by concluding agreements or contracts with a third State, an international organisation or a national of a third State». With the acquisition of third country *status*, the United Kingdom would

41 Having indicated that the Swiss-model of association «could» be a solution (see *infra*), but not entirely appropriate, the Committee recalled that belonging to Euratom and belonging to the Union are two «legally distinct» issues and ended by affirming the need for the Euratom issue to enjoy at least a transitional period – longer – separated from the wider process of exit from the Union.

42 In order to deepen this, see British Medical Association, *Brexit briefing: Euratom and Brexit*, in *europarl.europa.eu*, 2017.

also have the possibility to collaborate with countries like China and Russia, with whom Euratom has established a dialogue of cooperation and joint research.

Passing to the third and last scenario, the United Kingdom could participate in Euratom as an associated country: according to Art. 206 of the *Euratom Treaty* «the Community may conclude with one or more States or international organisations agreements establishing an association involving reciprocal rights and obligations, common action and special procedures». On the basis of this article, it is possible that a third State participates as a member of Euratom, despite its absence among the Member States of the Union: it is in this way that in 2014 Switzerland acquired the *status* of a country associated with Euratom⁴³.

If *prima facie* the last two scenarios can appear like the ‘Ariadne’s thread’, in reality there are many obstacles to be overcome, on both sides.

With regard to the possibility of stipulating a convention as a third country, agreements of this type constitute a form of collaboration not suitable for achieving the desired level of integration: these could only regulate marginal aspects of relationships between Euratom and the United Kingdom, assumed that a convention that guarantees the previous state of the rights, but without the obligations and the burdens typical of the participation in an organization, does not seem conceivable⁴⁴.

Dealing with the ‘association solution’, the United Kingdom should certainly ensure that its nuclear system complies with the European regulations of this sector (*Euratom Treaty* and secondary law), although it can no longer participate in their decision making⁴⁵. The safety standards required by Euratom are indeed higher than those deriving from international agreements, such as the IAEA⁴⁶.

43 Ukraine followed Switzerland’s steps concluding an agreement on the association of Ukraine to the *Euratom Research and Training Programme* (27th June 2016).

44 In this sense, see the statement of the German Chancellor Angela Merkel on 27th April 2017: ‘Countries with a third country status cannot and will not have the same or even more rights as a member of the European Union. All 27 Member States and the European institutions agree on this. You may think that all this is self-evident. But I have to put this so clearly because I get the impression that some in Great Britain still have illusions about this, and that is a waste of time’. The current President of the Commission, Jean-Claude Juncker, had previously expressed himself in the same terms.

45 Regarding to this, see the aforementioned *Nuclear Institute’s report*: «Some Euratom obligations, such as Article 37 submissions, will in any case continue to be required, as they are likely to be demanded by our neighbours». Art. 37 of the *Euratom Treaty* states in fact that «Each Member State shall provide the Commission with such general data relating to any plan for the disposal of radioactive waste in whatever form will make it possible to determine whether the implementation of such plan is liable to result in the radioactive contamination of the water, soil or airspace of another Member State».

46 Compare with paragraph 167 of the *House of Lords’ report*: «Euratom’s safeguarding standards are higher than those required by the UK’s international obligations. It will be difficult for the Government to deliver on its commitment to maintain Euratom’s standards at the point of withdrawal. The first priority should therefore be to ensure compliance with the

For this reason, UK would be in a paradoxical and deteriorating condition, effectively describable as 'regulation without representation'⁴⁷. Furthermore, the second paragraph of Art. 206 of the *Euratom Treaty* establishes that such agreements shall be concluded through the instrument of the special legislative procedure: in this case, the Council acts unanimously after having consulted the European Parliament. It is therefore evident that further difficulty arises for the conclusion of an agreement of this type: the achievement of unanimous consent in the Council is not at all obvious, given the eventual Brexit just completed.

5. Conclusion. The transition as a key moment for a 'second Withdrawal Agreement'

The UK intent is surely that to save links with part of the Euratom nuclear agency after Brexit, even if totally out of it⁴⁸.

At this point, if the 'no deal' scenario seems unlikely, the hypothesis of the removal of the notification not even close and the 'third country' and the 'Swiss' models disadvantageous, the preferable alternative solution can only be, once again, reaching a particular agreement in order to favour a 'soft Brexit'.

The idea of a more specific agreement during the transitional period is configured, and must be configured, as an unavoidable moment both for the pacific resolution of the exit and for the future relations between the withdrawing country and the Union.

This prospect is certainly the most desirable hypothesis: the formalization of the will of the parties to settle the dispute, past and present, and the relationships to become, would certainly make it less burdensome for both parties the separation in sight. Otherwise, assumed the level of integration in every area of society between the European Union and the Member States, the absence of definition of the remaining pending issues (economic, political, juridical) would inevitably subtract the relations between the withdrawing State and the EU from the law and the instrument of negotiation to deliver it to that of mere relations of force, true 'Achilles'heel' of customary and particular international law.

In this regard, the parties have published, attached to the WA, the 'Political declaration setting out the framework for the future relationship between the European Union and the United Kingdom'. This document is not strictly binding on the legal point of view, but it has a strong political value. As a demonstration

UK's IAEA obligations».

47 Periphrasis traceable in HOFMEISTER, Hannes. Splendid isolation or continued cooperation? Options for a State after withdrawal from the EU, in *Columbia Journal of European Law*, 21, 2, New York, 2015, 262.

48 In this sense, see Theresa May's speech at the historic Jodrell Bank observatory to back calls for close scientific collaboration with the EU after Brexit, 21st May 2018.

of the peculiarity of the issue, the parties have declared that «the future relationship will inevitably need to take account of this unique context» (para 5).

In the Political Declaration it has been laid down a statement of cooperation for all the areas of interest. In particular, the heading XI is dedicated to 'Energy': letter *b*) of it speaks about «Civil nuclear [cooperation]» and establishes that «the future relationship should include a wide-ranging Nuclear Cooperation Agreement between the European Atomic Energy Community (EURATOM) and the United Kingdom on peaceful uses of nuclear energy, underpinned by commitments to their existing high standards of nuclear safety» (para 68 PD)⁴⁹.

As indicated in para 138, the second part of the negotiations will start at the finalization of the Brexit, to be completed not later than the end of the 2020.

The result of these further negotiations, based on the principle of good faith (para 138), would give life to an international agreement to all intents and purposes, subject to prior ratification. Clearly, on the Union side, the agreement concluded during the transitional period would become part of the sphere of Union law under Articles 216, para 2, 217 and 218 TFEU (para 144 PD), and would be subject to the jurisdiction of the Court of Justice. Furthermore, since its entry into force, the national courts of the remaining Member States could refer the matter to the Court of Justice of the European Union in order to obtain a preliminary ruling pursuant to Article 267 TFEU concerning the interpretation of that agreement, whereas the courts of the United Kingdom could do likewise only if the agreement provided for it, which seems rather unlikely, given that the release from the subjection of the EU organs and, in particular, of the jurisdiction of the Court of Justice, is one of the main reasons of Brexit⁵⁰.

49 «Recognising the importance of nuclear safety and non-proliferation, the future relationship should include a wide-ranging Nuclear Cooperation Agreement between the European Atomic Energy Community (EURATOM) and the United Kingdom on peaceful uses of nuclear energy, underpinned by commitments to their existing high standards of nuclear safety. The agreement should enable cooperation between EURATOM and the United Kingdom and its national authorities. This should include exchange of information in areas of mutual interest such as safeguards, safety and cooperation with the International Atomic Energy Agency (IAEA). It should facilitate trade in nuclear materials and equipment, and provide for the participation of the United Kingdom as a third country in Union systems for monitoring and exchanging information on levels of radioactivity in the environment, namely the European Community Urgent Radiological Information Exchange and the European Radiological Data Exchange Platform. The Parties note the United Kingdom's intention to be associated with the EURATOM research and training programmes as provided for in Section II of Part I. The Parties note that the EURATOM Supply Agency intends to reassess in a timely manner the authorisations and approvals of contracts for the supply of nuclear material between Union and United Kingdom undertakings which it has co-signed. The Parties will also cooperate through the exchange of information on the supply of medical radioisotopes» (paras 68–71).

50 On the last point, compare with ŁAZOWSKI Adam. Withdrawal from the European Union and Alternatives to Membership, in *European Law Review*, London, 37, 5, 2012, 526.

It is hoped that a 'win-win'⁵¹ situation will be set up also in this second phase, from where both parties will emerge stronger: «it should be a relationship that will work in the interests of citizens of the Union and the United Kingdom, now and in the future» (para 5 PD). It will be History, the people – above all, the negotiators –, the resources, the geographical position and so long to tell if and in what way the withdrawal was a rightly weighted choice for the outgoing State.

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51 The expression belongs to Jil Morris, UK ambassador to Rome, who, believing strongly in a 'soft Brexit', hopes that his country will continue to play a fundamental role, together with the European Union, in the fields of nuclear research security, external relations and single market of the European continent.

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