

THE UNITED KINGDOM IS LEAVING THE EUROPEAN UNION: ANALYZING THE CONTRACTUAL AND LEGAL IMPLICATIONS FOR A MEMBER LEAVING

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I. INTRODUCTION

On June 23, 2016, the United Kingdom, consisting of England, Scotland, Wales, and Northern Ireland, participated in a referendum to determine whether the bloc of countries would maintain membership and remain in the European Union or withdraw.¹ Seventy-two percent of 46,501,241 eligible voters voted in this referendum, with “Leave” receiving 51.9% of the votes and “Remain” receiving 48.1% of the votes.² Despite the overall national results, very different results were seen throughout the countries of the United Kingdom.³ England and Wales narrowly voted to leave the European Union, while an overwhelming majority of voters in Scotland and Northern Ireland chose to remain.⁴ This significant historic event in the United Kingdom, now termed “Brexit,” was influenced by two distinct ideologies and groups; “Britain Stronger in Europe” and “Vote Leave,”⁵ each of which attracted the involvement of other groups, entities, and individuals.⁶

Part I of this Comment provides a history of the United Kingdom as it relates to membership in the European Union, the abilities for the countries

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1. Alex Hunt & Brian Wheeler, *Brexit: All you need to know about the UK leaving the EU*, B.B.C. NEWS (Oct. 2, 2016), <http://www.bbc.com/news/uk-politics-32810887>.

2. *EU Referendum Results*, B.B.C. NEWS (June 23, 2016), http://www.bbc.com/news/politics/eu_referendum/results.

3. *Id.*

4. *Id.* (explaining the first vote outcomes as such: in England, 53.4% of voters chose to leave the European Union; in Wales, 52.5% of voters chose to leave; in Scotland, 62% of voters chose to remain in the European Union; in Northern Ireland, 55.8% of voters chose to remain.).

5. Hunt & Wheeler, *supra* note 1.

6. *Id.* (Theresa May and the United Kingdom officially began the process of leaving the European Union on June 19, 2017, following “Brexit” officially being triggered on March 29, 2017 before the European Council. The talks began following a general election on June 8, 2017, in which Theresa May and the Conservative Party lost the majority, but were able to create a coalition with the Democrat Unionist Party to ensure an exit from the European Union would still occur for the United Kingdom.).

in the United Kingdom to gain membership in the European Union, and the factors surrounding the United Kingdom desire to leave the European Union. This section also discusses the European Union, the interconnectedness of the treaties forming this organization, and the process of leaving the bloc of nations. The 1972 European Communities Act, the Lisbon Treaty, the Treaty of the European Union, and the Treaty on the Functioning of the European Union will be specific areas of focus because of their impacts on membership in the European Union and process of withdrawing membership. This section concludes by discussing the Norway and Liechtenstein Plans, both of which helped the country negotiate a limited relationship with the European Union. Part II analyzes the information related to the United Kingdom leaving the European Union domestically and internationally and attempts to identify the pertinent and related contractual and legal obligations that will impact leaving the European Union. Part III offers solutions to the difficulties that the United Kingdom will encounter as a result of leaving the European Union and offers amendments that the European Union could enact to more directly address a Member-State leaving.

II. BACKGROUND

The United Kingdom applied to join the European Economic Community (EEC), a predecessor of the European Union, on August 1, 1961, but did not become a member of the Community until January 1, 1973.⁷ This eleven-year delay between the United Kingdom's application and accession to the EEC was due to French President Charles De Gaulle.⁸ De Gaulle was concerned that allowing the United Kingdom and other Atlantic nations into the EEC would eventually allow the United States to play a vital role in the organization's domestic and foreign affairs.⁹ This initial contention between the United Kingdom and the EEC would foreshadow the subsequent problems between the United Kingdom and the European Union. To better understand the United Kingdom as it relates to the European Union, it is first important to discuss the European Union, the treaties associated with the organization and membership, and process for leaving the European Union.

A. The European Union

On March 25, 1957, Belgium, France, West Germany, Italy, Luxembourg, and the Netherlands entered into the Treaty Establishing the

7. *A timeline of Britain's EU membership*, THE GUARDIAN (June 25, 2016), <https://www.theguardian.com/politics/2016/jun/25/a-timeline-of-britains-eu-membership-in-guardian-reporting>.

8. *Id.*

9. *Id.*

European Economic Community, informally referred to as the Treaty of Rome.¹⁰ This treaty not only established the EEC, but created the common market envisioned by members and laid groundwork for the creation of the European Union.¹¹ All members of the European [Economic] Community subsequently signed the Maastricht Treaty, also known and currently in force as the amended Treaty on the European Union.¹² This treaty became effective on November 1, 1993, which established the European Union and granted European Union citizenship to all people residing in a member state.¹³

Further, the agreement encouraged all countries to implement common foreign, security, and banking policies.¹⁴ The Treaty of Lisbon Amending the Treaty on the European Union and the Treaty Establishing the European Community, effective as of December 1, 2009, amended the Maastricht Treaty and the Treaty of Rome, simplifying the European Union's governing documents by amending the Treaty on the European Union and the Treaty on the Functioning of the European Union.¹⁵ These treaties helped create the current European Union system and contain all provisions that member states must abide by to maintain membership.¹⁶ Therefore, these provisions are crucial for the purpose and function of the European Union.

B. Purpose and Function of the European Union

Initially, the European Union originated as an economic association and it has continued to evolve and encompass other governmental aspects, such as creating common policies and a common currency, and enabling the free movement of all people in Member-States.¹⁷ With the integration of some European States under a common union, strong language has been written into the constitutional treaty to protect human rights, reduce poverty, protect the environment, and promote the common internal market.¹⁸ These ideas, most notably the common market allowing the free movement of people and

10. Treaty Establishing the European Economic Community, Mar. 25, 1957, 11. 57E/AFI/CNF [hereinafter TEEC].

11. *Id.*

12. *Id.*; Treaty on European Union, July 29, 1992, 1992 O.J. (C 191) 4 [hereinafter Maastricht Treaty].

13. Maastricht Treaty, *supra* note 12.

14. *Id.*

15. Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 13, 2007, 2007 O.J. (C 306) 1 [hereinafter Treaty of Lisbon].

16. *See generally id.* (explaining how the creation of the Treaty of Lisbon essentially worked to combine the numerous powers into a single document).

17. *The EU in Brief*, EUROPA (Oct. 21, 2016), https://europa.eu/european-union/about-eu/eu-in-brief_en.

18. *The founding principles of the Union*, EUROPA (Oct. 21, 2016), http://europa.eu/scadplus/constitution/objectives_en.htm.

goods among Member-States, were essential in the creation of the European Union, and are critical for its stability, function, and future.¹⁹

These objectives have largely been accomplished through the creation of quasi-political bodies.²⁰ Such quasi-political bodies include the European Institutions, separately known as the European Parliament, led by elected Members of European Parliament; the Council of the European Union, led by the rotating European President; and the European Commission, led by life-long bureaucrats.²¹

The European Parliament is comprised of 751 members elected every five years, based on political affiliation, from Member-States based proportionately on population and by political affiliation.²² The main purposes of European Parliament are to implement legislation impacting all Member-States, formulate international agreements, supervise all European Union institutions, and to establish a proper and feasible budget for the European Union and its institutions.²³

The Council of the European Union is comprised of multiple government ministers from all Member-States.²⁴ These ministers periodically meet in Summits to discuss laws and policies related to the following matters: Agriculture and fisheries; Competitiveness; Economic and financial affairs; Education, youth, culture, and sport; Employment; Social policy; Health and consumer affairs; Environment; Foreign affairs; General affairs; Justice and home affairs; and Transportation, telecommunications and energy.²⁵ Each policy area is chaired by the government minister representing the area holding the rotating Presidency of the Council of the European Union.²⁶ Additionally, the Council of the European Union works closely with European Parliament to adopt binding European Union laws and implement an annual budget through a qualified majority, while also coordinating policies among Member-States.²⁷

19. Michael Wilkinson, *What is the EU, why was it created and when was it formed?*, THE TELEGRAPH (June 22, 2016), <http://www.telegraph.co.uk/news/2016/06/20/what-is-the-eu-why-was-it-created-and-when-was-it-formed/>.

20. *Id.* (explaining how the institutions of the European Union are largely tasked with creating and implementing new policy, deemed to be most beneficial for the citizens of the bloc).

21. *See What does the European Union do?* B.B.C. NEWS (Jan. 23, 2013), <http://www.bbc.co.uk/newsround/21168839>.

22. *European Parliament*, EUROPA (Oct. 21, 2016), https://europa.eu/european-union/about-eu/institutions-bodies/european-parliament_en.

23. *Id.*

24. *Council of the European Union*, EUROPA (Oct. 21, 2016), https://europa.eu/european-union/about-eu/institutions-bodies/council-eu_en.

25. *See Council Configurations*, EUROPEAN UNION (Aug. 31, 2016), <http://www.consilium.europa.eu/en/council-eu/configurations/>.

26. *Id.*; *see also The Presidency of the Council of the EU*, EUROPEAN UNION (Oct. 21, 2016), <http://www.consilium.europa.eu/en/council-eu/presidency-council-eu/> (further explaining how the presidency of the Council of the European Union rotates among all Member-states every six months).

27. *Council Configurations*, *supra* note 25. (For purposes of the Council of the European Union, a qualified majority requires 55% of the countries (16) representing 65% of the European Union

The final institution of the European Union is the European Commission, which is the purely apolitical institution tasked with proposing and presenting new legislation to the other institutions.²⁸ The European Commission is also responsible for enforcing the laws of the European Union and representing the European Union in all international agreements and organizations.²⁹ The European Commission is comprised of one Commissioner representing each Member-State and led by an elected Commission President.³⁰ However, the day-to-day operations of the Commission are performed by lifelong bureaucrats organized into separate Directorates-General, which are the departments responsible for implementing a particular policy area.³¹ Through each of these institutions, the European Union is able to function on a day-to-day basis, significantly impacting the lives of all people residing in the Member-States of the European Union. These institutions have also played a significant role in creating the governing documents of the European Union and have worked together in providing the framework for leaving the transnational organization.

C. How to Leave the European Union

A major issue any Member-State would encounter if choosing to disassociate from the European Union is the lack of guidance existing within the treaties, governing documents, and other provisions related to leaving the economic and political union. The procedure for a Member-State to leave the European Union is discussed in Article 50 of the Treaty of the European Union, which states the following:

(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

population to pass. This can be blocked by four countries representing 35% of the European Union Population.).

28. *Id.*

29. *European Commission*, EUROPA (Oct. 21, 2016), https://europa.eu/european-union/about-eu/institutions-bodies/european-commission_en.

30. *Id.*

31. *Id.*; see generally *Jean-Claude Juncker*, EUROPEAN UNION (Oct. 21, 2016), http://ec.europa.eu/commission/2014-2019/president_en (Jean-Claude Juncker is the current President of the Commission.).

negotiated in accordance with Article 218(3)³² of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.

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

(4.) For the purposes of paragraphs 2 and 3, the member of the European Council or of the Council representing the withdrawing Member State shall not participate in the discussions of the European Council or Council or in decisions concerning it. A qualified majority shall be defined in accordance with Article 238(3)(b)³³ of the Treaty on the Functioning of the European Union.

(5.) If a State which has withdrawn from the Union asks to rejoin, its request shall be subject to the procedure referred to in Article 49.³⁴

Accordingly, Article 50 of the Treaty of the European Union contains the legal mechanism for a country to leave the European Union.³⁵ This Article also contains the provision governing the negotiation of the departure process and lays groundwork for working towards enacting future deals with the European Union.³⁶ Any Member-State wishing to leave the European Union must formally notify the Council of the European Union of its intent to leave.³⁷ This triggers a two-year process of negotiating a leaving agreement between the country leaving the European Union and the European Union member-states.³⁸ After the leaving agreement is reached with the Council of the European Union, the Member-State must then obtain consent from the European Parliament, with a qualified majority being

32. Consolidated Version of the Treaty on the Functioning of the European Union art. 218(3), May 9, 2008, 2008 O.J. (C 115) 47 [hereinafter TFEU] (“The Commission, or the High Representative of the Union for Foreign Affairs and Security Policy where the agreement envisaged relates exclusively or principally to the common foreign and security policy, shall submit recommendations to the Council, which shall adopt a decision authorizing the opening of negotiations and, depending on the subject of the agreement envisaged, nominating the Union negotiator or the head of the Union's negotiating team.”).

33. *Id.* art. 238(3)(b) (“By way of derogation from point (a), where the Council does not act on a proposal from the Commission or from the High Representative of the Union for Foreign Affairs and Security Policy, the 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.”).

34. Consolidated Version of the Treaty on European Union art. 50, June 10, 2012, 2012 O.J. (C 326) 13 [hereinafter TEU].

35. *Id.*

36. See generally Gavin Barrett, *The Era of Article 50: How the UK Will Leave the EU if it Opts for Brexit in its 23 June, 2016 Vote*, U. C. DUBLIN (May 25, 2016), <http://ssrn.com/abstract=2784214>.

37. *Id.*

38. See TEU, *supra* note 34, art. 50(2).

required to approve the agreement between the parties.³⁹ In the event a final agreement cannot be reached between the State invoking Article 50 and the Council of the European Union within two years, or if the European Parliament or Council of the European Union choose not to ratify the agreement, all treaties between the State and the European Union will cease to exist and the two parties will no longer have a diplomatic relationship.⁴⁰ However, because this process has never been enacted, there is no precedent to understand the negotiations or ramifications.⁴¹ To better understand the organization of the European Union, it is helpful to evaluate the treaties establishing the bloc.

D. Interconnectedness of Treaties

There are multiple treaties that laid the groundwork for establishing the European Union, implementing its values and objectives, and allowing for the transnational organization to function. The common market and institutions, now enjoyed by European Union Member-States, began in 1951 with the Treaty of Paris, formally known as the Treaty Establishing the European Coal and Steel Community.⁴² The Treaty of Paris was effective for fifty years, during which time it created the European Coal and Steel Community.⁴³ This treaty has since expired and is not binding on European Union Members-States, per provisions of the agreement.⁴⁴

The Treaty of Rome, formally known as the Treaty Establishing the European Economic Community, furthered the ideals found in the Treaty of Paris; still in force today, it established the European Atomic Energy Community and has been integrated into subsequent treaties impacting the European Union.⁴⁵ The Brussels Treaty, more commonly known as the Merger Treaty, became effective on July 1, 1967, and combined the executive powers of the European Steel and Coal Community, European Economic Community, and the European Atomic Energy Commission into the Commission of the European Economic Community and the Council of the European Economic Community.⁴⁶ Further, this treaty combined all European Communities, but was repealed by the Treaty of Amsterdam in

39. *Id.*

40. *Id.* art. 50(3).

41. *Id.*

42. Treaty establishing the European Coal and Steel Community art. 1, Apr. 18, 1951, 1 [hereinafter Treaty of Paris].

43. *Id.*

44. *Id.* art. 97.

45. TEEC, *supra* note 10; *see also EU Treaties*, EUROPA (Oct. 21, 2016), https://europa.eu/european-union/eu-law/decision-making/treaties_en.

46. *The History of the European Union—1967*, EUROPA (Oct. 21, 2016), https://europa.eu/european-union/about-eu/history/1960-1969/1967_en.

1999.⁴⁷ The Treaty of Amsterdam facilitated Member-States devolving domestic powers to the European Parliament in a variety of policy areas.⁴⁸

The Single European Act amended the Treaty of Rome in 1987 and aimed to streamline the decision-making process critical for implementation of a single and common market, while replacing previous voting mechanisms with the idea of a qualified majority vote.⁴⁹ The Maastricht Treaty paved the way for the European Monetary Union, introduced common domestic and foreign policies, and revamped the European Parliament.⁵⁰ The Treaty of Amsterdam updated the Brussels Treaty with few changes and reformed the institutions of the European Union to be better effective in the future when more Member-States joined.⁵¹

Similar to the Treaty of Amsterdam, the Treaty of Nice was implemented to correct potential current and future issues foreshadowed by the current Member-States; this was accomplished by modifying the European Commission, changing voting procedures and requirements for the Council of the European Union, and creating the opportunity for new and increased membership in the European Union.⁵² The final relevant treaty for the European Union is the Treaty of Lisbon, implemented in 2007, which clarified the rights and responsibilities of the European Union and its Member-States and worked toward uniting the European Union under a more unified political voice.⁵³ The Treaty of Lisbon combined the operating procedures and guidelines of the European Union⁵⁴ into two vitally important documents: the Treaty of the European Union and the Treaty on the Functioning of the European Union.⁵⁵

E. Previous Plans for Leaving the European Union

Though a Member-State of the European Union has not previously attempted to disassociate membership, the individual States and the European Union provide loose guidance on the issue. For example, Norway

47. See generally *id.*; see also EU treaties, *supra* note 45.

48. Treaty of Amsterdam Amending the Treaty on the European Union, the Treaties Establishing the European Communities and Certain Related Acts, Oct. 2, 1997, 1997 O.J. (C 340) 1 [hereinafter Treaty of Amsterdam]. (These powers Member-States allowed the European Union jurisdiction in included immigration, common laws, and a common security policy.)

49. *Id.*; see also *The EEC and the Single European Act*, U.K. PARLIAMENT (Apr. 2013), <http://www.parliament.uk/about/living-heritage/evolutionofparliament/legislativescrutiny/parliament-and-europe/overview/britain-and-eeec-to-single-european-act/> (explaining how the implementation of the qualified majority vote prevents individual States from asserting veto power in decision-making).

50. Maastricht Treaty, *supra* note 12.

51. Treaty of Amsterdam, *supra* note 48.

52. *Id.*

53. Treaty of Lisbon, *supra* note 15.

54. See the discussion *supra* Section II(a) for a more thorough analysis.

55. Treaty of Lisbon, *supra* note 15.

has continually expressed its desire not to join the European Union through referendums in 1972 and 1994, but chose to be associated through membership in the EEA instead.⁵⁶ With this arrangement, Norway is given full access to the internal market of the European Union but is required to implement all European Union laws thereby associated.⁵⁷

In addition to implementing European Union laws, Norway is also required to contribute to the yearly budget of the European Union in an amount comparable to Member-State contributions.⁵⁸ However, Norway is not involved in creating European Union laws and regulations because it is granted only the ability to participate, not vote, in programs created by the European Union.⁵⁹ This plan, commonly referred to as the Norway Plan, has allowed Norway to be free from some directives and rules of the European Union.⁶⁰ Nonetheless, with the demands imposed by the EEC, Norway still loses some of its autonomy to the European Union.⁶¹ Two other States, Iceland and Liechtenstein, have arrangements similar to Norway's based on their membership in the EEC, and are similarly allowed to participate in the internal market.⁶²

Additionally, a relationship similar to that between Switzerland and the European Union makes it possible for a Member-State to leave despite the difficulty created by this type of arrangement.⁶³ After rejecting membership to the EEA in 1992, Switzerland has agreed to over 120 bilateral agreements with various States, which allows for the State to participate in the common market, while contributing less than Norway to the European Union's budget.⁶⁴

Under a plan like Switzerland's, a former Member-State would still be required to abide by certain areas of European Union laws and contribute to the European Union's budget, but would not have the ability to participate in decision-making.⁶⁵ Furthermore, Switzerland's agreements do not allow the free movement of services, including financial services, which is vital to the economies of many European Union Member-States.⁶⁶

56. Damien Gayle, *The Norway Option: What Is It and What Does It Mean for Britain?*, THE GUARDIAN (Oct. 28, 2015), https://www.theguardian.com/politics/2015/oct/28/the-norway-option-what-is-it-and-what-does-it-mean-for-britain?CMP=share_btn_link.

57. *Id.* (explaining that Norway is required to implement all legislation related to the internal market, leading to approximately 75% of all European Union legislation being enacted in Norway).

58. *Id.*

59. *Id.* (listing some of the organizations Norway has participation rights in: the European Defence Agency, Frontex, Europol, and the European Monitoring Centre for Drugs and Drug Addiction).

60. *Id.*

61. *See generally id.* (explaining that the European Union and the European Economic Community are separate organizations, established under different treaties.).

62. *Id.*

63. *See generally id.*

64. *Id.*

65. *Id.*

66. *Id.*

F. The United Kingdom

The United Kingdom secured membership in the EEC, the European Coal and Steel Community, and the European Atomic Energy Community in 1973, after the United Kingdom Parliament passed the European Communities Act in 1972.⁶⁷ This Act of Parliament approved the formal relationship between the two parties, gave direct legal effect to the laws of the European Community, and allowed for the European Court of Justice to have direct jurisdiction in interpreting the applicability of European Union laws.⁶⁸ Further, this Act has played an important role in the United Kingdom, as it gave a certain amount of parliamentary sovereignty to the European Community.⁶⁹

The new relationship between the European Community and the United Kingdom began with difficulties, as the United Kingdom chose to hold a referendum on membership in the EEC in 1975, with 67% of votes choosing to remain in the community.⁷⁰ More issues became apparent with the passage of the Single European Act of 1986.⁷¹ Many protested Prime Minister Margaret Thatcher's proposal of implementing a unified currency for the single internal market and opposed increased integration of the Community and of Member-States.⁷² The United Kingdom's dissatisfaction with the idea of a European community has continued and has been demonstrated by the multiple opt-outs that have been secured since the Maastricht Treaty of 1992, which formally created the European Union.⁷³

The United Kingdom negotiated special exceptions into European Union law, specifying explicit areas where European Union laws are not binding in the United Kingdom.⁷⁴ In relation to the economic and monetary union associated with the European Union, the United Kingdom maintains control over domestic banks and relevant economic and monetary policies.⁷⁵ This control is maintained because there is no requirement for a Member-State to join the monetary union or use the euro and the State cannot be punished related to the Economic and Monetary Union.⁷⁶

67. Clive Coleman, *Reality Check: Did the UK Lose Its Sovereignty in 1972?*, B.B.C. NEWS (Mar. 10, 2016), <http://www.bbc.com/news/business-35766434>.

68. *Id.*

69. *Id.* (stating an important principle of the United Kingdom's constitution: "Parliament [is] the supreme legal authority in the UK, which can create or end any law.").

70. Daniel Kenealy, *How Did We Get Here? A Brief History of Britain's Membership of the EU*, EUROPEAN FUTURES (May 24, 2016), <http://www.europeanfutures.ed.ac.uk/article-3278>.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Rights and Obligations of European Union Membership*, p. 14, (Apr. 2016), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/516501/Rights_and_obligations_of_European_Union_membership_web_version.pdf.

75. *Id.*

76. *Id.*

The United Kingdom has refused to be a party to the Schengen Agreement, which established a border-free area, thus, the United Kingdom maintains its own controls on all borders.⁷⁷ With Parliament's ability to enact measures of national interest, the United Kingdom has also opted-out of some regulations related to justice and home affairs.⁷⁸ Under the expressed exceptions to European Union law, the United Kingdom is not required to further actions integrating the European Union politically and maintains the ability to veto European Union legislation.⁷⁹

G. UK Problems with the EU

Despite the United Kingdom's influence and exceptions to the rules and jurisdiction of the European Union, the desire to hold a referendum on membership culminated with the vote on June 23, 2016.⁸⁰ The factors contributing to the referendum on the United Kingdom's European Union membership were related to the issues seen throughout the world, including the United Kingdom's issue of sovereignty.⁸¹ The Brexit campaigners provided numerous reasons supporting their position to exit the European Union.⁸² Such reasons included, improving the United Kingdom's economy, allowing the United Kingdom to more effectively control immigration and migration, and helping the United Kingdom retain sovereignty.⁸³

A significant reason for wanting to leave the European Union is related to the desire of the Council of the European Union to become more integrated economically and politically,⁸⁴ which would eventually lead to Member-States acting more readily as a single unit.⁸⁵ However, such European Union goals are heavily opposed by some in the United Kingdom, such as the opposition related to creating a European Union Army for the common protection of the European Union.⁸⁶ There was also resistance to granting the European Court of Justice an increase in jurisdiction and power over its

77. *Id.*; see also *Schengen, Borders & Visas*, EUROPA (October 23, 2016), http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/index_en.htm. The Schengen Agreement created an area of no internal borders or border checks in Europe, allowing the visa-free movement of people and tourists.

78. *Rights and Obligations of European Union Membership*, *supra* note 74.

79. *Id.*

80. Hunt & Wheeler, *supra* note 1.

81. *Id.*

82. *Id.*

83. Lord Green et. al., *10 Reasons Why Choosing Brexit on June 23 Is a Vote for a Stronger, Better Britain*, THE SUN (June 22, 2016), <https://www.thesun.co.uk/news/1278140/why-voting-to-leave-the-eu-will-save-our-sovereignty-rein-in-migration-and-boost-our-economy/>.

84. *Id.*

85. See generally *id.* (with the integration of Member-States, economically and politically, the European Union is able to function as a single State).

86. *Id.*

citizens, as well as holding Member-States financially responsible for the necessary bailouts of poorer Member-States.⁸⁷

The free movement of people and goods is an essential tenet in the European Union.⁸⁸ This influenced immigration and migration into the United Kingdom, which is a major factor that contributed to the disdain by many British citizens of European Union membership.⁸⁹ Based largely on the influx of refugees entering Europe in recent years, an anti-immigration sentiment has developed in the United Kingdom.⁹⁰ Many feel the European Union's policy related to immigration and the free movement of people largely leaves borders unsafe, allows for immigration to occur largely unchecked or controlled, and creates economic concerns for both the nationals and foreign residents.⁹¹ These factors heavily influenced the decision of the United Kingdom to hold a referendum.⁹²

The United Kingdom's decision to leave the European Union also created a venue for British residents to potentially create a better geopolitical and economic climate for the future.⁹³ As the European Union has continually reduced domestic sovereignty in certain Member-States, the economic need for this is not as prevalent.⁹⁴ When the United Kingdom joined the EEC in 1973, Member-States accounted for 36% of the world economy, while currently only accounting for 17% of the global market.⁹⁵ The European Union's reduced economic power and integration of a common currency, common laws, and common decision-making has diminished the United Kingdom's ability to enter into more favorable agreements than existing agreements negotiated by the European Union.⁹⁶ Accordingly, loss of sovereignty and increased regulations imposed on the United Kingdom led to the United Kingdom's referendum on European Union membership and played a vital role in the final decision to leave the European Union.⁹⁷

87. *Id.* (the United Kingdom had to pay £850million for the bailout of Greece in 2008, an action not intended to be allowed by the opt-outs related to the euro and Eurozone).

88. *Id.*

89. *Id.*

90. Lindsay Holmes, *The One Factor in the Brexit Vote No One Is Talking About*, HUFFINGTON POST (June 24, 2016), http://www.huffingtonpost.com/entry/psychology-voting-brexit_us_576d636ae4b0f1683239641f.

91. *Id.*

92. *Id.*

93. *See generally id.* (future agreements enacted by the United Kingdom could enact better terms than previously had).

94. *See generally* Coleman, *supra* note 67.

95. *Id.* (globalization and the reduction in share of the world economy for the European Union has created the need for Member-States to trade with countries throughout the world).

96. *Id.*

97. *See generally id.* (these factors, among others, contributed to the decision to hold a referendum).

G. UK Leaving the EU Domestically

For the United Kingdom to leave the European Union, actions must be taken in accordance with this transnational organization and British law.⁹⁸ The process for the United Kingdom to leave the European Union began with the passage of the European Union Referendum Act of 2015, which enabled eligible voters living in the United Kingdom to vote on membership.⁹⁹ Through the passage of the Act, then-Prime Minister David Cameron was able to unilaterally call for and hold the June 23, 2016, referendum on membership in the European Union.¹⁰⁰ The Act identified eligible voters, modified domestic and European Union law to permit the referendum, and indicated the referendum was for the United Kingdom and Gibraltar to decide on European Union membership.¹⁰¹

“Britain Stronger in Europe” was chaired by prominent British figure Lord Rose and backed by key figures from the Conservative, Labour, Liberal-Democrats, Plaid Cymru, Alliance, and the Social Democrat and Labour parties.¹⁰² Britain strongly campaigned to remain in the European Union and raised £6.88 million pounds during the endeavor.¹⁰³ Additionally, former Prime Minister David Cameron was a leading voice of “Britain Stronger in Europe” and played a very important role in this camp.¹⁰⁴

In contrast, “Vote Leave” advocated for Britain to leave the European Union and raised £2.78 million pounds throughout its campaign.¹⁰⁵ “Vote Leave” was backed by prominent members in the Conservative, Labour, United Kingdom Independence, Democratic Unionist, and Social Democrat parties.¹⁰⁶ Other groups and individuals running independent campaigns also supported “Vote Leave” by encouraging all eligible voters residing in the United Kingdom to vote in favor of leaving the European Union.¹⁰⁷ Nigel Farage, the leader of the United Kingdom Independence Party, was the most notable advocate for “Vote Leave.”¹⁰⁸

The decision to leave the European Union on June 23, 2016, did not trigger an immediate response or automatic process, but rather was a binding vote that created a necessity for further action by both the United Kingdom

98. Hunt & Wheeler, *supra* note 1.

99. *European Union Referendum Act 2015*, THE NAT'L ARCHIVES <http://www.legislation.gov.uk/ukpga/2015/36/contents/enacted> (the European Union Referendum Act 2015 is an act of Parliament approved by both legislative houses, the House of Commons and House of Lords, and assented to by the head of state, Queen Elizabeth II).

100. *Id.*

101. *Id.*

102. Hunt & Wheeler, *supra* note 1.

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

and the European Union.¹⁰⁹ The process of leaving the European Union is detailed in Article 50 of the Treaty of the European Union (Article 50).¹¹⁰ After Article 50 is invoked, the United Kingdom and the European Union will engage in two years of negotiations and will culminate with the United Kingdom repealing all domestic legislation related to their membership and dissolving their membership in the European Union.¹¹¹

Following this referendum however, the larger question remained as to how the leaving process would occur and what, if any, actions must be taken by the United Kingdom's Parliament.¹¹²

After the referendum on European Union membership and departure of Former Prime Minister David Cameron, discussions transpired regarding which governmental body of the United Kingdom is legally authorized to trigger Article 50 proceedings.¹¹³ The debate is whether the Government, namely new Prime Minister Theresa May and her Ministers, or the United Kingdom Parliament, is the political body authorized to begin the process of formally leaving the European Union.¹¹⁴ Both branches are claiming their respective rights to trigger or refrain from triggering Article 50, with the issue being ruled on by the High Court of the United Kingdom.¹¹⁵ The Government appealed the High Court's decision, which was heard by the Supreme Court of the United Kingdom in December 2016.¹¹⁶ The Supreme Court of the United Kingdom ruled in January 2017, that consent of the United Kingdom's Parliament is necessary to allow the Prime Minister to initiate Article 50 proceedings.¹¹⁷

Nevertheless, the Government, by and through Prime Minister Theresa May, has emphasized the ability of her administration to trigger Article 50 and negotiate agreements for leaving the European Union based on the referendum's mandate.¹¹⁸ The Government argued Parliament authorized the possible exit from the European Union, shown by overwhelming support of

109. *See generally id.* (Article 50 was not automatically triggered by the June 2016 Referendum. An intent to leave the European Union must be filed with Council, in order to trigger this action).

110. *Id.*

111. *Id.*

112. Gayle, *supra* note 56.

113. Press Association, *Parliament 'Will Have Its Say on Brexit,'* DAILY MAIL (Aug. 30, 2016), <http://www.dailymail.co.uk/wires/pa/article-3765312/Parliament-say-Brexit-process.html>.

114. *Id.*

115. Alexis Flynn & Jenny Gross, *U.K. Court Puts Brexit in Hands of Parliament*, WALL STREET J. (Nov. 3, 2016), <http://www.wsj.com/articles/brexit-legal-challenge-set-for-court-ruling-1478159686> (the High Court initially ruled the Government, acting through Prime Minister Theresa May, is not able to trigger Article 50 and begin the process of leaving the European Union, without the consent of Parliament).

116. *Id.* (in the event that the Supreme Court upholds the decision of the High Court, there is the possibility for Prime Minister Theresa May to call a snap election in order to increase the support for Brexit among Members of [British] Parliament).

117. *Id.*

118. Rob Merrick, *UK Government Agreed Referendum Could Not Be Legally Binding*, THE INDEP. (Oct. 17, 2016), <http://www.independent.co.uk/news/uk/politics/brexit-senior-conservative-mps-seize-on-a-forgotten-government-pledge-to-let-parliament-decide-the-a7366316.html>.

Members of Parliament in allowing the referendum to occur.¹¹⁹ The Government also argued the Conservative General Election Manifesto of 2015, created a legal mandate for Parliament to allow the people to decide through referendum.¹²⁰ Lastly, it is argued the royal prerogative allows for the Government to act without the consent of Parliament, so long as it is in a manner appropriate and beneficial for the citizens, which essentially allows the Government to undo prior Parliamentary acts in way which most aligns with domestic thoughts and beliefs.¹²¹

Some members of the British government do not support the Government triggering Article 50 unilaterally.¹²² These members posit any negotiations or departure agreements between the United Kingdom and the European Union should occur with the consent of Parliament.¹²³ These parties claim because of the sovereign nature and ability of the United Kingdom Parliament to act, a referendum can only serve as an advisory opinion and may not be legally binding.¹²⁴ This argument is supported by a Parliamentary requirement for one act of Parliament being necessary to undo subsequent acts.¹²⁵ With these requirements imposed by the United Kingdom's Parliament, and the Supreme Court's decision granting Parliament the authority to initiate Article 50, questions are posed on how to proceed in light of the 1972 European Communities Act and the Single European Act of 1986, first allowing the EEC jurisdiction.¹²⁶ Proponents of Parliamentary involvement emphasize that despite any act by the Government, parliamentary acts previously enacted will remain domestic law unless repealed by Parliament.¹²⁷ Furthermore, unless Parliament speaks

119. *Id.* (Parliament voted in an overwhelming fashion, 6-to-1, to allow the eligible voters in the United Kingdom to decide on European Union Membership).

120. *The Referendum Result Is Binding*, LAWYERS FOR BRITAIN, <http://www.lawyersforbritain.org/referendum-binding.shtml>. (last visited Nov. 23, 2016) (stating "We believe in letting the people decide: so we will hold an in-out referendum on our membership of the EU before the end of 2017.").

121. *See id.*; William Blackstone, *Commentaries on the Laws of England*, 1765-1769. "By the word prerogative we usually understand that special pre-eminence which the King hath, over and above all other persons, and out of the ordinary course of common law, in right of his regal dignity."

122. *Id.*

123. Green, *supra* note 83.

124. *Is the EU Referendum Legally Binding?*, THE GUARDIAN (June 23, 2016), <https://www.theguardian.com/politics/2016/jun/23/eu-referendum-legally-binding-brex-it-lisbon-cameron-sovereign-parliament>. (in the United Kingdom's history, three referendums have been held nationally: on EEC membership in 1975; on an alternative voting system for Parliament in 2011; and on European Union membership in 2016).

125. Blackstone, *supra* note 121.

126. *See* Green, *supra* note 83; *see also The History of the European Union – 1967*, *supra* note 46. (These Acts began the assimilation process of the United Kingdom into the European Union allowing for transnational laws, regulations, and policy measures to be enacted domestically.).

127. *Id.*

chooses to leave.¹³¹ The existing language in Article 50 provides a framework for withdrawing from the European Union, details requirements that must be met, and discusses potential ramifications of failure to conclude the procedures.¹³²

There are five provisions of Article 50, which set forth the procedures for withdrawing from the European Union.¹³³ However, these provisions do not detail all necessary procedures to allow a smooth transition for all parties. Due to the insufficiency of Article 50 and related articles, it is likely the provisions may be construed in a manner that is aligned with current geopolitical conditions and ideological beliefs.

The first provision of Article 50 requires a Member-State to withdraw according to domestic law.¹³⁴ This provision is necessary and does not create controversy, as it is important for the sovereignty of the Member-State throughout the process. The second provision requires notification to the European Council of a Member-State's intention to leave, and specifies that an agreement for leaving must be adopted between the European Union and the exiting party.¹³⁵ The agreement must be ratified by a qualified majority of the European Council, and must strongly relate to the common foreign and security policies of the European Union.¹³⁶ This provision provides negotiations must occur, specifies two policies for this to occur, and requires significant support from the remaining European Union Member-States for any agreement to be adopted.¹³⁷ Though specifying some requirements, this provision does not explicitly detail what must occur and how the negotiations should occur, or provide guidance on the type of relationship that could be established post-exit.

The third provision requires all negotiations to commence within two years of triggering Article 50, unless there is unanimity among Member-States to extend the proceedings, or the Member-State leaves without an exit agreement.¹³⁸ This provision allows minimal flexibility in the exiting process, as it is largely susceptible to geopolitical conditions, ideologies, and desires of various powers, which could lead to an exiting Member-State to be potentially punished diplomatically or economically for its decision.

The fourth provision prohibits a Member-State leaving the European Union from participating in discussions with the established institutions.¹³⁹ This provision is problematic because a Member-State loses its ability to

131. TEU, *supra* note 34, art. 50.

132. *Id.*

133. *Id.*

134. *Id.* art. 50(1).

135. *Id.* art. 50(2).

136. *Id.*

137. *Id.*

138. *Id.* art. 50(3).

139. *Id.* art. 50(4).

participate in discussions that can significantly impact daily life domestically until the process of leaving is concluded. Additionally, the time requirement of Article 50 allows a Member-State to choose to remain in the European Union by withdrawing its formal intent to leave.¹⁴⁰ The fifth and final provision is without issue, as it specifies that a Member-State may choose to rejoin the European Union, so long as the established procedures for joining the bloc are satisfied.¹⁴¹

The insufficient language of Article 50 necessitates implementation of further language to guide a Member-State departing the bloc. Though all provisions within the Article are not controversial, provisions two through four lack clarity and should be modified to create a more concrete and detailed process for departing from the bloc.

IV. PROPOSAL

The insufficiency of Article 50, the biases among Member-States, the insertion of political ideologies into negotiations, and the desire to punish a departing Member-State can be remedied through the insertion of an additional article (“Article 51”) to the Treaty for the Functioning of the European Union. The proposed Article 51 should include binding language which promotes fairness in negotiations and the overall departing process. Accordingly, Article 51 should state the following:

In addition to areas specified in Article 218(3) of the Treaty on the Functioning of the European Union, the Union shall negotiate economic, trade, visa, diplomatic, and all other necessary areas. Such negotiations with the leaving Member-State may occur separately, but must be completed before the procedures of Article 50 and this article are concluded. All agreements must be ratified by the Union on behalf of the Council, acting by a qualified majority, after obtaining the consent of the European Parliament. The leaving Member-State is not included in the qualified majority vote.

Until the time a policy area has been fully negotiated, the departing Member-State is allowed to participate in discussions and vote on all matters. However, the departing Member-State cannot participate in discussions or vote on matters related to the future of or expansion of the Union.

At the conclusion of and formalization of all negotiations between the Union and departing State, all previous relationships of the State and Member-States are reenacted. Negotiations not concluded within two years of triggering these articles will not impact the ability of the State to enter into agreements with other States or parties.

140. *Id.*

141. *Id.*

In the event the Council deems that an individual representing a Member-State, or a Member-State, act in a manner that substantially impedes negotiations, places unfair requirements and expectations on a departing Member-State, or does not act in otherwise good faith, sanctions, censures, or other remedies can be implemented by the Union. Any provision contained in Article 50 of the Treaty for the Functioning of the European Union in violation of this article is void.

Implementation of Article 51 provides additional guidance for the European Union and the Member-States in the event that a Member-State chooses to withdraw from the bloc. Article 51, while providing additional guidance for all parties involved in the process, also creates a standard for how Member-States should proceed. The added requirement to negotiate all policy areas, will ensure that all aspects of the withdrawal are considered and determined at the time of departure. Along with reenacting the Member-State's previous agreements and recognizing the State's ability to enter into diplomatic relations, Article 51 attempts to reduce any impact that departure will have on the Member-State and on the bloc. In addition to modifying Article 50 to allow the Member-State to continue participating in European Union discussions and votes, this will ensure the Member-State is involved in decisions having a plays a domestic impact. Finally, by requiring Member-States to act in a fair manner and not to impede negotiations emphasizes the importance of fairness and good faith. The value of not punishing a departing Member-State is also shown, which can benefit relationships in the future.

Article 51 attempts to correct the problems created by Article 50 and the organization of the European Union. These problems are addressed by Article 51 but does not solve the problem completely. Methods and procedures are often implemented by political organizations to accomplish a certain goal. Though this proposal attempts to make departing from the European Union a fairer process, the article could be construed to force a departing State to accept unfair terms or risk no relationship. Further, the language of Article 51 may be interpreted differently by the competing political parties in Europe. Different interpretations of the article may lead the provisions to be implemented in an unintended fashion, and detrimental to the departing Member-State. However, the safety mechanisms built into Article 51 help to ensure no biases or unfair actions occur.

V. CONCLUSION

The provisions proposed above, help ensure that a Member-State and the European Union are not punished in the event of a Member withdrawing by protecting the relationship between the parties. A fair process for leaving the European Union is essential, as it prohibits for a transnational

organization from dictating to a country after leaving. It also protects the Member-State and EU from being impacted to the fullest extent possible. Under Article 51, the procedures of withdrawing from the European Union will be more readily accomplished and the process will be more fair to all parties involved. Accordingly, changing geopolitical climate among European Union Member-States has created a need for a clear withdrawal process, which will be accomplished if Article 51 or similar provisions are implemented to address this problem.