Article 50 TEU in practice

How the EU has applied the 'exit' clause
This publication analyses the application of Article 50 TEU during the first ever withdrawal of a Member State (i.e. the United Kingdom) from the European Union. Looking first at the origins and provisions of the withdrawal clause, the paper then considers the main issues surrounding its use, and sets out the European Union's approach to the withdrawal negotiations with the United Kingdom. It also looks at the role of the European Parliament in the process.

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This paper has been drawn up by the Members' Research Service, within the Directorate-General for Parliamentary Research Services (EPRS) of the Secretariat of the European Parliament.

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LINGUISTIC VERSIONS
Original: EN
Translations: DE, FR

Manuscript completed in November 2020.

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PE 659.349
DOI:10.2861/073728
CAT: QA-03-20-774-EN-N

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Executive summary

The Treaty of Lisbon, which entered into force in 2009, amended the Treaty on European Union (TEU) to add an explicit clause enabling the voluntary withdrawal of a Member State from the EU. On 23 June 2016, the United Kingdom (UK) held a national referendum on its continued European Union (EU) membership. The country voted by a narrow majority (51.89 % to 48.11 %) to leave the EU, and the UK government heeded the will of the voters by initiating the process of exiting the Union. More than three and a half years later, on 1 February 2020, the UK ended its 47-year membership of the EU and became a third country, following a process unprecedented in the Union’s history.

Following the UK referendum, Article 50 TEU, the clause setting out the conditions and procedure to be followed in the event of a Member State wishing to exit the EU, quickly became one of the best-known provisions of the Treaty. Experts have widely analysed and commented on the rather vaguely worded withdrawal clause, clashed over differing interpretations of its few provisions and extrapolated various conclusions as to how the withdrawal process should unfold. However, despite differences of opinion, most analysts concurred that the main purpose of the clause was to organise the withdrawal of a Member State from the Union in an orderly manner.

In addition, as Article 50 TEU (or the ‘exit clause’) had never been tested, some aspects of the procedure had to be defined in real time, once the prospect of the UK's withdrawal from the EU became reality. In particular, questions relating to the scope, order and timing of the negotiations mandated by the exit clause had to be settled. Furthermore, once negotiations between the EU and the UK over the terms of the withdrawal formally began, new questions arose, some of which were decided by the ultimate interpreter of EU law, the Court of Justice of the EU.

This paper looks at how Article 50 was actually applied during its first ever use by an EU Member State. It analyses the genesis and the main features of the provision and highlights the main debates surrounding its application. Furthermore, it focuses on the manner in which the EU institutions took the lead in the process by establishing very early on the parameters of the application of Article 50 TEU. The publication also shows how the unity and solidarity of the remaining Member States, as well as close interinstitutional cooperation, have contributed to a uniform EU interpretation of the legal clause and the process it manages, and to a unified and coherent EU position in the withdrawal talks with the UK.

Finally, the role of the European Parliament in the implementation of Article 50 is explored. While formally the Treaties limit the Parliament’s involvement in the withdrawal procedure to the final stage of giving consent to an eventual withdrawal agreement between the EU and the departing Member State, the Parliament managed to expand the scant role assigned to it by the Article 50 clause and to become an indispensable actor in the negotiations over the UK's withdrawal. To this end, it relied on its power of veto to negotiate with the other EU institutions its increased participation in the Brexit process, an approach reinforced by novel working methods that aimed to ensure large majorities and a unified and coherent position internally. Parliament also built an alliance with the European Commission by supporting the role of the latter as the obvious EU negotiator in the Brexit talks and receiving in exchange greater access to information and involvement in the negotiation process. Once its role was recognised, the Parliament acted constructively and responsibly to help forge a unified EU stance.
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1. Article 50 TEU: Genesis and main features / legal aspects

The Treaty of Lisbon, which entered into force on 1 December 2009, amended the EU Treaties to introduce a clause providing Member States with an explicit right of unilateral withdrawal from the Union. This 'exit' provision, which was taken over from the unratified Constitutional Treaty,¹ is now contained in Article 50 of the Treaty on European Union (TEU) and sets out the legal basis and procedure for the voluntary withdrawal of a Member State from the EU. It represents the only lawful way for a Member State to leave the EU. Following the UK referendum, Article 50 TEU quickly became one of the best-known provisions of the Treaty.²

Many have wondered why the EU Treaties would introduce an explicit right to exit what was meant to be an ever closer union. The purpose of Article 50 TEU is assumed thus to be two-fold: on the one hand, to facilitate an orderly withdrawal from the Union on the basis of a negotiated agreement between the withdrawing Member State and the EU³ and, on the other, to reflect the constitutional character of the EU as a free association of states and not a coercive project.⁴ A closer look at the genesis of the withdrawal provision may shed some light on the intentions of its drafters.

1.1. A brief look at the origins of Article 50 TEU

Prior to the Lisbon Treaty, the right of a Member State to secede from the EU was subject to contention, as there was no provision for this in the Treaties. The absence of a withdrawal clause from the founding Treaties was explained by the fact that the drafters saw the European integration process as irreversible.⁵ This was indeed one of the arguments against the possibility of unilateral withdrawal from the EU (or previously, the European Community – EC), which was based on the unlimited duration of the Treaties, the principle of ‘ever-closer union’ and the autonomy and primacy of EU law. In particular, the primacy of the EU legal order meant that the Member States were not allowed to reverse the application of EU law to their citizens.⁶

However, most experts assumed that an exit from the EU was possible either on the basis of international law (the Vienna Convention on the Law of Treaties) or by using the procedure for the revision of the Treaties, which requires the consent of all Member States (in which case, the withdrawal would not be of a unilateral nature).⁷ The latter mechanism was used for the withdrawal of Greenland in 1985, although the relevance of this example is limited as Greenland was a Danish territory and not a direct member of the European Community.⁸ In any case, the European Court of Justice never ruled on the unilateral right to withdraw from the EC/EU. Nevertheless, some experts assume that the Court would have rejected the legality of unilateral withdrawal but accepted the

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¹ Draft treaty establishing a constitution for Europe (not ratified), website of the European Parliament.
⁸ Idem, p. 1387.
withdrawal by consent of all Member States based on the Treaty revision procedure (now in Article 48 TEU).9

1.1.1. The Convention on the Future of Europe and the right to withdraw

It was the Convention on the Future of Europe (2002-2003), established by the European Council’s Laeken Declaration of December 2001 and which produced a draft Constitution for Europe, that first considered the issue of withdrawal from the EU. Several proposals by members of the Convention were analysed, including:10

- a right of withdrawal subject to ‘strict and deterrent conditions’: for example, some of the conditions proposed related to the moment of withdrawal (at the next stage of European integration); to the procedure (the same procedure as for accession to the EU); and to the conclusion of an agreement between the departing Member and the remaining Member States;11
- a right of withdrawal as an expression of Member States’ sovereignty, which would require a revision of the Treaties by the Member States acting unanimously after consultation of the European Parliament;
- a right of voluntary withdrawal, based on an internal decision of that state taken in accordance with the procedure for amending its constitutional provisions; the European Council would be notified by the Member State of its decision to withdraw and would take a decision on the effective date of withdrawal. Prior to the withdrawal, an agreement would have to be concluded between the withdrawing Member State and the Union (represented in the negotiations by the Council). The agreement would deal with the modalities of exercising the right of withdrawal and the consequences for the EU and the exiting Member State.

Eventually, after much debate and amendment, a provision containing the right to exit the EU unilaterally was adopted by the Presidium of the Convention and inserted into article I-59 of the draft Constitutional Treaty. The Presidium argued that a specific provision allowing voluntary withdrawal from the Union would clarify the situation regarding the right of withdrawal, would include a procedure for the negotiation of an agreement between the Member State concerned and the EU whereby the terms of the withdrawal would be settled (although the conclusion of such an agreement would not be a pre-requisite for the withdrawal, which would then take place two years after the notification) and would give the signal that the Union was not a rigid entity from which it was impossible to exit.

Although no member of the Convention contested the possibility for a Member State to withdraw from the Union, some considered the introduction of a withdrawal clause as incompatible with the nature of the Union and with the idea of European integration, among other things.12 In particular, some Member States that were especially supportive of the constitutional project for the EU, as well as the EU institutions, opposed such an insertion.13 Fears were expressed of possible blackmail and paralysis of the Union by Member States threatening to withdraw; in this respect, calls for further safeguards were made, among which a corresponding right to expel a Member State from the Union. Furthermore, even though a majority of Convention members eventually supported the inclusion of a withdrawal clause, for some the withdrawal could not be unilateral, but only based on

9 Idem, p. 1394.
10 Idem, pp. 1402-1406.
11 M. Huysmans, op. cit., p. 159.
12 A. Wyrozumska, op. cit., pp. 1403-1406.
13 P. Eeckhout and E. Franzoiu, op. cit., p. 704.
a negotiated agreement; or should occur only in exceptional circumstances. In addition, it was suggested, as mentioned above, that the withdrawal should be made conditional. For example, some considered that the provision should contain an exhaustive list of conditions upon which a Member State could lawfully withdraw from the Union. Others thought that withdrawal could be possible only if 'irreconcilable differences' following a Treaty change remained between the withdrawing state and the Union, after the Council, in a first stage, had failed to find a solution. Another proposal suggested that the withdrawing state should pay damages for any losses incurred by the Union during the withdrawal process. Other conditions related to the intention to rejoin the Union after the withdrawal, in order to create disincentives for triggering the provision: in particular, proponents argued in favour of imposing a limitation period before a Member State which had withdrawn could rejoin the EU, with proposals ranging from two to twenty years.

After the intergovernmental conference that followed the Convention, the exit clause became Article 1-60 of the Treaty establishing a Constitution for Europe (TCE). The provision retains the unilateral nature of the withdrawal and the lack of substantive conditions imposed on the Member State taking the decision to leave the EU. However, two important additions acted as a counterbalance: the possibility to extend the two-year negotiating period by unanimity only and the need to make a new application for accession to the EU should the withdrawing state wish to rejoin in the future. Their purpose was to prevent the withdrawing state from holding back the negotiations or from triggering the exit clause for opportunistic reasons. Beyond this, much of the provision’s vagueness can be traced back to the debates during the Convention and the inability to agree on precise wording for the provision and on how strict the withdrawal process should be. In this sense, it has been claimed that the exit clause was never meant to be used.

Following the failure of the Constitutional Treaty to enter into force, owing to negative referendums in France and the Netherlands in 2005, renewed efforts were deployed to hold onto the ground won in it. A new intergovernmental conference was convened in 2007 which would lead to the adoption of the Treaty of Lisbon. The Constitution’s withdrawal clause was taken over by the Lisbon Treaty, with minor technical adjustments, to become Article 50 TEU.

1.1.2. Why add a withdrawal clause to the Treaties?

The reasons and the timing of the introduction of the exit clause have been a matter of analysis. Introducing a right of withdrawal from the Union at such a late stage in the process of EU integration could not be explained easily, as most arguments would point to the clause being less rather than more likely to be adopted. For example, experts have asked why an exit clause was introduced after the EU had adopted a common currency and become more integrated, and therefore at a time when the importance of stability and credible commitment to the EU was greater.

One explanation relates to the 2004 enlargement of the Union. The 10 European countries joining the EU on 1 May 2004 were the first new Member States both to ‘differ significantly from the existing Member States and to enter when the EU had moved from unanimity decision-making to qualified majority voting’. In this context, it is argued that the prospective members were essentially offered...
an exit right as ‘constitutional protection’ to compensate for the lack of veto. Furthermore, in the light of the recent history of most central and eastern European candidate countries, the guarantee of an exit right was important to reassert their continued sovereignty and thus to ensure the success of their accession referendums. In addition to the accession countries, the inclusion of the withdrawal provision in the Constitutional Treaty was meant to boost support for approval of the Treaty in those Member States with eurosceptic populations, such as the UK and Denmark. As for the UK in particular, the exit clause partly served the purpose of showing British opponents of EU membership that the UK was not trapped in an ever-closer union.

1.1.3. The 'exit clause' and national constitutional courts

The withdrawal clause was positively assessed by some of the Member States' constitutional courts, in their judgments on the Lisbon Treaty (Germany, Czechia and Latvia) and on the Constitutional Treaty (France and Spain). In its 2010 judgment on the Lisbon Treaty, the Polish Constitutional Tribunal also briefly mentioned the withdrawal clause, reiterating the position taken in its 2005 judgment on the constitutionality of Poland's accession to the EU: should a conflict arise between the national constitution and EU law, the exit clause offered the Polish legislator the option to secede from the EU. The French Constitutional Council did not consider the withdrawal clause in the Constitutional Treaty in depth; it only underlined that the possibility to withdraw from the EU confirmed the Constitutional Treaty's nature as an international treaty. The Spanish Constitutional Tribunal referred to the provision to affirm that sovereignty was always ultimately assured by the right to exit the EU. The German Constitutional Court's decision on the constitutionality of the Treaty of Lisbon (2009) also underlined the right to withdraw as a marker of the Member States' sovereignty: 'If a Member State can withdraw based on a decision made on its own responsibility, the process of European integration is not irreversible.'

The Latvian Constitutional Court's judgment (2008) and the Czech Constitutional Court's two judgments on the constitutionality of the Lisbon Treaty (2008 and 2009) assess in more detail the Article 50 TEU clause. Voluntary withdrawal from the EU confirmed the continued sovereignty of Member States and the principle of the Member States being masters of the Treaty; in this respect, the Treaty was assessed as being in conformity with the respective constitutions and paved the way for its ratification. Furthermore, the Czech Court argued that making the right to secede conditional on respecting the procedure in Article 50 TEU did not restrict the withdrawing Member State's sovereignty. Instead, the Court maintained that leaving without notice and without allowing a period to make arrangements was arbitrary and contrary to the obligations assumed under the Treaties and to the nature of the relationship contracted by the Member States. The Latvian Court also concluded that the right to unilaterally withdraw from the EU preserved Member States' sovereignty.

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21 Idem, p. 169.
23 A. Wyrozumska, op. cit., p. 1410.
27 Ruling by the Czech Constitutional Court on the Treaty of Lisbon - 2009/11/03 - Pl. ÚS 29/09: Treaty of Lisbon II (3 November 2009) and Judgment by the Czech Constitutional Court on the Treaty of Lisbon - 2008/11/26 - Pl. ÚS 19/08: Treaty of Lisbon I (26 November 2008), CVCE.
28 A. Wyrozumska, op. cit., p. 1411.
sovereignty and that the two-year wait required before withdrawal took effect was proportionate in light of the bonds formed between the withdrawing country and the EU. Moreover, such a period was necessary to ensure that the rights and legal interests of the withdrawing state and its citizens were not coming to an abrupt end and that the disruption to commerce was mitigated through withdrawal arrangements.30

Article 50 of the Treaty on European Union (TEU)

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

2. A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3) 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) 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.

1.2. Analysis of the provisions of Article 50 TEU

Writing before the UK’s 2016 referendum, some experts considered that Article 50 TEU raised more questions than it answered. The withdrawal clause did not benefit from the established practice of another provision also worded in general terms, namely the accession procedure set out in Article 49 TEU, so there was no EU withdrawal acquis to guide the application of Article 50 TEU.31 It was therefore quite clear to commentators that the parameters of unilateral withdrawal could be considered unknown territory and that it would be for policy-makers and academics to interpret and translate them into reality.32 Indeed, many issues continued to generate debate long after the UK referendum and the triggering of the withdrawal clause by the UK. For example, the UK and the EU initially had differing views about the scope of the withdrawal agreement. Furthermore, the Article 50 provision did not settle the question whether, once the notification of withdrawal was sent and the clause triggered, the Member State could change its mind about leaving the EU and revoke that notification. The issue of agreeing a transitional period also raised many questions, in particular whether transitional arrangements could be legally created under Article 50 TEU and what they could cover. Against this backdrop, the first ever EU withdrawal negotiations have led to substantial additions to the withdrawal procedure in the form of contributions and positions from the EU institutions (e.g. European Council guidelines, European Parliament resolutions, Commission

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30 Ibidem.
31 A. Łazowski, op. cit., p. 525.
32 A. Łazowski, ‘Unilateral withdrawal from the EU: realistic scenario or a folly?’, Journal of European Public Policy, Vol. 23(9), 2016, pp. 1294-1301.
reports and Court of Justice of the EU (CJEU) case law), which now can be said to constitute the body of ‘EU withdrawal law’.33

### 1.2.1. Who stands to benefit?

It has been argued that Article 50 TEU has had two lives: pre- and post-June 2016. In particular, some experts claim that, after the UK referendum, the EU institutions opted for a different interpretation of Article 50 TEU than seen in pre-referendum literature. For example, prior to the referendum, analyses of Article 50 TEU tended to assume that the withdrawal talks would deal not only with the strict divorce matters, but also with the future relationship between the EU and the withdrawing state; this was not the view taken by the EU institutions after June 2016. For these experts, therefore, the Article 50 TEU process, as it was interpreted after the UK referendum, places the withdrawing Member State in a structurally weaker position compared to the EU.34 Other experts, however, consider that Article 50 TEU is politically neutral, favouring neither the withdrawing state nor the EU; nevertheless, the procedure does seem to work in the favour of the party with the greater economic and political power. In this respect, they argue that Article 50 TEU ‘simply formalises the balance that emerges from the underlying position of the parties’.35

For other academics, Article 50 TEU requires a constitutionalist interpretation: withdrawal must comply with EU constitutional law, including respect for national constitutional requirements, as well as EU values. According to a constitutionalist reading, ‘a non-punishing approach towards withdrawal is not merely a question of the Union’s charitable disposition but it is, rather, mandated by the Union’s obligation to respect the constitutional requirements of a withdrawing State, the rights of individuals, and its own values’.36 The withdrawal process must thus unfold under the duty of sincere cooperation, as mandated by Article 4(3) TEU, which binds the EU institutions, the withdrawing Member State and the rest of the Member States; must respect EU law and EU values; and must comply with the principles governing the division of competences between the EU and its Member States.37 The importance of interpreting Article 50 TEU in the light of the principle of sincere cooperation is emphasised by several other experts. Assuming the withdrawal notification could be withdrawn at any time, the principle is crucial to prevent political blackmailing on the part of the departing Member State.38 Some authors even argue that future Treaty reform should amend Article 50 TEU to explicitly insert the obligation on the withdrawing Member State to ‘respect the Union’s institutional framework and the principle of sincere cooperation under Article 4(3) TEU’.39

### 1.2.2. What does Article 50 TEU provide?

Article 50 TEU sets out the exclusive legal procedure (the only lawful way) for a Member State to withdraw from the Union.40 The provision’s main purpose is to ensure an orderly withdrawal, based

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37 Idem, p. 702.
38 A. Wyrozumska, op. cit., p. 1414.
39 D. Kostakopoulou, op. cit., p. 489.
40 International law is not applicable if the matter is regulated by the EU Treaties, according to the principle lex specialis derogat legi generali. See A. Wyrozumska, op. cit., pp. 1395-1396. Also, according to Article 54 of the Vienna Convention on the Law of Treaties (VCLT), withdrawal from a treaty may take place in conformity with the provisions of the treaty or by consent of all parties. However, the VCLT is not directly applicable to the TEU as the EU is not a party to the Convention, and nor are some of its Member States (France and Romania).
on the conclusion of an agreement between the exiting state and the Union, within the EU procedural framework. The procedure has a hybrid character: on the one hand, it encompasses an important role for the Member States through the European Council; on the other hand, it mandates the negotiation and conclusion of an EU act (namely, the withdrawal agreement, which is an international agreement concluded by the EU). Furthermore, it is for the EU institutions to negotiate and conclude the withdrawal agreement with the departing Member State, in contrast to the intergovernmental accession procedure in Article 49 TEU, where the Member States and the applicant state conclude the accession agreement.41

Conditions of withdrawal

Beyond the procedure established by Article 50 TEU, no substantive conditions exist in the Treaties concerning a Member State’s right to withdraw from the EU. Withdrawal constitutes a voluntary act, which does not require approval by the other Member States, and the withdrawing Member State need not state a reason for its decision to withdraw. What Article 50 TEU requires is that the decision to withdraw be taken in accordance with the state’s constitutional requirements (Article 50(1) TEU).42 On the one hand, this is said to minimise possible abuse of the clause for political reasons. On the other, it underlines that respect for the constitutional procedures of a withdrawing Member State must underpin the withdrawal process.43

It is therefore for the withdrawing Member State to decide what these constitutional requirements are. Experts have nevertheless pointed to some problems that may still arise, such as the eventuality that a government notifies withdrawal from the EU disregarding procedures that should be followed under national constitutional law. In this situation, there are differing views regarding the acceptance by the EU of the withdrawal notification.44 One view is that the EU institutions (including the Court of Justice) and the other Member States cannot verify the fulfilment of these national constitutional requirements, which is a matter of national competence for the withdrawing Member State alone.45 Accordingly, the EU and its Member States must accept the notification without any verification;46 this stems from an interpretation of Article 50 TEU as not intended to make compliance with national constitutional requirements a condition for the legality of the notification. The opposite view states that EU law does impose a condition when it requires respect of the national constitutional procedures and that the Court of Justice of the EU would therefore have jurisdiction to verify their fulfilment. It is nevertheless unclear what the implications would be of a finding by the CJEU that the withdrawing Member State had not complied with its constitutional requirements in serving the withdrawal notification.47

41 C. Hillion, op. cit., p. 30.
43 P. Eeckhout and E. Franziou, op. cit., p. 708.
45 A. Wyrozumska, op. cit., p. 1406.
46 An analogy with international law, in particular the VCLT, is not entirely relevant in this case. Article 68 VCLT does indeed provide that ‘A notification or instrument provided for in Article 65 or 67 may be revoked at any time before it takes effect’. However, as mentioned, the VCLT is not directly applicable to the TEU; Article 68 VCLT may be relevant for interpretation only if it is considered an established customary norm of international law.
47 T. Tridimas, op. cit., p. 303.
In the context of Brexit, the UK government’s interpretation of the national requirements for exiting the EU was swiftly challenged in court. On 24 January 2017, the UK Supreme Court confirmed that a withdrawal from the EU cannot be triggered by a notification served by the UK government alone, without a prior Act of the UK Parliament. According to the Court, royal prerogative powers, vested in the Crown but traditionally exercised on its behalf by government ministers, cannot extend to fundamental changes entailing major effects for UK constitutional arrangements and the legal rights of UK citizens.  

Procedure

The process set out in Article 50 TEU begins with a Member State’s formal notification to the European Council of its intention to withdraw. However, Article 50 TEU gives no indication as to the characteristics of the notification. As the notification is a unilateral act of the withdrawing Member State, it can be inferred that the form of the notification and its timing are at the discretion of that state. Nevertheless, the notification must be made in a clear and unambiguous manner. The notification also triggers the two-year countdown provided for by Article 50(3) TEU (see below).

Despite calls by the EU made immediately after the UK referendum for the UK to trigger the Article 50 procedure without delay and end the uncertainty, it was only nine months later that the withdrawal notification was sent. On 29 March 2017, the UK Prime Minister notified the European Council of the UK’s intention to withdraw from the EU, in accordance with Article 50 TEU, as well as from the Euratom Treaty (covering cooperation in nuclear energy). The notification took the form of a letter from the UK Prime Minister, Theresa May, to the European Council President, Donald Tusk. Besides expressing unequivocally the UK’s intention to withdraw, the letter went on to describe how the withdrawal process would unfold in the United Kingdom, the UK’s intention to negotiate with the EU a ‘deep and special partnership that takes in both economic and security cooperation’ (outside the single market), and a series of principles for the upcoming discussions.

The European Council then adopts guidelines for the negotiation and conclusion of an agreement between the Union and the withdrawing Member State, which should set out the arrangements for the withdrawal, and take account of the framework for that state’s future relationship with the EU. From the moment of formal notification, the EU and the withdrawing Member State have two years to reach an agreement on the withdrawal. At the end of these two years, if no agreement has been reached, the EU membership of the withdrawing Member State comes to an end, unless the European Council decides unanimously, in agreement with the withdrawing Member State, to extend the deadline, prior to its expiry.

It must be underlined that the obligation to negotiate an agreement is addressed only to the EU: ‘the Union shall negotiate and conclude an agreement with that State’ (Article 50(2) TEU). At the same time, there is no obligation for the EU to enter into negotiations before the withdrawal notification is received, as a counterbalance to the withdrawing Member State’s right to determine the timing of the triggering of Article 50 TEU. The existence of the two-year period laid down in the provision has been invoked as an argument that the withdrawing Member State does not have such an obligation and that, in theory, it can just wait out the two-year period, without engaging in any negotiations – proof that unilateral withdrawal is possible. This literal interpretation has been contested. According to A. Łazowski, unilateral withdrawal was not the preferred outcome of the drafters of Article 50 TEU, and not even a realistic scenario in light of the deep integration and interdependence between the EU Member States, leading to severe consequences for the

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49 T. Tridimas, op. cit., p. 303.
50 Idem, p. 306.
withdrawing state’s economy and citizens. Instead, the two-year deadline was inserted in order to focus the minds of the negotiators and avoid prevaricating. Moreover, the two-year period (a noticeably short time to conclude negotiations) may be extended by the European Council acting unanimously in agreement with the withdrawing Member State. Article 50 TEU imposes no limits in this respect, neither regarding the duration nor on how many times an extension could be agreed.51

During the Brexit negotiations, there were three extensions to the Article 50 period, for various periods of time and with some conditions attached. The first extension decision was taken on 22 March 2019 following the UK’s request to be granted an extension until 30 June 2019. The European Council agreed instead to an extension up to 22 May 2019, if the UK Parliament approved the withdrawal agreement in the week of 29 March. If not, the extension would run until 12 April 2019 (the deadline for the UK to give notice of holding European Parliament elections), unless the UK indicated a way forward for consideration by the European Council before then. The European Council decision further stated that, were the UK still a Member State on 23-26 May 2019, it would be obliged to hold European elections.

The European Council took the second decision to extend the Article 50 period on 11 April 2019. It followed another UK request to extend again up to 30 June 2019, sent on 5 April 2019.53 The European Council decision extended instead the period until 31 October 2019; however, it also provided that the extension would end on 31 May 2019 triggering a no-deal exit, if the UK failed to ratify the withdrawal agreement by 22 May 2019 and if it failed to hold elections for the European Parliament, a legal obligation under EU law.

The third and final extension during the Brexit negotiations was agreed on 29 October 2019, until 31 January 2020, following another UK request to this end.

Such European Council decisions are subject to the review of the EU Court of Justice (CJEU), in accordance with Article 263 of the Treaty on the Functioning of the EU (TFEU).

On the EU side, the withdrawal agreement must be negotiated in accordance with the procedure on the conclusion of international agreements set out in Article 218(3) 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 authorising 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.

The Council thus adopts the negotiating mandate and appoints the Union negotiator. However Article 50 TEU does not mention whether the rest of Article 218 TFEU on international agreements is applicable to the negotiation of a withdrawal agreement. In theory, the Treaties leave open the possibility of nominating a negotiator other than the European Commission in the case of a withdrawal agreement. Similarly, Article 218(3) TFEU is silent on the signature of the agreement; however, experts consider that Article 218(5) TFEU should apply – whereby the Council, following the negotiator’s proposal, adopts a decision authorising the signature of the agreement.55 Moreover, the question was raised as to whether the CJEU could rule on the compatibility with the Treaties of the draft withdrawal agreement, in accordance with Article 218(11) TFEU. It is reported

55 A. Wyrozumska, op. cit., p. 1407.
that the Council lawyers believed Article 218(11) TFEU did not allow such a reference to the CJEU, but other experts concluded that an early CJEU ruling on the agreement’s compatibility with the Treaties must be possible, in order to ensure legal certainty, although this process would interfere with the two-year negotiating period. In any case, it would be for the Court itself to judge on the admissibility of the action. In addition, the CJEU could be involved in other different ways: it could rule on an action for annulment under Article 263 TFEU against the Council decision to conclude the agreement or could pronounce itself on questions for a preliminary ruling (Article 267 TFEU) by national courts in the Member States. One such question did reach the Court during the Brexit talks, on the possibility of unilaterally revoking the notification of withdrawal (see Section 1.3.3 below).

The decision to conclude the agreement with the withdrawing Member State is taken by the Council on behalf of the Union, following the consent of the European Parliament (Article 50(2) TEU). The European Parliament gives its consent by a majority of the votes cast (Article 231 TFEU). If consent is given, the Council concludes the agreement with the ‘super qualified majority’ of the remaining Member States, as defined in Article 238(3)b TFEU: 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. While the representatives of the departing Member State do not take part in the discussions and decisions relating to the withdrawal in the European Council and the Council (Article 50(4) TEU), nothing is said about the Members of the European Parliament (MEPs) elected in the withdrawing Member State. Despite some arguments to the contrary, the prevailing view was that MEPs from the withdrawing Member State, as representatives of all EU citizens, must be allowed to participate in European Parliament debates concerning the withdrawal, and also in the final European Parliament vote on the withdrawal agreement.

Ratification of the withdrawal agreement by the remaining Member States is not required – in line with the voluntary character of the withdrawal, as well as in consideration of the withdrawal agreement as an EU-only agreement. Nevertheless, any international agreement between the EU and the state which has withdrawn defining their future relationship would require ratification in the remaining Member States, unless the agreement were only to cover matters falling within the exclusive competence of the Union.

Effects and consequences of withdrawal

According to Article 50(3) TEU, from the date of entry into force of the withdrawal agreement or, failing an agreement, two years following the withdrawal notification (unless there is an extension of this period), the EU Treaties and their Protocols shall cease to apply to the state concerned. While EU law ceases to apply in a Member State once it leaves the EU, national acts adopted in the implementation of, or transposition of, EU law remain valid until they are repealed or amended by national legislatures or administrations. The rights and obligations deriving from the Treaties cease to apply. International agreements between the EU and third countries or international organisations also no longer apply to the withdrawing state, which must negotiate alternative

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56 A. Gostyńska-Jakubowska, Brexit maze: the role of EU institutions in the negotiations, Policy brief, Centre for European Reform, 5 July 2017.
58 In the context of Brexit, the super qualified majority translated into 20 out of the 27 remaining Member States.
arrangements. As Article 50 TEU does not appear to support partial withdrawal from the EU (withdrawal from certain obligations only, and not from others), it would not be the appropriate legal instrument for any such arrangement.

In order to prepare for withdrawal, the UK Parliament passed a series of bills. The European Union (Withdrawal) Act 2018 provides for the repeal of the European Communities Act 1972 (ECA) – the constitutional basis for the UK’s membership of the EU and for the application of EU law in the UK. According to this act, the ECA is repealed on exit day, but at the same time, most existing EU law is transposed into domestic law, in order to prevent legal uncertainty after the withdrawal. This ‘retained EU law’ includes: EU regulations, decisions, domestic legislation passed to implement EU directives, relevant case law of the CJEU issued before exit day, and most rights and obligations that exist in domestic law. A great number of statutory instruments were also laid before Parliament, whose purpose was to bring corrections (or even more significant changes) to some of the EU legislation retained. Furthermore, other acts gave the UK power to establish its own regime in areas such as sanctions policy, customs, nuclear safeguards and taxation. By the time the transition period established by the Withdrawal Agreement ends on 31 December 2020, further pieces of legislation must be in place in the UK to replace EU law, on trade, agriculture, fisheries, the environment, immigration, and so on.

Finally, the European Union (Withdrawal Agreement) Act 2020 provides the domestic legal basis for the EU-UK Withdrawal Agreement (the UK is a dualist state) and fulfils previous conditions allowing for the ratification of the agreement. It also amends the EU Withdrawal Act 2018 to preserve the effects of the ECA, beyond the exit day, until the end of the transition period.

Moreover, Article 50(5) TEU provides that if a Member State that has withdrawn from the EU requests to rejoin the Union, the accession procedure in Article 49 will apply; thus, the clause does not confer an automatic right to rejoin the EU nor a privileged status on the former Member State after it has left the EU.

Finally, it has been argued that changes to the Treaties might become necessary as a consequence of the withdrawal. For example, Articles 52 TEU and 355 TFEU on the territorial scope of the Treaties would need to be amended, and the protocols relating to the withdrawing Member State revised or repealed. These amendments would require ratification by the remaining Member States, in accordance with Article 48 TEU on the revision procedure. However, at the time of writing, no initiative for the revision of the Treaties after Brexit has been announced. Moreover, according to the European Commission, there is no legal necessity to amend or delete all references to the UK or its institutions and actors in existing EU legislation, as they became obsolete after Brexit. When the respective legal acts are reviewed and updated within the usual procedures, the institutions may also proceed to the necessary amendments.

1.3. Main controversies surrounding Article 50 TEU

With the first ever application of the Article 50 TEU to the withdrawal of the UK from the Union, there is now a developing EU withdrawal law. In particular, even before the start of the negotiations with
the UK for a withdrawal agreement, the EU institutions had established a series of principles and procedures to guide those negotiations, as well as the overall framework for their conduct. In this respect, Article 50 TEU itself mandates the European Council to adopt the guidelines in light of which the Union conducts the withdrawal negotiations. In addition to the European Council guidelines, Council decisions, various reports and position papers from the Commission, and the European Parliament’s resolutions have completed the picture sketched by the legal provisions of Article 50 TEU. The withdrawal procedure in the Treaty has thus been further developed to address the practical issues arising from withdrawal and to ensure the interpretation and implementation of those aspects on which Article 50 TEU was silent. However, this process has not been smooth. A series of controversies and disagreements emerged about the application of Article 50 TEU, not only between the two negotiating parties, but also among legal experts and academics.

Before analysing the main points of contention during the UK withdrawal process, it is important to highlight two significant features of this emerging EU withdrawal law. Firstly, Article 50 TEU was interpreted as to provide the basis for an ‘exceptional horizontal’ and exclusive competence for the EU, enabling it to negotiate all arrangements necessary for the withdrawal. The Council negotiating directives adopted on 22 May 2017, following the European Council guidelines (29 April 2017) and the recommendation of the Commission (3 May 2017), state that:

*Article 50 of the Treaty on European Union confers on the Union an exceptional horizontal competence to cover in this agreement all matters necessary to arrange the withdrawal. This exceptional competence is of a one-off nature and strictly for the purposes of arranging the withdrawal from the Union. The exercise by the Union of this specific competence in the Agreement will not affect in any way the distribution of competences between the Union and the Member States as regards the adoption of any future instrument in the areas concerned.*

This formulation indicated that the EU could conclude a withdrawal agreement with the UK even if it were to address issues outside EU exclusive competence; however, this exceptional competence would be strictly circumscribed to the negotiation and conclusion of the agreement. Beyond the conclusion of the withdrawal agreement, it could not affect or act as a precedent for the normal distribution of competences between the Union and its Member State established by the Treaties. The direction had been set by the European Council guidelines of 29 April 2017, which insisted on the unity of views among the EU-27 in support of the common interests, as well as on the need to avoid undermining the position of the Union through separate bilateral negotiations between individual Member States and the UK on matters relating to the withdrawal. Furthermore, the recognition of such an exceptional exclusive competence for the EU has been explained by the need to facilitate the conclusion of a withdrawal agreement, thereby leading to an orderly process of withdrawal, which was the intention of the drafters of the Treaty. Finally, the exceptional EU competence derived from Article 50 TEU has allowed the adoption of transitional arrangements as part of the withdrawal agreement – a possibility that had been contested by some (see below).

The second feature worth highlighting is the introduction of conditionality to the application of Article 50 TEU. By establishing the principles and red lines that would guide the Union in the withdrawal talks with the UK and by bringing in elements of conditionality (similarly to the
enlargement process), it was the European Council that put in place the framework for the withdrawal negotiations. In particular, the European Council decided on the sequencing of the negotiations, first of all dealing with three key issues (citizens’ rights, the financial settlement and the border on the island of Ireland) and a second phase when the parties would start preliminary discussions about the framework of the future relationship. It was the European Council that decided when to start the second phase, after assessing, according to its own criteria, that sufficient progress had been achieved on the first phase issues. Importantly, the EU-27 took this decision unanimously. The introduction of a veto power in the procedure has been assessed as surprising due to the risk of the talks being blocked by one Member State and in light of the purpose of Article 50 to ensure an orderly withdrawal. In any case, experts consider that the EU has managed to set the agenda and the conditions for the withdrawal of the UK, all within the parameters of the EU legal order and in consideration of the EU’s objectives and interests. This has left the withdrawing state with the alternatives: to accept the EU’s terms or to exit the Union without an agreement.72

1.3.1. The scope of the withdrawal agreement and the sequencing of the talks

Article 50 TEU does not clarify what should be included in the scope of the withdrawal agreement to be negotiated between the EU and the withdrawing Member State, or how negotiations should be organised. It was assumed from the start that the withdrawal arrangements would have to address, among other issues, the protection of individual subjective rights based on EU law, the phasing out of EU financial programmes in the departing Member State, the common liabilities under the EU budget and a broader financial settlement, the relocation of EU agencies, and border issues. Some of these issues would also depend on the future relations between the EU and the Member State concerned.73 Some experts, however, initially reached the conclusion that the withdrawal agreement would have to be limited to the issues falling under the EU’s exclusive competence (set out in Article 3 TEU), due to the fact that Article 50 TEU provided for an EU-only agreement that did not require ratification by the Member States.74

Furthermore, debates ensued over questions relating to the future relationship between the EU and the departing Member State. First, it was unclear whether the withdrawal agreement could cover the future relationship as well. Second, if two (or more) agreements were necessary, the question arose as to whether the negotiations over the withdrawal agreement and those on the future relationship could proceed in parallel and whether these agreements could be concluded at the same time. As mentioned above, some commentators assess that prior to the UK referendum the understanding regarding the scope of a withdrawal agreement differed from the prevailing view post-referendum.75 Three approaches to the question of whether the future relations could be governed by the withdrawal agreement emerged. The first saw Article 50 TEU as a stand-alone provision for entering agreements. Accordingly, the agreement covering the conditions of withdrawal would cover not only the exit itself, but also future relations between the departing state and the Union.76 The second concluded that there were limitations to the scope of Article 50 TEU, entailing the negotiation, in parallel with the withdrawal talks, of an international agreement under the ordinary provisions of the Treaties. Finally, the third view considered that the settling of the
future relationship must be dealt with only after the withdrawal; priority was to be given to the ‘divorce’ issues, while transitional arrangements would bridge the gap to future relations.\(^77\)

The latter became the prevailing view after the UK referendum, when most observers reached the conclusion that the withdrawal agreement and the agreement on the future relationship must be concluded one after the other, mainly on account of considerations relating to the legal basis. For instance, it was argued that doing otherwise would breach the principle of conferral enshrined in the Treaties.\(^78\) According to this view, the agreement on the future relationship can only be formally concluded once the withdrawing Member State has become a third country in relation to the EU. Because negotiations on the future arrangements are expected to take far longer than the two years provided for by Article 50 TEU, this indicates that a future trade or association agreement could not be covered by the agreement on the withdrawal. Furthermore, owing to the difference in procedures for the two types of agreements, most experts argued that the withdrawal agreement could not cover the future relationship and must be limited to the necessary arrangements to extricate the withdrawing state from the EU. While the withdrawal agreement – based on the procedure in Article 50 TEU – is an EU-only agreement, concluded by the Council under qualified majority, after Parliament has given its consent, different procedures apply to a trade agreement (Article 207 TFEU on the common commercial policy) or an association agreement (Article 217 TFEU). A trade agreement would fall under EU exclusive competence and require qualified majority voting in the Council; however, should the agreement cover issues such as trade in cultural and audiovisual services or education and health services, unanimity becomes the rule in the Council. As for association agreements, they are approved by the Council acting unanimously. Moreover, association agreements are normally mixed agreements, covering issues going beyond the EU’s exclusive competence, which entails that they be concluded jointly by the EU and its Member States and that national ratification is also required for their entry into force.\(^79\) Therefore, Article 50 TEU would not confer on the EU the competence to conclude an agreement addressing the future relationship, including trade, with a former Member State. Furthermore, the Treaty rules regarding international agreements (Articles 207, and 216 to 219 TFEU) provide that they are concluded by the EU with third countries.\(^80\) A withdrawing Member State becomes a third country only after the end of the two-year period or when the withdrawal agreement enters into force. As long as the departing Member State is still an EU member, Article 50 TEU can provide the legal basis for only one agreement.\(^81\) This has also been the view taken by the European Commission in the context of the Brexit negotiations.\(^82\)

Regarding the sequencing of the talks, some experts argued that Article 50 TEU made it clear that the two negotiations were linked and that discussions on the withdrawal arrangements must begin at the same time as discussions on the future relations.\(^83\) Others maintained, however, that Article 50 clearly separated withdrawal issues from the negotiation of an agreement governing future relations. Such dissociation aims mainly to prevent the withdrawing Member State from remaining

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\(^77\) D. Dixon, op. cit., p. 925.

\(^78\) See EUR-lex, Conferral, Glossary of summaries.


\(^80\) J.-C. Piris, Brexit: the transition period, European issues, No 461, Fondation Robert Schuman, 6 February 2018.


\(^82\) Michel Barnier: Oral evidence: Brexit and Northern Ireland, Northern Ireland Affairs Committee, HC 329, United Kingdom House of Commons, 22 January 2018.

\(^83\) G. T. Davies, Legal and constitutional aspects of Brexit, Tijdschrift voor Constitutioneel Recht, April 2017, pp. 137-149.
an EU member until it can negotiate a better arrangement for itself, which would lead to ‘perpetual provisional membership’.84

Practice has filled in the gaps left by Article 50 in this respect. The European Council set the initial guidelines for the Brexit negotiations and, in doing so, established the framework for their conduct. The UK had insisted, including in its withdrawal notification letter, on conducting parallel negotiations, on the withdrawal from the EU and on the terms of the future partnership, as it aimed to conclude a comprehensive trade agreement within the two-year period.85 The European Council rejected the proposed parallelism and instead set out a phased approach to the negotiations. A first phase would be dedicated to ensuring clarity and legal certainty for citizens, businesses, stakeholders and international partners on the immediate effects of the UK withdrawal from the Union; as well as to settling the disentanglement of the UK from the Union and from all the rights and obligations assumed while a Member State.86 In particular, three key issues were identified: securing an agreement on the rights of EU citizens living in the UK and of UK nationals in the EU; the financial settlement; and the issue of the border between Northern Ireland and Ireland.87 The second phase would see discussions taking place to reach an overall understanding of the framework for the future relationship, while the future relationship agreement could be finalised only once the UK was formally a third country. Transitional arrangements could also form part of the second phase of the talks and would provide a bridge towards the future relationship.

The European Council’s approach was supported by the other EU institutions, including Parliament. The Council’s negotiating directives set out the guidelines in more detail, following the Commission recommendation on the mandate.88

The EU approach to the timing and sequencing of the negotiations was contested by the UK government, but it eventually came to accept the parameters set by the EU institutions.89 Questions were also raised by commentators, who challenged for example the inclusion of the Irish border issue or the protection of citizen’s rights in the key topics to be addressed as part of the separation talks, both of which belonged, in their view, to the future relationship, just as any discussion on trade tariffs.90 Others have argued there was no impediment to a withdrawal agreement that would regulate the future relationship on a legal basis other than Article 50 TEU, taking into account the fact that international agreements may have more than one legal basis.91 Moreover, against the argument that Article 50 TEU is the legal basis for a sui generis agreement and could not be combined with a legal basis regulating the future relationship with the UK as a third country, they point out that the entry into force of the withdrawal agreement coincides with the moment the UK becomes a third country; in this sense, the withdrawal agreement does deal with the future, as it is built on the prospect of the UK becoming a third country.92

86 European Council (Article 50) guidelines for Brexit negotiations, 29 April 2017.
87 Remarks by President Tusk on the Special European Council (Article 50) of 29 April 2017.
88 Council of the EU, Directives for the negotiation of an agreement with the United Kingdom of Great Britain and Northern Ireland setting out the arrangements for its withdrawal from the European Union, XT 21016/17 ADD 1 REV 2, 22 May 2017.
89 M. Dougan, op. cit., p. 647.
90 D. Dixon, op. cit., p. 927.
92 Ibid.
Overall, experts argue that the approach chosen by the EU institutions largely influenced not only the conduct but also the outcome of the withdrawal talks and, consequently, it proved its effectiveness. It has allowed the parties to focus on finding agreement on a legal text designed to solve the immediate separation issues and to organise an orderly withdrawal; it created the concept of a political declaration that would contain the parameters of the future relationship; and it recognised the need for a transitional regime. The European Council’s guidelines were based not only on political grounds (to avoid the risk of failure for the withdrawal negotiations, as discussing both the separation issues and the future relationship would likely have over-run the two-year negotiating period) but also on legal reasoning, namely the intention to interpret Article 50 TEU within the constitutional framework of the Union. As mentioned above, the exceptional competence granted to the Union in the Council’s negotiating mandate, would enable the EU institutions to negotiate and conclude an agreement covering all issues related to the separation; nevertheless, this competence and the Article 50 TEU legal basis could not be justified constitutionally as a basis for negotiating and concluding an agreement on the future relationship. As the Treaty provisions mention that the EU may conclude agreements with third countries, and not with a state that is still a member of the Union, most experts now consider the sequencing option to have been the legitimate one. It would have been for the Court of Justice to clarify the nature of EU competences under Article 50 TEU, but this matter never reached the Court.93

1.3.2. The transition period

Also related to the scope of the withdrawal agreement, determining transitional arrangements turned out to be a novel (and significant) aspect of the Brexit negotiations. Article 50 TEU does not mention transitional arrangements and the concept raised a number of questions. In particular, a series of issues had to be settled for a transitional deal to take effect, such as whether and to what extent the UK would still be bound by parts of EU legislation; the role of the UK in post-Brexit EU decision-making or the effects of new EU law over the old legal acts still binding the UK.94 Moreover, it was uncertain that Article 50 TEU could be a valid legal basis for transitional arrangements that would extend the EU acquis to a withdrawing Member State for a certain period of time once it became a third country.95 Other questions related to whether CJEU jurisdiction would apply to the UK or whether another type of dispute settlement mechanism would be agreed instead.96

Initially, it was the UK that requested an ‘implementation period’. As mentioned above, the UK’s initial intention was to use the two-year period set by Article 50 TEU to reach an agreement on the future partnership. In this context, a phased implementation period would have allowed the UK, the EU institutions and the 27 Member States to adapt gradually to the new arrangements, whose introduction may have differed depending on the issue.97 Instead, the EU opted for the sequencing of the negotiations, but conceded that, ‘to the extent necessary and legally possible’, clearly defined and time-limited transitional arrangements ‘which are in the interest of the Union’ could be discussed during the negotiations on the withdrawal agreement, in order to build bridges towards the framework envisaged for the future relationship. These transitional arrangements would be subject to effective enforcement mechanisms. If a time-limited extension of the EU acquis to the UK

94 A. Łazowski, Procedural steps towards Brexit, CEPS, 13 July 2016.
95 J.-C. Piris, op. cit., p. 3.
97 HM Government, The United Kingdom’s exit from and new partnership with the European Union, Cm 9417, February 2017.
was considered in this context, then all EU regulatory, budgetary, supervisory, judicial and enforcement instruments and structures should apply.

Recognising that a final deal on the future relationship could not be reached in two years, in September 2017 the UK Prime Minister requested an 'implementation period', strictly time-limited, starting once the UK became a third country, to give the UK and the EU time to adjust to the new future arrangements in a smooth and orderly way. The implementation period would be agreed under Article 50 TEU and would consist of the extension of almost the entire existing EU acquis. The UK request differed from its initial phased implementation proposal and at the same time went further than what the European Council had envisaged in its April 2017 guidelines. In December 2017, the European Council adopted new guidelines on transition whereby the EU-27 agreed to the UK request for a 'status quo' transitional period of around two years, as part of the Withdrawal Agreement. During this time, the whole of the EU acquis (with some exceptions) would apply to the UK, but without any representation in EU decision-making for the former Member State. This was in line with the European Council principles of maintaining the EU's decision-making autonomy and that no third country can enjoy the same rights and benefits as a Member State. The guidelines further specified that all existing Union regulatory, budgetary, supervisory, judicial and enforcement instruments and structures would apply to the UK, including the competence of the CJEU, as well as new EU rules and new CJEU case law. No derogations to the application of EU law in the UK, such as regarding the free movement of people, were accepted by the EU.

The Withdrawal Agreement’s provisions on the transition follow the parameters set by the EU institutions, although the two-year transition initially envisaged was in the end reduced to 11 months, due to UK difficulties in approving the agreement and the extension periods agreed under Article 50 TEU that had prolonged UK membership of the EU. Indeed, in accordance with the principle that a transition period should be limited in time, the debate initially focused on the appropriate duration for that transition. While the UK government had suggested that the transition could last for around two years, the European Parliament suggested a transitional period of maximum three years. The Commission's recommendation, agreed to by the Council in the new directives for negotiations, put forward the date of 31 December 2020 as the end of the transition period, mainly to coincide with the expiry of the EU's multiannual budget. In addition, a safeguard was introduced in the Withdrawal Agreement allowing for a one-time extension of the transition, before 1 July 2020, for one or maximum two years, to take into account the eventuality that a future relationship agreement would not be in force by 31 December 2020. The introduction of the possibility to extend the transition was agreed after much debate and in particular, in the context of significant opposition in the UK to continue being bound by EU rules without any participation in decision-making. Furthermore, there was uncertainty over the legal form that the extension to the transition period would take. While some experts argued that an additional international agreement amending the Withdrawal Agreement (although founded on a legal basis other than Article 50 TEU, no longer applicable to the relationship between the EU and the UK) would be the best solution,
the EU and the UK opted for a simpler approach, whereby the decision on extension would be taken by the Joint Committee in charge of managing the Withdrawal Agreement.

Finally, in order to extend the effects of the EU’s trade agreements to the UK beyond Brexit day (31 January 2020), the EU’s external trade partners were also informed that the UK would continue to be considered a Member State during the transition; so far, no third-country partner has contested the arrangements. The UK was also allowed to start trade talks with third countries but would not be able to be bound by any such agreement during the transition, without the prior authorisation of the Council.

Two common EU and UK concerns converged in the agreement on a transition period: the need to give authorities more time to prepare for the UK’s withdrawal and the need to ensure that businesses and citizens only had to undergo one regulatory change, in order to minimise disruption and uncertainty.104 However, if the current talks over the future partnership fail to deliver an agreement by 31 December 2020, and given the refusal of the UK government to request an extension to the transition period as provided for by the Withdrawal Agreement, the objective of undergoing just one regulatory change will not be attained.105 The transition will simply have postponed the ‘cliff-edge’ it was meant to prevent, by allowing more time for the negotiation of the future partnership agreement; nevertheless, it will have given authorities and the general public in the UK and the EU more time to adapt to the consequences of UK withdrawal.

Against this backdrop, experts underline that the transition period continues to raise a series of legal (constitutional) questions for the EU. First, there is the issue of the legality of treating a third country as if it were still a Member State and the adequacy of Article 50 TEU as a legal basis for these arrangements.106 For most commentators, the withdrawal agreement based on Article 50 TEU is the appropriate legal instrument to provide for transitional arrangements.107 Indeed, as shown above, the EU institutions interpreted Article 50 TEU as giving the EU an exceptional competence that may in certain ways deviate from the normal rules on the division of competences between the EU and the Member States: even if the ‘status quo’ transitional arrangements in the Withdrawal Agreement go beyond matters falling under the EU’s exclusive competence, the Member States did not insist in this respect on shared competences or on characterising the agreement as a mixed agreement, as domestic ratifications would have rendered the approval process more difficult and uncertain. On the other hand, under the provisions of Article 50 TEU, the Treaties cease to apply to the departing Member State, which becomes a third country upon its withdrawal. This provision raises significant doubts about the competence of the EU to consider a former Member State as if it still were part of the Union, in particular when the same Article 50 provides for the possibility of extending the negotiating period and, with it, the withdrawing Member State’s EU membership.108 Political considerations have indeed played their part in the decisions on the establishment of the transition period during the Brexit negotiations. Challenges may still lie ahead if the prospect of a no-deal outcome were to lead the UK government to request an extension to the transition period in extremis. In this situation, as the provision in the Withdrawal Agreement expired on 1 July 2020, consideration could be given to amending or supplementing that agreement to provide for another extension to the transition. However, using Article 50 TEU for such an instrument would be doubtful.

107 J.-C. Piris, op. cit., p. 3.
and, in any event, the question of shared competences could not be avoided. Furthermore, if Article 50 cannot be used, then the legality of replicating the current transitional arrangements under the EU’s external competences in the Treaties would be uncertain.109

1.3.3. Revoking the withdrawal notification

Another key question to emerge in the Brexit process was whether the withdrawal notification could be revoked, as Article 50 TEU is silent on the matter. Most experts considered the notification revocable and rejected the argument that Article 50 TEU triggered an irreversible process. The alternative would result in peculiar consequences, such as forcing a Member State that had changed its mind to withdraw from the Union or preventing all Member States from agreeing new terms that would lead the withdrawing state to remain part of the EU.110

While it was widely assumed that the withdrawal process could be reversed if all parties considered it to be in their interest, the notion of unilateral revocation of the withdrawal notification has been controversial.111 Many experts and the EU institutions have opposed the notion of such a unilateral right, without the agreement of the other EU Member States. Some commentators argued that a Member State could not unilaterally revoke its notification to leave the EU (in the sense of legally compelling the rest of the Member States to accept this revocation). The event triggering withdrawal proceedings is a Member State’s unilateral notification under Article 50(2) TEU, effectively starting a countdown to the deadline (which may be extended if the European Council, together with the withdrawing Member State, so agrees), by which time the withdrawal process must end, unless the withdrawal agreement concluded provides otherwise (Article 50(3) TEU). For this reason, as well as in order to prevent any abuse on the part of the withdrawing Member State – for example, stalling the negotiations by withdrawing the notification, then re-notifying and re-starting the two-year period, thus bypassing the agreement of the other Member States – the possibility of a unilateral revocation of the notification at a later date is thought by these commentators to be legally doubtful.112

Others, however, consider unilateral revocation of an Article 50 withdrawal notice to be legally possible, if made in accordance with the national constitutional requirements of the withdrawing Member State. In this scenario, if the withdrawing state decided to stop the exit process, the other Member States would not be able legally to force that state to leave the EU.113 A state expresses its intention to withdraw, and an intention may be withdrawn. Any other situation would amount to an expulsion from the EU, which would not have been the purpose of the drafters of Article 50.114 It would also be contrary to the principles of sincere cooperation and the EU’s commitment to respect the Member States’ constitutional identities, as well as to the overarching EU objective of further integration.115 Other experts meanwhile consider unilateral revocation to be possible subject to

110 T. Tridimas, op. cit., p. 304.
113 O. Garner, Referring Brexit to the Court of Justice of the European Union: Why revoking an Article 50 notice should be left to the United Kingdom, European Law Blog, 14 November 2016.
114 J.-C. Piris, Article 50 is not for ever and the UK could change its mind, Financial Times, 5 September 2016; G. Campbell, Article 50 author Lord Kerr says Brexit not inevitable, BBC, 3 November 2016.
certain constraints, notably if the Member State had genuinely and in good faith taken a new decision to remain in the EU (a decision that must not be about rejecting a specific agreement).

The CJEU was called to rule on the question in the case Wightman and Others v Secretary of State for Exiting the European Union (Wightman), following a request for a preliminary ruling referred by the Scottish Court of Session (on appeal) on 21 September 2018. Before the CJEU, the UK government expressed no opinion on the question of revocability, but argued the request for a preliminary ruling was not admissible by the CJEU owing to the hypothetical nature of the question. The European Commission also contended that the question was hypothetical. However, supported by the Council, the Commission admitted that revocation of the notification to withdraw was indeed possible before the expiry of the two-year period laid down in Article 50(3) TEU, although it contested the possibility of unilateral revocation: the unanimous consent of the European Council was required for revocation of the Article 50 notification, as otherwise there would be a risk of abuse on the part of the withdrawing Member State. In its ruling of 10 December 2018, delivered in a remarkably short time, the CJEU found that, in the absence of any provision in the Treaties, there was a right to unilateral revocation similar to the unilateral right to withdraw established in Article 50 TEU. As the right to withdraw was a sovereign choice of the Member State, it followed that a decision to revoke a withdrawal notification was also a sovereign decision of the Member State that opted to retain its EU membership. The Court underlined that Article 50 TEU referred to the notification of an intention to withdraw and that an intention cannot be definitive or irrevocable. It then established that the UK had the unilateral right to revoke the notification, as long as a withdrawal agreement had not entered into force or as long as the two-year Article 50 period, including extension(s), had not expired. The decision to revoke must be ‘unequivocal and unconditional’ (implying an element of good faith), addressed in writing to the European Council, and taken in accordance with the UK’s constitutional requirements. The withdrawal process would then end and the UK would continue its EU membership on the same terms as it currently enjoyed.

Revoking the Article 50 notification was one of the options considered by the Commons during the ‘indicative votes’ process in March and April 2019, when some Members still argued that the withdrawal process could be reinitiated following revocation, once a majority in the UK in favour of a model for the future relationship with the EU had been established.

2. The EU approach to applying Article 50 TEU

The results of the UK referendum in June 2016 came as a shock to the EU and Brexit was initially viewed as an existential threat. Therefore, uncertainty for the integrity of the European project and fears of a domino effect among Member States prompted a rapid response from the EU institutions and the remaining Member States, who coalesced around the overarching objective of the Union’s survival. With hindsight, experts point to the outstanding consistency and coherence of the EU throughout the entire withdrawal process. Furthermore, the EU approach, based on ‘transparency, firmness, method, consistency and reliability’, contrasted with the UK’s secretiveness...
and inconsistency.\textsuperscript{120} The EU managed to set the agenda right from the start and established the principles and the terms of the negotiation, so that the UK was faced with a choice of accepting the EU’s conditions or leaving the Union without a negotiated settlement, in a so-called hard exit.\textsuperscript{121}

2.1. Principles, method and organisation

On 24 June 2016, soon after the results of the UK referendum were confirmed, the Presidents of the European Council, Parliament, Commission and the rotating presidency of the Council issued a joint statement outlining an initial EU position on the outcome of the referendum.\textsuperscript{122} They lamented the unprecedented situation for the Union but emphasised the EU’s unity of response. A series of elements were already set out in this statement that would guide the Union’s approach later on:

- the EU and the UK should follow the procedure established by Article 50 TEU, as the only legal way for an orderly withdrawal from the EU;
- the UK should end the uncertainty and trigger Article 50 without delay;
- while hoping the UK would remain a close partner to the EU, any agreement (on the future relationship) would have to reflect the interests of both sides and ensure a balance of rights and obligations;
- the February 2016 agreement containing a series of concessions to the UK would not take effect and would not be renegotiated.\textsuperscript{123}

A few days later, the European Parliament reiterated these points in its resolution on the outcome of the referendum in the UK.\textsuperscript{124} In their statement following the informal summit of 29 June 2016, the EU-27 leaders reaffirmed their unity and the principle of no negotiation without notification. Procedurally, they emphasised the role of the European Council in adopting the guidelines for the negotiations and the full role to be played by the Commission and the Parliament in accordance with the Treaties. Finally, they emphasised that access to the single market required the acceptance of all four freedoms, including freedom of movement.\textsuperscript{125}

Within a week following the referendum, it was obvious that the EU had already established the main parameters for the withdrawal negotiations with the UK, including the institutional organisation. The initial EU response focused thus on ensuring the survival of the EU and sending the message to its Member States and citizens that EU membership mattered; on emphasising the balance of rights and obligations (not allowing ’cherry-picking’); on preserving the unity of the institutions and Member States; on ensuring an orderly withdrawal in conformity with Article 50 TEU; and on safeguarding the EU’s interests. In short, the EU aimed to protect the principles of the EU, maximise its influence in the negotiations and maintain unity.\textsuperscript{126} However, as shown above, Article 50 TEU fails to address all the practical problems arising from the withdrawal of a Member State. Its provisions do not clarify who should negotiate on behalf of the EU, nor what the withdrawal negotiations should cover. These lacunae were filled by the European Council.

\textsuperscript{121} C. Hillion, op. cit., pp. 44-49.
\textsuperscript{122} Joint statement by Schulz, Tusk, Rutte and Juncker on UK referendum outcome, 24 June 2016.
\textsuperscript{124} European Parliament resolution of 28 June 2016 on the decision to leave the EU resulting from the UK referendum, P8_TA(2016)0294.
\textsuperscript{125} Statement, Informal meeting at 27, 29 June 2016.
During the months preceding the withdrawal notification, these initial principles were fine-tuned and the structure of the negotiation process, including the roles of the institutions, and cooperation with the Member States, was established.\textsuperscript{127} The EU institutions had already designated their representatives and task forces for the subsequent negotiations: Didier Seewus as head of the Council’s task force (25 June 2016); Michel Barnier as chief negotiator of the Commission task force (27 July 2016); and Guy Verhofstadt as Parliament’s Brexit coordinator (8 September 2016). At an informal summit on 15 December 2016, the EU-27 leaders adopted guidelines on the procedural arrangements to be followed on the EU side.\textsuperscript{128} Accordingly, the European Council was to take up the leading role assigned to it by Article 50 TEU by issuing the guidelines for the negotiations; but would however remain ‘permanently seized of the matter’. The Council and the Commission would take up their roles in accordance with Article 218(3) TFEU (i.e. the Council would adopt the negotiating directives on the Commission’s recommendation). Furthermore, the European Council invited the Council to nominate the European Commission as the Union negotiator (as also requested by the European Parliament); therefore, Michel Barnier took up the post of EU chief negotiator on 1 October 2016. The EU negotiator’s team would include representatives from the Council and the European Council. As for Parliament’s involvement, its representatives would be invited to the preparatory meetings ahead of European Council meetings; importantly, Parliament would be kept closely and regularly informed throughout the negotiations by the EU negotiator, as well as by the Council Presidency, and the Parliament’s President would be invited to speak at European Council meetings. At the same time, a reflection process regarding the future of the Union was initiated.\textsuperscript{129}

Moreover, in autumn 2016, the Commission task force began to screen the \textit{acquis} to assess the impact of Brexit on EU policies and legislation, in order to evaluate the implications of the UK demands, but also to build the trust of the Member States in the Commission. In this sense, Michel Barnier opted for an inclusive approach and visited the EU capitals to appraise their interests and opinions on Brexit, something that also contributed significantly to building trust.\textsuperscript{130}

Against this backdrop, by the time the UK notified its intention to withdraw on 29 March 2017, the EU was entirely prepared for the negotiations. Moreover, the positive interaction between the key actors, visible since the beginning, continued throughout the process.\textsuperscript{131}

On 29 April 2017, the European Council adopted guidelines setting out the priority issues for the EU in the Brexit negotiations and establishing the sequencing of the negotiations.\textsuperscript{132} The guidelines also reaffirmed the core principles at the basis of the EU’s position, which would apply to the withdrawal negotiations but also to any preliminary and preparatory discussions on the framework for a future relationship, and to any form of transitional arrangements. The political principles framing the negotiations are: preserving the EU’s unity; protecting the EU legal order by ensuring that a country leaving the EU would not get better treatment than a Member State; guaranteeing a balance of rights and obligations; ensuring an orderly withdrawal that would afford legal certainty to citizens and businesses; prohibiting any bilateral negotiations between individual Member States


\textsuperscript{128} Statement, Informal meeting of the Heads of State or Government of 27 Member States, as well as the Presidents of the European Council and the European Commission, 15 December 2016.

\textsuperscript{129} S. Kotanidis, \textit{Mapping the ‘Future of the EU’ debate}, EPRS, European Parliament, June 2017.


\textsuperscript{132} European Council (Article 50) guidelines for Brexit negotiations, 29 April 2017.
and the UK, with talks to be conducted only through the formal channels; and conducting negotiations as a single package in accordance with the principle ‘nothing is agreed until everything is agreed’. In addition to these, the European Council also emphasised two legal principles: preserving the autonomy of the EU legal order, including the role of the CJEU, and the principle of sincere cooperation. These principles formed the EU’s red lines and have governed the application of Article 50 TEU as the legal basis for managing the UK’s withdrawal from the EU. The EU position was thus considerably reinforced by this framework, strengthened by conditionality, and enhanced by the success of the EU institutions and remaining Member States in defending their shared fundamental political interests. Another significant decision that would characterise the EU position was that the negotiations were to be conducted transparently. In addition to informing stakeholders and avoiding leaks, the approach also helped build trust among the Member States that their interests were being well represented.

In December 2017, the European Council adopted new guidelines for the second phase of the negotiations, having decided that sufficient progress had been achieved on the first-phase issues, on the recommendation of the Commission. The decision on sufficient progress belonged exclusively to the European Council, which gave considerable leverage to the EU in the negotiations. Moreover, with the December 2017 guidelines, further sequencing was introduced to the talks: first the discussions would cover the transitional arrangements and thereafter the framework for the future relationship. Progress in the second phase would only be considered once the commitments undertaken in the first phase had been followed through and translated into legal text.

Furthermore, in recognition of the unique impact of Brexit on Ireland, this Member State was, to all intents and purposes, handed a veto over moving to the next stage of the talks. Indeed, early on, the EU identified certain issues of great concern to some of its Member States, such as Ireland, Spain (over the Gibraltar issue), and Cyprus (over the British sovereign territory hosting military bases on the island), and set out in the negotiations to uphold those Member States’ particular interests. Ireland in particular has benefited from EU solidarity and is an example of a Member State managing to raise its priorities up to EU level. At the same time, the EU’s support for Ireland was the strongest signal of the EU’s unity in the Brexit talks. Overall, experts argue that the EU institutions have managed to synthesise the various national positions and interests into a common position meeting both national priorities and also their own.

3. The European Parliament and Article 50 TEU: Asserting influence and supporting EU unity

According to the Treaties, the formal role of the European Parliament in the withdrawal procedure may appear to be limited. It is however a crucial one since, under Article 50 TEU, Parliament must give its consent to the final agreement for it to enter into force. During the UK’s withdrawal from the EU, Parliament has leveraged its right to block a withdrawal agreement in order to gain more influence in the process. To avoid being involved only at the end of the procedure, Parliament

134 Council of the EU, Guiding principles for transparency in negotiations under Article 50 TEU, XT 21023/17, 22 May 2017.
135 A. Gostyńska-Jakubowska, op. cit., p. 11.
136 C. Hillion, op. cit., pp. 44-49.
137 L. O’Carroll, ‘Ireland will have final say on progress of Brexit talks, says EU’, The Guardian, 1 December 2017.
asserted right from the start its wish for a more prominent role during the negotiations. Parliament insisted therefore on the application of Article 218(10) TFEU, whereby it must be kept immediately and fully informed during all stages of the negotiation of an international agreement, to the procedure in Article 50 TEU. The importance of securing its approval enabled the European Parliament to use its power of consent skilfully, to attain its objective of increasing its institutional power to be fully involved in the negotiations and have its voice heard throughout the process.139

As a result, the European Council guidelines recognised the essential role of the Parliament in approving the withdrawal agreement and mandated that the institution should be kept closely and regularly informed throughout the negotiations. Accordingly, during the Brexit process, close and regular contacts were established between the Parliament and the Commission’s chief negotiator. Furthermore, the Council Presidency exchanged views with the European Parliament before and after each General Affairs Council meeting, while Parliament representatives were invited to Sherpa meetings preparing the European Council meetings. Finally, the European Parliament President was invited to be heard at the beginning of European Council meetings (as is normally the case).140 Against this background, it is clear that Parliament managed to play a greater role in the withdrawal negotiations than that envisaged by the Treaties.141

In order to assess Parliament’s real influence in the UK withdrawal process, it is important to look at how it decided to approach Brexit internally and at its subsequent institutional involvement. In particular, Parliament opted for a form of organisation that aimed to maximise the unity of the political groups internally in order to present a unified stance externally.142 Alongside its right to be kept informed by the other institutions throughout the talks, Parliament managed to forge a more proactive role for itself than that provided by the Treaties, by regularly setting out its position to the public and the other EU actors. At the same time, Parliament has worked together with the other EU institutions and has not risked undermining the EU’s position.143 Finally, Parliament contributed on substance to constructing the EU position and could therefore take ownership of the Withdrawal Agreement.144

3.1. Organisation and procedures

In addition to asserting its prerogatives at interinstitutional level, Parliament had to carefully devise its working methods and structures in dealing with Brexit.145 At its meeting of 8 September 2016, the European Parliament’s Conference of Presidents of political groups (CoP) appointed Guy Verhofstadt, Chair of the Alliance of Liberals and Democrats for Europe (ALDE, now Renew Europe) Group, as the Parliament’s coordinator for the negotiations on the UK withdrawal from the EU. The CoP stressed the importance of this decision as crucial to guaranteeing Parliament’s involvement throughout all stages of the negotiations. Verhofstadt’s mandate involved providing the CoP with regular updates on the status of negotiations. Moreover, Parliament’s standing

141 Idem, p. 255.
145 Idem.
committees were asked to provide factual analysis addressing the issues arising from Brexit in their areas of competence. Their findings were subsequently used in drafting a European Parliament resolution setting out Parliament’s key messages and red lines. The need for a coordinated European Parliament approach was emphasised from the start. Therefore, the European Parliament coordinator maintained close cooperation with the political groups and the chair of the Committee on Constitutional Affairs (AFCO, responsible for the consent recommendation).

Once the UK notified its intention to withdraw, on 6 April 2017, the CoP decided to remain in charge of the Brexit process and to establish under its aegis a Brexit steering group (BSG) to coordinate and prepare the European Parliament position. This decision stemmed from the initial reflection that Parliament’s usual approach (setting up a special committee) would not only be slow but, owing to the public nature of its deliberations, would also put Parliament’s close involvement in the negotiations at risk. Brexit would thus be coordinated at the highest political level of the European Parliament, using new working methods. The BSG was composed of those Members of the political groups that had signed the European Parliament’s second resolution on the UK withdrawal of 5 April 2017 and the chair of the AFCO committee: the coordinator and chair of the BSG, Guy Verhofstadt (ALDE), Elmar Brok (EPP), Roberto Gualtieri (S&D), Gabriele Zimmer (GUE/NGL), Philippe Lamberts (Greens/EFA) and Danuta Hübner (chair of the AFCO committee at the time). The three political groups that did not support the European Parliament’s resolution on Brexit – the European Conservatives and Reformists (ECR), the Europe of Freedom and Direct Democracy (EFDD), and Europe of Nations and Freedom (ENF) - were not represented on the BSG.

Between April 2017 and April 2019, the BSG met 84 times and welcomed the EU’s chief negotiator for exchanges of views on most of those occasions. Michel Barnier also met a number of times with the CoP and the Conference of Committee Chairs. Once official negotiations began with the UK, the BSG provided the Commission task force with comments on the EU and UK position papers and issued regular statements on various aspects of the talks. Furthermore, a series of seminars organised by the BSG and the Commission provided the chairs and coordinators of the five political groups represented in the BSG and the relevant Parliament committees with the opportunity to analyse the main issues at stake in various policy areas. In addition, Parliament also discussed preparedness and contingency planning with the Commission. On a technical level, European Parliament experts could attend seminars for Member States’ representatives. Parliament’s resolutions remained however the most important signals of its position on the Brexit negotiations. Since the UK referendum, the European Parliament has adopted seven resolutions related to the UK’s withdrawal from the EU, each passed with a large majority of votes.

146 Brexit Steering Group, website of the European Parliament.
148 After the 2019 European Parliament elections or for other reasons, the BSG composition changed: Antonio Tajani (current chair of AFCO), Martin Schirdewan and Pedro Silva Pereira replaced MEPs Brok, Gualtieri and Zimmer.
149 The European Parliament elections in May 2019 affected the composition of the political groups: EFDD, the home of the United Kingdom Independence Party (UKIP), disintegrated and its members continued to sit as non-attached; ENF became Identity and Democracy.
European Parliament resolutions on Brexit

- **Resolution** of 28 June 2016 on the decision to leave the EU resulting from the UK referendum: Parliament reiterated the initial principles for UK withdrawal set out by the leaders of the EU institutions on 24 June 2016, supported the appointment of the Commission as EU negotiator, and demanded to be fully involved at all stages of the negotiations.

- **Resolution** of 5 April 2017 on negotiations with the UK: Parliament set out its key principles and red lines with a view to its approval of the Withdrawal Agreement; the resolution served as input to the European Council Guidelines of 29 April 2017 and emphasised the European Parliament priorities of citizens’ rights, the Northern Ireland peace process and the importance of the UK honouring all of its obligations.

- **Resolution** of 3 October 2017 on the state of play of negotiations with the UK: Parliament concluded that sufficient progress had not been achieved on the priority issues and recommended that the European Council not proceed to the second phase of talks.

- **Resolution** of 13 December 2017 on the state of play of negotiations with the UK: Parliament welcomed the progress in the negotiations and took the view that the European Council should decide to start the second phase of negotiations; Parliament also called for a time-limited transition period that would see the full EU acquis and control mechanisms apply to the UK.

- **Resolution** of 14 March 2018 on the framework of the future EU-UK relationship: Parliament reiterated its proposal to establish the future EU-UK relationship in the form of an association agreement that would have a single coherent governance mechanism for the entire relationship.

- **Resolution** of 18 September 2019 on the state of play of the UK’s withdrawal: Parliament reiterated the EU position that in the absence of a Withdrawal Agreement, no transition period would be possible and no sectoral mini-deals to mitigate the effects of a disorderly withdrawal; the European Parliament also insisted that, in the event of there being no deal, the talks on the future relationship must be made subject to prior agreement on the three priority issues. Parliament also referred to its decision to give consent to the Withdrawal Agreement only after the UK Parliament had approved the deal.

- **Resolution** of 15 January 2020 on implementing and monitoring the provisions on citizens’ rights in the Withdrawal Agreement: Parliament stressed the commitments enshrined in the agreement with regard to the rights of EU and UK citizens and expressed a series of concerns relating to their implementation, both in the UK and in the EU Member States.

The draft Council decision to conclude the Withdrawal Agreement was sent to Parliament for consent in October 2019. According to its Rules of Procedure, the European Parliament gives consent to a withdrawal agreement by a majority of votes cast (i.e. a simple majority of MEPs present).\(^{151}\) As mentioned above, it had been decided that members elected in the UK would have the right to vote. The recommendation on consent was drawn up by the Committee on Constitutional Affairs (AFCO) which decided to appoint as rapporteur the chair of the BSG, Guy Verhofstadt. Parliament gave its consent on 29 January 2020, by 621 votes to 49, with 13 abstentions.\(^{152}\) The BSG ended its activity on 31 January 2020, when the UK became a third country.\(^{153}\)

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153. To monitor the negotiations on the future relationship agreement between the EU and the UK, a new group was set up – the European Parliament UK Coordination Group, chaired by David McAllister, chair of Parliament’s Committee on Foreign Affairs. The UK Coordination Group is made up of the chairs of several Committees and of the Conference of Committee Chairs, the standing rapporteurs for the UK, and one representative of each political group.
3.2. European Parliament strategies for asserting influence in the Brexit negotiations

3.2.1. Pursuing internal unity

In order to enhance the credibility of its veto threat in exchange for increased institutional involvement in the Brexit process, Parliament focused its strategy on strengthening its internal unity and building solid majorities for its positions. One challenge to this unity was the eurosceptic political groups; for that reason, none of the eurosceptic groups were represented on the BSG. Furthermore, committee missions to the UK were suspended to avoid messaging diverging from the European Parliament position. This approach allowed Parliament's resolutions and positions on the UK withdrawal to receive large majority support.  

Analysis of four European Parliament resolutions on the negotiations with the UK (from April, October and December 2017, and March 2018) confirms that opposition to the resolutions was minimal within the groups represented in the BSG and strongest within the groups outside the BSG. Research also shows the Parliament's limited fragmentation along national lines (with the exception of British members), pointing again to the cohesion of the political groups, but also to the unity manifested by the Member States in the negotiations.

3.2.2. Cooperating closely with the Commission

The European Parliament also decided to build a strong alliance with the Commission during the Brexit process, an approach that helped enhance Parliament's role. As mentioned above, the European Parliament called for the Commission to be appointed as EU negotiator in its first resolution on the outcome of the UK referendum of 28 June 2016 and subsequently endorsed the appointment of Michel Barnier as head of the Commission Task Force on the negotiations with the UK. Once the Commission was appointed EU negotiator, the European Parliament was rewarded with information, access and involvement in the negotiation process. Michel Barnier exchanged views regularly with the BSG, the European Parliament leadership and plenary, and welcomed the European Parliament positions, as it was clear for the Commission that if the European Parliament did not consent to the agreement at the end of the negotiations, then the UK's orderly withdrawal would not take place. It has thus been argued that the Commission placed the European Parliament on the same level as the Council with respect to the information shared with regard to progress in the negotiations. Furthermore, interinstitutional unity was enhanced by greater European Parliament involvement and the Commission's support in this regard. At the same time, the Commission also stood to benefit from the Parliament's more assertive role in the negotiations: as the position papers were extensively discussed with the European Parliament and Parliament's comments taken into account, the Commission was able to point to the European Parliament red lines in order to strengthen the EU approach in the negotiations with the UK government.

Once its role was recognised by the other EU institutions, experts emphasise that Parliament acted responsibly and participated actively in constructing the EU position and ensuring its coherence. On the substance, the European Parliament chose its priorities carefully. It made citizens' rights its number one priority right from the start and pushed for a more generous approach in the

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155 M. Brusenbauch Meislova, op. cit., p. 248.
156 Ibidem.
158 C. Closa, op. cit., p. 642.
negotiations, which the Commission did not oppose. Later, during the talks, the Northern Ireland peace process and the avoidance of a hard border on the island of Ireland became more prominent for the European Parliament. In general, on all the key issues in the negotiations, the European Parliament position mirrored that of the other EU institutions. The European Parliament did however make a different proposal regarding the framework for future relations, when it suggested an association agreement between the EU and the UK; but again, in a show of EU cohesion, the European Council took up Parliament’s proposal as one of the options that could structure a future agreement with the UK.159

Overall, the European Parliament has cooperated closely with the Commission, but also with the other EU institutions in the Brexit process. Due to the commonality of views, the Parliament’s influence is hard to assess, although it is clear that its involvement in scrutinising the negotiations with the UK has helped to strengthen the EU position (in particular the Commission’s stance in the talks).160 It is also evident that Parliament did not intend to relinquish its increased role, once the UK became a third country. Having opted for a different organisational approach, with an enhanced role for the relevant standing committees, the European Parliament continues to be closely involved in the negotiations on the agreement on the future relationship with the UK.161 As for the enhanced participation that Parliament managed to secure within the Article 50 process, analysts assume that the institution would seek to enshrine this new role in the event of future Treaty reforms.162

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160 Ibidem.
162 C. Closa, op. cit., p. 644.
4. Annex: Brexit timeline

**Source:** adapted from the Council of the European Union [website](https://www.consilium.europa.eu)

References


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The United Kingdom’s 2016 referendum on EU membership triggered the first ever application of Article 50 of the Treaty on European Union (TEU), the withdrawal clause. However, as Article 50 TEU had never been tested, some aspects of the procedure had to be defined in real time, a process that was not without controversy. This EPRS In-depth Analysis looks at how the EU has applied the ‘exit clause’ that sets out the conditions and procedure to be followed in the event of a Member State wishing to leave the Union.

Looking first at the origins and the main features of the withdrawal clause, the paper then emphasises the way in which the Union filled in certain gaps left open in the drafting of Article 50 TEU and took the lead in establishing the main parameters for the withdrawal negotiations with the UK. It also analyses the European Parliament’s success in forging a more substantial role in the withdrawal negotiations than that originally assigned to it by the Treaties.