

Committee on Constitutional Affairs
The Chair

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Mr Jerzy Buzek
Chair of the Conference of Committee Chairs
Paul-Henri Spaak building – Office 08B046
Brussels

Subject: Contribution of AFCO on the implications of the UK withdrawal for its areas of responsibility


Dear Chair,

As requested by the Conference of Presidents on 29 September 2016 and in line with the letter subsequently addressed to you by the President of the European Parliament, on 12 October 2016, the Committee on Constitutional Affairs (AFCO) has analysed the impact of the withdrawal of the United Kingdom on the policy areas and legislative files in this committee's specific fields of competence.

The conclusions of that analysis, as endorsed by AFCO coordinators, are attached and constitute AFCO's preliminary reflection on a number of issues that require further debate.

I would like to reiterate the specific role of AFCO in the process of the withdrawal of the United Kingdom, as recognised by the Conference of Presidents, which has committed to liaising closely with the AFCO Chair, already during the preparatory and negotiation phases of the withdrawal.

Yours sincerely,



Professor Danuta Hübner

Encl: Note on the Impact of UK's withdrawal on the policy areas under AFCO's remit

Impact of UK's withdrawal on the policy areas under AFCO's remit

I. Introduction

1. The committees were tasked by the Conference of Presidents (CoP) to consider the impact of the UK's withdrawal on the policy areas and legislation in their respective fields and prepare analytical material based on this fact-finding work. This work should moreover concentrate on facts and analysis and should in no way provide any indication as to what might be a desirable outcome of negotiations or of what could be the committees' priorities in view of the negotiations. The committees were thus requested to answer the following questions:
 - What is the possible impact on legislative files currently under discussion of impending UK departure?
 - What is the likely impact on these legislative files if they are not concluded pre-Brexit and therefore only concluded post-Brexit?
 - Are there policies or EU legislation in force likely to feature as part of the EU-UK withdrawal agreement, and if so in what way?
 - Are there policies or EU legislation in force likely to feature as part of the future EU-UK relationship agreement, and if so in what way?
2. The role of the Committee on Constitutional Affairs (AFCO): as a horizontal committee, AFCO does not have many sectorial policies within its remit and is responsible for only a few legislative files that could be affected by Brexit. However, it has an important specific role to play in the process related to the withdrawal of the United Kingdom, as the committee competent to deal with the institutional consequences of the withdrawal of a Member State from the Union, in accordance with the Rules of Procedure (Annex VI, XVIII, 3). It will thus be for AFCO to draft the report on the basis of which the EP will decide to give or not its consent to the possible withdrawal agreement provided for in Article 50 TEU. This role was further acknowledged by the CoP, which has committed to liaising closely with AFCO Chair, who should be associated already during the preparatory and negotiation phases for that purpose.
3. For the purposes of fulfilling the task assigned by the CoP, this document will be structured around the above questions, while grouping the reply to the third and fourth questions. At this very early stage, this document cannot aim to more than setting out a number of questions that may prove necessary to address in the months to come. The scope and object of the future agreements will depend on the priorities as defined by both parties in the negotiations.

II. What is the possible impact on legislative files currently under discussion of impending UK departure?

4. The pending AFCO legislative procedures affected by a withdrawal are:

- A file directly affected by the withdrawal is the **revision of the European Council Decision establishing the composition of the European Parliament¹**.

The Decision of the European Council 2013/312/EU of 28 June 2013 establishing the composition of the European Parliament (to which the Parliament gave its consent), allocates 73 seats in the European Parliament to the United Kingdom.

According to Article 4 of that Decision, which applies only to the 2014-2019 term, Parliament is to present by the end of 2016 a proposal for the definition of “...*a system which in future will make it possible, before each fresh election to the European Parliament, to allocate the seats between Member States in an objective, fair, durable and transparent way...*”.

In accordance with that provision, the decision is to be revised sufficiently in advance of the beginning of the 2019-2024 parliamentary term. The content of the decision will depend on whether the UK would be expected to still carry on being a member of the EU by the date of the next European elections or not (the issue of the participation of the UK in the next elections for the European Parliament is further referred below).

- There are two other important files now under appreciation in the Council:
 - the revision of the **Act concerning the election of the members of the European Parliament by direct universal suffrage²** and
 - the **Proposal for a Regulation of the European Parliament on the detailed provisions governing the exercise of the European Parliament's right of inquiry replacing the Decision of the European Parliament, the Council and the Commission of 19 April 1995 (95/167/EC, Euratom, ECSC)³**.

Both the above files are not materially affected by the withdrawal, as their texts do not require modification with the withdrawal of the United Kingdom. However the negotiations within the Council could be affected by any changes in the political

¹ The EP has the initiative on this matter and must provide its consent to the Decision of the European Council, which decides by unanimity (Article 14 (2) TFEU). The Conference of Presidents postponed its decision on the authorization to draft the legislative INI requested by AFCO until the triggering of Article 50 by the UK, but allowed AFCO to start the necessary preparatory work. The President of the European Parliament has informed the President of the European Council of this, by letter of 14 December 2016.

² Proposal adopted in 11 November 2015, under a special legislative procedure in accordance with Article 223 TFEU, whereby Parliament has the legislative initiative, while the Council has to approve unanimously. The file is currently in appreciation in the Council Working Group.

³ Proposal adopted in 23 May 2012, under a special legislative procedure in accordance with Article 226 TFEU, whereby Parliament has the legislative initiative, while the Council and the Commission give their consent.

balance in that institution. As such, the final outcome could be affected by a withdrawal of the UK. This will also depend on how protracted in time these negotiations will be.

In the case of the electoral law, our pledge to the successive Presidencies since the last quarter of 2015 has been that the file is extremely urgent, as the procedure should be concluded within the first semester of 2017 in order to allow for the application of the new Act to the next elections. The file has been discussed in a large number of meetings at Council Working Group level in the course of this year. It was latest referred to Coreper on 30 November. Apparently, discussions are not closed in the Council yet. Inter-institutional contacts on this file are being carried on.

In the case of the right of inquiry, Parliament adopted a legislative resolution on 16 April 2014 aimed at ensuring that the procedure did not lapse at the end of the parliamentary term. In September 2014, the Conference of Presidents confirmed this legislative resolution. However, the file has been blocked due to the Council's negative stance towards Parliament's proposal. Only very recently, contacts were initiated between the legal services of the three institutions aiming at identifying possible technical solutions that could be suggested to the political authorities as a path to overcome the divergences between the institutions.

III. What is the likely impact on these legislative files if they are not concluded pre-Brexit and therefore only concluded post-Brexit?

5. Regarding the revision of the European Council Decision establishing the **composition of the European Parliament**, Article 3 of the of the European Council Decision 2013/312/EU establishes the number of representatives in the European Parliament elected in each Member State for the term 2014-2019. It establishes the number of MEPs elected in the UK at 73.

According to its Article 4, the Decision should be revised “sufficiently far in advance of the beginning of the 2019-2024 parliamentary term” (in some Member States, electoral legislation may not be modified from a certain time onwards before the elections).⁴ Legally, until the withdrawal takes effect, the rights and obligations of the UK regarding the election and the seats allocation in Parliament remain unmodified.

Supposing that the notification under Article 50 TEU is lodged in March 2017 and the withdrawal takes effect two years later, i.e. by mid-2019, the above Decision should have been revised by then, as it has to apply to the next parliamentary term. Should the notification under Article 50 TEU be lodged later than March 2017, or should the two-year period be extended in accordance with Article 50(3) TEU, or should a withdrawal agreement be reached which sets a later date of departure (e.g. 2020), the conclusion would be the same. Indeed, whatever the scenario, the decision on the composition of Parliament must be adopted before the next term.

The issue of the moment of withdrawal is, however, relevant concerning the content of the decision:

- in case it establishes a formula for the calculation of the number of seats⁵ that is applicable automatically, that decision could be adopted at whatever stage and would apply to all the Member States of the Union, whatever their number;
- in case it follows the format of the current Decision, which sets the number of seats allocated to each Member State (see Article 3 of European Council Decision 2013/312/EU), that decision could envisage a differentiated regime for EU28 and for the EU without the UK to be applied until and after the withdrawal takes effect, respectively;
- in any case, the decision should address the issue of the destiny of the 73 seats allocated currently to the UK when this leaves the EU: to fix the number of MEPs at 73 or to redistribute all or some of those seats (for instance, only those necessary to correct existing breaches of the basic principle of degressive proportionality, or to take account of a possible joint constituency, as proposed by the Parliament in the above-mentioned

⁴ See also note 1, above.

⁵ Article 4 of Decision 2013/312/EU, provides for “establishing a system which in future will make it possible, before each fresh election to the European Parliament, to allocate the seats between Member States in an objective, fair, durable and transparent way”.

proposal on the reform of the electoral law). It will be up to Parliament to formulate a proposal on these matters.

6. Regarding the other two pending files as mentioned above, and which are under appreciation in the Council (the electoral law and the right of inquiry), there seems to be no direct impact of a conclusion of such files before or after the withdrawal of the United Kingdom takes effect.

IV. Are there policies or EU legislation in force likely to feature as part of the EU-UK withdrawal agreement, and if so in what way? / Are there policies or EU legislation in force likely to feature as part of the future EU-UK relationship agreement, and if so in what way?

Scope of the agreements referred to in Article 50 TEU

7. The scope of the “arrangements for withdrawal” or of the “framework for [the] future relationship with the Union” as referred to in Article 50(2) TEU is not defined. In line with that provision, the withdrawal agreement must however take account of the framework for the future relationship of the withdrawing Member State with the Union. This framework should, therefore be defined before an agreement on the future relationship is negotiated.⁶ The content of both agreements is thus interdependent, and the scope and object of the withdrawal agreement will change in function of how the future relationship will be framed.
8. The fact that Article 50 TEU provides that the withdrawal agreement must take account of the “framework” of the future relationship between the EU and the UK implies that at least the basic content or lines of the future agreement on that relationship should be known at the time of negotiations and conclusion of the first agreement. The greater the level of understanding on the future relationship the clearer would be the scope of the withdrawal agreement. The content of the agreements will thus depend on how the negotiations will unfold and on the terms that will be mutually agreed between the UK and the EU and its Member States. There is a great number of technical aspects to be dealt with in order to extricate the UK from its EU membership, but the limits and the scope of both agreements are more of political nature rather than technical.
9. In any case, the withdrawal agreement should at least include the technical aspects that have to be dealt with for the UK to extricate itself from the rights and obligations of EU membership. Moreover, Article 50 TEU defines the withdrawal agreement as an act of EU law, thus excluding from its scope and object all aspects that may relate to the terms of the future relationship between the EU and the UK thus excluding the possibility of being a mixed international agreement.
10. The scope of the “arrangements for withdrawal” as referred to in Article 50(2) TEU not being defined in precise terms in the Treaty or elsewhere implies that the UK withdrawal agreement will probably set the pattern of a “withdrawal approach” to be (possibly) applied by the Union in the future. As far as the matters of constitutional and institutional significance are concerned, the withdrawal agreement could contain provisions regulating:
 - The exit of UK representatives from the EU Institutions and bodies: the Members of the European Parliament elected in the UK, the representatives in the Council, the Commissioner appointed by the UK, the judges appointed to the Court of Justice, the Members of the Committee of the Regions and of the Economic and Social Committee, etc.;

⁶ The form and the procedure for defining that framework, e.g. within the European Council Conclusions, should thus be discussed. See also point 23 and note 9 below.

- The acquired rights of UK citizens residing in other EU Member States, and of EU citizens residing in the UK;
- The contributions and receipts of the UK to and from the EU budget, including the winding down of EU spending programmes in the UK;
- The rights of the UK staff working in the EU institutions;
- The closure of the seats of the EU agencies based in the UK (e.g. the European Medicines Agency and the European Banking Authority);
- The winding down or other interim arrangements of UK involvement in common security and defence policy missions and operations;
- The pulling out of or other interim arrangements regarding the participation of UK police in Europol and the engagement in Frontex;
- The establishment of frontier control, including any possible specific solutions for UK's land borders in Northern Ireland and Gibraltar;
- The treatment of pending cases in the Court of Justice;
- The handling of the rights and obligations stemming from international agreements to which the both EU and its Member States are parties.

Relevance of the effective date of the withdrawal agreement

11. The date when the withdrawal agreement will take effect is of utmost importance and could have an impact on the content to be regulated by that agreement. Indeed, depending on that date, a decision will have to be taken regarding the participation of the UK in the elections to the European Parliament of 2019. A deferred or staggered entry into force of certain provisions may also need to be considered.
12. Until its departure, the UK remains a Member State of the Union with full rights and obligations under the Treaties. Thus, from a legal point of view, if its membership is not terminated by then, the participation of the UK in the European elections may not be excluded.
13. In the context of the effective date, the possibility or even the need to provide a deferred or staggered entry into force of the withdrawal agreement for certain provisions should be addressed. Such a possibility would have to be gauged against the two year deadline as set by Article 50(3) TEU.⁷

Transitional provisions

14. As referred above, in principle, the content of the withdrawal agreement is closely linked to the future relationship between the EU and the UK. A careful alignment between phasing out (in the withdrawal agreement) and possible phasing in of the UK's involvement in or association to the EU's legal order should be achieved. This requires transitional provisions and a clear understanding of the future relationship.

⁷ This could prove problematic since Article 50(3) TEU deadline can only be extended by unanimity in the Council, whereas the withdrawal agreement is concluded by the Council acting under qualified majority.

15. The specific content of such transitional provisions will differ depending on whether there will be or not an agreement on a future relationship between the EU and the UK. If there is such an agreement, the transitional provisions may relate to matters to be regulated between the entry into force of the withdrawal agreement and the conclusion and entry into force of the agreement on the future, so that continuity and legal certainty are ensured.

Dispute settlement

16. The issue of dispute settlement and means of judicial redress under the withdrawal agreement must also be addressed. The withdrawal agreement is an internal act of Union law and the UK will no longer be a Member State of the Union after the agreement enters into force. Once again, the approach of the withdrawal agreement should be linked to the approach to be taken in the future agreement between the EU and the UK. In case the future agreement provides for an acceptance of the jurisdiction of the Court of Justice of the European Union (EUCJ), legal certainty and continuity would plead for such a jurisdiction in the context of the withdrawal agreement. However, that may prove unfeasible, as the UK Government has expressed objections to maintaining the EUCJ jurisdiction. That would require negotiating other form of dispute settlement in both agreements, e.g. by granting jurisdiction to an international court.

UK devolved and overseas territories

17. The issue of the devolved territories or other territories where citizens voted by a majority to remain (e.g. Scotland, Northern Ireland and Gibraltar) will also require a thorough discussion, as to its constitutional and institutional implications for the Union. There are discussions in those territories regarding the possibility of obtaining differentiated status as compared to the rest of the UK in the withdrawal process. This would point to a possible differentiated territorial application of EU law. Moreover, there is a call from some sectors of those territories to listen to and accommodate the will of the majority of the citizens of those territories to remain in the EU. Should such issues be raised during the negotiations, the institutions should be prepared for dealing with them from an EU law point of view.
18. In this context, and regarding the specific situation of Northern Ireland, the possibility of creating, within the future agreement between the EU and the UK, a special regime regarding the land borders between Ireland and Northern Ireland and the movement of people and of goods between the UK and Ireland has been suggested. Some also consider the possibility of addressing those issues bilaterally between Ireland and the UK. Such possibilities should be discussed as to how such solution would fit in the constitutional and institutional set up of the Union.
19. Regarding Scotland in particular, the issue relates in particular to the different positions of that devolved territory and of the UK Government regarding the participation in the single market as well as their approach to the free movement of citizens. The questions on whether

differentiations could be envisaged in the current constitutional and institutional set up of the Union should thus be addressed.⁸

Treaty modification

20. The withdrawal may imply at least material changes in the Treaties. Article 52 TEU on the composition of the Union, Article 355 TFEU, on the territorial scope of the Treaties, and several protocols and declarations concerning the UK may need revision, including Protocols 15, 20, 21 and 30 and Declarations 55, 56, 62, 63, 64 and 65. This could be done by considering obsolete all the provisions where reference is made to the UK or, should there be political will, by a revision of the Treaties.

⁸ It should be noted that Scotland voted 62% to 38% with a majority for “Remain” in all its council areas.

V. Other issues to be considered

21. AFCO has a specific role to play in the process of the withdrawal of the United Kingdom, as the committee competent to deal with the institutional consequences of the withdrawal of a Member State from the Union. It will thus be for AFCO to draft the report on the position of the EP on the possible withdrawal agreement. This role was further acknowledged by the Conference of Presidents, which has committed to liaising closely with AFCO Chair, already during the preparatory and negotiation phases for that purpose. The involvement of AFCO should be effective and systematic.

22. Article 50 TEU gives few indications on issues such as the possibility of revocation of the intention to withdraw after its notification to the European Council, or the exact meaning of the clause “*taking account of the framework for its future relationship with the Union*”. The views in the specialised literature differ significantly on the first question, and it is furthermore under appreciation in ongoing court cases in the UK. Regarding the second issue, the following should be clarified:

- What exactly can the withdrawal agreement contain as an EU-only agreement;
- and
- When and in what form should the “framework” of the future EU-UK relationship be defined, so that it can be duly taken into account by the withdrawal agreement.⁹

It is necessary to ensure a clear understanding on those questions, based on shared solid legal arguments across the three Institutions.

⁹ The text of the Treaty seems to suggest that this “framework” is “defined” outside the agreement, for instance in the conclusions of the European Council.