

Public Hearing

Brexit: constitutional challenges and implications

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Christophe Hillion*

Thank you Madam chair for your kind introduction. My thanks also go to the AFCO Committee for the invitation.

I was asked to consider various aspects of the withdrawal negotiation envisaged by Article 50 TEU. I shall restrict myself to three points. First, I will recall that the negotiation is governed not only by the terms of Article 50 TEU but also by EU (constitutional) law more generally. At the same time, and that will be my second point, additional rules and principles are being developed by EU institutions which further structure the process of withdrawal. This emerging 'EU withdrawal law' raises legal questions, notably as to its interface with the terms of Article 50 TEU. My third and final point is briefly to indicate what consequences this development may have for the role of the European Parliament in the withdrawal negotiation.

I. Article 50 TEU and EU constitutional law

Article 50 TEU spells out two important aspects of the withdrawal negotiation. First it establishes its specific purpose, namely *to set out the arrangements for the withdrawal*, taking account of the framework for the future relationship of the withdrawing state with the EU. Second, Article 50 stipulates the procedural modalities of that negotiation. It makes clear that on the Union side, the process is driven by EU institutions and not by the Member States, in contrast to the negotiation and conclusion of an accession treaty based on Article 49(2) TEU.

By involving institutions acting on the basis of TEU procedure (e.g. Council negotiating directives based on European Council guidelines, Commission as negotiator, Council conclusion of the agreement using QMV, consent of the EP, supervision of the European Court of Justice), the withdrawal negotiation is embedded in the EU constitutional framework. As such, they are governed not only by the terms of Article 50 TEU, but by the canons of EU constitutional law more generally. This has several implications:

* Universities of Leiden and Göteborg, SIEPS and NUPI [c.hillion@law.leidenuniv.nl]

First, the negotiations must be conducted in full observance of the general rules governing the EU institutional framework (notably Article 13(2) TEU), as interpreted by the European Court of Justice.

It also means, second, that in these negotiations, institutions must equally respect the distribution of competence between the Member States and the EU (e.g. as spelled out in Articles 2-6 TFEU). Legally, this obligation explains the distinction between withdrawal negotiations on the one hand, and those relating to the future relationship with the former Member State, on the other. The EU cannot negotiate an external agreement with a Member State which, under EU law, does not have the competence to act in areas of EU exclusive competence (e.g. trade), at least as long as it remains Member State – the EU empowerment under Article 2(1) TFEU would be of little help in this respect.

Third, the protagonists of the negotiations must act in line with the core function of the EU institutional framework (as established by Article 13(1) TEU) namely to ‘promote [the EU] values, advance its objectives, serve its interests, those of its citizens and those of the Member States’; and thus to help the Union fulfill its aims spelled out in Article 3 TEU.

In negotiating the withdrawal agreement, EU institutions should not only respect EU fundamental rights, including the principle non-discrimination. They should also preserve the integrity of the internal market and the four freedoms, EU policies more generally, including its external relations *acquis*. Article 50 TEU does not empower institutions substantially to amend the EU *acquis*; adjustments thereto are conceivable only if necessary to disentangle the withdrawing state from the EU legal order, in line with the purpose of Article of the withdrawal procedure.

These basic principles, reflected in the April guidelines of the European Council, circumscribe the freedom the EU enjoys in the negotiation with the UK. They equally limit the ability of the remaining Member States to interact bilaterally with the UK in areas covered by the withdrawal negotiation - the negotiating directives adopted by the Council indeed borrow the language of exclusivity in interpreting the EU competence based on Article 50 TEU. Similarly, the UK remains bound by those principles until its effective departure from the Union.

That the Union’s hands are tied in the withdrawal process does not mean that EU institutions have no ability to craft tailor-made arrangements for handling the withdrawal. For example, preserving the integrity of the single market, which involves three EFTA states within the European Economic Area, will require creative measures to ensure that potential arrangements agreed between the UK and the EU are, insofar as they would be ‘EEA relevant’, applicable to the EEA more generally (including EEA EFTA nationals in the UK).

II. Article 50 TEU and emerging 'EU withdrawal law'

Article 50 TEU does not cover every aspect of the withdrawal process. There is no precedent. Additional rules and principles must be, and have been added. This is reminiscent of the incremental development of EU enlargement law, on the basis of and/or alongside the provisions of Article 49 TEU. Thus far, the European Council has built upon Article 50 TEU, particularly by introducing the so-called 'phased approach' in the negotiation of the withdrawal agreement (A), and by envisaging the possibility of establishing post-exit transitional arrangements (B).

A. Sequencing

While this is not explicit in Article 50 TEU, the European Council guidelines foresee that the withdrawal negotiation should be organised in two distinct phases.

The first phase shall focus on providing certainty for the main stakeholders, and on settling the disentanglement of the UK from the Union. The European Council will determine when 'sufficient progress' has been achieved to allow the negotiations to proceed to the second phase, in the context of which the EU and the UK will have preliminary and preparatory discussions on the framework for their future relations.

Thus, as in the enlargement process, the phased approach introduces *conditionality* in the withdrawal process. It is noticeable that the European Council guidelines do not elaborate on what 'sufficient progress' means; nor are there specific criteria to determine when negotiations can move from phase one to phase two. This is left entirely to the European Council to decide, most likely by consensus – even if the chief negotiator will have a role there too. Hence if disagreement arises among members of the European Council as to whether progress is sufficient, the process of withdrawal could be stalled.

Such a development would sit uncomfortably with the terms and purpose of Article 50 TEU, at least for the Union, namely to ensure a swift negotiated withdrawal.

While there are legitimate reasons for the EU to adopt a phased approach, transparency and certainty would require more clarity as regard the criteria.

Moreover, the institutional balance of the exit procedure should be maintained. In particular, Member States must not be allowed to hijack what is an EU procedure to pursue domestic gains, the way it has happened in the context of the essentially intergovernmental enlargement process.

B. Transitional arrangements

Potential transitional arrangements would be negotiated in the second phase of the withdrawal negotiations, based on new negotiating directives. They would be established 'if in the interest of the Union', and possibly to provide for bridges towards the foreseeable framework for the future relationship.

There are many good reasons to envisage transitional arrangements. But like the phased approach, their introduction raises legal questions, notably in relation to Article 50 TEU. For instance, it is still unclear whether such arrangements could be included in the withdrawal agreement itself, or whether they would have to be established through a distinct instrument, which, if touching upon areas of shared powers, could require Member States' approval. If so, how could such a mixed arrangement be concluded and applied by the time the UK withdraws?

Arguably, transitional arrangements could and should be included in the withdrawal agreement itself, rather than in a separate instrument. This should be legally possible given that they would be aimed at supporting the main purpose of the agreement, namely to ensure an orderly withdrawal taking into consideration the future relationship in line with the terms of Article 50 TEU. They would thus be *ancillary* components of the withdrawal agreement. This would indeed seem permitted by the broad interpretation of the EU competence based on Article 50, spelled out in the directives of negotiations.

Such transitional arrangements would thus be conceived primarily as a *phasing out* period, to make withdrawal less brutal. They could also be used to maintain certain EU norms in force, under the conditions envisaged by the guidelines (pt 6), to prevent the establishment of e.g. trade obstacles in the period between exit and the entry into force of the potential new agreement.

III. Consequence for the role of EP in the negotiation process

How should the European Parliament relate to the above mentioned development of EU withdrawal law?

First, using the leverage it possesses on the basis of Article 50 TEU, the EP should vigilantly control that the protagonists of the withdrawal negotiations observe the principles recalled in part I of this note. The EP should in particular ensure that the withdrawal agreement does not lead to a watering down of the *acquis* (cp. New Settlement for the UK of February 2016).

Second, the EP could monitor the application of the phased approach and the conditionality that underpins it. The Parliament shall arguably be immediately and fully informed at all stages of the procedure. It is in the interest of the Commission and the Council to consider the EP views in deciding whether substantial progress has been achieved, and thus to move to the second phase.

Such an involvement appears all the more important as the EP is the only directly elected body that will ratify the withdrawal agreement on the EU side.