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DRAFT RECOMMENDATION

on the draft Council decision on the conclusion of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (XT 21105/3/2018 – C9-0148/2019 – 2018/0427(NLE))

Committee on Constitutional Affairs

Rapporteur: Guy Verhofstadt

Symbols for procedures

- * Consultation procedure
- *** Consent procedure
- ***I Ordinary legislative procedure (first reading)
- ***II Ordinary legislative procedure (second reading)
- ***III Ordinary legislative procedure (third reading)

(The type of procedure depends on the legal basis proposed by the draft act.)

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DRAFT EUROPEAN PARLIAMENT LEGISLATIVE RESOLUTION

**on the draft Council decision on the conclusion of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community
(XT 21105/3/2018 – C9-0148/2019 – 2018/0427(NLE))**

(Consent)

The European Parliament,

- having regard to the notification of 29 March 2017 by the United Kingdom to the European Council of its intention to withdraw from the European Union and from the European Atomic Energy Community, pursuant to Article 50(2) of the Treaty on European Union and to Article 106a of the Treaty establishing the European Atomic Energy Community,
- having regard to the draft Council decision on the conclusion of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (XT 21105/3/2018),
- having regard to the draft agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community¹,
- having regard to the political declaration setting out the framework for the future relationship between the European Union and the United Kingdom²,
- having regard to European Council Decisions (EU) 2019/476 of 22 March 2019³, (EU) 2019/584 of 11 April 2019⁴ and (EU) 2019/1810 of 29 October 2019⁵, taken in agreement with the United Kingdom, extending the period under Article 50(3) TEU until 12 April 2019, until 31 October 2019, and until 31 January 2020, respectively,
- having regard to its resolutions of 5 April 2017 on negotiations with the United Kingdom following its notification that it intends to withdraw from the European Union⁶, of 3 October 2017 on the state of play of negotiations with the United Kingdom⁷, of 13 December 2017 on the state of play of negotiations with the United Kingdom⁸, of 14 March 2018 on the framework of the future EU-UK relationship⁹, and of 18 September 2019 on the state of play of the UK's withdrawal from the European

¹ OJ C 384 I, 12.11.2019, p. 1.

² OJ C 384 I, 12.11.2019, p. 178.

³ OJ L 80 I, 22.3.2019, p. 1.

⁴ OJ L 101, 11.4.2019, p. 1.

⁵ OJ L 278 I, 30.10.2019, p. 1.

⁶ OJ C 298, 23.8.2018, p. 24.

⁷ OJ C 346, 27.9.2018, p. 2.

⁸ OJ C 369, 11.10.2018, p. 32.

⁹ OJ C 162, 10.5.2019, p. 40.

Union¹⁰,

- having regard to the request for consent submitted by the Council in accordance with Article 50(2) of the Treaty on European Union (C9-0148/2019),
 - having regard to Rule 105(1) and (4) and Rule 88 of its Rules of Procedure,
 - having regard to the letters from the Committee on Foreign Affairs, the Committee on International Trade, the Committee on Employment and Social Affairs, the Committee on the Environment, Public Health and Food Safety, the Committee on the Internal Market and Consumer Protection, the Committee on Transport and Tourism, the Committee on Agriculture and Rural Development, the Committee on Legal Affairs, the Committee on Civil Liberties, Justice and Home Affairs and the Committee on Petitions,
 - having regard to the recommendation of the Committee on Constitutional Affairs (A9-0000/2019),
1. Gives its consent to the conclusion of the draft withdrawal agreement;
 2. Instructs its President to forward its position to the European Council, the Council and the Commission, as well as to the national parliaments and to the Government of the United Kingdom.

¹⁰ P9_TA(2019)0016.

EXPLANATORY STATEMENT

Introduction

The withdrawal process

The referendum of 23 June 2016 in the United Kingdom (UK) on whether it should remain a member of the EU or leave the EU resulted in a majority of 51.9 % in favour of leaving.

On 29 March 2017, the Government of the United Kingdom notified its intention to withdraw from the EU, in accordance with Article 50 of the Treaty on European Union (TEU).

On 5 April 2017, the European Parliament adopted its resolution on negotiations with the United Kingdom following its notification that it intends to withdraw from the European Union¹¹, where it sets its position for the European Council Guidelines under Article 50(2) of the TEU, and also the basis of Parliament's assessment of the negotiation process and of any agreement reached between the EU and the UK. In this resolution, Parliament defined its position on all the fundamental issues relating to the withdrawal of the UK: on general principles of the negotiations, among which the need for ensuring an orderly exit, the protection of interests of the citizens of the EU-27, and the competence of the EU for the issues related to the withdrawal; on the sequencing of the negotiations, on the scope of the withdrawal agreement, on transitional arrangements and on the future relationship between the EU and the UK.

In line with Article 50(2) of the TEU, the European Council issued Guidelines for the negotiations on 29 April 2017¹², setting a phased approach for the negotiations: a first phase aiming at providing clarity and legal certainty and at settling the disentanglement of the UK from the EU. The European Council stated its intention to monitor progress closely and determine when sufficient progress had been made to proceed to the next phase of the negotiations, dealing with preliminary and preparatory discussions on the framework for a future relationship.

The negotiations between the EU and the UK started on 19 June 2017, with the EU represented by Michel Barnier, the EU's Chief Negotiator, and the UK represented by David Davis, Secretary of State for Exiting the European Union.

A Joint Report on progress during phase 1 of the negotiations was issued by the negotiators of the EU and the UK Government on 8 December 2017, in which the negotiators jointly stated that an agreement in principle had been reached across the three areas under consideration in the first phase of negotiations: protecting the rights of EU citizens in the UK and UK citizens in the EU, the framework for addressing the unique circumstances in Northern Ireland, and the financial settlement.

¹¹ OJ C 298, 23.8.2018, p. 24

¹² European Council Guidelines Following the United Kingdom's Notification Under Article 50 TEU (EUCO XT 20004/17).

On 15 December 2017, the European Council decided that sufficient progress had been made to move to the second phase related to transitional arrangements and the overall understanding on the framework for the future relationship, and issued supplementing Guidelines. The European Council emphasised that the negotiations in the second phase could only progress if the commitments made during the first phase had been respected in full and translated faithfully into legal terms.

Further Guidelines regarding the opening of negotiations on the overall understanding of the framework for the future relationship were defined by the European Council on 23 March 2018, to be elaborated in a political declaration accompanying and referred to in the WA.

After six rounds of negotiations and other meetings at negotiator and technical level, a draft agreement on the withdrawal of the UK from the EU was agreed at negotiators' level on 14 November 2018. The draft political declaration setting out the framework for the future relationship between the EU and the UK that was agreed at negotiator level and agreed in principle at political level was sent by the European Council President to the EU-27 Member States on 22 November 2018. Finally, on 25 November 2018, the EU-27 leaders endorsed the WA and approved the political declaration.

On that date, the European Council asked the Commission, the European Parliament and the Council to take the necessary steps to ensure that the agreement could enter into force on 30 March 2019, so as to provide for an orderly withdrawal of the UK.

On 11 January 2019, the Council adopted Decision (EU) 2019/274¹³ on the signing of the WA, as well as a draft decision on the conclusion of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, which was announced in plenary on 30 January 2019.

The WA as agreed at negotiator level was, however, rejected by the UK Parliament in three successive votes, on 15 January, 12 March and 29 March 2019.

The result of the several votes on the Withdrawal Agreement between the EU and the UK showed that there was a clear majority against leaving the EU without a deal, but there was no positive majority around any alternative option, including that of a comprehensive UK-wide customs union with the EU, or that of a public confirmatory vote on the WA, leading to a deadlock.

The UK submitted three consecutive requests to the EU for an extension of the period provided for in Article 50(3) of the TEU. The first extension was granted until 12 April 2019 (European Council Decision (EU) 2019/476), the second until 31 October 2019 (European Council Decision (EU) 2019/584), and the final one until 31 January 2020 (European Council Decision (EU) 2019/1810).

Meanwhile, the talks proceeded between the negotiators of the EU and the UK in order to

¹³ Council Decision (EU) 2019/274 of 11 January 2019 on the signing, on behalf of the European Union and of the European Atomic Energy Community, of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (OJ L 47 I, 19.2.2019, p. 1). The text of the Withdrawal Agreement attached to Decision (EU) 2019/274 was published in OJ C 66 I, 19.2.2019, p. 1.

overcome the objections of the UK regarding the backstop solution, while adhering to the negotiation principles of the EU. The EU was clear, in particular, that the WA could not be renegotiated, and that a legally operative solution avoiding a hard border between Ireland and Northern Ireland should be provided for.

Talks intensified during the months of September and October 2019, and an agreement was finally reached on 17 October 2019 on a revision of the Protocol on Ireland/Northern Ireland included in the draft WA, and on the necessary technical adaptations to Articles 184 and 185 of the agreement, as well as on a revision of the political declaration. Also on 17 October 2019, the European Council endorsed the amended WA and approved the revised text of the political declaration.

By Decision (EU) 2019/1750 of 21 October 2019¹⁴, the Council amended its draft decision on the signing of the WA. A revised proposal for a decision on the conclusion of the WA was approved by the Council on the same date¹⁵, and transmitted, together with the updated text of the agreement, to Parliament, which was announced in plenary on 21 October 2019.

The Conference of Presidents of the European Parliament met the same day to discuss the next procedural steps, including the referral of the text to the competent parliamentary committees.

The competent committee for consent is the Committee on Constitutional Affairs (AFCO) in line with Parliament's Rules of Procedure. In this context, the Conference of Presidents decided that the procedure of consent could be concluded once the process of parliamentary ratification of the WA in the UK had been finalised.

The Conference of Presidents decided that the remaining committees concerned by the withdrawal procedure could provide opinions in the form of letters on AFCO's draft recommendation on consent. Ten committees have issued opinions in form of letters, which are attached to this consent recommendation. These include the Committees on Foreign Affairs (AFET), on International Trade (INTA), on Employment and Social Affairs (EMPL), on the Environment, Public Health and Food Safety (ENVI), on the Internal Market and Consumer Protection (IMCO), on Transport and Tourism (TRAN), on Agriculture and Rural Development (AGRI), on Legal Affairs (JURI), on Civil Liberties, Justice and Home Affairs (LIBE), and on Petitions (PETI).

In accordance with Rule 88 of its Rules of Procedure, the European Parliament approves the WA by a simple majority. Under 105(4) of the Rules of Procedure, Parliament decides by means of a single vote on consent, irrespective of whether the recommendation is to approve or reject the act. No amendments may be tabled. In the voting at committee and plenary level,

¹⁴ Council Decision (EU) 2019/1750 of 21 October 2019 amending Decision (EU) 2019/274 on the signing, on behalf of the European Union and of the European Atomic Energy Community, of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (OJ L 274 I, 28.10.2019, p. 1). The text of the Withdrawal Agreement attached to Decision (EU) 2019/1750 was published in OJ C 384 I, 12.11.2019, p. 1.

¹⁵ Draft Council Decision on the conclusion of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, Council Document XT 21105/3/18 REV 3

Members elected in the withdrawing Member State are fully entitled to participate in the debate and to vote.

For it to be concluded by the EU, the WA must still be passed by a qualified majority of the Council, defined in accordance with Article 238(3)(b) of the Treaty on the Functioning of the European Union (TFEU), of the remaining 27 Member States, that is 20 of those Member States representing 65 % of their population.

The role of the European Parliament

The European Parliament is not formally involved in the negotiations of the withdrawal of a Member State. Parliament is, however, not only an institution with political control competences as provided for in Article 14 of the TEU, but is also part of the decision-making procedure under Article 50 of the TEU, as its consent is a precondition for the conclusion of a WA.

From the outset of the UK withdrawal process, Parliament has therefore played a strong, active role in the negotiations, given its power to give consent to the WA as provided for in Article 50 of the TEU.

Parliament has been discussing the matter since the referendum. Indeed, an extraordinary meeting of the Conference of Presidents took place immediately after the referendum, on 24 June 2016, in order not only to prepare the meeting of the President of the Parliament with the Presidents of the other institutions following the referendum, but also to weigh up Parliament's next steps in the process.

During the same meeting of the Conference of Presidents, it was decided that an extraordinary part-session would be scheduled for 28 June 2016 to debate the outcome of the UK referendum.

At the beginning of that part-session, the President stressed the exceptional nature of the sitting, which had been called following the UK referendum of 23 June 2016, the outcome of which was of concern to all EU citizens.

During that same part-session, and after the Council and Commission statements, Parliament adopted its resolution on the decision to leave the EU resulting from the UK referendum¹⁶, with 395 votes in favour, 200 against and 71 abstentions.

In its resolution, Parliament recalled that its consent was required under the Treaties, and that it should be fully involved at all stages of the various procedures concerning the WA and any future relationship.

In practical terms, the involvement of Parliament in the withdrawal process has translated into establishing from very early on the closest possible contact with the other institutions and keeping up regular information flows on the progress made throughout the cycles of preparation and of negotiation.

¹⁶ OJ C 91, 9.3.2018, p. 40.

The coordination of Parliament's work was centralised at the level of the Conference of Presidents in view of the complex political, horizontal legal and policy issues involved. The Conference of Presidents decided to establish a phased approach to the process, defining a first phase until the definition of the European Council Guidelines, when the work would be kept at the level of the Conference, with Guy Verhofstadt (Renew Europe¹⁷, BE) as coordinator for the negotiations on the UK withdrawal following his appointment at the Conference meeting of 8 September 2016. A second phase of negotiations, when Guy Verhofstadt would coordinate the work with the Chair of the Committee on Constitutional Affairs (AFCO), and a third phase, steered by AFCO and other committees, corresponding to the consent procedure.

In this context and with the same aim of ensuring a structured involvement of Parliament in the withdrawal process, the Brexit Steering Group (BSG) was created. The BSG was formally established by the Conference of Presidents during its meeting of 6 April 2017, which decided that it would be composed of Guy Verhofstadt, as coordinator of the steering group, Elmar Brok (EPP, DE), Roberto Gualtieri (S&D), Gabriele Zimmer (GUE/NGL, DE), Philippe Lamberts (Greens/EFA, BE), and Danuta Hübner, as Chair of the Committee on Constitutional Affairs (AFCO) (EPP, PL), in order to coordinate and prepare Parliament's deliberations, considerations and resolutions on the UK withdrawal, under the aegis of the Conference of Presidents.

After the 2019 European elections, the composition of the BSG changed for the EPP, now represented by Danuta Hübner, the S&D, now represented by Pedro Silva Pereira (PT), and the GUE/NGL, now represented by Martin Schirdewan (DE), and by the new Chair of AFCO, Antonio Tajani, (EPP, IT).

Parliament was also involved at all times in the methods and structures dealing with the negotiations, through information channels or active participation. In line with the Statement issued after the informal meeting of the Heads of State or Government of the 27 Member States of 15 December 2016, 'representatives of Parliament' were invited to the preparatory meetings of the European Council. This meant that Parliament was effectively involved, including in Sherpa meetings and meetings of the General Affairs Council.

The BSG, in more than 100 meetings, most of them in the presence of the EU Chief Negotiator, Michel Barnier, contributed to Parliament being permanently involved in and at the forefront of the procedure, through timely resolutions and statements, containing substantiated positions on the negotiations and major developments since the notification of the intention to withdraw.

Recognising the importance of all committees ensuring a continuous informal dialogue, technical expertise and cooperation in the withdrawal procedure, several meetings of the BSG and technical seminars were organised in the presence of those committees directly responsible for sectoral policies relevant within the scope of the withdrawal agreement. This dialogue was also undertaken through the Conference of Committee Chairs, which discussed the withdrawal procedure in a number of meetings.

As coordinator of the BSG, Guy Verhofstadt was part of meetings with a number of

¹⁷ In the previous term the ALDE group, now Renew Europe group.

stakeholders (institutional, civil society, citizens and business representatives, national parliaments etc), having also received and replied to more than 4500 emails and letters on Brexit over the past two years.

The role of AFCO

According to the Rules of Procedure of the European Parliament, AFCO is the committee competent for preparing Parliament's consent under Article 50 of the TEU. Indeed, Rule 88 of Parliament's Rules of Procedure on withdrawal from the Union, provides that 'if a Member State decides, pursuant to Article 50 of the Treaty on European Union, to withdraw from the Union, the matter shall be referred to the committee responsible'. In accordance with section XVIII of Annex VI to the Rules of Procedure on the powers and responsibilities of standing committees, AFCO is the committee competent for the institutional consequences of withdrawal, being therefore responsible for the consent procedure, after the conclusion of the negotiations.

AFCO has a horizontal role, without prejudice to the specific competences of other committees on sectoral issues, related to the policy areas for which they are responsible. AFCO is in charge of issuing a recommendation to approve or reject a WA as negotiated by the EU and the withdrawing Member State.

In the course of its long and exhaustive preparatory work, AFCO gathered evidence, advice and expertise from different sectors and stakeholders, public or private, either from the continent or from the UK. AFCO, but also other parliamentary committees, organised debates and hearings on the implications of the withdrawal of the UK from the EU in the policy areas of their respective remits, in line with the guidelines provided by the Conference of Presidents.

AFCO has, since 3 September 2015, organised more than 20 specific events, including hearings, workshops and presentations of studies or briefing papers, on issues ranging from the renegotiation of the United Kingdom's constitutional relationship with the European Union and the agreement reached by the European Council on 18 and 19 February 2016¹⁸, to the future constitutional relationship of the UK with the European Union, citizens' rights, and the implications of Brexit for the Ireland/Northern Ireland border. AFCO has also participated or has been directly involved in the hearings of other committees on issues related to the withdrawal or the future relationship between the EU and the UK.

Apart from these special events, the withdrawal issues and, in particular, the state of play of the process were debated in virtually every committee meeting after the notification of the intention to withdraw.

The Chair of AFCO and member of the BSG participated in more than 500 bilateral meetings with public and private stakeholders on issues related to the withdrawal and its impact on the EU and the UK.

¹⁸ A New Settlement for the United Kingdom within the European Union, OJ C 69 I, 23.2.2016, p. 1.

The prompt and exhaustive involvement of the European Parliament and its bodies was crucial, as the WA can only be concluded with its consent in line with Article 50 of the TEU.

Article 50 of the TEU

Article 50 of the TEU provides for the procedure for an EU Member State to lawfully exit the EU by negotiating and concluding an agreement with the EU setting the arrangements for its withdrawal, taking account of the framework for its future relationship with the EU.

Parliament has consistently reiterated that the withdrawal of the UK from the EU is unprecedented and regrettable, and that its continued membership of the internal market and the customs union would be preferable, especially if the UK wishes to maintain frictionless trade or other benefits that are closely related to EU membership.

Parliament has also noted from the beginning that the purpose of the WA is to provide for an orderly withdrawal of the UK from the EU, by addressing three fundamental separation issues: the rights of EU citizens resident in the UK and UK citizens resident in the EU-27, the border between Ireland and Northern Ireland and the settlement of the UK's financial obligations to the EU.

As regards the framework for a future relationship, as provided for in Article 50(2) of the TEU, Parliament has made it clear that any agreement on this would be treated as an integral part of the overall withdrawal settlement, and its content would therefore also be assessed by Parliament within the consent procedure, although the object of consent is legally the WA only.

Orderly withdrawal

For Parliament, an orderly exit was essential in order to protect the interests of the European Union and of its citizens. This meant that, as provided for in Article 50 of the TEU, the negotiations concerned the arrangements for the UK's withdrawal, while taking into account the framework for the UK's future relationship with the EU, and aimed to provide legal stability and minimise disruption.

Through its resolutions, Parliament has progressively established its interpretation of the provisions of Article 50 of the TEU including a number of basic requirements for the negotiations, as regards both their scope and their phasing.

For Parliament, as outlined in its resolution of 5 April 2017 on negotiations with the United Kingdom following its notification that it intends to withdraw from the European Union, the priority issues to be addressed were:

- The legal status of EU-27 citizens living or having lived in the UK and of UK citizens living or having lived in other Member States, including their fair treatment and the guarantee that their status be subject to the principles of reciprocity, equity, symmetry and non-discrimination;
- The settlement of financial obligations between the UK and the EU, on the basis of the EU's annual accounts as audited by the European Court of Auditors, including all its legal liabilities arising from outstanding commitments, as well as making provision for

off-balance sheet items, contingent liabilities and other financial costs arising directly as a result of the UK's withdrawal;

- The recognition of the unique position of and the special circumstances of the island of Ireland, in order to mitigate the effects of the withdrawal on the border between Ireland and Northern Ireland, ensure the continuity and stability of the peace process and avoid a hardening of the border.

Other issues relevant from Parliament's point of view included the clarification of the status of the UK's international commitments undertaken as a Member State, the guarantees of legal certainty for legal entities, including companies, and of the role of the Court of Justice of the European Union (CJEU).

In its resolution of 3 October 2017¹⁹ on the state of play of negotiations with the United Kingdom²⁰, Parliament made clear that substantial progress on citizens' rights, Ireland and Northern Ireland and the settlement of the United Kingdom's financial obligations needed to be made before the second phase of talks on a new and close partnership between the EU and the UK could begin. Moreover, Parliament noted that it would only be possible to conclude an agreement on a future relationship once the UK had withdrawn from the EU.

This approach was confirmed by the European Council in its Conclusions of 15 December 2017. The European Council emphasised that negotiations could only progress to the second phase once all commitments undertaken during the first phase had been respected in full and translated faithfully into legal terms.

As the Commission reported in its Communication to the European Council (Article 50) of 8 December 2017 on the state of progress of the negotiations with the United Kingdom under Article 50 of the Treaty on European Union²¹, the first phase of the negotiations gave priority to 'three issues which have been identified as particularly important for ensuring an orderly withdrawal':

- a) The rights of citizens;
- b) The dialogue on Ireland/Northern Ireland; and
- c) The financial settlement.'

The draft WA deals with all of these issues, including a part on citizens' rights (Part Two), a part on financial provisions (Part Five) and a Protocol on Ireland/Northern Ireland and its annexes. On the issue of the role of the CJEU, the WA provides for its jurisdiction at different levels, as will be discussed below in the section on governance.

Regarding the status of the UK's international commitments undertaken as a Member State, the WA clarifies that the UK would continue to be bound by the EU's international agreements during the transition period. However, the UK would be allowed to negotiate, sign and ratify international agreements entered into in its own capacity in the areas of exclusive competence of the EU, provided those agreements did not enter into force or apply during the transition period, unless so authorised by the EU.

¹⁹ OJ C 346, 27.9.2018, p. 2.

²⁰ OJ C 346, 27.9.2018, p. 2.

²¹ COM(2017)0784.

Likewise, guarantees of legal certainty for legal entities, including companies, are duly provided for in Part Three of the WA on separation provisions, which allow for the smooth conclusion of all ongoing procedures and business related to market access for goods, customs, VAT and excise matters, intellectual property, police and judicial cooperation in both criminal and civil/commercial matters, the protection of data obtained before the end of the transition period, public procurement procedures, Euratom issues, and EU judicial/administrative processes, privileges and immunities.

The WA provides therefore for an orderly withdrawal, which is the goal the EU and the UK negotiators have pursued over the past three years.

The conclusion and ratification of the WA also ruled out the no deal scenario. This is of the utmost importance, as the implications of a no deal withdrawal would be very significant for both the EU and the UK.

Citizens' rights

Article 50 of the TEU does not provide for a guarantee of the status of EU citizens. However, such rights can be protected in the WA concluded under Article 50 of the TEU. In its resolution of 14 March 2018 on the framework of the future EU-UK relationship²², Parliament considered that the EU and the UK had an overriding obligation to ensure a comprehensive and reciprocal approach to protecting the rights of EU citizens living in the UK and of UK citizens living in the EU-27.

Parliament's main priority of protecting EU citizens was made clear from the outset, in its resolution of 28 June 2016 on the decision to leave the EU resulting from the UK referendum²³, and has been reiterated in all its resolutions on Brexit since then. As the institution representing all citizens of the EU, Parliament pledged to act throughout the entire withdrawal process to protect their interests and demanded that the negotiations be conducted with the aims of providing legal stability and minimising disruption, and providing a clear vision of the future for citizens and legal entities.

Parliament's main focus was the protection of citizens both in the sense of respecting their wish as democratically expressed in the UK referendum, and, most importantly, in the sense of mitigating the uncertainty arising from the withdrawal and keeping intact, as far as possible, the rights they derived from their pre-withdrawal status. This is even more important as there are over 3 million EU citizens in the UK and more than a million UK nationals in the EU.

The protection of the rights of citizens affected by the withdrawal of the UK from the EU has also been a priority for the institutions that are more closely involved in the withdrawal process.

The European Council has followed a very similar line to Parliament's by establishing among the main priorities of the negotiations the protection of citizens who have built their lives on the basis of rights associated with the UK's membership of the EU.

²² OJ C 162, 10.5.2019, p. 40.

²³ OJ C 91, 9.3.2018, p. 40.

The Council, moreover, made clear in the mandate for the negotiations that ‘safeguarding the status and rights of the EU-27 citizens and their families in the United Kingdom and of the citizens of the United Kingdom and their families in the EU-27 Member States is the first priority for the negotiations because of the number of people directly affected and of the seriousness of the consequences of the withdrawal for them. The Agreement should provide the necessary effective, enforceable, non-discriminatory and comprehensive guarantees for those citizens’ rights, including the right to acquire permanent residence after a continuous period of five years of legal residence and the rights attached to it’.

In their Joint Report of 8 December 2017 on progress during phase 1 of negotiations under Article 50 TEU on the United Kingdom’s orderly withdrawal from the European Union, the negotiators gave a detailed overview of the common understanding reached regarding citizens’ rights.

On 26 June 2017, the UK published a document entitled ‘The United Kingdom’s exit from the European Union – Safeguarding the Position of EU Citizens Living in the UK and UK Nationals Living in the EU’, in which the Government indicated that its first priority was to reach an agreement on the post-exit position of EU citizens living in the UK and of UK nationals living in other EU countries, expressing the intention to put those citizens first.

The issue of citizens’ rights was therefore given great attention by both parties from the earliest stages of the negotiations. The chapter on citizens’ rights was indeed agreed rather early on, as the initial version of the draft WA published on 19 March 2018 contained an entirely agreed Part Two on citizens’ rights, including on the direct effect of its provisions, and on the jurisdiction of the CJEU on the relevant provisions on citizens’ rights.

In its resolutions, Parliament had established a number of minimum requirements as regards the content of the WA in the citizens’ rights chapter, including the following:

(a) Eligible EU national residents and children born after the United Kingdom’s withdrawal should fall within the scope of the WA as family members and not as independent right holders. Moreover, future family members should continue to benefit from the right of residence under the same provisions as current family members,

The definition of personal scope provided in Article 10(1)(e) and (f) of the WA includes family members in their own right, including those born to or legally adopted after the end of the transition period by primary right holders under the conditions defined in that article. The status of family members is further reinforced by Article 17(2) of the WA, which provides for the continuity of the rights of dependant family members after they are no longer dependant.

(b) The administrative procedure should be light-touch, declaratory and free of charge, enabling families to initiate the procedure by means of a single declaration, and the burden of proof should be on the UK authorities.

The agreement allows the host state to choose either a declaratory system or a constitutive system. The UK and around half of the Member States have, so far, chosen a constitutive system.

Article 18 of the WA defines the applicable administrative procedure, providing that its purpose is to verify whether the applicant is entitled to the residence rights granted by the WA. It establishes requirements for the application procedure, while striving to ensure that the procedure is as simplified and applicant-friendly as possible.

As an example, applications made by families at the same time will be considered together.

Moreover, according to points (g) and (h) of Article 18(1) of the WA, the documents proving the status of those covered by the WA are to be issued free of charge.

(c) All benefits defined in EU legislation should be exportable.

According to Article 31 of the WA, Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems²⁴ will remain applicable to those covered by the WA.

Those covered will maintain their right to social security benefits, and if they are entitled to a benefit in one country, they will in principle be entitled to receive it if they move to another country.

(d) CJEU decisions related to the interpretation of citizens' rights provisions should be binding.

The WA on citizens' rights can be relied upon directly by EU citizens in UK courts, and by UK nationals in the courts of the EU Member States.

Moreover, UK courts must, in line with Article 4(4) of the WA, consistently interpret the case law of the CJEU handed down until the end of the transition period, and pay due regard to case law handed down after that date (Article 4(5) of the WA). UK courts may also ask for preliminary rulings to the CJEU on the interpretation of the citizens' part of the WA for eight years from the end of the transition period. The legal effects in the UK of such rulings will be the same as the legal effects of preliminary rulings given under Article 267 of the TFEU (Article 158(2) of the WA).

(e) Providing for the role of the future independent national authority created to act on citizens' complaints.

In line with Article 159 of the WA, the implementation and application of the citizens' rights part of the WA in the EU will be monitored by the Commission and, in the UK, by an authority with powers equivalent to those of the Commission. Such an authority should be a truly independent body. In any case, under Article 159(2) of the WA, the Commission and the Independent Monitoring Authority are obliged to inform the specialised committee on citizens' rights (Article 165(1) of the WA) about the implementation of the citizens' rights part of the agreement in the EU and in the UK, respectively.

However, the constitution, composition and functions of the independent authority are not defined in the WA, being established in the UK European Union (Withdrawal Agreement)

²⁴ OJ L 166, 30.4.2004, p. 1.

Bill. The Parliament, in its resolution 15 January 2020 on implementing and monitoring the provisions on citizens' rights in the Withdrawal Agreement (*insert footnote with TA number*) expressed concern about that Bill's proposed provisions on the authority, in particular as far as its genuine independence is concerned.

It must be recognised that the WA represents a compromise between the EU and the UK, including on citizens' rights. Its provisions on citizens' rights could not aim at granting the entire status conferred to EU citizens under the TEU and TFEU, which are built upon membership of the EU. The main objective of the agreement is thus to safeguard and guarantee most of these rights, and, in particular, those which allow most of the affected citizens to maintain life choices made on the basis of free movement until the end of the transition period.

On 12 November 2019, the BSG issued a statement regarding the implementation in the UK and in the EU-27 of the citizens' rights provisions of the WA, considering that there were some areas of concern as regards the UK's EU Settlement Scheme. These concerns were confirmed by Parliament in its resolution of 15 January 2020, regarding the implementation of Part Two of the WA, and in particular on the following issues:

- The high proportion of applicants to the EU Settlement Scheme who have been accorded pre-settled status only;
- The independence of the Independent Monitoring Authority as referred to in Article 159 of the WA;
- The possible consequences for EU citizens who fail to apply for the EU Settlement Scheme within the deadline of 30 June 2021;
- The absence of a physical document issued at the end of the application procedure, which increases the risks of uncertainty as regards the proof of status, and of discrimination against EU-27 citizens;
- The measures in place to address the situation of vulnerable citizens in the context of the application procedure;
- The applicability of the EU Settlement Scheme to EU-27 citizens in Northern Ireland who have not sought British citizenship under the Good Friday Agreement.

The European Parliament will continue to monitor very closely the implementation of the WA as a whole, and of the citizens' rights chapter in particular.

Ireland and Northern Ireland

Safeguarding the Good Friday Agreement

The European Union and its institutions, Parliament in particular, were especially concerned about the consequences of the United Kingdom's withdrawal for Northern Ireland and its future relations with Ireland. Indeed, the exit from the EU of one of the co-guarantors of the Good Friday Agreement could cause economic and legal divergences leading to difficulties in the implementation of that agreement as an essential framework of peace, cooperation and understanding on the island of Ireland.

Brexit could have disruptive effects, essentially in relation to three aspects: the stability of the peace process, the nature of the border and cross-border cooperation and equality and rights²⁵.

Parliament has been clear that it is crucial to safeguard peace and preserve the Good Friday Agreement in all its parts, and to do everything possible to avoid a hardening of the border. It has thus consistently reiterated, in its resolutions and in its statements through the BSG, that the WA should include a workable, legally operational and all-weather backstop for the Ireland/Northern Ireland border that would address the unique circumstances facing the island of Ireland.

Parliament has also insisted on the importance of the UK's commitment to ensuring that there will be no reduction in rights, safeguards and equality of opportunity as set out in the Good Friday Agreement, while insisting on the transposition of all elements of the Common Travel Area and on the free movement rights of EU citizens, as embedded in EU law and in the Good Friday Agreement²⁶.

For its part, the European Council called, in its Guidelines of 29 April 2017, for 'flexible and imaginative solutions' addressing 'the unique circumstances on the island of Ireland, including with the aim of avoiding a hard border, while respecting the integrity of the Union legal order.'

The Good Friday Agreement entered into force in 1998 creating 'the conditions that brought an end to nearly three decades of conflict in Northern Ireland'; 'it paved the way for a sustained period of relative peace which saw a Northern Ireland Assembly elected, a power sharing Executive established, significantly improved political relations between Northern Ireland and Ireland, the promotion of human rights and equality, a dramatic increase in cross-border cooperation, and significant examples of increased economic integration and interdependence on the island of Ireland'²⁷.

Although both parties in the withdrawal negotiations have consistently stressed their commitment to upholding the Good Friday Agreement in all its parts, the issue of Ireland/Northern Ireland has proved the most politically sensitive and indeed the most complex of the three main priorities for an orderly withdrawal.

The initial backstop solution

In their Joint Report of 8 December 2017 on progress during phase 1 of negotiations, the EU and the UK affirmed that the achievements, benefits and commitments of the peace process would remain of paramount importance to peace, stability and reconciliation, and agreed that

²⁵ 'UK Withdrawal ('Brexit') and the Good Friday Agreement', European Parliament, Policy Department for Citizens' Rights and Constitutional Affairs, Directorate-General for Internal Policies of the Union, November 2017. Available at:

[https://www.europarl.europa.eu/RegData/etudes/STUD/2017/596826/IPOL_STU\(2017\)596826_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2017/596826/IPOL_STU(2017)596826_EN.pdf)

²⁶ European Parliament resolution of 14 March 2018 on the framework of the future EU-UK relationship, OJ C 162, 10.5.2019, p. 40.

²⁷ UK Withdrawal ('Brexit') and the Good Friday Agreement, European Parliament, Policy Department for Citizens' Rights and Constitutional Affairs, Directorate-General for Internal Policies of the Union, November 2017. Available at:

[https://www.europarl.europa.eu/RegData/etudes/STUD/2017/596826/IPOL_STU\(2017\)596826_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2017/596826/IPOL_STU(2017)596826_EN.pdf)

the Good Friday Agreement must be protected in all its parts. These were joint commitments agreed to by both parties.

However, devising a solution for the issues at stake proved extremely complex due to the highly politicised context and also to practical difficulties. A major difficulty was finding operable methods²⁸ that would not lead to a hardening of the border while at the same time respecting the red lines set by the UK – namely that it would no longer be part of the single market and the customs union – on the one hand, and the guiding principles of the EU in the negotiations, on the other. These were essentially, as defined by the European Council Guidelines of 29 April 2017, ‘avoiding a hard border, while respecting the integrity of the Union legal order’.

In the above-mentioned Joint Report of 8 December 2017, both parties agreed that if the UK’s intention of achieving its objectives for Ireland/Northern Ireland through the overall future EU-UK relationship could not be met, the UK would, as a second option, propose specific solutions to address the unique circumstances of the island of Ireland.

In the absence of such an agreed solution, the third option would be for the UK to maintain full alignment with the rules of the internal market and the customs union, which support north-south cooperation, the all-island economy and the protection of the Good Friday Agreement. In all circumstances, the United Kingdom would continue to ensure the same unfettered access for Northern Irish businesses to the whole of the UK internal market.

The draft WA as published on 19 March 2018 was designed on the basis of the third option of the Joint Report – the so-called backstop solution – which aimed to protect north-south cooperation and avoid a hard border. The text provided for the protection of the Common Travel Area, on the upholding of which there was an agreement between the EU and the UK.

In order to avoid border checks, the proposed solution included full alignment with EU law on goods, veterinary and plant health rules, and the application of the EU customs code to Northern Ireland.

The commitment was still, however, to discuss all three of the options set out in paragraph 49 of the Joint Report. Nonetheless, a substantial part of the text of the Protocol as inserted at that time was not agreed.

The backstop solution proposed by the UK Government

It was difficult to find a ‘flexible and imaginative’ bespoke solution, both for political reasons connected to the UK Government’s red lines and for legal reasons stemming from the constitutional architecture of both the EU and the UK.

²⁸ In view of this, several proposals have been made in the literature on this issue, including for a ‘Smart Border 2.0’, which ‘proposes the implementation of a new border solution that serves both sides of the border with maximum predictability, speed and security and with a minimum burden and cost for traders and travellers’, by using ‘a combination of international standards, global best practices and state-of-the-art technology’. Smart Border 2.0: Avoiding a hard border on the island of Ireland for Customs control and the free movement of persons, European Parliament, Policy Department for Citizens’ Rights and Constitutional Affairs, Directorate-General for Internal Policies of the Union, November 2017. Available at [https://www.europarl.europa.eu/RegData/etudes/STUD/2017/596828/IPOL_STU\(2017\)596828_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2017/596828/IPOL_STU(2017)596828_EN.pdf)

Given the UK Government's 'intention to leave the single market, the customs union and the jurisdiction of the Court of Justice of the EU (CJEU)', the challenge was considerable in political terms²⁹. In legal terms, the integrity of the EU's legal order, and for the UK the integrity of the UK as a single customs territory, constituted significant limits to differentiated solutions. Indeed, in the Joint Report of 8 December 2017, the parties committed to establishing mechanisms to ensure that the implementation and oversight of any specific arrangement would safeguard the integrity of the EU internal market and the customs union. The United Kingdom also recalled its commitment to preserving the integrity of its internal market and Northern Ireland's place within it, as it leaves the EU's internal market and customs union.

Work proceeded on the basis of a mapping exercise of north-south cross-border cooperation³⁰, and on scoping the provisions necessary to ensure legally operative text regarding the Ireland/Northern Ireland issue. In their joint statement of 19 June 2018, the parties recognised that the backstop on Ireland/Northern Ireland required provisions on customs and regulatory alignment in line with paragraph 49 of the Joint Report of December 2017.

The backstop was designed on the basis of proposals by the UK Government, which was looking for 'bespoke solutions' to 'Northern Ireland's unique circumstances' as 'an integral part of the UK economy (...) fully integrated with that of Ireland particularly in areas like the agri-food sector', while acknowledging that it was 'difficult to imagine how Northern Ireland could somehow remain in while the rest of the country leaves'³¹.

The text finally agreed at negotiator level on 14 November 2018, at the end of the negotiations, aimed to respond to the above-mentioned challenges that the unique circumstances of Ireland and Northern Ireland posed to the EU and the UK.

The text provided for a backstop solution based on the UK proposal for a single customs territory between the EU and the UK as a whole. The solution would enter into force only if no subsequent agreement on the future relationship was concluded by the EU and the UK by 1 July 2020.

The draft WA of November 2018 thus set out the parties' shared intention to negotiate a future agreement that would supersede the Protocol, obliging them to endeavour to conclude and ratify such an agreement.

²⁹ Smart Border 2.0: Avoiding a hard border on the island of Ireland for Customs control and the free movement of persons, European Parliament, Policy Department for Citizens' Rights and Constitutional Affairs, Directorate-General for Internal Policies of the Union, November 2017. Available at [https://www.europarl.europa.eu/RegData/etudes/STUD/2017/596828/IPOL_STU\(2017\)596828_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2017/596828/IPOL_STU(2017)596828_EN.pdf)

³⁰ The goal of the mapping exercise was 'to assess the breadth and depth of this cooperation, as well as the role of EU membership in its operation and development. (...) North-South cooperation is specific to the island of Ireland and comes under the remit of the Government of Ireland and the Northern Ireland Executive. The cooperation is provided for by Strand Two of the Belfast/Good Friday Agreement'. See: 'Mapping of North-South cooperation & Implementation Bodies – Report and key findings of the exercise, European Commission, Task Force for the Preparation and the Conduct of the Negotiations with the United Kingdom under Article 50 TEU', 21 June 2019.

³¹ Speech of James Brokenshire, Secretary of State for Northern Ireland, in the European Policy Centre, 6 November 2017.

The backstop was therefore inserted in the draft WA as an insurance policy, designed to come into effect only if no future agreement were in place at the end of the transition period.

The intention of the parties, clearly stated and sufficiently provided for in legal text, was that the backstop would not need to be triggered, on the one hand, and to commit to working speedily on the future relationship agreement, on the other.

Confronted with the controversy around the backstop after the conclusion of the negotiations, the European Union made all possible efforts to clarify to the UK counterparties the significance of the provisions of the Protocol, until the eve of the first meaningful vote in the UK House of Commons, while rejecting the possibility of reopening the negotiations, as made clear by the European Council (Article 50) during its special meeting of 13 December 2018.

Indeed, in a letter from the President of the European Council and the President of the European Commission to Prime Minister Theresa May of 14 January 2019, clarifications with regard to the backstop were made, by reassuring the UK that the European Union did not wish to see the backstop enter into force, and was determined to replace the backstop by a subsequent agreement as quickly as possible.

This version of the WA was, however, rejected by the UK Parliament in three successive votes, on 15 January, 12 March and 29 March 2019.

Change of approach of the UK Government

After Prime Minister Theresa May resigned and a new UK Government was formed, the new Prime Minister Boris Johnson, in his statement on priorities for the government of 25 July 2019, said that the UK could not accept the deal that had been negotiated with the previous Prime Minister. The new Prime Minister considered that the backstop had to be removed and the issues of the Irish border solved in the context of a future EU/UK agreement.

In its conclusions of 10 April 2019, the European Council stated that there could be ‘no opening of the Withdrawal Agreement, and that any unilateral commitment, statement or other act should be compatible with the letter and the spirit of the Withdrawal Agreement and must not hamper its implementation’. In this context, the Chief Negotiator, Michel Barnier, confirmed that the EU remained open to analysing legally operational proposals from the UK that would be compatible with the WA. The talks between the EU and the UK have thus continued with a view to finding alternative arrangements, allowing the WA to contain a workable, legally operative solution to the unique circumstances on the island of Ireland.

At the beginning of October 2019, the UK Government presented new proposals for a revised Protocol on Ireland/Northern Ireland, which included the following: (1) a single regulatory zone for goods on the island of Ireland, (2) the EU and the UK would form two distinct customs territories, and all customs checks would be performed away from the border between Ireland and Northern Ireland, and (3) the Northern Irish Assembly and Executive would have the power to, first, consent to the single regulatory zone entering into force, and afterwards approve its continuation every four years.

The main objectives of the UK Government were to ensure that the whole of the UK would be in a single customs territory, to regain the control of its external trade policy and to focus

less on the continuance of frictionless trade between the EU and the UK as a whole.

The EU's Chief Negotiator, Michel Barnier, considered that the UK's proposals raised major problems, as they would put the EU single market and customs union integrity at serious risk by not providing for operational and credible customs and regulatory checks at the border between Ireland and Northern Ireland, which would effectively become two distinct jurisdictions.

On democratic consent, while accepting to examine the idea of giving the Northern Irish institutions a more important role in the application of the Protocol, the EU Chief Negotiator considered that the proposal made the application of the Protocol conditional on a unilateral decision by Northern Irish institutions.

For these reasons, those proposals could not be accepted, as they would involve replacing an operational, practical and legal solution with a purely hypothetical and provisional one.

Parliament reacted through its BSG to the proposals of the UK, issuing a statement on 3 October 2019 declaring that the UK proposals did not represent a basis for an agreement to which Parliament could give consent. The concerns of the BSG were essentially that the UK proposals on customs and on regulatory aspects explicitly provided for infrastructure, controls and checks, potentially harming the all-island economy. As for requiring the consent of the Northern Irish Assembly, this would make the agreement uncertain and both contingent and conditional on provisional and unilateral decisions, instead of the certainty provided for by the backstop. However, Parliament remained open to all proposals, as long as these were credible, legally operable and had the same effect as the compromises reached in the WA.

Final text agreed

Intensive talks continued over the following days until, on 17 October 2019, the Commission announced that it had advised the European Council (Article 50) to endorse the agreement reached at negotiator level on a revised text of the WA, including a revised Protocol on Ireland/Northern Ireland, and approve a revised political declaration on the framework of the future EU-UK relationship.

The Chief Negotiator stated that the negotiators 'managed to find solutions that fully respect the integrity of the Single Market [and] created a new and legally operative solution to avoid a hard border, and protect peace and stability on the island of Ireland. It is a solution that works for the EU, for the UK and for people and businesses in Northern Ireland'.

The most significant change is that the revised Protocol removed the 'backstop' solution and the single EU-UK customs union. Under the revised Protocol, Northern Ireland is fully part of the UK customs territory, while applying EU customs legislation (Article 5(3) of the Protocol on Ireland/Northern Ireland). No tariffs are applicable on goods moving from Great Britain to Northern Ireland, unless such goods are at risk of moving into the EU, in which case they will be subject to EU customs duties and to the EU rules on VAT. That would ensure that no customs checks or controls are required, but administrative procedures would be required in order to make sure that goods moving into the EU comply with the relevant legislation.

The removal of the single customs territory between the EU and the UK led to the removal of

the level playing field rules. Northern Ireland will nevertheless remain aligned with a defined set of rules related to the single market, including legislation on goods, sanitary rules for veterinary controls, rules on agricultural production/marketing, VAT and excise duties on goods, and State aid rules, all in order to avoid a hard border. EU State aid rules will also apply to the UK with respect to measures affecting trade between Northern Ireland and the EU.

Necessary checks and controls on goods will be ‘implemented at the Northern Ireland-Rest of World border or on trade moving East-West between Great Britain and Northern Ireland [...] These processes will be largely electronic in nature and any checks on goods will principally relate to regulatory alignment rather than customs compliance’³².

The UK will be responsible for the implementation of the provisions of EU law made applicable by the Protocol but EU representatives will have a right to supervise UK activities in this context. The CJEU will keep its jurisdiction regarding the implementation of the provisions of the Protocol related to customs and regulatory alignment³³.

The solutions established in the new Protocol aim to avoid checks at the border between Ireland and Northern Ireland, guaranteeing there will be no hard border between them while protecting the integrity of the single market and the EU customs union. It provides for permanent status rather than an ‘insurance policy’ conditional on the conclusion of an agreement on the future relationship.

A major novelty of the revised Protocol is that it is conditional on the ‘consent’ of the Members of the Northern Ireland Assembly, who will decide whether the application of relevant EU law will continue in Northern Ireland. However, the terms for this consent differ considerably from those initially proposed by the UK, with the text ensuring predictability and stability for at least a few years.

The Protocol will come into force from the end of the transition period, in line with Article 185, paragraph 5, WA. However, under Article 18 of the Protocol, in conjunction with the UK’s unilateral declaration concerning the operation of the ‘Democratic consent in Northern Ireland’ provision of the Protocol on Ireland/Northern Ireland³⁴, four years after the end of the transition period, the Northern Irish Assembly will decide on whether to continue to apply Articles 5 to 10 of the Protocol (regulatory, customs and market arrangements). In the event of approval after this initial period, consent will be renewed four years later, if originally approved by the majority of the Members of the Northern Ireland Assembly, or eight years if approved with cross-community support, in the sense of Article 18(6)(a) of the Protocol. In the event that the continuation of the application of those provisions is rejected, these will

³² Explainer for the New Ireland/Northern Ireland Protocol and the Political Declaration on the Future Relationship, Department for Exiting the European Union, UK Government, 18 October 2019. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/840653/EXPLAINER_FOR_THE_NEW_IRELAND_NORTHERN_IRELAND_PROTOCOL_AND_THE_POLITICAL_DECLARATION_ON_THE_FUTURE_RELATIONSHIP.pdf

³³ For further details on the revised Protocol provisions, see ‘Brexit: What did you agree with the UK today?’, European Commission, Questions and Answers, 17 October 2019. Available at: https://ec.europa.eu/commission/presscorner/detail/en/QANDA_19_6122

³⁴ The declaration is available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/840232/Unilateral_Declaration_on_Consent.pdf

cease to apply two years after the vote.

Although the Protocol is no longer conditional on a future agreement, its Article 13(8) makes clear that it can be superseded by that agreement, wholly or in part.

The Protocol provides a legally operational and permanent solution that avoids a hard border and protects the all-island economy and the Good Friday Agreement in all its dimensions, while safeguarding the integrity of the single market.

Moreover, it provides for the maintenance of the Common Travel Area, in full respect of the rights of Irish citizens in Northern Ireland derived from EU law.

Settlement of the UK's financial obligations

The settlement of the financial obligations of both parties as a result of the withdrawal of the UK generated great controversy at the very beginning of the process due to the amount to be settled cited in the press (EUR 60 billion), and was considered by some to be 'possibly the single biggest obstacle to a smooth Brexit'³⁵.

For the EU, rather than arriving at a figure, the aim was to define a methodology ensuring that both the EU and the UK would respect all obligations resulting from the whole period of the United Kingdom's membership of the EU, on the basis of the principle that what is committed by 28 Member States has to be borne by 28 Member States. This methodology was agreed early on in the negotiations.

In fact, the then UK Prime Minister Theresa May, in her Florence speech of 22 September 2017, made it very clear that the UK would honour the commitments it made during its membership of the EU.

On the EU side, the European Council, in its Guidelines of 29 April 2017, determined that an orderly withdrawal would require a single financial settlement ensuring that both the EU and the UK respect the obligations resulting from the whole period of the UK's membership of the EU, covering all commitments and liabilities.

For Parliament, it was clear that the UK should honour all its legal, financial and budgetary obligations, including its commitments under the 2014-2020 multiannual financial framework (MFF), up to and after the date of its withdrawal. The WA should address such obligations, including those incurred by the EU, through a single financial settlement based on the EU's annual accounts as audited by the European Court of Auditors, covering all legal liabilities arising from outstanding commitments and making provision for off-balance sheet items, contingent liabilities and other financial costs directly related to the withdrawal.

³⁵ 'The bill includes financial liabilities that stretch decades into the future, for longer, indeed, than the UK's 40-odd years of EU membership. Pension pledges, infrastructure spending plans, the decommissioning of nuclear sites, even assets like satellites and the Berlaymont building – all these must be divvied up in a settlement if Brexit is to be anything but a hard, unmanaged, unfriendly exit.', in *The €60 billion Brexit bill: How to disentangle Britain from the EU budget*, Alex Barker, Policy brief, Centre for European Reform, 6 February 2017. Available at: <https://www.cer.eu/publications/archive/policy-brief/2017/%e2%82%ac60-billion-brexif-bill-how-disentangle-britain-eu-budget>

The mandate for the negotiations adopted by the Council on 22 May 2017 defined the principles that should underlie the methodology of the financial settlement to be established in the first phase of the negotiations. On the basis of this, the Commission drafted, on 24 May 2017, a working paper on the principles of the financial settlement, which is essentially based on the principle that the UK must honour its share of the financing of all the obligations undertaken while it was a Member State.

In their Joint Report of 8 December 2017, the negotiators declared that a methodology for the financial settlement had been agreed, consisting of a set of principles for calculating the value of the financial settlement and payment modalities, of arrangements for the continued participation of the UK in the 2014-2020 MFF programmes until their closure, and for financial arrangements regarding EU bodies and funds related to EU policies (the European Investment Bank, the European Central Bank, European Union trust funds, the Facility for Refugees in Turkey, Council agencies and the European Development Fund).

The initial draft WA of 28 March 2018 translated those arrangements into legal terms, including certain practical modalities and payment deadlines. In its resolution of 14 March 2018³⁶, Parliament stated that the text largely reflected its views and did not add further observations or demands regarding the financial settlement. The revised draft WA did not include any changes to this part of the text.

Part Five of the WA deals with the financial provisions, which cover, in particular, the following:

- The participation of the UK in the EU budgets of 2019 and 2020, the implementation of EU programmes and activities under the 2014-2020 MFF, and the rules of EU law applicable after 31 December 2020, that is after the transition period ends;
- Any outstanding commitments on 31 December 2020;
- Fines collected by the EU and the related reimbursements due to the UK;
- The UK's contribution to the financing of EU liabilities incurred up until 31 December 2020, including contingent financial liabilities relating to financial operations decided on or approved before the entry into force of the WA, and legal cases concerning EU financial interests related to the budget;
- The EU's liabilities to the UK in general, including regarding the European Coal and Steel Community and the European Investment Fund;
- The schedule of payments after 2020;
- The reimbursement of the paid-in capital provided by the UK to the European Central Bank;
- The liabilities of the UK regarding the European Investment Bank (EIB) and the reimbursement of the paid-in subscribed capital by the UK to the EIB;
- The liabilities of the UK regarding the European Development Fund (EDF) and the continued participation of the UK in this fund until the closure of the 11th EDF;
- The UK's commitments to the European Union Emergency Trust Fund for stability and addressing root causes of irregular migration and displaced persons in Africa;
- The UK's participation in the relevant bodies related to the Facility for Refugees in Turkey;

³⁶ OJ C 162, 10.5.2019, p. 40.

- The UK's liabilities regarding the financing of the European Defence Agency, the European Union Institute for Security Studies, the European Union Satellite Centre, and Common Security and Defence Policy operations.

Transition period

Among the substantive issues that generated intense political and legal debate was the possibility of transitional arrangements.

Article 50 of the TEU does not contain any explicit reference to the possibility of a transitional period, and this raised questions on whether that provision could constitute a legal basis for transitional arrangements or whether these had to rely on separate, sectoral legal bases.

Both the European Parliament and the European Council took a position on that issue at an early stage of the process. The European Council agreed that it was necessary to negotiate a transition period covering the whole of the EU *acquis*, although the UK, as a third country, would no longer participate in, nominate or elect members of the EU institutions, nor participate in the decision-making of the EU bodies, offices and agencies.

Parliament, in its resolution of 3 October 2017³⁷, considered that a transition period was necessary in order to avoid a cliff-edge scenario on the date of the withdrawal and ensure legal certainty and continuity. This would require the existing EU regulatory, budgetary, supervisory, judiciary and enforcement instruments and structures to be kept, amounting to a continuation of the whole of the *acquis communautaire* and the full application of the four freedoms (free movement of citizens, capital, services and goods), under the full jurisdiction of the CJEU.

Both institutions have clearly stated that transitional arrangements should be strictly limited both in time and in scope, being clearly defined and building bridges towards the future relationship. Such requirements would bring any transition period within the scope of Article 50 of the TEU as an aspect of the withdrawal process³⁸.

A degree of conditionality was introduced by making a transition period a requirement for the conclusion of a fully-fledged WA covering all the issues pertaining to the withdrawal. Without an agreement, there would be no transition period. Such a transition, connecting the period between the end of EU membership and a future relationship agreement is key for an orderly withdrawal of the UK from the EU.

A transition period was included in the draft WA, in Part Four, which provides that a transition or implementation period will start on the date of entry into force of the WA and end on 31 December 2020 (Article 126 of the WA). During that period, although the UK's participation in the institutions, bodies, offices and agencies of the EU will end as the UK will no longer be a Member State, most of EU law will remain applicable in the UK, and, as a general rule (exceptions are listed in Article 127 of the WA), with the same effect as in the

³⁷ OJ C 346, 27.9.2018, p. 2.

³⁸ Tobias Lock and Fabian Zuleeg, Extending the transition period, EPC discussion paper, 28 September 2018, p. 6.

Member States, in order to avoid disruption during the negotiation of the agreement on the future relationship. This period may be extended for up to one or two years by decision of the Joint Committee before 1 July 2020 (Article 132 of the WA).

In its resolution of 14 March 2018³⁹, Parliament expressed support for Part Four of the draft WA on transitional arrangements.

However, it should be acknowledged that the transition period ‘provides some breathing space’, but may not avert a ‘second cliff edge since its provisions merely cover the modalities of leaving’, and ‘finding a long-term agreement [...] will be extremely challenging’, as ‘complex, comprehensive and ambitious trade deals take much longer to negotiate, and [the future EU-UK agreement] is arguably the trickiest one the EU has ever had to conclude’⁴⁰.

With the successive extensions under Article 50(3) of the TEU, this challenge is now even bigger, as the deadline of the transition period remained unchanged in the revised draft WA. Unless an extension decision is taken before 1 July 2020, the transition period will last no longer than 11 months.

Governance

Institutional framework of the WA

The institutional framework of the WA, on the one hand, and of the future relationship between the EU and the UK, on the other, is a key subject for Parliament. In its resolution of 18 September 2019⁴¹, Parliament considered that the value of the WA is, among other things, that to the fullest extent possible, ‘it contains governance provisions which safeguard the role of the Court of Justice of the European Union (CJEU) in the interpretation of the WA’.

Parliament has not only consistently reiterated the importance of the role of the CJEU as the competent authority for the interpretation and enforcement of the WA, but also of ensuring a governance framework with a robust and independent dispute settlement mechanism in the context of the agreement on the future relationship. The role of the CJEU is an essential marker for the autonomy and integrity of the EU legal order.

The WA proposes a nuanced governance system depending on the individual parts of the WA, and on the relevant juncture, as during the transition period the application of EU law is unchanged. It accords a central role to the CJEU in several instances.

Transition period

During the transition period, the CJEU will remain competent for all procedures registered before the end of the transition period and until a final binding judgment is given (Article 131 of the WA). The CJEU will also retain its jurisdiction in pending cases until the end of the transition period (Article 86 of the WA), as well as in new infringement procedures brought

³⁹ OJ C 162, 10.5.2019, p. 40.

⁴⁰ Tobias Lock and Fabian Zuleeg, ‘Extending the transition period’, EPC discussion paper, 28 September 2018, p. 3.

⁴¹ Texts adopted, P9_TA(2019)0016.

within four years after the end of transition for breaches of EU law or non-compliance with EU administrative decisions before the end of the transition period or, in some cases, even after the end of the transition period (Article 87 of the WA).

Citizen's rights

Regarding Part Two of the WA, on citizens' rights, the CJEU will remain competent for requests for preliminary rulings from UK courts for eight years after the end of the transition period (if the transition period is extended, this period will also be extended by the corresponding number of months).

Dispute settlement

As regards the general dispute settlement of the WA, any disputes will be settled by the Joint Committee or an arbitral tribunal. However, if the dispute concerns the interpretation of concepts or provisions of EU law, under Article 174, the arbitral tribunal is required to refer to the CJEU for a ruling on the question.

Protocol on Ireland/Northern Ireland

In the context of the Protocol on Ireland/Northern Ireland, Article 12(4) provides for the jurisdiction of the Court in relation to the exercise of the powers of the institutions, bodies, offices and agencies of the EU as regards the implementation of a number of Articles of the Protocol, and for the possibility of preliminary rulings under Article 267 of the TFEU.

The future relationship

As far as the future relationship is concerned, in its resolution of 14 March 2018⁴², Parliament provided significant details on the governance issue, expressing its view that any future EU-UK agreement with the UK as a third country should include the establishment of a coherent and solid governance system as an overarching framework, covering the joint continuous supervision/management of the agreement and dispute settlement, and enforcement mechanisms with respect to the interpretation and application of the agreement's provisions.

However, the contours of the future relationship are now less clear. The revised political declaration of 17 October 2019 removed references to use the arrangements of the WA as a basis for future dispute settlement and enforcement (former paragraph 132). The new political declaration also omits the reference to the CJEU in the context of the enforcement mechanisms, although keeping its role as regards the interpretation of provisions and concepts of EU law. However, it explicitly notes that the Court should not be involved if a dispute does not raise a question of EU law. In general, the new political declaration approach of a looser, less close relationship is reflected in the envisaged institutional framework.

Role of Parliament in monitoring the implementation of the WA

Beyond the structures established in the WA, Parliament has sought to have a more substantial role in monitoring the implementation of the WA. Indeed, Parliament had

⁴² OJ C 162, 10.5.2019, p. 40.

expressed concerns regarding the considerable powers given to the Joint Committee established in Article 164 of the WA, and that a WA is not the customary type of international agreement with a third country, but a treaty between the EU and a withdrawing Member State.

It was necessary to ensure proper accountability and parliamentary scrutiny arrangements in relation to decision-making in the Joint Committee.

On the basis of a mandate from the Conference of Presidents, the BSG and its Chair have liaised with the Council with a view to establishing a close cooperation on the workings of the Joint Committee created by the WA. The discussions focussed on EP's participation in the main decisions of the Joint Committee, in particular regarding an extension of the transition period and the UK's financial contributions in that scenario, the possible phasing out of the Ireland/Northern Ireland backstop, and the termination of the UK independent monitoring authority.

EP's involvement in these matters was confirmed in a statement by Jean-Claude Juncker, then the President of the European Commission, during the final session of the 8th term, in the part-session of 10 April 2019. The President of the Commission ensured that the Commission would go on working closely with the Parliament in the context of the implementation of the WA, and that, whenever a decision is taken in the Joint Committee, the Commission will closely involve Parliament and take utmost account of its views.

The Joint Committee is composed of representatives of the EU and of the UK, and is responsible for the implementation and the application of the WA. The decisions of the Joint Committee are binding on the EU and the UK, with the same legal effect as the WA, and it has extensive powers regarding the operation of the WA. These include the power to decide on an extension of the transition period and the impact thereof, and in particular the amount of the contribution of the UK to the EU budget.

In the revised Protocol on Ireland/Northern Ireland, the Joint Committee also has important powers in the context of customs arrangements, notably that of determining the criteria under which goods brought into Northern Ireland from outside the EU are not at risk of subsequently being moved into the EU (Article 5(2) of the Protocol on Ireland/Northern Ireland). The Joint Committee also has the power to determine the maximum overall annual level of UK support for the production of and trade in agricultural products in Northern Ireland, up to which the provisions of EU law on State aid are not applicable (Article 10(2) and Annex 6 of the Protocol on Ireland/Northern Ireland). These issues are particularly relevant given they relate to matters which carry a potential risk for the EU single market.

The Council decision on the conclusion of the WA, in its revised version of 18 October 2019, provides, in Article 2(4), for annual reporting by the Commission to Parliament and the Council on the implementation of the WA, and, in particular, of Part Two thereof, during the first five years after its entry into force.

Article 2(3) of the draft Council Decision provides that Parliament will be in a position to exercise fully its institutional prerogatives throughout the Joint Committee proceedings.

According to Articles 3(5) and 4(8) of the same decision, Parliament also has the right to be

informed on decisions of the Council authorising the UK to express its consent to be bound by an international agreement during the transition period, or authorising Ireland, Cyprus and Spain to negotiate bilateral agreements with the UK in areas of exclusive competence of the EU, in relation to the relevant protocols to the WA.

Framework for a future relationship

The nature and form of the framework for a future relationship also featured among the issues which proved rather controversial during the negotiations, as these are entirely undefined in the provisions of Article 50 of the TEU.

During most of the duration of the withdrawal process, the future relationship with the EU was arguably one of the most relevant issues for the UK, at least during Theresa May's premiership.

The future relationship sought by the UK at that stage, although rejecting participation in the internal market and in the customs union, was very ambitious in terms of access to EU programmes, bodies, databases and even meetings. The UK also strove to negotiate the future relationship in parallel with the withdrawal arrangements.

Parliament clarified from the outset in its resolution of 5 April 2017⁴³ that, although it sought as close as possible a future relationship, this had to be balanced in terms of rights and obligations and based on the premise that a state withdrawing from the EU cannot enjoy the same benefits as a Member State.

In its resolution of 13 December 2017 on the state of play of negotiations with the United Kingdom⁴⁴, Parliament further noted that an overall understanding on the framework for the future relationship had to be agreed between the EU and the UK, taking the form of a political declaration annexed to the WA, subject to a number of principles as listed in the same resolution.

The same line was taken by the European Council, in its Guidelines of 15 December 2017, which approached the question of the future relationship between the EU and the UK as a matter of identifying an overall understanding to be elaborated in a political declaration accompanying and referred to in the WA.

The possible contours of a future relationship were far from clear for everyone in the UK. Various proposals were put forward by different sectors and stakeholders, from a basic free trade agreement to a 'Norway plus' status, or even acceding to the EEA, although the UK Government had made clear from the outset that it did not wish to participate in the internal market, the EEA or the customs union. In any event, there was a firm understanding in the UK that a clear agreement on the future relationship was indispensable, in order to determine the withdrawal 'landing zone'.

Parliament proposed that a future relationship be based on Article 217 of the TFEU, and that it be comprehensive, as close as possible, but balanced in terms of rights and obligations, and

⁴³ OJ C 298, 23.8.2018, p. 24.

⁴⁴ OJ C 369, 11.10.2018, p. 32.

that it safeguard the integrity of the internal market and the four freedoms, while avoiding a sector-by-sector approach. The European Council warned that, although the objective was a deep partnership, any future relationship could not offer the same benefits as EU membership, as Parliament had also made clear. Referring to a free trade agreement, the European Council also emphasised the need for balance and for ambition in the areas covered, without undermining the EU's integrity and proper functioning.

The principles as thus outlined by the EU rejected any kind of 'cherry-picking' in the context of a future relationship between the EU and the UK.

Parliament, in its resolution of 14 March 2018⁴⁵, reiterated that an association agreement in accordance with Article 8 of the TEU and Article 217 of the TFEU could provide an appropriate framework for the future relationship, and secure a consistent governance framework, which should include a robust dispute settlement mechanism, thus avoiding a proliferation of bilateral agreements and the shortcomings which characterise the EU's relationship with Switzerland.

Parliament proposed that this future relationship be based on four main pillars:

- trade and economic relations,
- foreign policy, security cooperation and development cooperation,
- internal security,
- thematic cooperation.

The negotiations finally led to an agreement on a political declaration, which was criticised by some for its vagueness and non-binding nature⁴⁶.

The political declaration is indeed a non-binding document, which accompanies the WA, but it is not an integral part of the latter. The first version of the text was published with the draft WA in the Official Journal of 19 February 2019⁴⁷. Paragraph 3 of the declaration stated that its object was to establish the parameters of an ambitious, broad, deep and flexible partnership across trade and economic cooperation, law enforcement and criminal justice, foreign policy, security and defence and wider areas of cooperation.

In the context of the resumption of talks on the text of the Protocol on Ireland/Northern Ireland, and closely related to the changes made to that Protocol, the UK Government changed approach as compared to that of its predecessor regarding the future relationship. This change was expressed by Prime Minister Boris Johnson in his letter of 2 October to the previous President of the European Commission, Jean-Claude Juncker. In that letter, the UK Prime Minister clarified that 'the backstop acted as a bridge to a proposed future relationship with the EU in which the UK would be closely integrated with EU customs arrangements and would align with EU law in many areas. That proposed future relationship is not the goal of the current UK Government. The Government intends that the future relationship should be

⁴⁵ OJ C 162, 10.5.2019, p. 40.

⁴⁶ See, in this context, Steve Peers' EU Law Analysis blog post of 8 December 2018, noting that the 'very non-binding and imprecise nature of the political declaration has led to criticism'. In a later post, of 12 March 2019, Steve Peers reiterated that 'the political declaration, on top of its non-binding status, is vague or non-committal about a number of key aspects of the future relationship. It could be revised (...) to provide for firmer and more precise commitments'. Both posts are available in <http://eulawanalysis.blogspot.com>

⁴⁷ OJ C 66 I, 19.2.2019, p. 185.

based on a Free Trade Agreement in which the UK takes control of its own regulatory affairs and trade policy’.

The revised political declaration of 17 October 2019, as published in the Official Journal on 12 November 2019⁴⁸, although keeping the objectives unchanged in terms of the areas to be covered (paragraph 3 of the political declaration), now explicitly defines the model for the future relationship: ‘a comprehensive and balanced Free Trade Agreement at its core’, based on zero tariffs and zero quotas. Other important changes in the text reflect the removal of the backstop and therefore also of the reference to the single EU-UK customs territory.

The changes to the text reflect the fundamental change of approach and level of ambition: references to the alignment of rules were removed from the parts of the text related to regulatory aspects, customs and checks and controls; the role of the CJEU was removed in the context of the mechanisms for dispute and enforcement except when questions on the interpretation of EU law are raised. As regards the level playing field, the text now refers to ‘robust commitments to ensure a level playing field [which should] be commensurate with the scope and depth of the future relationship and the economic connectedness of the Parties’.

A level playing field is an essential issue for the EU in general, and for Parliament in particular. In this context, it is worth recalling the European Council (Art. 50) Guidelines of 23 March 2018, which confirmed the readiness of the European Council to achieve ‘a balanced, ambitious and wide-ranging free trade agreement (FTA) insofar as there are sufficient guarantees for a level playing field’, and that the ‘future relationship will only deliver in a mutually satisfactory way if it includes robust guarantees which ensure a level playing field’.

Likewise, Parliament stated clearly, in its resolution of 18 September 2019⁴⁹, that negotiations on future EU-UK relations would require strong safeguards and level playing field provisions with a view to safeguarding the EU’s internal market and avoiding placing EU firms at a potential unfair competitive disadvantage, and that any free trade agreement that fails to respect such levels of protection would not be ratified by Parliament.

Rapporteur’s position

The withdrawal of the UK is a regrettable moment for the European Union and for our integration process, but we can only respect the sovereign decision of the British people and provide for a withdrawal agreement that organises the separation with the less harm possible for both parties.

The withdrawal agreement is in line with the general principles that the institutions, and the Parliament in particular, have set for the conduct of the negotiations and the conclusion of the agreement. It serves the fundamental objective of ensuring an orderly exit of the UK, and paving the way for the negotiations of a fair and balanced future relationship between the EU and the UK.

⁴⁸ OJ C 384 I, 12.11.2019, p. 178.

⁴⁹ Texts adopted, P9_TA(2019)0016.

In the light of the above, your Rapporteur suggests that the AFCO Committee give a favourable recommendation on the conclusion of the Withdrawal Agreement.