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WORKING DOCUMENT

on the implementation of Article 50 TEU (2020/2136 (INI))

Committee on Constitutional Affairs

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I. Introduction

A referendum on 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. After the UK Government notified its intention to withdraw from the EU on 29 March 2017, in accordance with Article 50 of the Treaty on European Union (TEU), negotiations on the withdrawal arrangements followed, leading to the conclusion of the Withdrawal Agreement.¹ This agreement entered into force upon the UK's exit from the EU on 31 January 2020 at midnight CET.

The withdrawal of a Member State from the Union was a new process and an unprecedented challenge for the Union. Article 50 TEU had only recently been introduced by the Treaty of Lisbon. The actual triggering of the procedure by the UK came as a shock to the integration project². It demanded intense and deep reflection on the implementation of Article 50 TEU and on complex issues related to the unprecedented disentanglement of a Member State from the Union, all within a limited timeframe.

The procedure of withdrawal stands at the very confluence of complex legal and political issues and constraints, while also highlighting the unique nature of the EU's legal order. The procedure also demonstrated how the principles and values on which the European Union is based constitute the building blocks in the functioning of the Union. Although Article 50 TEU, as the withdrawal of the UK shows, creates a process for leaving by explicitly giving Member States a sovereign right to withdraw, the values on which the Treaties are based and their integration objectives were not called into question.

Article 50 TEU solved the pre-existing uncertainty and ambiguity on the right to withdraw from the EU, by explicitly giving Member States a unilateral right to withdraw subject to no conditions apart from the compliance with their own national constitutional requirements. Article 50 TEU establishes the only procedure under which a Member State may lawfully withdraw from the EU. However, Article 50 TEU is silent on many aspects that arose during the process of withdrawal, and what some see as “procedural deficiencies”³, others consider normal because “Article 50 TEU does not cover every aspect of the withdrawal process”, and “additional rules and principles must be, and have been added”⁴.

This working document will constitute the basis of an implementation report, aiming at analysing the way the provisions of Article 50 TEU were interpreted and applied, and the way the procedure of withdrawal of the UK from the EU was organised and conducted under those provisions. These issues merit reflection and analysis from a constitutional and institutional point of view.

Such an analysis lies within the scope of the responsibilities of the Committee on Constitutional Affairs (AFCO) according to Parliament's Rules of Procedure, and in particular its competence for “the implementation of the Treaties and the assessment of their operation”. Given the importance of and the impact that the application of Article 50 TEU had on the Union, it is crucial to have an in-depth reflection on how Article 50 TEU provisions were interpreted and applied, and what are the lessons that can be drawn regarding the constitutional integrity of the Union and its legal order.

A critical assessment of the way Article 50 TEU was read and the procedure worked can be made on the following main elements.

II. The procedure of Article 50 TEU

1) *“A Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.”*

Article 50(1) TEU does not impose any substantive conditions to the withdrawal, and a decision to withdraw from the Union is unilateral, belonging exclusively to the Member State in question.

In its resolution of 28 June 2016 on the decision to leave the EU resulting from the UK referendum⁵, Parliament emphasised that “the will expressed by the people must be entirely and fully respected”.

Likewise, in their 24 June 2016 statement on the outcome of the UK referendum, the EU leaders and the Netherlands Presidency considered that “in a free and democratic process, the British people have expressed their wish to leave the European Union”, and respected such decision.

In its judgment of 10 December 2018 in Case C-621/18, the Court of Justice also makes a reference to the notification of the intention to withdraw from the Union as being “in accordance with [the withdrawing Member State] constitutional requirements and following a democratic process”.

The Court recalled, in that same judgment, “the importance of the values of liberty and democracy, referred to in the second and fourth recitals of the preamble to the TEU, which are among the common values referred to in Article 2 of that Treaty and in the preamble to the Charter of Fundamental Rights of the European Union, and which thus form part of the very foundations of the European Union legal order”.

2) *“A Member State which decides to withdraw shall notify the European Council of its intention.”*

The referendum in the UK took place on 23 June 2016. The UK Government notified its intention to withdraw from the EU in accordance with Article 50(2) of the TEU on 29 March 2017.

Article 50 TEU contains no provisions or requirements regarding the format or the timing of the notification. However, as long as the UK did not notify its intention to withdraw, no negotiations could take place.

In their joint Statement of 24 June 2016, the Presidents of the European Council, of the European Parliament, of the rotating Council Presidency and of the European Commission, asked the UK Government “to give effect to this decision of the British people as soon as possible [...]”, adding that “any delay would unnecessarily prolong uncertainty”.

The Parliament, in its resolution of 28 June 2016 on the decision to leave the EU resulting from the UK referendum, asked that in order to prevent damaging uncertainty for everyone and to protect the Union’s integrity, the notification stipulated in Article 50 TEU should take place as soon as possible.

Likewise, in their informal meeting of 29 June 2016, the Heads of State or Government of EU27, stated the need to organise the withdrawal of the UK from the EU in an orderly fashion, and that it was for the British government to notify the European Council of the UK's intention to withdraw from the Union, which should be done as quickly as possible, making clear that no negotiations of any kind before the notification could take place.

Before the referendum, the UK Prime Minister at the time, David Cameron, committed to trigger the procedure immediately: “if the British people vote to leave there is only one way to bring that about – and that is to trigger Article 50 of the Treaties and begin the process of exit. And the British people would rightly expect that to start straight away.”⁶

Formal notification of withdrawal was only given by the UK by letter of 29 March 2017 from the UK Prime Minister to the President of the European Council. This letter was preceded by an act adopted by the UK national parliament on 13 March 2017 conferring power on the Prime Minister to notify, under Article 50(2) of the Treaty on European Union, the United Kingdom’s intention to withdraw from the EU (European Union (Notification of Withdrawal) Act 2017).

As a principle of EU law under Article 4(3) TEU, sincere cooperation obliges the withdrawing Member State to avoid unduly delaying the notification of the intention to withdraw. Although a decision to withdraw is entirely up to the Member State in question, once this is taken, the notification should not be unduly delayed.

3) In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union.

Article 50(2) TEU does not specify any substantive requirements on the guidelines of the European Council or their scope. It also doesn’t provide detailed indications on the content of the withdrawal agreement, limiting its definition to a generic formulation of “*arrangements for its withdrawal*”, taking into account the “*framework*” of the future relationship of the departing state, without also defining the nature and form of such framework.

(a) Arrangements for withdrawal

At their meeting of 29 June 2016, the Heads of State or Government of 27 Member States, as well as the Presidents of the European Council and the European Commission made a statement defining the aim of the process: “to organise the withdrawal of the UK from the EU in an orderly fashion. Article 50 TEU provides the legal basis for this process.”

In its resolution of 5 April 2017 on negotiations with the United Kingdom following its notification that it intends to withdraw from the European Union⁷, Parliament set its position for the European Council Guidelines under Article 50(2) of the TEU, by defining the issues that it considered fundamental, and in particular:

- the general principles of the negotiations: ensuring an orderly exit, the protection of interests of the citizens of the EU-27, and the competence of the EU for issues related to the withdrawal;
- the sequencing of negotiations;
- the scope of the withdrawal agreement;
- the transitional arrangements; and,

- the future relationship.

On 29 April 2017, the European Council enacted specific guidelines and principles for the negotiations, determining a phased approach and giving priority to an orderly withdrawal.

The guidelines required the negotiations to be conducted in accordance with the principle that nothing is agreed until everything is agreed, and the Union to approach them with unified positions, excluding separate negotiations between Member States and the UK on matters related to the withdrawal.

To that effect, in the first phase, negotiations would aim at ensuring the orderly withdrawal of the UK by ensuring as much clarity and legal certainty as possible to citizens, businesses, stakeholders and international partners, and settling the disentanglement of the UK from the Union and from its rights and obligations as a Member State. In the second phase, an overall understanding on the framework for the future relationship should be identified.

Regarding the substantial priorities for the negotiations, the Guidelines defined the areas that should be given priority:

- To safeguard the status and rights derived from EU law at the date of withdrawal for EU and UK citizens, and their families, affected by the withdrawal;
- To define a single financial settlement in relation to the obligations resulting from the whole period of the UK membership;
- To find flexible and imaginative solutions addressing the unique circumstances on the island of Ireland, aiming at avoiding a hard border, while respecting the integrity of the Union legal order;
- To set arrangements as regards the Sovereign Base Areas of the UK in Cyprus;
- To initiate a constructive dialogue on a possible common approach towards third country partners, international organisations and conventions concerned;
- To address potential issues arising from the withdrawal in other areas of cooperation, including judicial cooperation, law enforcement and security;
- To ensure legal certainty and equal treatment for all court procedures pending before the EU Court of Justice on the date of withdrawal that involve the UK or natural or legal persons in the UK;
- To ensure arrangements for administrative procedures pending before the Commission and Union agencies on the date of the withdrawal that involve the UK or natural or legal persons in the UK.

The European Council also indicated that appropriate dispute settlement and enforcement mechanisms regarding the application and interpretation of the withdrawal agreement should be foreseen, in such a way as to protect the Union's autonomy and legal order, including the role of the Court of Justice.

The European Council opened furthermore the door to a transitional period, by considering that, to the extent necessary and legally possible, transitional arrangements could be negotiated, which should be in the interest of the Union and provide for bridges towards the foreseeable framework for the future relationship.

The initial European Council Guidelines were complemented by further Guidelines - on 15 December 2017 and 23 March 2018. The successive Guidelines issued by the European

Council constituted the primary basis for the negotiations and their main substantive and procedural frame.⁸ As the European Council made clear, all the guidelines remained fully applicable throughout the procedure.

Very importantly, the negotiating directives adopted by the Council on 22 May 2017 further defined the scope of the negotiations and of the withdrawal agreement, by considering that Article 50 TEU “confers on the Union an exceptional horizontal competence to cover in this agreement all matters necessary to arrange the withdrawal”, which is an exceptional competence and “of a one-off nature and strictly for the purposes of arranging the withdrawal from the Union.”

(b) Framework for a future relationship

Regarding the framework of the future relationship of the UK with the Union, the European Council stated that although the future agreement could only be finalised and concluded once the UK left the Union, “Article 50 TEU requires to take account of the framework for its future relationship with the Union in the arrangements for withdrawal”, and “to this end, an overall understanding on the framework for the future relationship should be identified during a second phase of the negotiations under Article 50 TEU.” In view of this, it authorised “preliminary and preparatory discussions” in the context of Article 50 TEU negotiations, as soon as it would decide “that sufficient progress has been made in the first phase towards reaching a satisfactory agreement on the arrangements for an orderly withdrawal”.

The European Council adopted a decision on such “sufficient progress” rather early in the procedure, i.e. on 15 December 2017, thus unlocking the second phase of negotiations.

Parliament considered, in its resolution of 13 December 2017 on the state of play of negotiations with the United Kingdom⁹, that an overall understanding on the framework for the future relationship should be agreed between the EU and the UK, taking the form of a political declaration annexed to the Withdrawal Agreement, and subject to a number of principles listed in the same resolution.

The same line was taken by the European Council, in its Guidelines of 15 December 2017 and of 23 March 2018, which approach 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 Withdrawal Agreement.

Although it was clear that any full-fledged negotiations on the future relationship could only start formally after the actual withdrawal of the UK, the provisions of Article 50 TEU required at least an *understanding* on the framework of that future relationship.

The scope and value of the framework for the future relationship was a contentious issue in the negotiations with the UK as, initially, the UK Government considered that both discussions should be done in parallel.

The political declaration is a non-binding document, and accompanied the Withdrawal Agreement, both published in the Official Journal of 19 February 2019.¹⁰ As stated in its paragraph 3, it establishes 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. It defines what the parties aim for a future relationship, but it does not define the relationship itself in legal and binding terms.

Although initially the UK sought an ambitious, deep and special future partnership with both economic and security cooperation, the UK Government has later changed its approach by considering that 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 was no longer the goal of the UK Government (following the appointment of Prime Minister Boris Johnson). During the negotiations of the future relationship, the UK has also signalled that some of the elements of the partnership were no longer sought, including regarding the security partnership (Part III of the Political Declaration).

Only the outcome of the negotiations on the future partnership will show to what extent the political declaration as agreed by the negotiators is reflected in the resulting future agreement.

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

Apart from the above, Article 50 TEU does not give further details on the negotiation phase.

On 22 May 2017, the Council adopted a decision authorising the opening of negotiations, appointing the Commission as the Union negotiator, and setting the negotiating directives in light of the European Council Guidelines. The directives were supplemented by additional negotiating directives on transitional arrangements on 22 January 2018.

In its negotiating directives, the Council clarified that the Withdrawal Agreement would be “negotiated in the light of the European Council guidelines and in line with the negotiating directives”, and that the “negotiating directives build on the European Council guidelines by developing the Union's positions for the withdrawal negotiations in full respect of the objectives, principles and positions that the guidelines set out”.

Procedurally, Council established detailed arrangements for the conduct of the negotiations, including on the coordination and information flow between the Union negotiator and the Council and its preparatory bodies.

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

(a) *An agreement is not mandatory*

Article 50(3) TEU makes clear that an exit agreement is not mandatory, as the Treaties cease to apply to the withdrawing Member State two years after the notification should no withdrawal agreement be concluded. According to the drafters of the text of what is now Article 50 TEU, “making withdrawal conditional upon a previous agreement between the withdrawing Member State and the Union would render the concept of voluntary withdrawal void of substance.”¹¹ However, in case no agreement is concluded, the departing Member State has nevertheless to wait for the two-year period to elapse.

It can also be inferred from the provisions of Article 50 TEU that only the EU is obliged to

negotiate and conclude an agreement. The EU has made serious efforts in this regard. After the House of Commons rejected the draft withdrawal agreement in two votes, on 15 January and on 12 March 2019, although expressing serious concern, the EU kept its effort to reach an agreement on an orderly withdrawal. In this context, the EU sought to provide for legal clarifications and assurances at all stages, including through an instrument clarifying and providing legal guarantees on the nature of the solution found at the time for Ireland/Northern Ireland (the “backstop”), and a joint statement supplementing the political declaration.

Withdrawing without an agreement was widely considered as creating general uncertainty and adversely affecting the rights of citizens and businesses, especially those directly impacted by the withdrawal. However, regardless of the obligations on the EU or the potential risks of an exit without agreement, “if the parties fail to reach an agreement, withdrawal will nevertheless become effective two years after notification of the Council”, and “there is the risk that the parties may eventually find themselves in a situation of effective withdrawal but without an agreement”.¹²

This risk is all the more real “since any agreement, dealing with an issue as complex as withdrawal, would require a sense of cooperation among the parties”, which “may be difficult to achieve without an existing legal framework, setting out the procedure for withdrawal in detail”, and in “tense and conflict-laden situations such as withdrawal”.¹³

The risk of a no-deal withdrawal was indeed present until the conclusion of the WA, which was preceded by tense and highly politicised negotiations, aggravated by the very limited time available.

(b) Extension of the two-year period

Article 50(3) TEU provides for the possibility to extend the period of two years, in view of facilitating the conclusion of an agreement¹⁴, but is silent on whether or not there can be multiple extensions.

Three extensions to the period under that provision were granted. In view of allowing for further talks, on 21 March 2019, the European Council (Art.50) granted the UK Prime Minister’s request for an extension under Article 50(3) TEU, under which the withdrawal would be delayed until 22 May 2019 if the WA was approved by the House of Commons by 29 March 2020, to give time for adoption of the necessary implementing legislation. In the event of the WA not being approved by that date, Article 50 was extended until 12 April. As the WA was not approved by 29 March 2019, the UK submitted a request for a further extension, and the European Council agreed to such an extension until 31 October 2019. Already after agreement had been reached, on 19 October 2019 the United Kingdom submitted another request for one more extension of the period provided for in Article 50(3) TEU until 31 January 2020, to which the European Council agreed with a view to allowing for the finalisation of the ratification of the WA.

While some considered that the two-year period “is far too short for negotiating and concluding a withdrawal implementation agreement in an ‘average’ Member State withdrawal case”¹⁵, others questioned the possibility of extending the two-year period. Indeed, although recognising that the provisions on extending the two-year period aim at facilitating the conclusion of an agreement, some authors consider that the possibility of an indefinite extension might not be compatible with the commitment required to be a Member State.¹⁶

Criticism is also related with the fact that, although the Treaty gives Member States a unilateral right to withdraw, it then requires that “either the two-year period must have expired or [that] a withdrawal agreement must have been successfully concluded.”¹⁷

Article 50 TEU does not solve the issue of the possible exit without an agreement, and how to address such possibility and its effects.¹⁸

(c) Transition period

Article 50 TEU provides that the Treaties cease to apply to the withdrawing State “from the date of entry into force of the withdrawal agreement”, but does not explicitly refer to a transition period. The possibility for transitional arrangements was evoked by Parliament in its above-mentioned resolution of 5 April 2017, determining that these should ensure legal certainty and continuity, the right balance of rights and obligations for both parties and preserve the integrity of the EU’s legal order.

Unlike its status during the extension under Article 50(3) TEU, in which the withdrawing State is a Member State with full rights and obligations as such, with the limitation provided for in Article 50(4) TEU¹⁹, the status of withdrawing state in the transition period is that of third country.

Following the proposal put forward by the UK for a transition period of around two years, the European Council considered in its 15 December 2017 Guidelines that, to the extent necessary and legally possible, transitional arrangements could be negotiated, which should be in the interest of the Union and provide for bridges towards the foreseeable framework for the future relationship, making clear that the transitional arrangements would be part of the WA. The transitional arrangements were thus to be agreed under the legal basis of Article 50 TEU.

The European Council defined the terms of a transition period as follows:

1. It should cover the whole of the EU acquis;
2. The UK, as a third country, would not participate in or nominate or elect members of the EU institutions, nor participate in the decision-making of the Union bodies, offices and agencies;
3. These arrangements should be clearly defined and precisely limited in time;
4. Changes to the acquis adopted by EU institutions, bodies, offices and agencies would have to apply both in the UK and the EU in order to ensure a level playing field based on the same rules applying throughout the Single Market;
5. All existing Union regulatory, budgetary, supervisory, judiciary and enforcement instruments and structures would also apply, including the competence of the Court of Justice;
6. As the UK would still be part of the Customs Union and the Single Market, it would have to continue complying with EU trade policy, to apply EU customs tariff and collect EU customs duties, and to ensure all EU checks are performed on the border vis-à-vis other third countries.

In the UK, a transitional period was viewed as allowing coordination “between the withdrawal treaty on the one hand and the future relations treaty on the other”, with the aim “to have a smooth transition between the past in the EU and the future in the new arrangement”.²⁰

In terms of their relationship with the Article 50 TEU legal basis, transitional arrangements are viewed as “supporting the main purpose of the [withdrawal] agreement, namely to ensure an orderly withdrawal taking into consideration the future relationship in line with the terms of Article 50 TEU”. This would be “permitted by the broad interpretation of the EU competence based” on Article 50 TEU.²¹

Whether or not the transition period effectively allowed “for bridges towards the foreseeable framework for the future relationship in the light of the progress made”, as the European Council envisaged, should be assessed in the light of the future agreement. The fact that a few weeks before the end of the transition period an agreement on a future relationship had not yet been concluded may prove that the transition period finally could not solve the uncertainty associated with a no-deal scenario, on the one hand, and also that the timeframe for the negotiations on a future relationship may not have been sufficient, on the other.²²

6) *“If a State which has withdrawn from the Union asks to rejoin, its request shall be subject to the procedure referred to in Article 49.”*

The consequence of the withdrawal for the withdrawing Member State is a clear-cut termination of its membership of the European Union, with no possibility of obtaining a privileged status.

This was noted by Parliament in its above-mentioned resolution of 5 April 2017, in which it considered that a state withdrawing from the Union cannot enjoy similar benefits to those enjoyed by a Union Member State. Similarly, the European Council emphasised in its Guidelines of 29 April 2017 that a non-member of the Union, that does not live up to the same obligations as a member, cannot have the same rights and enjoy the same benefits as a member.

Article 50(5) TEU makes clear that the concern of the provisions of Article 50 TEU is the safeguard of legal certainty and of the autonomy of the EU legal order, as well as the protection the EU and its Member States from consequences affecting the process of integration.²³

Also here the analysis of the Court of Justice in its judgment of 10 December 2018 in Case C-621/18 may be relevant. As the Court indicates in that judgment, it “is apparent from Article 49 TEU, which provides the possibility for any European State to apply to become a member of the European Union and to which Article 50 TEU, on the right of withdrawal, is the counterpart, the European Union is composed of States which have freely and voluntarily committed themselves” to a set of common values referred to in Article 2 of the TEU and in the preamble to the Charter of Fundamental Rights of the European Union. These values “form part of the very foundations of the European Union legal order, and EU law is thus based on the fundamental premiss that each Member State shares with all the other Member States, and recognises that those Member States share with it, those same values.”

Thus, withdrawing from or joining the European Union are not mere formal procedures, as they imply fundamental choices and decisions regarding the adherence to the values, principles and objectives on which the European Union is based and the sharing of these with other Member States.

III. Role of the Parliament

Parliament is not formally involved in the negotiations of the withdrawal under Article 50 TEU. Parliament has a competence of political control as provided for in Article 14 TEU. It is also part of the decision-making procedure under Article 50 TEU, as its consent is a precondition for the conclusion of the WA.

Parliament played a strong, active role since the referendum outcome was known. In practical terms, the involvement of Parliament in the withdrawal process translated into establishing from very early on a position on the issue, along with the closest possible contact with the other institutions and a regular inter-institutional information flow on the progress made throughout the cycles of preparation and of negotiation. On 15 December 2016, the 27 heads of state or government issued a Statement setting out procedural arrangements for the negotiations, where the Union negotiator was invited “to keep the European Parliament closely and regularly informed throughout the negotiation”. Parliament was involved at all times in the methods and structures dealing with the negotiations, through information channels or active participation, including in Sherpa meetings and meetings of the General Affairs Council. Parliament issued several resolutions and statements during the negotiations’ phase, until Parliament’s consent on 29 January 2020.²⁴

The negotiating directives adopted by the Council on 22 May 2017 don’t make reference to Parliament, but in its “Guiding principles for transparency in negotiations under Article 50 TEU”, of the same date, Council determined that Parliament would be kept closely and regularly informed throughout the negotiations by the Union negotiator, including through the transmission of negotiation documents through the appropriate channels and in accordance with applicable rules and practices. Regular contacts between the rotating Presidency and Parliament’s representatives would also take place, in particular before and after meetings of the General Affairs Council (Art.50).

(a) Brexit Steering Group

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 Europe, BE) appointed coordinator for the negotiations on the UK withdrawal appointment on 8 September 2016. A second phase of negotiations, work would be coordinated with the AFCO Chair, 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 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, IT), Gabriele Zimmer (GUE/NGL, DE), Philippe Lamberts (Greens/EFA, BE), and Danuta Hübner, as Chair of the Committee on Constitutional Affairs (AFCO) (EPP, PL)²⁵, in order to coordinate and prepare Parliament’s deliberations, considerations and resolutions on the UK withdrawal, under the aegis of the Conference of Presidents.

In more than 100 meetings, most of them in the presence of the EU Chief Negotiator, Michel Barnier, the BSG constituted the forum through which Parliament was kept permanently informed of the progress in the negotiations and where its positions on the negotiations as they progressed were mainly prepared. In the context of BSG, political groups have prepared

six resolutions, which were voted and adopted by the Parliament on the process of withdrawal of the UK, and 15 statements.

(b) AFCO preparatory work

According to the Rules of Procedure, AFCO was the committee competent for the consent, having played a horizontal role. In its long and exhaustive preparatory work, AFCO gathered evidence, advice and expertise from varied sectors and stakeholders, through debates and hearings on the implications of the withdrawal of the UK from the Union. Since 3 September 2015, AFCO organised more than 20 such events on issues ranging from the renegotiation of the United Kingdom constitutional relationship with the European Union and the agreement reached by the European Council on 18-19 February 2016²⁶, to the future constitutional relationship of the UK with the European Union, citizens' rights, and the implications of the UK's withdrawal for the Irish border. AFCO has also participated or has been directly involved in hearings of other committees on issues related to the withdrawal or the future relationship between the EU and the UK. Apart from these events, 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 by the UK.

The withdrawal of the UK was of interest to Parliament as a whole. In this context, the Parliament engaged from the outset in the process, starting by identifying the particular consequences of the withdrawal for the policies under the remit of each parliamentary committee. At its meeting of 29 September 2016, the Conference of Presidents requested the committees to analyse the impact of the UK's withdrawal on the policy areas and legislation in their respective fields.

That exercise was concluded in January 2017, and AFCO contributed to it, indicating that among the legislative files under its competence that would be affected by the withdrawal, the revision of the European Council Decision establishing the composition of the European Parliament²⁷ was the most important. AFCO also identified very clearly the issues that it considered essential to be included in the withdrawal agreement.

IV. Other issues

The lack of indications in the TEU provisions of Article 50, and of experience in managing the withdrawal has led to questions and debate on a range of other issues. Some of these issues are related, directly or indirectly, to the status of the withdrawing Member State in the various stages of the process.

Article 50(4) TEU provides for the only limitation to the fully-fledged status of a Member State, i.e., that the withdrawing Member State does not participate in the discussions of the European Council or Council or in decisions concerning it.

In the guidelines of 29 April 2017, the European Council made clear that until leaving the Union, UK would remain a full Member of the EU, "subject to all rights and obligations set out in the Treaties and under EU law, including the principle of sincere cooperation". In its judgment of 19 September 2018 (C-327/18), the Court of Justice confirmed that the notification under Article 50 TEU "does not have the effect of suspending the application of EU law in the Member State that has given notice of its intention to withdraw from the European Union and, consequently, EU law (...) continues in full force and effect in that State until the time of its actual withdrawal from the European Union."

(a) Presidency of the Council

However, issues like holding the Presidency of the Council and participating in the trio Presidency system were considered of relevance, mainly for political reasons. The Council amended Decision 2009/908/EU related to exercise of the Presidency, by considering that “although no notification has as yet been received under Article 50 TEU from its government, a Member State has made it known publicly that it will withdraw from the Union”. For this reason, the order of presidencies of the Council was amended “to take account of that circumstance, without prejudice to the rights and obligations of that Member State”.²⁸

(b) Revocation of the notification of the intention to withdraw

One of the issues that Article 50 TEU does not explicitly deal with is the possibility for the withdrawing Member State to revoke the notification of the intention to withdraw. Although the UK Government never expressed an intention to revert the withdrawal procedure, this issue was widely discussed during the process. This is a particularly important issue as it is a defining element, not only of the status of the withdrawing state, but also of the withdrawal procedure as it reveals the values and interests at play in this context.

The question was solved by the Court of Justice, in its judgment of 10 December 2018 (Case C-621/18), in which it found that for as long as a withdrawal agreement has not entered into force or, in case no such agreement is concluded, as long as the two-year period laid down in Article 50(3) TEU, possibly extended in accordance with that provision, has not expired, the withdrawing Member State may revoke unilaterally the notification of its intention to withdraw from the Union, in accordance with its constitutional requirements. The Court considered that the revocation of the notification of the intention to withdraw in those terms reflects a sovereign decision by that State to retain its status as a Member State of the European Union, a status which is not suspended or altered by that notification.

This is framed by the Court in the context of the Treaties, and in particular by reference to the 13th recital in the preamble to the TEU, the first recital in the preamble to the TFEU and Article 1 TEU, all indicating that the purpose of the treaties is the “creation of an ever closer union among the peoples of Europe, and to the second recital in the preamble to the TFEU, from which it follows that the European Union aims to eliminate the barriers which divide Europe.” The Court considered that, not allowing the Member State to reverse its decision to withdraw following a democratic process would be inconsistent with the aims and values of the Treaties.

Beyond the legal assessment of the Court of Justice in its judgment, which is the ultimate institution competent for interpreting EU law, there may be political considerations, which the judgment cannot cater for. Indeed, Parliament considered in its above-mentioned resolution of 5 April 2017 that a revocation of the notification should be subject to conditions set by all EU-27, so that it is not used as a procedural device or abused in an attempt to improve on the current terms of the United Kingdom’s membership.

(c) European elections and composition of the European Parliament

Given the Member State status of the withdrawing state until the entering into force of a withdrawal agreement or the end of the two-year period under Article 50(3) TEU, the decisions taken extending this period had as a consequence that the UK was still a Member State during the European Parliament elections of 2019, which raised the question of its participation in these.

There were doubts on whether the Parliament could be constituted and the EU institutions operate in a secure legal context if the UK remained in the EU after 1 July 2019 without

participating in the EU elections, as EU acts of an irregularly composed Parliament could be legally challenged. Moreover, EU citizens deprived of the right to be represented in the Parliament and to vote or stand in its elections could also take legal action in case the UK did not participate.²⁹

The European Council settled this matter in its decision of 11 April 2019, taken in agreement with the UK extending the period under Article 50(3)TEU. It clarified that if the UK was still a Member State on 23-26 May 2019, and if it had not ratified the WA by 22 May 2019, the UK would be under an obligation to hold the elections to the Parliament in accordance with EU law, otherwise the extension would cease on 31 May 2019.

The issue of UK participation in the elections was further complicated by the need to reallocate the UK seats in the Parliament as a consequence of the withdrawal.

The European Council Decision 2013/312/EU of 28 June 2013 establishing the composition of the European Parliament allocated 73 seats in the European Parliament to the United Kingdom. The withdrawal of the UK had a direct impact on the allocation of seats and the composition of Parliament. The Parliament, in its resolution of 7 February 2018 on the composition of the European Parliament³⁰, acknowledging the uncertainty on whether the UK would still be a Member State at the time of the 2019 European elections, proposed a new allocation of seats in Parliament to be applied from the European elections in 2019 that, in line with the criteria laid down in Article 14 TEU, provided specifically for the event that the UK would still be a Member State of the Union at the beginning of the 2019-2024 parliamentary term, or for the event that the withdrawal would become legally effective before the beginning of that term. The European Council Decision 2013/312/EU was thus revised and replaced by European Council Decision (EU) 2018/937 of 28 June 2018 establishing the composition of the European Parliament.³¹

¹ The Council adopted the decision on the conclusion of the withdrawal agreement on behalf of the EU by written procedure, on 30 January 2020.

² “During the deliberations of the Convention, several representatives of the Member States had expressed their fears that an express admittance of a right to withdraw might release the winds of secession and thus jeopardize the very existence of the Union. Taking, however, into account the practical consequences that such a choice might entail, it seems highly unlikely that these fears will be substantiated. It is therefore preferable to perceive and interpret the right to withdraw from the Union as a symbol of democracy and eventually as an express indication of the Union’s increasing selfconfidence.” Malathouni, Eliza «Should I Stay or Should I go: The Sunset Clause as Self-Confidence or Suicide», *Maastricht Journal of European and Comparative Law* 15 (2008), p. 115.

³ Malathouni, Eliza «Should I Stay or Should I go: The Sunset Clause as Self-Confidence or Suicide», *Maastricht Journal of European and Comparative Law* 15 (2008), p. 115.

⁴ Hillion, Christophe AFCO Public Hearing on “Brexit: constitutional challenges and implications”, European Parliament, 20 June 2017.

⁵ OJ C 91, 9.3.2018, p. 40.

⁶ [PM Commons statement on EU reform and referendum: 22 February 2016](#).

⁷ OJ C 298, 23.8.2018, p. 24.

⁸ Christophe Hillion refers to the “normative significance” of the content of the guidelines, in “withdrawal under Article 50 TEU: An integration-friendly process”, *Common Market Law Review*, No 55, 2018, p. 45.

⁹ OJ C 369, 11.10.2018, p. 32.

¹⁰ OJ C 66I, 19.2.2019, p. 185.

¹¹ Malathouni, Eliza «Should I Stay or Should I go: The Sunset Clause as Self-Confidence or Suicide», *Maastricht Journal of European and Comparative Law* 15 (2008), p. 115.

¹² Hofmeister, Hannes, «Should I Stay or Should I Go? – A Critical Analysis of the Right to Withdraw from the EU», *European Law Journal* 16 (5: 2010): 589-603.

¹³ Idem.

¹⁴ Louis, Jean Victor, « Le droit de retrait de l'Union européenne », *Cahiers de droit européen*, Vol. 42, No 3-4, 2006, 293-314.

¹⁵ Herbst, Jochen, «Observations on the Right to Withdraw from the European Union: Who are the “Masters of the Treaties”?», *German Law Journal* 6 (11: 2005): 1755-1760.

¹⁶ Louis (2006).

¹⁷ Hofmeister (2010).

¹⁸ Louis (2006).

¹⁹ Article 50(4) TEU provides that “for the purposes of paragraphs 2 and 3, the member of the European Council or of the Council representing the withdrawing Member State shall not participate in the discussions of the European Council or Council or in decisions concerning it.”

²⁰ Evidence by Professor Derrick Wyatt, House of Lords EU Committee, 8 March 2016.

²¹ Christophe Hillion, in AFCO Public Hearing on “Brexit: constitutional challenges and implications”, European Parliament, 20 June 2017.

²² In this regard, it should be noted that the Withdrawal Agreement provides in its Article 132 for the possibility of extending the transition period for up to 1 or 2 years, which was dismissed by the UK Government.

²³ Perakis, Manolis, “*Exiting the European Union: Legal Procedure, Dimensions and Implications*”, May 2019.

²⁴ European Parliament legislative resolution of 29 January 2020 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 (TA(2020)0018).

²⁵ After the 2019 European elections, the composition of the BSG changed for the EPP, which became represented by Danuta Maria Hübner, the S&D, which became represented by Pedro Silva Pereira (PT), the GUE/NGL, which became represented by Martin Schirdewan (DE), and AFCO, which became represented by Chair Antonio Tajani (EPP, IT).

²⁶ “A New Settlement for the United Kingdom within the European Union”, OJ C 69I , 23.2.2016, p. 1.

²⁷ The Parliament has the right initiative on this issue and provides its consent to the Decision of the European Council, which decides by unanimity (Article 14 (2) TEU).

²⁸ Council Decision (EU) 2016/1316 of 26 July 2016 amending Decision 2009/908/EU, laying down measures for the implementation of the European Council Decision on the exercise of the Presidency of the Council, and on the chairmanship of preparatory bodies of the Council (OL L 208, 2.8.2016, p. 42).

²⁹ See House of Commons Briefing Paper, “European Parliament Elections 2019: results and analysis”, Number 8600, 26 June 2019, pp 9-10.

³⁰ OJ C 463, 21.12.2018, p. 83.

³¹ OJ L 165I , 2.7.2018, p. 1.