

Brexit's Legal Framework

When, at the time of drafting the Lisbon Treaty (and before that the EU Constitution), a provision on the eventual withdrawal of a Member State was inserted, no one really thought that this provision would ever be applied and even less that it would be so soon. Since the Brexit referendum, Article 50 of the Treaty on European Union (TEU) became the most debated and controversial Treaty provision, the interpretation of which gave rise to a lot of legal discussions. This paper intends to give an overview of the legal framework of Brexit by underlining the uncertainties and open questions on the eve of triggering the withdrawal procedure.

I Provisions of the Treaty on European Union Providing Member States with the Possibility of Withdrawal (Article 50)

Although Article 50 TEU regulates the framework for the withdrawal of a Member State from the Union, its interpretation raises a multitude of questions. The first thing to question could be the exclusiveness of Article 50 to regulate the withdrawal. Article 5 of the Vienna Convention on the Law of Treaties makes it clear that the Convention also applies to any treaty that is the constituent instrument of an international organisation, without prejudice, however, to any relevant rules of the organization.¹ As such – despite the exit option from an international treaty set out in Article 54 of the Vienna Convention – Article 50 TEU shall apply exclusively.

This is going to be the first time of applying Article 50 – once the intention to exit is officially notified – therefore the process which is about to start can be considered as the test of Article 50. On the other hand, it's not only because of this test that we face a number of issues, but rather because of the framework nature of Article 50: it sets out numerous elements of the exit, but more detailed rules and practical questions remain open with regard to the procedure. In addition to the political significance of the forthcoming procedure, caution is also justified due to the precedent nature of it. How will the official notification of the intention to withdraw take

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¹ Article 5 of the *Vienna Convention on the law of treaties concluded at Vienna on 23 May 1969*: The present Convention applies to any treaty which is the constituent instrument of an international organization and to any treaty adopted within an international organization without prejudice to any relevant rules of the organization.

place? Would an oral announcement addressed either to the President of the European Council or to the Members of the European Council during their meeting be sufficient? Should the intention to withdraw be written? How should an *exit treaty* be drafted? Could the treaty of accession serve as an example for it? Who negotiates with whom? Who is the EU's negotiator? Who gives the mandate to the negotiator? Could a Member State change their mind following the announcement of the intention to withdraw? All these questions and many others would require precise responses also with regard to the political significance of the exit procedure. The answers hereinafter – although they are not the only ones – offer options with the aim of taking account of the practical steps in the forthcoming process and of exploring the possible ways of interpretation – along the lines of Article 50.

1 Decision on Withdrawal in Accordance with National Constitutional Requirements

By virtue of Article 50 of the TEU, any Member State may decide to withdraw from the Union exclusively *in accordance with its own constitutional requirements*.² In the UK, the Government can initiate a referendum by law. Under the law adopted in 2000,³ the result of the referendum is not binding on the Government or on the legislator. The question put to a referendum requires a simple majority and there is no participation threshold. The provisions of the Act defining the legal framework of the EU referendum⁴ were drafted accordingly, saying that the referendum has an *advisory* character. The British Government is therefore legally not bound by the result of the referendum, however it was confirmed on several occasions that the Government regards it as politically binding.⁵

Although the results of the consultative referendum may be regarded by the Government as politically binding, the role of the British Parliament in the process is however far from clear. In my view, Parliament can't be bypassed and can't be omitted from the UK's national decision-making process on EU membership. This opinion is not only supported by the fact that, in recent years the British delegation – due to the need for a parliamentary mandate in EU-related issues – in almost every EU negotiation entered parliamentary reservation and kept that reservation until the end of the negotiations. The Government argues that the exit from the EU formally means the termination of the EU accession treaty and – as such – it is deemed to fall under the royal prerogative, therefore it requires the adoption of measures within the competence of the executive power. Parliament's decision is therefore not necessary at this stage. According to those who dispute the Government's legal arguments, the Act of Accession to the European Communities (1972) should not to be overlooked. Without the amendment of that

² Paragraph 1 Article 50 TEU: Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.

³ Political Parties, Elections and Referendums Act 2000.

⁴ European Union Referendum Act 2015.

⁵ E.g. David Cameron's speech of 27th June 2016 in the House of Commons.

Act, withdrawal is legally impossible. At the same time, its amendment requires a parliamentary majority. In the national judicial procedure initiated on this particular issue, the High Court, in its ruling of 3rd November 2016, upheld the action. It stated that the Government can't announce the withdrawal officially without the authorisation of Parliament.

However, the ruling gives no instruction regarding how Parliament should be provided with the right to decide on authorisation. As a result several possibilities have already been given for obtaining parliamentary authorisation for the official notification of the intention to withdraw: 1) starting a legislative procedure; 2) adoption of a parliamentary resolution; 3) the Government imposes on itself the obligation to provide information continuously and to engage in permanent dialogue with Parliament. The latter appears to be far from sufficient though, taking the resolution of 3rd November into account.⁶ If a draft law is to be submitted and a legislative procedure for the adoption of a parliamentary act is started accordingly in order to obtain the parliamentary mandate for the notification, the procedure can be significantly prolonged and, in addition, the opportunity is provided for submitting motions for amendment. The submission of a parliamentary draft resolution results in a much shorter procedure, but in this case the role of Parliament is limited to the approval or rejection of the Government's submission. The Government has not yet taken a position on the matter of obtaining parliamentary authorisation.

At the same time, the review of the possible ways of obtaining parliamentary authorisation should wait until the end of the appeal procedure. Following the Government's appeal, the Supreme Court – having declared the appeal admissible – held hearings lasting four days from 5th December 2016. The Supreme Court – for the first time in its history – is trying the case with 11 judges. The judgement is expected by the end of January 2017.

The accountability of the Government to Parliament was not in dispute so far: the Government is obliged to inform Parliament continually on negotiations in relation to the withdrawal agreement. International treaties (both on the exit and on the future relationship) agreed at the end of the negotiations are subject to vote in the House of Lords and in the House of Commons, but only the House of Commons can block their ratification (the deputies can't modify the agreed text, though). Parliament will also have an important role to play in the amendment of the laws related to the EU membership of the United Kingdom.

It's obvious that even the way leading to a national decision required for the announcement of the intention to withdraw – which is a condition to the exit procedure – has posed questions to the United Kingdom. Those questions are unavoidable from a constitutional and institutional point of view. To answer them is time-consuming and, of course, is not without adopting political positions in relation to the issue of staying/exiting. However, the European Union made it clear that no negotiations in any format – neither on withdrawal nor on conditions setting up the framework of future relations – can be started with the United Kingdom prior to the official announcement of withdrawal.

⁶ <https://www.theguardian.com/politics/2016/nov/03/high-court-brexit-ruling-what-does-it-all-mean>

2 Official Notification of the Member State's Intention to Withdraw

In accordance with the constitutional requirements, the decision taken by a Member State on the intention to withdraw is officially announced (notified) to the European Council.⁷ The procedure according to Article 50 can only be launched after this official announcement (notification). On the occasion of the European Council's meeting of 28-29th June 2016, the Member States clearly agreed not to enter into negotiations with the United Kingdom in any way prior to the official announcement. No formalities have been established with regard to the official announcement so it can take place at any meeting of the European Council as well. The question is: When? There aren't any provisions at all in the Treaty on the timing of the official announcement of the intention to withdraw, nor are there any time limitations in this regard. The reason is that the process within the Union will be launched by the notification itself. Prior to this notification there is *no case*, no procedure in the eyes of the EU. Even if there is no procedure – legally speaking – until the official announcement of the intention to withdraw, in any event there is already a political situation. This can be clearly seen in the current situation: the question concerning the date of the notification arises every day since the results of the referendum became known. There was an opinion, immediately after the referendum, that the notification could have taken place even in the European Council during its meeting on 28-29th June 2016, as Prime Minister Cameron had made it clear that he acknowledged the binding force on his Government of the outcome of the referendum. After the internal political crisis that followed the results of the referendum and the nomination of the new Prime Minister, Theresa May – having taken her office – has repeatedly said that negotiations on exit would not start in 2016. Then March 2017 came up, currently being the date given by the UK⁸.

More has been said about the interests linked to the timing of the notification by the UK than about the EU's institutional aspects. They aren't less significant, though. How long can the current situation, where there is a valid national referendum on the intention to withdraw but there is no official announcement in this regard to the European Council, be maintained? What happens if, due to a national – judicial or parliamentary – deliberation, the notification foreseen for March 2017 cannot be possible? How long can the official announcement of the intention to withdraw be delayed and what can the EU institutions do during this period? Legal options 'to enforce' a notification are not included in the Treaty and daily news of the European shock following the referendum has abated by now. However, the fact remained here with us. Since the European Council returned to 'business as usual'⁹ – which means continuous crisis management – the United Kingdom is taking part in the negotiations, but neither the EU institutions nor the Member States are negotiating on setting up post-Brexit conditions with her.

⁷ Paragraph 2 of Article 50 of TEU: A Member State which decides to withdraw shall notify the European Council of its intention.

⁸ <http://www.bbc.com/news/uk-politics-37532364>

⁹ <http://europedecides.eu/2016/10/octobers-brussels-summit-shows-the-eu-getting-back-to-business-by-ignoring-brexit/>

TEU, however, imposes on Member States and EU institutions the obligation of sincere cooperation.¹⁰ Due to this, Member States and EU institutions must assist each other in the implementation of their tasks. Accordingly, in order to implement Article 50, the Member State concerned and the EU institutions do not lose sight of their obligation of sincere cooperation. Consequently, following the successful referendum on the exit the Government can be expected to communicate its intentions in due course to the EU. Obviously 'due course' does not mean years, especially not in the situation where the UK would have held the Presidency of the Council of the EU in 2017 according to the decision fixing the order of rotation of the Presidency of the Council.

Opinions are divided regarding the reversibility of the procedure following the notification of the intention to withdraw at least as much as they are regarding obtaining parliamentary authorisation for the notification. The Government – during the judicial procedure scrutinising the necessity of the parliamentary notification – made it clear that the process is irreversible. Despite the British Government's current determination aiming at going through with the exit, I believe that one should not overlook the fact that the submission of the notification opens the negotiations in order to prepare the agreement on withdrawal, and in this phase of negotiations there can't be legal obstacles to prevent the Member State who submitted the notification from stepping back. Consequently, until the entry into force of the agreement on withdrawal, it is legally possible to stop the exit procedure. Similar opinion has been expressed by the author of Article 50, Lord Kerr, secretary-general of the European convention, which drafted the Treaties. He said that notification under Article 50 should not be irrevocable, as it would be politically unthinkable that anyone or any institution of the EU would encourage a Member State to leave the EU if this Member State finally decided not to leave.¹¹

3 Adopting a Negotiating Mandate before Starting Exit Negotiations; the Guidelines of the European Council

Under Article 50 (2) TEU, negotiations are started in accordance with the guidelines of the European Council. Since the notification of withdrawal is an essential condition for the official commencement of the exit procedure, the adoption of guidelines setting up the framework for the negotiations would be possible only after this notification. In a political sense, however, this preparation has certainly begun: in order to prepare political discussions on the way forward, leaders have already held several talks with the 27 Member States.¹²

The content of the guidelines referred to in Article 50 serves as a negotiating mandate and as such sets the framework for negotiations. Article 50 (2) clarifies this by referring back to Article 218. (3) TFEU.¹³

¹⁰ Paragraph 3 of Article 4 of TEU: Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.

¹¹ <http://www.bbc.com/news/uk-scotland-scotland-politics-37852628>

¹² <http://www.consilium.europa.eu/en/press/press-releases/2016/09/16-bratislava-declaration-and-roadmap/>

¹³ Paragraph 2 of Article 50 TEU: A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude

With regard to the international agreements concluded by the EU, the Council sets out negotiating directives to the negotiator. These directives are found in the form of a Council decision. The negotiator can't deviate from them, unless the Council amends its negotiating policy.¹⁴

Therefore, before the exit negotiations, detailed and precise guidelines adopted by the European Council can facilitate the commencement of negotiations, a further essential condition of which is the adoption of a Council decision providing a mandate to open negotiations. The negotiating directives – which serve as a mandate for the negotiator – are established in accordance with the framework set out in the guidelines. The Council decision on the negotiating directives is adopted by a qualified majority.¹⁵ Prior to the Council's negotiations, the Commission shall submit recommendations and the Council will act in accordance with them.

II Leaders of the Talks, Parties to the Negotiations

Under Article 50 (2), the Union negotiates with the Member State preparing for exit. The Council concludes the agreement on behalf of the Union, acting by a qualified majority, after obtaining the consent of the European Parliament. According to Article 218 (3) referred to by Article 50, the Council will adopt a decision authorising the opening of negotiations and nominating the Union negotiator or the head of the Union's negotiating team. The nomination of the negotiator is therefore contained in the Council decision; however, Article 50 does not specify which institution delegates the negotiator or upon which institutional arrangement the delegation is based. Such a decision can't be adopted prior to the formal notification of the intention to withdraw. The institutions however began naming people in charge of the negotiations just a few days after the results of the referendum were presented.¹⁶ First, the President of the European Council announced that he had entrusted the leadership of the negotiations to director Didier Seeuws, head of the Brexit Working Group of the General Secretariat.¹⁷ Then, a few weeks later,

an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.

¹⁴ Paragraph 3 of Article 218 TFEU: The Commission, or the High Representative of the Union for Foreign Affairs and Security Policy where the agreement envisaged relates exclusively or principally to the common foreign and security policy, shall submit recommendations to the Council, which shall adopt a decision authorising the opening of negotiations and, depending on the subject of the agreement envisaged, nominating the Union negotiator or the head of the Union's negotiating team.

¹⁵ Point *b*) of Paragraph 3 of Article 238 TFEU: where the Council does not act on a proposal from the Commission or from the High Representative of the Union for Foreign Affairs and Security Policy, the qualified majority shall be defined as at least 72 % of the members of the Council representing the participating Member States, comprising at least 65 % of the population of these States.

¹⁶ <https://www.theguardian.com/politics/2016/jun/26/belgian-diplomat-to-head-eus-brexit-taskforce>

¹⁷ See uws used to be the head of cabinet of the former President of the European Council, Herman van Rompuy.

the European Commission named its leader of the talks as Michel Barnier, former Internal Market Commissioner.¹⁸ So for the time being, both the European Council and the European Commission have their main persons responsible for the negotiations, which is necessary, since the preparation of the agreement on exit presupposes inter-institutional cooperation. We have seen above, however, that the Council decision will give a mandate to begin negotiations preparing the withdrawal agreement and this formal decision of the Council will provide the name of the Union's negotiator or the head of the negotiating team.

III Content, Conclusion and Entry into Force of the Withdrawal Agreement

All that Article 50 provides on the content of the withdrawal agreement is that the Union shall negotiate and conclude an agreement with the Member State concerned, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union.¹⁹

There is less certainty as far as the content of the withdrawal agreement is concerned compared to, for example, its provisions on its entry into force. Which elements can fit into the exit agreement, and which elements should be part of an agreement that is separate from the withdrawal agreement have already been the topic of debates for months without an answer. The subject-matter to be regulated by the withdrawal agreement is not only important in terms of content and negotiation technicalities and tactics, but it is also important in terms of selection of the procedure to be applied for the adoption. Reading Article 50 and Article 218 (3) together makes it clear to me that the settlement of future relations should be subject to a separate agreement, not to the withdrawal agreement. Consequently, it is necessary to conclude at least two agreements, one on the withdrawal and another on future relations. It is likely, however, that further agreements would be needed – as the European Commission has suggested on several occasions – to clarify transitional arrangements.

The withdrawal agreement is concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament. Consequently, it is clear that the conclusion, or the entry into force of this agreement, doesn't require any further procedural steps (e.g. ratification) from the Member States; the agreement is concluded on behalf of the Union by the Council. There are no obstacles to starting negotiations simultaneously on the withdrawal and on the elements of the agreement on the future relationship between the Member State and the EU. However, this is not the subject of the withdrawal agreement, as a separate agreement should be concluded to that effect. If a solution

¹⁸ <http://www.politico.eu/article/michel-barnier-named-as-junckers-brexit-chief-europe-negotiations-consequences-future/>

¹⁹ 2nd sentence of 2 Paragraph of Article 50 TEU: 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.

is adopted where the withdrawal agreement itself contains matters related to the arrangements of future relations, the withdrawal agreement could become a mixed international treaty, and as such, it could require ratification by the national parliaments as far as it concerns regulatory areas which do not fall under the exclusive competence of the Union. In order to keep the withdrawal agreement under the rules of Article 50 and in accordance with the conditions set out for the agreements concluded by the Council, it is necessary to prevent the agreement from regulating more than the withdrawal.

The agreement on the future relationship should be negotiated and adopted under Article 218, on the conclusion of international agreements, instead of under Article 50. This determines the decision-making procedure as well and, accordingly, instead of qualified majority voting, unanimity is required in areas where unanimity is required for the adoption of EU legal acts; moreover, approval by the national parliaments will be needed in respect of areas of mixed competence.

It is also worth comparing the accession treaties of the Member States to the withdrawal agreement to be worded for the first time now. The accession treaties are an organic part of EU primary law; they are concluded by the Member States with the country that intends to access the EU and unanimity is required for these treaties. In contrast, in accordance with Article 50, the withdrawal agreement is concluded with the exiting country by the Union itself instead of the Member States and a qualified majority in the Council is sufficient for that.

Where the withdrawal agreement is not part of EU primary law but an international agreement under Article 218, the Court of Justice of the European Union could even prevent its entry into force with a given content²⁰, if, for example, it was in conflict with any fundamental provisions of the Treaties. Therefore, also in this case, scrutiny could take place to explore which matters can be drawn in the regulatory area of a withdrawal agreement concluded in accordance with Article 50 (2). May it regulate on issues that would otherwise fall under the areas of mixed competence or would these require national ratification (e. g. provisions on the EU's own resources)? Or does it already endanger the fulfillment of the requirement laid down in Article 50m according to which the withdrawal agreement is concluded by the Council acting on behalf of the Union?

As far as the entry into force is concerned, it can be stated that the date of termination of rights and obligations under the Treaties is necessarily included in the withdrawal agreement. If the agreement is not concluded two years after the notification of the intention to withdraw then the rights and obligations under EU Treaties for the exiting State will terminate on that date,²¹ unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.

²⁰ Paragraph 11 Article 218 TFEU: A Member State, the European Parliament, the Council or the Commission may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the Treaties. Where the opinion of the Court is adverse, the agreement envisaged may not enter into force unless it is amended or the Treaties are revised.

²¹ Paragraph 3 of Article 50 TEU: 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.

It is worth having also a look at the ordinary review and revision of the Treaties which can take place according to the procedure set out in Article 48 (2)-(5) of the TEU:²²

- The Government of any Member State, the European Parliament or the Commission may submit to the Council proposals for the amendment of the Treaties. These proposals shall be submitted to the European Council by the Council and the national Parliaments shall be notified.
- If the European Council, after consulting the European Parliament and the Commission, adopts by a simple majority a decision in favour of examining the proposed amendments, the President of the European Council shall convene a Convention composed of representatives of the national Parliaments, of the Heads of State or Government of the Member States, of the European Parliament and of the Commission.
- The European Council may decide by a simple majority, after obtaining the consent of the European Parliament, not to convene a Convention should this not be justified by the extent of the proposed amendments. In the latter case, the European Council shall define the terms of reference for a conference of representatives of the Governments of the Member States.
- If the European Council approves the amendments proposed by the Convention or decides not to convene the Convention, the conference of representatives of the Governments of the Member States convened by the President of the Council adopts by common accord (by unanimity) the proposed amendments. Once this common accord is reached the proposal should be ratified by all the Member States in accordance with their respective constitutional requirements.

²² Paragraph 2-5 Article 48 TEU: Ordinary revision procedure:

2. The Government of any Member State, the European Parliament or the Commission may submit to the Council proposals for the amendment of the Treaties. These proposals may, inter alia, serve either to increase or to reduce the competences conferred on the Union in the Treaties. These proposals shall be submitted to the European Council by the Council and the national Parliaments shall be notified.

3. If the European Council, after consulting the European Parliament and the Commission, adopts by a simple majority a decision in favour of examining the proposed amendments, the President of the European Council shall convene a Convention composed of representatives of the national Parliaments, of the Heads of State or Government of the Member States, of the European Parliament and of the Commission. The European Central Bank shall also be consulted in the case of institutional changes in the monetary area. The Convention shall examine the proposals for amendments and shall adopt by consensus a recommendation to a conference of representatives of the Governments of the Member States as provided for in paragraph 4. The European Council may decide by a simple majority, after obtaining the consent of the European Parliament, not to convene a Convention should this not be justified by the extent of the proposed amendments. In the latter case, the European Council shall define the terms of reference for a conference of representatives of the Governments of the Member States.

4. A conference of representatives of the Governments of the Member States shall be convened by the President of the Council for the purpose of determining by common accord the amendments to be made to the Treaties. The amendments shall enter into force after being ratified by all the Member States in accordance with their respective constitutional requirements.

5. If, two years after the signature of a treaty amending the Treaties, four fifths of the Member States have ratified it and one or more Member States have encountered difficulties in proceeding with ratification, the matter shall be referred to the European Council.

The notification, which is consequently indispensable for the procedure to open, has not yet happened, but lawyers, politicians and institutions have already been kept busy for months on the question of how to proceed. Brexit will remain with us over the coming years.