

Committee on Constitutional Affairs
The Secretariat

Brussels, 22 June 2016

NOTE for the attention of Ms Danuta Hübner, Chair of the Committee on Constitutional Affairs

Subject: Withdrawal from the European Union

The provisions of the Treaty on the European Union regarding the withdrawal from the Union were inserted by the Treaty of Lisbon and, so far, have not been applied. These are indeed "uncharted waters" and that explains the fact that there are many unanswered questions regarding the application of Article 50 TEU.

Article 50 TEU does not address all the questions that arise regarding such a complex procedure as the withdrawal of a Member State. Among these questions are, for instance, the content and scope of the withdrawal agreement or the status of the withdrawing Member State during the negotiations of the withdrawal agreement or until the two year deadline as provided for in Article 50(3) TEU expires, status which is not defined.

Withdrawal

1) Legal basis: Article 50 TEU

Article 50 contains nothing more than the procedural requirements of the withdrawal. It provides that any Member State may decide to withdraw "*in accordance with its own constitutional requirements*", but it does not lay down any substantive requirements for a Member State to be able to exercise that right.

2) Procedure

(i) *Formal notice of intention from the withdrawing Member State to the European Council*

Article 50 is silent regarding the timing of this notification. In any case, the outcome of the referendum in the UK does not constitute by itself, "*the formal notice of intention from withdrawing*". It will be up to the competent authorities of the UK to transmit that "*formal notice*", when they consider it appropriate.

The deadline of two years mentioned in Article 50(3) will only start counting from that transmission on.

(ii) *The European Council issues negotiating guidelines on the basis of which the Council will negotiate a withdrawal agreement with the withdrawing Member State*

(iii) *The withdrawal agreement is negotiated in accordance with Article 218(3) TFEU*

According to this provision,

(a) The Commission submits recommendations with regard to the opening of negotiations;

(b) The Council authorises the opening of negotiations and nominates the Union negotiator or the head of the Union's negotiating team.

The reading of the two provisions seems to imply that the Commission will establish its recommendations taking into account the guidelines formulated by the European Council. On that basis, and always taking into account the guidelines of the European Council, the Council will authorise the opening of negotiations and will nominate the EU negotiator.

Given the nature of the withdrawal agreement, Member States will in principle retain significant control over the negotiations.

(iv) *The Council concludes the agreement acting by QMV, as defined in Article 238(3)(b) TFEU, and after Parliament's consent*

The consent of the EP requires only a simple majority. The consent procedure could give Parliament considerable influence in the negotiations on the withdrawal agreement.

(v) *The withdrawal negotiations must be concluded within two years after the notification of the intention to withdraw*

In the absence of an agreement at the end of this period, the Treaties will cease to apply to the withdrawing Member State, unless the European Council, in agreement with the concerned Member State unanimously decides to extend this period.

There is no provision limiting the duration of the extension or the number of extensions possible.

In case the two year period ends without an agreement and without an extension, the withdrawing State ceases to be a Member State.¹ This shows that the withdrawal agreement is, legally, not a necessary pre-condition for the withdrawal, and is therefore not mandatory.

¹ EU law ceases to apply and access to the internal market is terminated. Some experts say that in such scenario, the withdrawing State would automatically fall back on the trading terms derived from the WTO's membership.

As Article 50 TEU contains no specific provision in that sense, the question can be raised on whether there is the possibility of reversing the decision to withdraw at any point before the date on which the withdrawal agreement takes effect.

In fact, Article 50(5) only specifies that a MS that has withdrawn from the Union shall be submitted to the procedure for accession (Article 49 TEU) should it ask to re-join the Union. In any case, it seems at least possible that the procedure for withdrawing be suspended indefinitely by the European Council in agreement with the interested MS, since Article 50(3) TEU does not provide for any limitation to the possibility of extending the period of two years for the entry into force of the withdrawal agreement.

Several sources concur with the view that negotiations, especially those regarding the future relationship between the EU and the withdrawing Member State, will be very complex and may be considerably lengthy, due to the extension and depth of influence of EU law and its implementation in Member States.

Withdrawal agreement

Article 50(2) TEU defines the withdrawal agreement as the agreement setting out the arrangements for the Member State withdrawal, taking account of the framework for its future relationship.

The specific details to be laid down by the withdrawal agreement are not provided for.

The withdrawal agreement is concluded between the EU and the withdrawing Member State, and not between the latter and the remaining Member States, as it only concerns the relationship between the Union and the withdrawing State. In these circumstances, that agreement does not require ratification by the remaining Member States.

It may be considered as merely declaratory, as the withdrawal may take place even if an agreement is not concluded, as mentioned above.

Article 50(2) TEU requires that the withdrawal agreement takes “*account of the framework of the [withdrawing Member State's] future relationship with the Union*”.

On the basis of this provision, experts consider that the withdrawal agreement will in principle only address the details of the withdrawal. As it cannot accommodate all the details of the future relationship of the withdrawing Member State with the Union, the adoption of two separate agreements to be negotiated in parallel is necessary.

Moreover, at the level of the internal functioning of the Union, changes would, in principle, also be required, which would demand Treaty amendment. Treaty changes that might be necessary as a consequence would follow the procedures of Article 48 TEU.²

² At least, the Treaties should be modified in order to delete the mentions to the UK as a signatory Member State, Article 355 TFEU on the territorial scope of application of

Legal status of the withdrawing Member State

Article 50 TEU is silent regarding the status of the withdrawing Member State during the negotiations of the withdrawal agreement, except for the mention that the withdrawing Member State will not participate in the discussions or decisions foreseen in Article 50(2) and (3) TEU that take place in the Council or in the European Council. This means that, apart from that exception, the withdrawing MS remains fully a Member State until the withdrawal agreement takes effect or until the two years period after the notification of withdrawal has lapsed (and no extension is agreed between the MS in question and the European Council). Legally, the withdrawing Member State would go on participating in EU decision-making at all levels, and would be bound by all new legislation adopted before the entry into force of the withdrawal agreement.³

This means also that Parliament's consent regarding the withdrawal agreement would in principle also be voted by the MEPs coming from the withdrawing Member State. It also implies, more generally, that representatives of that Member State in the Council (*with the exception mentioned above*) or MEPs elected in the withdrawing MS would continue participating in the debates and decisions taken at EU level until the withdrawal takes effect.

Some voices argue that it would not be politically acceptable that representatives of a MS in the Council or MEPs elected in that MS continue to participate in the decisions concerning new legislation which that MS will in fact not apply. However, in the light of the existing Treaty provisions, this issue may only receive a political solution (for instance, MEPs elected in that MS may agree on a voluntary basis that they will abstain or not participate on some decisions to come during the negotiations). In fact, legally, they remain full Members of the EP until the withdrawal agreement becomes effective. They cannot be prevented from participating in the activities of the EP and to exercise their parliamentary rights⁴.

Moreover, according to Article 14(2) TEU, the European Parliament is composed of representatives of the Union's citizens as whole and not only of those who elected them.⁵

Treaties the modification or repeal of several protocols, like the one on EIB or protocols 15, 20 and 21.

³ However, some sources indicate that, politically, "selective disengagement from some areas of EU policy might be necessary".

⁴ Contrary to some ideas voiced in public discussions, it is not possible to draw an analogy with the situation of observers of Member States before the accession enters into force. Those were not yet Members of the EP, they were participating in the activities of the Parliament on the basis of a political agreement and could not exercise the powers of Members in what concerns taking decisions. In the case of withdrawal procedure, the Members in question are full Members of the EP and keep the whole of their rights as parliamentarians until their mandate ceases.

⁵ It should also be noted that, as long as a Member State has not formally withdrawn from the Union by way of a withdrawal agreement as mentioned above, the citizens of

In this sense, as long as a withdrawal agreement does not take effect, the legal and constitutional status quo is kept unchanged.

Consequences of the withdrawal and possible content of the withdrawal agreement

1) Application of EU law: directly applicable Union law will cease to apply, while national acts adopted in implementation or transposition of EU law will remain valid until the national authorities will amend or repeal them.

If the withdrawing State establishes a relationship with the EU, a complete isolation from the EU law and the EU *acquis* is impossible. Moreover, in the context of the negotiations regarding the future relationship between the withdrawing Member State and the EU, it is most likely impossible to completely sever links with EU law.

2) Institutional changes: the representatives of the withdrawing State would lose their seats in the various EU institutions and bodies. As far as the EP is concerned in particular, Members elected in the UK would lose their mandate.

What would this imply? Regarding the Parliament, Article 14(2) TEU establishes only the maximum number of MEPs and the maximum and minimum number of MEPs to be elected in a Member State. The concrete distribution of seats by MS is established in a decision of the European Council adopted by unanimity after obtaining the consent of the EP (which also initiates the procedure). The composition of the EP could be reduced by the number of MEPs previously attributed to the withdrawing State, possibly followed by a re-distribution among the remaining Member States but this does not involve modifying the treaties.⁶

Procedure within the Parliament

According to Rule 82 of the Rules of Procedure, if a Member State decides, pursuant to Article 50 TEU, to withdraw from the Union, the matter shall be referred to the "*committee responsible*". Rule 81 ("*Accession treaties*") applies *mutatis mutandis*. Parliament decides on consent to an agreement on the withdrawal by a majority of the votes cast.

Rule 82 is part of Title II, Chapter 7, on constitutional matters.

According to Annex VI to the Rules of Procedure, AFCO is responsible, in particular, for "*(1.) the institutional aspects of the European integration process, in particular the preparation, initiation and proceedings of ordinary and simplified Treaty revision procedures, (2.) the implementation of the Treaties and the assessment of their operation, and (3.) the institutional consequences of enlargement negotiations of or withdrawal from the Union.*"

that Member State remain citizens of the EU, with all the rights associated to such status.

⁶ See also section on the "Withdrawal agreement", above.

No other reference is made, concerning the competence of other committees, to the process of withdrawal.