



DIRECTORATE-GENERAL FOR INTERNAL POLICIES

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The Role and Powers of the European Parliament in the Brexit Process

In-Depth Analysis for the IMCO Committee



DIRECTORATE GENERAL FOR INTERNAL POLICIES
POLICY DEPARTMENT A: ECONOMIC AND SCIENTIFIC POLICY

The Role and Powers of the European Parliament in the Brexit Process

IN-DEPTH ANALYSIS

Abstract

This document explores the role and powers of the European Parliament in the Brexit process. It describes the challenges and relevant steps and stages of the process and highlights the significance of agreement(s) to be concluded between the EU and the UK. On that basis, the Parliament's mandate and powers in substantial terms as well as its involvement in the procedure are outlined. Some options are highlighted to enable the Parliament to adequately fulfil its mandate and play its role in the process.

The document was provided by Policy Department A at the request of the European Parliament's Committee on the Internal Market and Consumer Protection.

This document was requested by the European Parliament's Committee on the Internal Market and Consumer Protection.

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Original: EN

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Manuscript completed in April 2017

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This document is available on the Internet at:

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LIST OF ABBREVIATIONS

EP European Parliament

EU European Union

TEU Treaty of the European Union

TFEU Treaty on the Functioning of the European Union

UK United Kingdom

EXECUTIVE SUMMARY

Several months have passed since the referendum held in the UK on the Brexit of 23 June 2016. On 29 March 2017, the Prime Minister of the United Kingdom has given a notification to the European Council in accordance with Article 50(2) of the Treaty on European Union. Still, the implications and consequences of this so-called Brexit are difficult to estimate.

This study, which has been provided by Policy Department A at the request of the European Parliament's Committee on the Internal Market and Consumer Protection explores the role and powers of the European Parliament in the Brexit process.

It describes the challenges and relevant steps and stages of the process and particularly the significance of agreement(s) to be concluded between the EU and the UK.

On that basis, the Parliament's mandate and powers in substantial terms as well as its involvement in the procedure are outlined. Some options are highlighted to enable the Parliament to adequately fulfil its mandate and play its role in the process.

Brexit brings about challenges for both the United Kingdom and the European Union, which are substantial, complex and far-reaching.

- The withdrawal entails the separation of the UK from the Union in institutional and legal terms and requires the UK's disentanglement from the EU's institutions and procedures as well as the settlement of budgetary and financial issues and even the rearrangement of both the EU's and the UK's external relations with third States and international organizations.
- The withdrawal of a Member from the European Union implies, that the EU legal order will cease to apply in regard to such Member. This will affect a variety of transactions, businesses and activities which in some way or the other are linked to the UK and individuals, institutions and businesses under UK jurisdiction.
- Most importantly, this will affect EU citizens from other Members, which live or have lived in the UK in view of their status and rights concerning residence, suffrage, employment, social security, economic and financial arrangements and their links to their home country.
- Conversely, Brexit will fundamentally affect the status of rights of UK citizens working or resident in other EU member states. They will lose their EU citizenship and all related entitlements and rights under EU law.
- Alongside with managing withdrawal, Brexit requires, that the future relationship between the EU and UK be determined.

In order to cope with such challenges

- the conclusion of a withdrawal agreement under Art. 50 TEU is key.
- Such agreement will very likely need by complemented by an agreement on future relations to be negotiated and concluded after the withdrawal has taken place. – are the principal means of choice. Both such agreements are international in nature.

- Furthermore the EU treaties and other EU legal acts may be in need for readjustments.

The European Parliament fulfils an important constitutional function within the EU's constitutional framework. It is a primary source of democratic legitimation and a core legislative organ. It also has important budgetary powers. Furthermore, it is charged with functions of the political and legality control of EU politics and legal acts.

In order to properly play its pertinent role in this historical moment, the European Parliament has to be adequately and early on be involved in the negotiation and ratification of the EU-UK agreements, which will be key in the Brexit process.

- An early involvement is crucial to facilitate later parliamentary approval in the ratification phase.
- Despite the peculiarities of the Art. 50 TEU procedure, the EP's involvement has to follow the rules and practices established for its engagement with the making of EU international agreements.

Because of the numerous issues to be dealt with and the uncertainties at hand, EU-UK agreements will very likely need to be equipped with mechanisms to allow for their further development or modifications by facilitated procedures.

- Agreements designed in this way are characterized as *living agreements*.
- Under the Treaties, the European Parliament has hardly any specific means at its disposal to oversee the operation of EU agreements, including the use of such mechanisms.
- Depending the scope and function of such mechanisms, a need could arise for the European Parliament to be closer involved in such treaty operations.
- This could be provided for by appropriate interinstitutional arrangements.
- In turn, this could facilitate the approval of such mechanisms in EU-UK agreements in the process of ratification.

A close cooperation between the EP and the UK Parliament is key in the Brexit process. Such cooperation is already under way.

- It should be maintained after the UK has withdrawn from the European Union.
- The European Parliament has a rich record of interparliamentary work, taking place in various forms.
- In view of the key role, that EU-UK agreements play in the Brexit process, it may be useful to equip them with interparliamentary bodies in order that such interparliamentary cooperation between the European Parliament and the UK Parliament be properly embedded in EU-UK agreements.

1. INTRODUCTION

Several months have passed since the referendum held in the UK on the Brexit of 23 June 2016. On 29 March 2017, the Prime Minister of the United Kingdom has given a notification to the European Council in accordance with Article 50(2) of the Treaty on European Union. Still, the implications and consequences of this so-called Brexit are difficult to estimate. What is clear is that Brexit will affect the EU as a political project and the common market as an economic means to produce growth and wealth. However, it took quite some time, for instance, to fully appreciate that Brexit will also curtail or remove rights of a large number of individuals, which have set up their lives, careers and businesses in trustfully relying on the four freedoms and their status as EU citizens. What is more, Brexit also raises significant questions about the role and powers of institutions involved in managing the UK's withdrawal and the definition of the future EU-UK relations. Given the eminent importance of Brexit both for the UK and the EU, its democratic management under the control and with the consent of the respective Parliaments becomes a pivotal question, which, in the case of the UK, has already given rise to a veritable constitutional legal dispute.¹

This paper focuses on the role of the European Parliament (EP) in the Brexit process. It aims at exploring the EP's role, functions and competences with regard to the management of the UK's withdrawal and the future relations between the EU and its Member States on the one part and the UK on the other. In addition, the paper proposes arrangements for ensuring a permanent inclusion of the EP in these future relations even after the UK's withdrawal will have become effective.

The remainder of this paper is structured as follows: Section 2 will outline the challenges that arise in the management of Brexit and explore the steps to be taken. The conclusion and operation of international treaties will be the principal means of choice. Turning to the EP's role in this process, Section 3 briefly revisits the former's mandate and functions within the EU's constitutional framework, which provides the necessary background for approaching the EP's involvement in the making of Brexit agreements (in Section 4) and in the operation of these agreements (in Section 5) and a proposed continued interparliamentary cooperation with the British Parliament (in Section 6). Section 7 concludes.

¹ Supreme Court of the UK, *R (on the Application of Miller and another) v Secretary of State for Exiting the EU*, Judgment of 24 January 2017, [2017] UKSC 5. On the extensive constitutional debate in the UK see i.e. Gordon and Moffatt (2016); Gordon (2016); Hestermeyer (2016); Miller (ed.) (2013).

2. BREXIT: CHALLENGES AND STEPS TO TAKE

KEY FINDINGS

- Brexit brings about challenges for both the United Kingdom and the European Union, which are substantial, complex and far-reaching.
- Brexit entails the separation of the UK from the Union in institutional and legal terms and requires the UK's disentanglement from the EU's institutions and procedures as well as the settlement of budgetary and financial issues and even the rearrangement of both the EU's and the UK's external relations with third States and international organizations.
- The withdrawal of a Member from the European Union implies, that the EU legal order will cease to apply in regard to such Member. This will affect a variety of transactions, businesses and activities which in some way or the other are linked to the UK and individuals, institutions and businesses under UK jurisdiction.
- Most importantly, this will affect EU citizens from other Members, which live or have lived in the UK in view of their status and rights concerning residence, suffrage, employment, social security, economic and financial arrangements and their links to their home country.
- Conversely, Brexit will fundamentally affect the status of rights of UK citizens working or resident in other EU member states. They will lose their EU citizenship and all related entitlements and rights under EU law.
- Alongside with managing withdrawal, Brexit requires, that the future relationship between the EU and UK be determined.
- In order to cope with such challenges the conclusion of a withdrawal agreement under Art. 50 TEU is key.
- Such agreement will very likely need to be complemented by an agreement on future relations to be negotiated and concluded after the withdrawal has taken place.
- Also the EU treaties and other EU legal acts may be in need for readjustments.

For the first time in history, Art. 50 of the 2009 Treaty on European Union (TEU) explicitly spells out the Member States' right to leave the EU. Pursuant to Art. 50(1) TEU, a Member can initiate its withdrawal by unilateral notification of its intent to withdraw to the European Council. As the EP has recently put it, it is the "sovereign right of a Member State to withdraw from the European Union".²

Art. 50(2) TEU calls for arrangements for a withdrawal, to be set forth in an agreement between such State and the Union, and a framework for the future mutual relationship.

² European Parliament, Resolution of 5 April 2017 on negotiations with the United Kingdom following its notification that it intends to withdraw from the European Union (2017/2593(RSP)) at D.

In this way, Art. 50 TEU envisages a “managed exit” and, to this end defines the role of the EU and its organs in the withdrawal procedure. Should no agreement be reached within two years from the date of notification (or any other period agreed on by the European Council and the withdrawing Member), the withdrawal will nevertheless take effect, resulting in an “unmanaged exit”.³

Leaving the European Union thus represents a formidable challenge both for the Member in question as well as for the EU. It is important to detail this challenge (2.1) in order to explore, which steps have to be taken (2.2).

2.1. The challenges of Brexit

The implications of leaving the European Union are vast and complex. As Art. 50 indicates, the withdrawal of a member requires to manage such withdrawal as well as to establish a new relationship.

2.1.1. Institutional, administrative and budgetary issues

Brexit first of all entails the UK’s disentanglement from the EU’s institutions and procedures. This also includes the settlement of budgetary and financial issues. Also, Brexit will require rearranging both the EU’s and the UK’s external relations with third States and international organizations.⁴

2.1.2. The termination of the application of EU law in the UK

More importantly, however, Brexit implies the separation of the withdrawing Member State from the Union in institutional and legal terms. As Art. 50(3) TEU phrases it, the withdrawal means that “the Treaties cease to apply” to such State.

By implication, this refers to the entire EU legal order, e.g. the Treaties, EU legislation, the many legal acts, the entire *acquis unionaire* and in particular the case law of European courts.⁵ This European legal order will cease to take effect in the jurisdiction of the UK and will not be observed any more by the UK legislature, the UK government and in UK courts. In substance, this concerns the Charter of Fundamental Rights, the four freedoms, non-discrimination, the many principles as developed by European courts as well as the countless rules and regulations in all areas of activity of the European Union. It will affect any kind of transactions, businesses and activities which in some way or the other are linked to the UK and individuals, institutions and businesses under UK jurisdiction.

2.1.3. Uncertainties in regard to the status and rights of EU and UK citizens

Brexit will importantly affect the rights and the situation of the large number of individuals, which have set up their lives, careers and businesses in trustfully relying on the four freedoms and their status as EU citizens.

³ On the Art. 50 TEU procedure see further Calliess (2016), commentary on Art. 50 EUV [TEU] para. 5; Novak P and M. Tell Cremades (2017) pp. 13-23; Poptcheva, E.-M. (2016); HM Government (2016); Hillion (2015), pp. 135-142. On the consequences of a lapse of the two-year time limit without consensual extension see House of Lords of the UK, EU Committee (2016a), paras. 45-50.

⁴ See Whitman (2016).

⁵ Poptcheva, E.-M. (2016), p. 5.

For one part, this applies to EU citizens from other member States, the so-called E27 citizens, which have settled down or live for some time in the UK. It will affect all their entitlements and rights emanating from EU law and their EU citizenship vis-à-vis the UK. These include their resident status, their right to vote, their employment relations, their social security arrangements, their financial and economic activities and assets and their affiliations and links to their home country.⁶ Resulting entitlements and ties endure in case, that such individual has returned or moved to other places within the EU.⁷

For another part, Brexit will fundamentally affect the status of rights of UK citizens working or resident in other EU member states, such as e.g. British EU staff or retired British pensioners as well as any other individuals from the UK, who work or live in the EU. As a consequence of the cessation of the EU treaties' application, British nationals lose their EU citizenship and related rights provided for in EU law.

2.1.4. Determining the Future EU-UK Relations

Apart from the need to manage the immediate consequences of the withdrawal of a Member, Art. 50 (2) TEU also requires the EU and that Member to determine and agree on their future relationship. Several models have been discussed in this regard. They include the option that the UK becomes a member of the European Economic Area and/or the European Free Trade Association or will be linked to the EU by a separate agreement as is the case with Switzerland. Also, an association agreement along the lines of the EU-Turkey or the EU-Ukraine association agreements is being discussed. Furthermore, it has been considered whether future EU-UK relations could be based solely on the rules of the WTO.⁸

2.2. The steps to take

In order to address these various challenges, a number of steps have to be taken.

2.2.1. The "Withdrawal Agreement" under Art. 50(3) TEU

While under Art. 50 TEU, a withdrawal could become legally effective even in the absence of any consensus among the EU and the leaving Member State, it is obvious that any form of "managed Brexit" will require the EU and the UK to agree on mutually acceptable terms.

In this vein, Art. 50(2) TEU envisages that "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."

⁶ See HM Government (2016), paras 4.1-4.11; Novak P and M. Tell Cremades (2017), at pp. 21-23; Gordon and Moffatt (2016) at pp. 44-68; House of Commons of the UK (2013), pp. 14-16.

⁷ 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 (2017/2593(RSP)) the European Parliament has highlighted this aspect by explicitly addressing «the legal status of EU-27 citizens living *or having lived* in the United Kingdom » (emphasis added), at para. 17.

⁸ For more details on the models for a future EU-UK relationship see Novak P and M. Tell Cremades (2017), at pp. 24-37; House of Lords of the UK, EU Committee (2016b); Piris (2015).

Art. 50(3) TEU refers to this agreement as the “withdrawal agreement” and sets out a short and strict 2-years timeframe for its negotiation, adoption and entry into force unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.

It should be noted that according to Art. 50(2) TEU, the withdrawal agreement will be concluded exclusively between the EU and the UK, without the EU’s remaining Member States becoming parties.⁹ This in turn greatly increases both the responsibility of the EU and its organs and the need for sufficient democratic legitimation of the withdrawal agreement and any arrangements it will provide for.

As a consequence of the withdrawal of a Member of the EU, the future relationship between the withdrawing Member and the EU will change. Initially and during the negotiation of the withdrawal agreement, the State intending to leave is still a Member, with some modifications regarding its participation in the Council as provided for by Art. 50(4) TEU. Yet, the withdrawal procedure aims at terminating membership and establishing a new relationship between the EU and the former Member. This relationship will be international in nature, and it will be governed by international law.¹⁰ The withdrawal agreement in substance will be about such future “international” type of relations between the UK and the EU and arrangements for the necessary changes.

Obviously, the withdrawal agreement will have a fundamental role to play in Brexit. Apart from setting out the modalities of the UK’s withdrawal, Art. 50 (2) TEU also refers to a “framework for [the] future relationship with the Union”. In sum, the agreement will inform the entire Brexit process, including negotiations of a possible future agreement as well as future adjustments of the EU Treaties and EU legal acts.¹¹

2.2.2. A subsequent agreement on EU-UK relations

It is hard to imagine, that the huge number of issues involved and their complexity can be comprehensively dealt with in the tight timeframe set in Art. 50. Therefore, the view prevails, that a subsequent agreement will have to be negotiated after withdrawal and which will address the details of the future EU-UK relations.¹² Thus, such agreement will clearly be an international agreement and the rules on EU international agreements will apply to it.

Such second agreement will have to be negotiated according to the general provisions on EU international agreements, notably Art. 218 TFEU, as Art. 50 TEU exclusively applies to the withdrawal agreement.

⁹ Novak P and M. Tell Cremades (2017) at p. 18; Łazowski (2013) at p. 2.

¹⁰ Cf. Łazowski (2013) at p. 2.

¹¹ Cf. Novak P and M. Tell Cremades (2017), at p. 20.

¹² HM Government (2016), para. 3.6; Miller/Lang/Simson-Caird (2017) at pp. 24-35. It is well conceivable that the fact that the withdrawal agreement will only be concluded between the EU and the UK will be an additional incentive to bring about a second comprehensive agreement concluded by the UK, the EU and the 27 remaining EU member states, see Novak P and M. Tell Cremades (2017), at p. 18.

2.2.3. Necessary changes to the EU treaties and other EU legal acts

Finally, there are significant challenges as to the respective future shape of the EU's internal legal order. As far as the EU is concerned, it is likely that the EU Treaties will have to be adapted to the new situation after Brexit. Beyond some technical amendments as might be necessitated, there will be pressing practical needs to readjust the EU's institutional, procedural and substantive legal framework.¹³ The pertinent procedure for amendments of the EU treaties is laid down in Art. 48 TEU. Notably, any such amendments are subject to ratification by all remaining 27 Member States in accordance with their respective constitutional requirements. Usually, this includes obtaining the consent of national parliaments. In some States, it might also require referenda.¹⁴

Moreover, a potentially vast number of legal acts of the EU will be in need for revision and adjustments.¹⁵ Not least, this affects the EP itself, e.g. in terms of redefining the number of mandates per Member State (Art. 14(2) TEU) or by deciding on the termination of the British Members of the European Parliament's (MEP) mandates.

3. THE EP'S MANDATE AND FUNCTIONS IN THE EU'S CONSTITUTIONAL FRAMEWORK

KEY FINDINGS

- The European Parliament fulfils an important constitutional function within the EU's constitutional framework.
- It is a primary source of democratic legitimation and a core legislative organ.
- It also has important budgetary powers.
- Furthermore, it is charged with functions of the political and legality control of EU politics and legal acts.

The EP's role in the Brexit process and the EU-UK relations thereafter is rooted in its constitutional mandate and functions vested in it by the EU Treaties.

Within the constitutional framework of the EU, the EP directly represents the EU citizens at Union level, Art. 10(2) TEU. It is one of the two sources of the EU's 'dual legitimacy' (the other one being the Council) and the only EU organ directly legitimized by the EU citizens via elections (Art. 14(3) TEU). As such, the EP has an important constitutional function within the EU, the functioning of which is "founded on representative democracy" (Art. 10(1) TEU).¹⁶

¹³ Novak P and M. Tell Cremades (2017), at pp. 40-44; House of Lords of the UK, EU Committee (2016a) at para. 32. On the range of possible long-term adjustments see European Commission (2017). For a comparison of the impact on the UK legal order, see i.e. Miller (ed.) (2013) at pp. 24-91.

¹⁴ On Art. 48 TEU see Calliess (2016), commentary on Art. 48 EUV [TEU], paras. 3-9; Böttner (2016).

¹⁵ Novak P and M. Tell Cremades (2017) at p. 40-44.

¹⁶ On representative democracy in the EU see Ruffert (2016), commentary on Art. 10 EUV [TEU] at para. 4.

The EP exercises legislative and budgetary functions, jointly with the Council, as well as functions of political control and consultation (Art. 14(1) TEU). The Treaty of Lisbon substantially solidified and expanded its mandate and functions in this regard. Its consent is now required in vast areas of EU legislation.

Moreover, as is evidenced by the Treaties themselves and is established by the jurisprudence of the Court of Justice of the EU (CJEU), the EP as one of the principal legislative organs of the EU must be involved in all essential questions of EU policy.¹⁷

Furthermore, the EP is one of the EU organs competent to initiate legality review of the EU's actions. It may do so by initiating an annulment procedure (Art. 263 TFEU), an action for wrongful failure to act (Art. 265 TFEU) before the CJEU or by requesting an advisory opinion of the CJEU concerning the compatibility of an envisaged international agreement with the EU Treaties (Art. 218(11) TFEU).

These constitutional functions have to be borne in mind, as they provide the backdrop against which the EP's role in the Brexit process is to be examined and assessed.

¹⁷ Art. 290(1) TFEU; as examples of the extensive case-law see CJEU, C-25/70, *Einfuhr- und Vorratsstelle v. Köster*, ECLI:EU:C:1970:115, para. 6; CJEU, Case No. C-355/10, *Parliament v. Council*, ECLI:EU:C:2012:516, para. 64. Criterion for the essentiality of a matter is generally whether it defines the basic elements and decisions of EU policy, see CJEU, Case No. C-240/90, *Germany v. Commission*, ECLI:EU:C:1992:408, para. 37; Ruffert (2016), commentary on Art. 290 AEUV [TFEU], para. 10; but the CJEU has also found recently that a matter is essential if fundamental rights are at stake, see CJEU, Case No. C-355/10, *Parliament v. Council*, ECLI:EU:C:2012:516, para. 77.

4. INVOLVING THE EP IN THE MAKING OF BREXIT AGREEMENTS

KEY FINDINGS

- In order to properly play its pertinent role in this historical moment, the European Parliament has to be adequately and early on be involved in the negotiation and ratification of the EU-UK agreements, which will be key in the Brexit process.
- An early involvement is crucial to facilitate later parliamentary approval in the ratification phase.
- Despite the peculiarities of the Art. 50 TEU procedure, the EP's involvement has to follow the rules and practices established for its engagement with the making of EU international agreements.

The EP's role as a source of democratic legitimation and as a principal legislative organ comes to play in the making of international agreements to be concluded by the EU, in which it participates (4.1). Despite the peculiarities of Art. 50 TEU, the EP's participation rights also exist as to Brexit agreements (4.2).

4.1. The EP's Involvement in the Making of EU International Agreements

As one of the principal political and legislative organs of the EU, the European Parliament is involved in the making of international agreements to which the EU is a party. This involvement is crucial for two reasons: Firstly, international treaties usually require implementation by further EU legislative acts. Secondly, international treaties become, upon their ratification, an integral part of the EU legal order and can even provide a benchmark for the legality of future EU legislative acts.¹⁸ As to both aspects, involving the EP in the treaty making process ensures that EP approves the extent to which the envisaged treaty restrains its future legislative margins.

The EP's most prominent function in the making of treaties is to ratify most agreements that have been negotiated by the Commission and the Council (Art. 218(6) TEU), including the withdrawal agreement according to Art. 50(2) TEU.¹⁹ Yet, pursuant to Art. 218 TFEU, and according to interinstitutional agreements and practice, the EP's role and function reaches well beyond that.²⁰ It is involved in the making of EU treaties from the very beginning, including a right to information and a right to give its views.²¹

¹⁸ Stoll, Holterhus and Gött (2017), pp. 81 et seq., with further references.

¹⁹ See Novak P and M. Tell Cremades (2017), at pp. 16-17; Koutrakos (2015), pp. 152-154; Krajewski (2014) at paras. 128, 158-162.

²⁰ See e.g. European Parliament/European Commission, Framework Agreement on relations between the European Parliament and the European Commission, L 304/47, 10.11.2010; European Parliament/Council of the EU, Interinstitutional Agreement between the European Parliament and the Council concerning classified information held by the Council, 2014/C 95/01, 12 April 2014; Krajewski (2014) at paras 154-168.

²¹ The Framework Agreement on relations between the Commission and the EP even foresees the possibility of a EP Members to take part as observers in international conferences which include

This early involvement reflects the need to have the EP on board from the very start of the making of an agreement in view of ensuring its later ratification of the agreement.²² It also enables the EP to articulate its own positions as to the envisaged treaty, which then can be taken into account by the Commission and the Council at an early stage during the negotiations. Moreover, as has been mentioned above, according to Art. 218(11) TFEU, the Parliament may ask for an opinion of the CJEU as to whether an envisaged agreement is compatible with the Treaties.²³

4.2. The EP and the Making of Brexit Agreements – A Special Case?

As compared to the general procedure on the making of EU international agreements laid down in Art. 218 TFEU, Art. 50 TEU contains certain modifications. In two respects, one could therefore ask whether, because of these peculiarities, the EP's role in the withdrawal procedure is different and more limited as compared to its role in the general treaty-making procedure. As these questions are new and have remained largely unexplored, some brief remarks are warranted why this is not the case.

The first point concerns the applicability of Art. 218 TFEU, and the parliamentary participation rights enshrined therein, in the context of the withdrawal procedure. Art. 50(2) TEU stipulates that the withdrawal agreement "shall be negotiated in accordance with Article 218(3) [TFEU]." This could be understood in the way that, conversely, the other sections of Art. 218 TFEU (including those on EP participation) shall not apply. This suggestion might appear to be even further supported when comparing this ruling of Art. 50(2) TEU with the wording of other treaty provisions referencing Art. 218 TFEU in its entirety.²⁴ If one were to follow such approach, parliamentary rights, such as the right to be immediately and fully informed at all stages of the procedure (Art. 218(10) TFEU)²⁵ or the right to request an advisory opinion from the CJEU (Art. 218(11) TFEU) would be curtailed.

However, such an overly literal reading of Art. 50(2) TEU clearly conflicts both with the EP's eminent role in the EU's constitutional framework and its particular role in the making of international agreements.

negotiations, however generally without the possibility to be present in the negotiations themselves, see European Parliament/European Commission, Framework Agreement on relations between the European Parliament and the European Commission, L 304/47, 10.11.2010, para. 25; Krajewski (2014) at para. 122.

²² Cf. European Parliament/European Commission, Framework Agreement on relations between the European Parliament and the European Commission, L 304/47, 10.11.2010, para. 24; CJEU, Case No. C-658/11, *Parliament v. Council*, ECLI:EU:C:2014:2025, para. 75-87; CJEU, Case No. C-263/14, *Parliament v. Commission*, ECLI:EU:C:2016:435, paras. 68-85.

²³ On the relevance of Art. 218(11) TFEU see Koutrakos (2015) at pp. 230-250.

²⁴ For example, Art. 207(3) TFEU reads "Article 218 shall apply, subject to the special provisions of this Article."

²⁵ Such a right is also stipulated in Rule 81(3) EP-RoP, which applies to withdrawals by virtue of Rule 82 EP-RoP. However, the said provisions are internal law of the EP and, therefore, are not binding on other EU organs, see CJEU, Case No. C-393/07, *Donnici v. European Parliament*, ECLI:EU:C:2009:275, para. 48.

For example, it is difficult to see, why the EP should have the abovementioned rights with regard to negotiations of agreements with any third state or international organization, but not in negotiations with a withdrawing member, which are likely to be of way higher importance to the EU. Against this background, the reference from Art. 50(2) to Art. 218(3) TFEU can hardly be read in a way of exclusivity, which would curtail the EP's rights provided for in other sections of Art. 218.²⁶

The second point concerns the composition in which the EP operates and decides during the Brexit negotiations and the ratification of Brexit agreements. Up to the point when the UK's withdrawal will become effective, British MEPs will retain their mandates and may as such decide on the ratification of the withdrawal agreement by the EP. The fact that British nationals are involved in parliamentary discussions and decision-making on the 'EU side' can give rise to concerns about potential conflicts of interests. This in turn raises the question whether British MEPs should be excluded from participating in the EP's activities concerning Brexit.

In order to avoid such conflicts of interests, Art. 50(4) TEU excludes British members of the European Council and the Council from participating in the discussions and the decisions concerning the withdrawal. Yet, no comparable provision exists as to the EP. This corresponds to the fact that British MEPs do not represent the British Government, which is negotiating the Brexit arrangements on the UK side. Rather, they have an independent mandate and represent the citizens of the EU (Art. 14(1) TEU).²⁷ Hence, British MEPs may participate in the EP's activities regarding the British withdrawal from the EU.

²⁶ Dörr (2016), at para. 35. This is confirmed by the pertinent rules in the EP's internal Rules of Procedure, see Rule 81(3) and (4) EP-RoP, in conjunction with Rule 82 EP-RoP.

²⁷ See also Rule 2 EP-RoP.

5. INVOLVING THE EP IN THE OPERATION OF EU-UK AGREEMENTS

KEY FINDINGS

- Because of the numerous issues to be dealt with and the uncertainties at hand, EU-UK agreements will very likely need to be equipped with mechanisms to allow for their further development or modifications by facilitated procedures.
- Agreements designed in this way are characterized as *living agreements*.
- Under the Treaties, the European Parliament has hardly any specific means at its disposal to oversee the operation of EU agreements, including the use of such mechanisms.
- Depending the scope and function of such mechanisms, a need could arise for the European Parliament to be closer involved in such treaty operations.
- This could be provided for by appropriate interinstitutional arrangements.
- In turn, this could facilitate the approval of such mechanisms in EU-UK agreements in the process of ratification.

Apart from its participation in the negotiation and ratification of Brexit agreements, it appears reasonable to seek to involve the EP in the operation of these agreements.

5.1. Brexit agreements will very likely be living agreements

Today's international agreements in many cases do no longer only contain fixed rules that are being agreed upon at the time of conclusion and are immutable thereafter. Rather, in order to facilitate implementation, to adapt to new circumstances and to further develop cooperation, treaties often establish committees or similar bodies. What is more, such bodies are often authorized to take decisions, which may even include the modification of parts of the agreement and which take effect without a need to undergo a full new ratification process regarding these amendments. Agreements with these simplified amendment procedures are sometimes referred to as "living agreements".²⁸

As has been seen, Brexit involves many and complex issues to be addressed by some sort of agreement. Also, uncertainties exist as to the implications and possible solutions for this unprecedented and historical challenges. Thus, Brexit agreements will very likely need to be equipped with such dynamic elements and there will likely be "living agreements".

²⁸ On the importance and the challenges emanating from international lawmaking by treaty bodies see Boyle/Chinkin (2007) at pp. 151-157; Wessel (2016) at 179-199. For a related use of the term "living agreement", relating to the dynamic and evolutive interpretation of a treaty, see the jurisprudence of the European Court of Human Rights, beginning with ECtHR, *Tyrer v. United Kingdom*, judgment of 25 April 1978, Series A no. 26, pp. 15-16, para. 31.

5.2. The case for strengthening the EP's involvement in the operation of EU-UK treaty operations

Compared to its role to the negotiation and ratification of treaties, the EP's role in the application and implementation of such treaties is far more confined. Pursuant to the wording of Art. 218(9) TFEU, the positions that the EU is going to take in treaty bodies are determined by the Council alone. According to Art. 218(7) TFEU, the Council may also authorize the Commission to approve modifications of an agreement by itself. By contrast, the EP's role is essentially limited to enacting secondary law that implements the treaty, to receiving information and to express its views by adopting declarations.²⁹

This is appropriate where there are only technical or other minor modifications of agreements made during their operation and implementation. However, regarding Brexit, the presumably "living" nature of the future EU-UK agreements might extend to a range of politically sensitive issues. This may substantially affect individuals and businesses and their rights or have a far-reaching impact on the EU's policies. It is established in EU law that such essential questions ought to be reserved for the legislative organs. For example, a delegation of regulatory powers to the Commission is excluded for essential questions (Art. 290(1) TFEU). But also in other areas, the reservation of essential questions for the legislative, which are the Council and the EP, has been widely recognized in CJEU jurisprudence.³⁰

In the same vein, it is crucial to ensure that the EP remains adequately involved in essential matters even after the ratification of "living" EU-UK agreements. Unlike Art. 290 TFEU envisages for the comparably situation of delegated rulemaking, Art. 218(9) TFEU does not explicitly provide for the EP to be involved in the operation of a "living agreement". Yet, as the EP is not only one of the main legislative organs of the EU, but also the primary source of democratic legitimation at EU level, its continued participation is warranted by virtue of its constitutional role and functions. This is true at least insofar as essential questions are dealt with within the institutional framework of future EU-UK agreements.³¹

5.3. The EP decides about how "living" EU-UK agreements will be

Since treaty institutions and their power to modify the treaty text without formal ratification are created by the respective agreements themselves, the EP can determine, during the negotiation and ratification phase, to what extent it will allow such agreement to become "living" instruments. Thus, on a political level, the EP could adopt a fairly restrictive approach in neatly defining issues and areas for which it would allow for such a dynamic approach.

²⁹ Cf. the systematic analysis by Krajewski (2014) at paras. 154-168. Further details on the right to information are entailed in European Parliament/European Commission, Framework Agreement on relations between the European Parliament and the European Commission, L 304/47, 10. November 2010, para. 26, see also Fn. 20 and accompanying text.

³⁰ See e.g. CJEU, C-25/70, *Einfuhr- und Vorratsstelle v. Köster*, ECLI:EU:C:1970:115, para. 6; CJEU, Case No. C-355/10, *Parliament v. Council*, ECLI:EU:C:2012:516, para. 64.

³¹ Cf. the similar debate on the participation of the EP in treaty body decision processes of free trade agreements like CETA and TTIP (so called mega-regionals), see Stoll/Holterhus/Gött (2016) at p. 24.

It could furthermore make its consent to the agreement conditional on appropriate safeguards to ensure that it will be involved in essential matters dealt with treaty bodies after ratification.

This could be done in two ways, which can also be considered cumulatively. The first option, which will be examined in more detail in the next section, is to provide for appropriate influence of the EP at international level, within the institutional framework of the Brexit treaties. As a second, EU-internal option, the EP could seek to enhance its involvement in defining the EU's position in treaty bodies pursuant to Art. 218(9) TFEU. This could e.g. be achieved by an interinstitutional agreement (Art. 295 TFEU) between the EP, the Council and the Commission.³² Further to what is provided for under present arrangements³³, such an agreement could foresee that the EP must consent to a position established pursuant to Art. 218(9) TFEU.

Current practice as to related aspects of Art. 218 TFEU illustrates that the EU Treaties leave room for such an interinstitutional agreement, especially where there are far-reaching consequences. For example, it has been interinstitutional practice to seek the EP's approval before a treaty is provisionally applied by the EU, although such an approval is not foreseen in the applicable provision (Art. 218(5) TFEU).³⁴

In a similar manner, seeking the EP's approval of EU positions to be taken in treaty bodies would satisfy the need for enhanced democratic legitimisation in cases of "living" Brexit agreements. The conclusion of an interinstitutional agreement, as opposed to merely changing interinstitutional practice in this regard, would ensure the permanence of the EP's involvement.

³² Interinstitutional agreements have been considered in EU jurisprudence early on, see i.e. CJEU, Case No. 34/86, *Council v. Parliament*, ECLI:EU:C:1986:291, para. 50; CJEU, Case No. 204/86, *Greece v Council*, ECLI:EU:C:1988:450, para. 16; see also Calliess (2016), commentary on Art. 13 EUV [TEU] at para. 25-27; Kietz, Slomski, Maurer and Puntischer Riekman (eds.) (2010).

³³ The Framework Agreement between the European Parliament and the European Commission foresees a right to information of the European Parliament on treaty body meetings which is to a certain degree similar to the right to information on international negotiations (see Fn. 21). The European Parliament has the right to be informed on treaty body meetings, facilitated by inclusion of Members of the European Parliament as observers to EU delegations, without however being allowed to participate directly in the meetings. This right is conditional on the competence of the treaty body to take decisions which require the consent of the European Parliament, or the implementation of which require to adopt legal acts under the EU's ordinary legislative procedure. See European Parliament/European Commission, Framework Agreement on relations between the European Parliament and the European Commission, L 304/47, 10.11.2010, para. 26.

³⁴ For the recent example of CETA, see Stoll/Holterhus/Gött (2017).

6. EU-UK PARLIAMENTARY COOPERATION

KEY FINDINGS

- A close cooperation between the EP and the UK Parliament is key in the Brexit process. Such cooperation is already under way.
- It should be maintained after the UK has withdrawn from the European Union.
- The European Parliament has a rich record of interparliamentary work, taking place in various forms.
- In view of the key role, that EU-UK agreements play in the Brexit process, it may be useful to equip them with interparliamentary bodies.

Interparliamentary cooperation is a further means to ensure sustained parliamentary influence on the future EU-UK relations. It takes place already to date and can be maintained after the UK has left the European Union.

6.1. Cooperation between the EP and the UK Parliament during the remaining period of UK membership

As per now, the EP is already liaised and cooperates with the EU Member States' national parliaments. This is provided for in the Protocol on the Role of National Parliaments in the EU (especially its Arts. 9 and 10), which has been annexed to the EU treaties.³⁵ In particular, the EP engages in an exchange of information, maintaining mutual contacts and reciprocal facilities³⁶ and participates in mutual conferences.³⁷ As to the British Parliament, this status quo will persist until the UK will have left the EU.

6.2. Parliamentary cooperation after withdrawal

The EP could strive to maintain those ties to the British Parliament even after the UK has left the EU as part of its international interparliamentary activities.

6.2.1. Interparliamentary activities of the European Parliament

The EP is already widely engaged in interparliamentary exchanges and cooperation with parliaments of third States. These interparliamentary activities of the EP are noteworthy, because they represent an "external" function. For example, the EP maintains delegations with 44 parliaments worldwide.³⁸ There are also more institutionalized forms of cooperation: The EU has established interparliamentary bodies with a range of States and international organizations, each body consisting of both MEPs and members of the respective other parties' parliaments.

In particular, it has established joint parliamentary committees with associated States and accession candidates³⁹, parliamentary cooperation committees with States that have signed strategic partnership agreements with the EU or are involved

³⁵ See also Rules 142 – 144 EP-RoP.

³⁶ Rule 142 EP-RoP.

³⁷ The Conference of European Affairs Committees (COSAC, see Rule 143 EP-RoP) and in the Conference of Parliaments (Rule 144 EP-RoP).

³⁸ See Rule 212 EP-RoP.

³⁹ See Rule 214 EP-RoP.

in the EU's Good Neighbourhood Policy and, finally, five multilateral parliamentary assemblies.⁴⁰

In view of Brexit and the different options for a future relationship, it has to be emphasized that these interparliamentary activities can take different forms, depending on the agreements between the EU and the respective other States. To take the example of Canada, a long-standing interparliamentary dialogue exists.⁴¹

It is, however, separate from the newly established CETA agreement and the accompanying EU-Canadian Strategic Partnership agreement. On the other hand, cooperation of parliaments with the EEA-States, Turkey and Ukraine, for instance, is embedded in the respective agreements. These agreements feature Joint Parliamentary Committees, which may direct recommendations to the treaty bodies and will be informed about the operation of the agreements.

6.2.2. Joint Parliamentary Committees to be embedded in the EU-UK agreements

In a similar vein, future EU-UK relations could feature an element of interparliamentary cooperation. Such a mechanism, by adopting joint positions, launching joint initiatives and by joint monitoring of the other treaty bodies and the parties' adherence to the treaty, could help to 'export' some of the aforesaid EP's constitutional functions to the international level on which the new EU-UK relations will be situated.

Whereas, technically speaking, such a cooperation could be established at different levels of institutionalization and either in the context of a Brexit treaty or separately, certain aspects run in favour of creating a joint parliamentary mechanism within the framework of future Brexit agreements. Firstly, inclusion in a treaty ensures a greater degree of permanence. Secondly, it would arguably be easier to link and adjust the interparliamentary mechanism's role and functions to other treaty bodies and the treaty as a whole. Ultimately though, independently of its eventual design, it should be emphasized that an EU-UK interparliamentary mechanism holds the potential of ensuring parliamentary voice, ensuring parliamentary functions and enhancing democratic legitimation within the future EU-UK relations.

⁴⁰ <http://www.europarl.europa.eu/delegations/en/about-delegations.html> (last access 23.3.2017); see also Lupo/Fasone (eds.)(2016); more generally Costa, Dri and Stavridis (ed.)(2013).

⁴¹ Canada-EU Joint Political Declaration and Action Plan of 17 December 1996, at IV. 4.

7. CONCLUSION

The EP has a crucial role to play in Brexit to secure legitimacy and the rule of law in the process. This is particularly so as the withdrawal of the UK from the EU will put into question the further enjoyment of rights of a huge number of individuals, which often have based their lives on the four freedoms and the fundamental rights as enshrined in the Charter.

The EP will have to play its role as a co-legislator of the Union in this regard. As such legislation likely will build on agreements with the UK and particularly so the Agreement under Art. 50 TEU, the early involvement of the EP in that process is of critical importance.

As seen, the role of the EP in that context is not limited to give its consent to the final text of the agreement. To the contrary, the EP is to be involved from the very beginning, including full information and the opportunity to make its views heard.

The important role of the Parliament requires caution in view of a “living” character of such agreements. Such flexibilities are welcome for parties to allow their agreement to develop further. However, the EP is well advised to carefully scrutinize related mandates in the agreement for treaty bodies and authorizations for the modification of parts of the agreement. This is particularly warranted where essential questions of EU policy are at stake.

Concerns at this point could be accommodated by facilitating the further involvement of the Parliament in the operation of agreements. This could be arranged for between EU institutions.

At international level, a cooperation between the EP and the UK Parliament could help to secure legitimacy and the rule of law in the Brexit process and in the future EU-UK relations after withdrawal. It would be particularly worth considering to establish an interparliamentary mechanism in the withdrawal agreement as well as the agreement defining the future relations between the EU and the UK.

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ISBN 978-92-846-1119-5 (paper)
ISBN 978-92-846-1118-8 (pdf)

doi:10.2861/69 (paper)
doi:10.2861/621954 (pdf)

