

BREXIT

NEGOTIATION PHASES AND SCENARIOS OF A DRAMA IN THREE ACTS

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SUMMARY

Brussels and London are gearing up for the Brexit negotiations. By the end of March 2017, the British government is planning to declare that the UK intends to leave the EU. On 24 January 2017 the UK's Supreme Court ruled that the government must get approval from parliament before beginning the formal withdrawal process. After the formal declaration of withdrawal by the United Kingdom, its EU membership, as Article 50 TEU stipulates, will automatically come to an end exactly two years later or at the date specified in the withdrawal agreement.

The schedule of the negotiations is governed by legal and political provisions. Within the two-year period EU member states, the European Parliament and the United Kingdom will have to give their consent to the withdrawal agreement so that it can enter into force when the British EU membership comes to an end. Michel Barnier, the EU's chief negotiator, said that the negotiations should be completed by October 2018. The orderly withdrawal from the EU would follow at the end of March 2019, and the next elections to the European Parliament in May 2019 (without the United Kingdom).

After Prime Minister Theresa May outlined her approach in her Lancaster House speech on 17 January 2017, the objective of this Policy Paper is to systematize the next procedural steps in the Brexit negotiations. It identifies the various procedural preconditions in order to examine the legal and institutional context in a more precise manner.

From a European point of view a distinction needs to be made between three negotiating tracks:

- The withdrawal negotiations of Article 50 TEU ("the withdrawal")
- Negotiations on the shape of the future relationship between the EU and the United Kingdom ("the future")
- The reconfiguration of the EU Treaties ("the rest")

It is possible to imagine different scenarios. Already the withdrawal negotiations might well be characterized by repeated crises or by pragmatism. It is to be expected that certain patterns in the withdrawal negotiations will be repeated in the negotiations on the shape of the future relationship. The two negotiating tracks are closely connected. And finally, the reconfiguration of the EU Treaties depends on the results emanating from the two preceding processes.

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INTRODUCTION

On 2 October 2016, British Prime Minister Theresa May announced that she intended to notify the European Council by the end of March 2017 that the United Kingdom of Great Britain and Northern Ireland was going to withdraw from the European Union pursuant to Article 50 TEU. After the general proclamation “**Brexit means Brexit**” as a response to the outcome of the referendum on 23 June 2016, this announcement was the first precise indication when the negotiations might begin. On 24 January 2017 the Supreme Court of the United Kingdom confirmed an earlier ruling by the English High Court and stated that the withdrawal process could not be triggered without a vote by the UK parliament. The government intends to proceed quickly, but this could delay the timetable.

The Treaty of Lisbon introduced a standardized procedure for a member state to withdraw from the EU. **Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements** (Article 50 paragraph 1 TEU).¹ Article 50 paragraph 2 sentence 2 TEU stipulates that in such a case the EU must negotiate an agreement with the state concerned with regard to the arrangements for its withdrawal. This withdrawal agreement should already sketch out a framework for the future relationship of the member state with the EU. Since there have been no precedents so far, the content of the agreement remains to be defined. There is a great deal of room for interpretation with regard to the meaning of “taking account of the framework for the future relationship [of this state] with the Union”.

Even if in general terms people tend to talk about “withdrawal negotiations,” we should distinguish—at least on a conceptual level—between three separate issues for which arrangements will have to be found:

1. **The withdrawal:** The negotiations pursuant to Article 50 TEU.
2. **The future:** The future relationship between the EU 27 and the United Kingdom.
3. **The rest:** The reconfiguration of the EU treaties within the EU 27.

The reason for this distinction is essentially that different preconditions based on different articles of TEU/TFEU formally apply to the various procedural steps, and these cannot be circumvented by assuming that everything associated with Brexit is based exclusively on Article 50 TEU.

” THE WORDING OF ARTICLE 50 TEU ACTUALLY DISTINGUISHES BETWEEN THE WITHDRAWAL AGREEMENT AND THE ‘FRAMEWORK FOR FUTURE RELATIONSHIP’.” The wording of Article 50 TEU actually distinguishes between the withdrawal agreement and the “framework for . . . future relationship”. The latter is merely taken into “account” and thus not in itself a part of the withdrawal agreement. The aim of this provision is to ensure that withdrawal happens in an orderly manner, and thus it seems apposite to construe this agreement as a temporary framework for the process of disentanglement. The agreement is supposed to offer the state that intends to withdraw, in this case the United Kingdom, an appropriate period of time to prepare its own national legal order for repealing the EU legal order. Furthermore, an agreement on the future relationship between the United Kingdom and the EU will be governed by other procedural provisions. What these are depends on the shape of the future relationship: requires the consent of the EU member states.

1. On the one hand this brought to an end earlier disputes on whether or not withdrawal was actually possible, and on the other hand by emphasizing the voluntary nature of membership it was a sop to those who were sceptical about integration.

In addition to that, no significant amendments can be made to the EU treaties within the framework of an agreement pursuant to Article 50 TEU. Such primary law changes can only be made on the basis of the ordinary or simplified treaty amendment procedure specified in Article 48 TEU, and in each and every case requires ratification by the member states.

” NEVERTHELESS, IT MAY BE ASSUMED THAT THE THREE STAGES OF BREXIT OVERLAP TO A CERTAIN EXTENT AND ARE POLITICALLY INTERCONNECTED.”

Therefore, a tripartition can be identified. The **withdrawal agreement** proper as specified in Article 50 is merely a transitional provision designed to bring about the careful disentanglement of one of member state from the EU. Then there is an **agreement on the future relationship**, quite distinct from the first agreement, that can be concluded on the basis of the normal competences and procedural provisions of primary law.² Finally, minor formal changes and comprehensive **amendments to the EU treaties** must make use of the procedure specified in Article 48 TEU. Nevertheless, it may be assumed that the three stages of Brexit overlap to a certain extent and are politically interconnected. The EU 27 is interested in negotiating the withdrawal agreement first and the future relationship afterwards. From a British point of view, simultaneous and interlinked negotiations or even the reverse sequence would be advantageous.³ The British Prime Minister has stated that she wants to reach “an agreement about our future partnership by the time the two-year Article 50 process has concluded.”⁴

For every phase of the forthcoming negotiations it is possible to identify different scenarios. The aim of this Policy Paper is **to systematize the next steps in the Brexit negotiations and to extrapolate the various procedural preconditions.**

1. The withdrawal. The phases of the withdrawal negotiations pursuant to Article 50 TEU

Brexit is a controversial subject in the United Kingdom. Is the referendum politically binding? How must Parliament be involved in the decision-making process? Is it going to be a hard Brexit? Everything which happens before the withdrawal declaration (that is, before notifying the EU of the UK's intention to withdraw pursuant to Article 50 TEU) is based on British law. The judgement of the Supreme Court on 24 January 2017 cannot be described in any great detail in this context. If one uses German terminology, the British referendum is probably more of a public consultation than a referendum and not binding as far as the UK parliament or the British government are concerned.⁵ The EU Treaties do not contain any indication of when the withdrawal declaration has to be submitted and the EU is virtually excluded from the intra-state process until the British authorities issue a formal withdrawal declaration. **In the following sections, this Policy Paper divides the procedure triggered by the declaration into five phases.**

1.1. Phase 1: The United Kingdom notifies the EU of its intention to withdraw

The procedure is set in motion by a withdrawal declaration submitted to the European Council⁶ by the United Kingdom.⁷ Since it is **a one-sided declaration of intent which becomes complete on receipt by the other**

2. A dissenting opinion points out that an agreement imposes no obligations which go beyond those that come with EU membership, and that for this reason the procedure pursuant to Article 50 TEU seems justified. See Booß in Lenz and Borchardt, *EU-Verträge Kommentar*, 6th ed (2013), TEU, Article 50 TEU marginal note 4.

3. Bertoincini, Enderlein and Lamy, “The Brexit Rubik's Cube”, Paper prepared for the 25th Evian Franco-German Meeting, September 2016, p. 6f.

4. Prime Minister's Office, The government's negotiating objectives for exiting the EU: PM speech, 17 January 2017.

5. Michl, *NVwZ* 2016, 1365 (1366).

6. The prevailing opinion and since the 5th ed (2016) also Calliess, in Calliess and Ruffert, *EUV/AEUV*, 5th ed (2016), Article 50 TEU, marginal note 5.

7. Whether or not the prescribed intra-state preconditions for the submission of the declaration, e.g. its assignment to a specific institution, have been adhered to is irrelevant from a European point of view as long as the infringement of intra-state law is not apparent.

party, the withdrawal declaration comes into effect when it has been delivered to the European Council. Until then, the referendum in the UK is of no significance for European law. Article 50 TEU does not stipulate any additional formal requirements for the withdrawal declaration, and does not require a reason for withdrawal. Since preliminary negotiations with the UK before the submission of the declaration have been ruled out, this declaration—after UK parliament’s approval to a bill allowing the government to move ahead with triggering Article 50 TEU—will build upon Theresa May’s Lancaster House speech and set out the position of the UK government and its views with regard to the organization and the course of the negotiations and its preferences for the future relationship and the withdrawal agreement.

It is debatable whether the declaration can be retracted from this time on and whether the withdrawal process can be rescinded unilaterally.⁸ If one construes the declaration as a one-sided declaration of intent which becomes complete on receipt, it seems apposite to regard its retraction as inadmissible, at least if there is no compelling reason, such as a fundamental change of the circumstances. However, many observers believe that from a political point of view the other 27 member states would probably not object if the UK decided to retract the declaration.

The ball is now in the UK’s court. Representatives of the EU have asked for the withdrawal application to be submitted as fast as possible, and have accused the UK of unnecessarily holding up the process.⁹ In theory, the EU could do something about the delay by invoking the principle of sincere cooperation mentioned in Article 4 paragraph 3 TEU. To presume, however, the EU could trigger the two-year period without a withdrawal declaration on the basis of an intra-state decision,¹⁰ would be far-fetched, and tantamount to misunderstanding the formative legal character of the declaration.

Despite likely parliamentary participation, the British Prime Minister adheres to the envisaged date for the submission of the withdrawal declaration (“by March 2017”). This determination is motivated by domestic policy considerations: Brexit supporters in her own party want the withdrawal process to begin as quickly as possible. **The heads of the EU institutions also hope that the declaration will be submitted without delay.**¹¹ The next summit of the EU 27 is to be held in Valletta, the capital of Malta, on 3 February 2017, the European Council meets on 9-10 March 2017, and the 60th anniversary of the signing of the Treaties of Rome will be celebrated on 25 March 2017. Even though Brexit Secretary David Davis told MPs after the Supreme Court judgement on 24 January 2017 to expect a bill allowing the government to move ahead with triggering Article 50 TEU “within days”, it cannot be ruled out that amendments and debates in Parliament will hold up the process and that it may not be possible to adhere to the envisaged date.

1.2. Phase 2: The European Council specifies the guidelines

” **THUS EVERY SINGLE MEMBER STATE HAS DE FACTO A VETO RIGHT WHEN IT COMES TO THESE GUIDELINES”**

As soon as the withdrawal declaration will have been received by the European Council, it will define the guidelines for the withdrawal negotiations, marking the beginning of the second phase, which takes its cue from the European Council’s general rules on decision-making. For this reason, pursuant to Article 15 paragraph 4 TEU, decisions of the European Council must be taken by consensus. Thus every single member state has de facto a veto right when it comes to these guidelines. It goes without saying that the UK will not take part in this decision-making process (see Article 50 paragraph 4 sentence 1 TEU).

8. Against: F. Mayer, *Zwei Jahre sind nicht immer gleich zwei Jahre: wann beginnt der Brexit-Countdown?*, Verfassungsblog, 26.06.2015, (most recent retrieval 28.10.2016). For: Sari, *Biting the Bullet: Why the UK Is Free to Revoke Its Withdrawal Notification under Article 50 TEU*, U.K. Const. L. Blog, 17.10.2016, (most recent retrieval 28.10.2016); Michl, *NVwZ* 2016, 1365 (1368 f.); Thiele, *EuR* 2016, 281 (295), although he rejects the formative legal effect of the declaration. The prevailing view is that retraction is possible, even though the High Court has said the opposite.

9. Martin Schulz, “a hold up only because of the party tactics of the British Conservatives harms everybody”; Manfred Weber: “Die beginnende Verzögerungstaktik in London ist inakzeptabel,” *tagesschau.de*, 26.06.2016, (most recent retrieval 18.11.2016).

10. F. Mayer, *Zwei Jahre sind nicht immer gleich zwei Jahre: wann beginnt der Brexit-Countdown?*, Verfassungsblog 26.06.2016 (most recent retrieval 28.10.2016).

11. Joint statement by Schulz, Tusk, Rutte and Juncker on UK referendum outcome, 24.06.2016.

If it should prove impossible to reach a consensus, the question will arise whether and how the negotiations should be conducted. The guidelines issued by the European Council are needed in order to enable the Council to initiate the negotiations.¹² However, at this point **the two-year period** specified in Article 50 paragraph 3 TEU is already under way. It **begins with the submission of the withdrawal declaration and after two years the EU treaties cease to apply to the member state concerned if no agreement has been reached.**

It is neither clear how detailed the guidelines of the European Council will be, nor which aspects they are supposed to cover. However, they will constitute the EU 27's response to the withdrawal declaration. The main concern of the President of the European Council may well be to get the heads of state and government to adopt the guidelines and thus to preserve the unity of the EU 27, and to start the withdrawal process. The Statement after the informal meeting of the 27 heads of state or government on 15 December 2016¹³ constitutes a good basis for this objective. **If the guidelines are very detailed, it will become more difficult to reach a consensus. On the other hand, clear and precise guidelines** will enable the Council of Ministers and the member states to **exercise their influence on and in the negotiations** over the European Commission. It is increasingly possible to discern an anticipation of political decisions as a result of the European Council's very combative view of its leadership role, which in the light of Article 15 TEU and the institutional balance is a cause for concern.¹⁴ However, the EU 27 are still in the process of making up their minds about the nature of these negotiating guidelines.

1.3. Phase 3: The Council defines the negotiating mandate and appoints the chief negotiator

The agreement will be negotiated pursuant to the procedure set forth in Article 218 paragraph 3 TFEU, in other words, the procedure normally used for international agreements. According to the annex to the EU 27 statement of 15 December 2016, "after the adoption of the guidelines, the European Council will invite the General Affairs Council to proceed swiftly with the adoption of the decision authorising the opening of the negotiations, following a recommendation by the European Commission." The Council will adopt negotiating directives, be invited to nominate the European Commission as "Union negotiator" and give it the go-ahead to start the negotiations.¹⁵ The Council can make the decision on the basis of a qualified majority vote. The UK representative is excluded from this decision-making process (Article 50 paragraph 4 TEU).

” THE COUNCIL CAN TAKE DECISIONS ON THE BASIS OF A QUALIFIED MAJORITY VOTE: INDIVIDUAL MEMBER STATES NO LONGER HAVE A VETO.”

It is sometimes pointed out that the guidelines provided by the European Council (Article 50 paragraph 2 Sentence 2 TEU) may in fact overlap with the Commission's right to make recommendations that is specified in Article 218 paragraph 3 first half sentence TFEU.¹⁶ However, spirit and purpose of the Commission's right to make recommendations seems to be that, as an institution that represents the interests of the Union and not those of the member states, it can appoint a chief negotiator from its own ranks.¹⁷ Nevertheless it is no more than a recommendation, and the final decision-making competence probably remains in the hands of the Council. The Council can take decisions on the basis of a qualified majority vote. This means that individual member states (in contrast to the European Council's guidelines) no longer have a veto, and that a majority of 15 of the 27 states representing 65% of the population of the EU 27 (Article 238 paragraph 3 letter a TFEU) is sufficient.¹⁸ Specific aspects and EU 27

12. See Thiele, *EuR* 2016, 281 (299).

13. Annex to the Statement after the informal meeting of the 27 heads of state or government, 15 December 2016.

14. See Calliess in Calliess and Ruffert, *EUV/AEUV*, 5th ed (2016), Article 15 TEU marginal note 9.

15. Annex to the Statement after the informal meeting of the 27 heads of state or government, 15 December 2016.

16. See Michl, *NVwZ* 2016, 1365, 1368.

17. The post of chief negotiator has also been assigned to the European Commission by Kumin in: Hummer and Obwexer, *Der Vertrag von Lissabon*, 302 (318); and Dörr, in Grabitz, Hilf and Nettesheim, *EUV/AEUV*, EL 45 (August 2011), Article 50 TEU, marginal note 27.

18. Duff, *After Brexit*, Policy Network, October 2016, p. 7.

positions will be defined in greater detail by the negotiating directives, without curtailing the negotiators' room for manoeuvre.

This is the basis on which Michel Barnier, who was appointed to the post of chief negotiator of the European Commission on 1 October 2016, will conduct the negotiations between the European Union and the United Kingdom. Sabine Weyand has been appointed to the post of deputy chief negotiator. Even though the European Council brought Didier Seeuws into play, he will merely preside over a special committee pursuant to Article 218 paragraph 4 TFEU which will monitor the negotiations on an ambassadorial level. But the Annex to the Statement of the EU 27 shows their willingness to control the negotiations closely: The General Affairs Council will meet regularly in an EU 27 configuration to discuss the Brexit negotiations.¹⁹ However, the Council recognises that only the European Commission has the administrative capacity needed for the complex disengagement process.

The European Parliament (with its chief negotiator Guy Verhofstadt) **is another veto player**, as the negotiated withdrawal agreement requires its consent (see 1.5). However, since the Council will take the final decision, the United Kingdom has a more pronounced interest in building direct relationships with a number of influential member states such as Germany, France, Italy and the Visegrad countries which can exert an informal influence on the negotiations.

1.4. Phase 4: Chronology of the negotiations between the negotiating partners

The course of the negotiations is not defined in legal terms. In fact, negotiations on the withdrawal arrangements, the future relationship and internal adjustment or reform arrangements can take place simultaneously. As in the case of negotiations on accession or association agreements between non-EU states and the EU, there could well be a division into chapters or baskets which will deal with the various aspects of the disentanglement.

”NEGOTIATIONS ON THE WITHDRAWAL ARRANGEMENTS, THE FUTURE RELATIONSHIP AND INTERNAL ADJUSTMENT OR REFORM ARRANGEMENTS CAN TAKE PLACE SIMULTANEOUSLY.”

The task at hand is to ensure that certain EU legal provisions remain in force for a transitional period (as yet to be defined) in order to give national legislators an opportunity to prepare for **a smooth transition leading to complete disentanglement from the EU's legal order**. Furthermore, there is the fate of cases being heard by the Court of Justice of the European Union and what is happening in the administrative area (for example, monitoring compliance with competition law) and the issue of participation in ongoing EU projects. The participation of the United Kingdom in the various institutions during the disengagement phase also needs to be clarified.²⁰ This is an extremely pressing question, especially in the light of the forthcoming elections to the European Parliament in 2019. It seems sensible to agree to retain (on a temporary basis) the direct applicability and the primacy of EU law in certain regulatory areas. Whether there is a political willingness for such a transitional period, remains to be seen. **The following four scenarios exemplify the possible course that the negotiations could take.**

- **Scenario 1 “Sincerity”:**

”A QUIET AND RATIONAL DIVORCE”

At this point in time it seems plausible that the British government will adhere to the slogan “Brexit means Brexit” and (primarily for domestic policy reasons) will try to move ahead quickly with the negotiations. At the Conservative Party Conference beginning of October 2016 Theresa May announced that she did not wish to delay the process of withdrawal unnecessarily, and therefore intended to submit the declaration to the

19. Brüssler, Raus! Aber wie? Die EU ringt um den Brexit, Süddeutsche Zeitung, 19.11.2016, (most recent retrieval 19.11.2016). See also Annex to the Statement after the informal meeting of the 27 heads of state or government, 15 December 2016.

20. See Meng in von der Groeben, Schwarze and Hatje, EUV/AEUV, Vol. 1, 7th ed (2015), Article 50 TEU, marginal note 5.

European Council by the end of March 2017 at the latest. Thus, the actors in scenario 1 are straightforward, for they abide by the majority's wish for withdrawal, and follow the goals enunciated by the British Prime Minister. They have chosen to adhere to the legal framework of Article 50 TEU, including the two-year period, and hope to bring the withdrawal negotiations within two years to an end and have a result acceptable to all sides. One could call this a quiet and rational divorce. Subsequently the post-Brexit relationship will not be a close one.

- **Scenario 2 "Crisis":**

” THE SLOW, LOUD AND
THEN DEFERRED DIVORCE
PROCESS”

In scenario 2 the negotiations in 2017 and 2018 are making slow progress. There is an economic crisis in the United Kingdom and an orderly Brexit by March 2019 is impossible. This scenario is not improbable. In November 2016 the Financial Times reported that on account of the weak economy and declining tax revenues the British government may be faced with a budget deficit of €116 billion.²¹ In this scenario the actors make maximum demands and adhere to their positions, which leads to a serious crisis during negotiations. At a meeting of EU foreign ministers in mid-November 2016, Boris Johnson insisted that the free movement of persons was not one of the basic freedoms of the EU. Carlo Calenda, the Italian industry minister, called Johnson's remarks about Italian prosecco exports to the UK offensive.²² Angela Merkel and other EU politicians reiterated that they do not intend to make any compromises with regard to free movement. The British Prime Minister seems to have accepted that the EU 27 see the four freedoms as indivisible.²³ If the UK reverts to a Johnson-like position, a crisis scenario of this kind is certainly possible. In order to limit the damage, the United Kingdom might apply for an extension of the negotiations to avoid a disruptive cliff-edge. In this scenario the European Council would agree under the condition that the UK backed down on contentious issues. In this case the slow, loud and then deferred divorce process would lead to a situation in which the relationship between the EU 27 and the United Kingdom may remain close for longer than was originally assumed in 2016/2017.

- **Scenario 3 "Pragmatism":**

” TRANSITIONAL PERIODS
DESIGNED TO CUSHION THE
BLOW OF BREXIT”

In scenario 3 the negotiations also make slow progress, but are in fact characterized by a pragmatic approach. For this reason it is possible to resolve contentious issues. There is agreement on transitional periods designed to cushion the blow of Brexit, and at an early stage the chief negotiators come to the conclusion that the future negotiations ought to be conducted at the same time as the withdrawal negotiations (in order to implement a transitional agreement which will be an intermediate step that comes into effect as soon as withdrawal has entered into force, and before making arrangements for a future relationship). The appointment of experienced chief negotiators such as Barnier and Seeuws seems to point to a pragmatic scenario of this kind. Many commentators believe that Didier Seeuws in particular can keep his head, and that he might be able to negotiate a meaningful compromise.²⁴ Remarks made by the British Prime Minister before a meeting with the German Chancellor in November 2016 also spell out the goal of a pragmatic approach. Theresa May said that she wanted to work on a solution within the framework of an orderly process that was in the interests of both the UK and its European partners.²⁵ The British Prime Minister's 12th objective in the 17 January 2017 speech was a "smooth, orderly Brexit" which would, however, not amount to "seek[ing] some form of unlimited transitional status, in which we find ourselves stuck forever in some kind of permanent political purgatory."²⁶

21. UK faces €100bn Brexit hole in budget, *Financial Times*, 16.11.2016, (most recent retrieval 18.11.2016)

22. *The Guardian*, 17.11.2016, Boris Johnson ridiculed by European ministers after prosecco claim (most recent retrieval 18.11.2016)

23. Prime Minister's Office, The government's negotiating objectives for exiting the EU: PM speech, 17 January 2017.

24. T. Mayer, Didier Seeuws: Ein stiller Anwalt für die Scheidung von den Briten, *Der Standard*, 28.06.16, (most recent retrieval 18.11.2016)

25. PM and Chancellor Merkel statements, 18 November 2016, (most recent retrieval 19.11.2016) "I want to see this as a smooth process, an orderly process, working towards a solution that is in the interests of both the United Kingdom but also in the interests of our European partners too."

26. Prime Minister's Office, The government's negotiating objectives for exiting the EU: PM speech, 17 January 2017.

- **Scenario 4 “Realignment”:**

The fourth scenario combines fast negotiations with the realization (on both the British and the Continental European sides) that despite the UK’s withdrawal close relations are in their mutual interest. For this reason the outlines of a future association and the basis for a good relationship are already being discussed in the context of the withdrawal negotiations, which are concluded much faster than expected and are tantamount to a fundamental realignment. For example, Norbert Röttgen, the chairman of the Committee on Foreign Affairs in the German parliament struck a rather conciliatory note. In a paper published by the think tank Bruegel he and his co-authors suggested a “Continental Partnership” in order to maintain close ties between the United Kingdom and the European Union.²⁷ It remains an open question whether such a scenario is politically realistic.

1.5. Stage 5: Consent of the European Parliament and adoption by the Council

The draft of the negotiated withdrawal agreement will be presented to the European Parliament, which has to give its consent (Article 50 paragraph 2 TEU). Thereafter the Council makes a decision on the basis of a qualified majority as defined in Article 238 paragraph 3 letter b TFEU (Article 50 paragraph 2 sentence 4 and paragraph 4 sentence 2 TEU).²⁸ The British representative in the Council does not take part in the vote (Article 50 paragraph 4 sentence 1 TEU.) The withdrawal agreement then has to be ratified in the United Kingdom, though not in the other member states. It is a bilateral international agreement.

” IN THE PAST, IT HAS STOPPED AGREEMENTS SUCH AS SWIFT AND THE ANTI-COUNTERFEITING TRADE AGREEMENT (ACTA). ”

Thus the European Parliament, unlike individual member states, has the right to veto the withdrawal agreement. How the European Parliament is going to be kept informed about the negotiations and whether it will be represented are open questions. Media reports say that Guy Verhofstadt has already pointed out that the European Parliament will not simply rubber-stamp the agreement.²⁹ In the past, it has stopped agreements such as SWIFT and the Anti-Counterfeiting Trade Agreement (ACTA). In addition to the veto power over the withdrawal agreement, the European Parliament is trying to obtain a seat at the table, and direct influence on the negotiations. Although the governments have not as yet agreed to these demands³⁰, the risk of failure (or delay) of such an agreement could be reduced if the European Parliament were to become directly involved in the negotiating process at an early stage in the proceedings.³¹ In the European Parliament the MEPs elected in the United Kingdom continue to participate fully as a result of the principle of the independent mandate until the day Britain leaves. The wording of Article 50 paragraph 4 TEU merely points out that the withdrawing member state will be excluded from decision-making in the European Council and the Council.³²

The influence of national parliaments on the negotiations pursuant to Article 50 TEU and the various national representatives in the Council and the European Council **is limited**. This fact makes the consent of the European Parliament even more important. However, discussions about Brexit in the European Council are also subject to specific parliamentary procedures which have been instituted in the majority of national parliaments in order to monitor their head of state or government before or after summit meetings of the European Council.³³

The withdrawal agreement is not a constitutive feature of the withdrawal. The decisive element is the withdrawal declaration and nothing else. **Should the agreement collapse at some point during the**

27. Pisani-Ferry, Röttgen, Sapir, Tucker and Wolff, *Europe after Brexit: A proposal for a continental partnership*, Bruegel, 29.08.2016.

28. 72% of the members of the Council, who represent the member states concerned (20 out of 27) and at least 65% of the population of the EU 27.

29. Brössler, Raus! Aber wie?, *Süddeutsche Zeitung*, 19.11.2016.

30. The Annex to the Statement after the informal meeting of the 27 heads of state or government, 15 December 2016, only includes the following provisions: “The Union negotiator will be invited to keep the European Parliament closely and regularly informed throughout the negotiation. The Presidency of the Council will be prepared to inform and exchange views with the European Parliament before and after each meeting of the General Affairs Council. The President of the European Parliament will be invited to be heard at the beginning of meetings of the European Council.”

31. Kreilinger, Watchdogs and Vetoplayers: Europe’s parliaments will keep an eye on Brexit negotiations, Blog Post, Jacques Delors Institut - Berlin, 25.11.2016 (most recent retrieval 30.11.2016).

32. See also Michtl, *NVwZ* 2016, 1365 (1368).

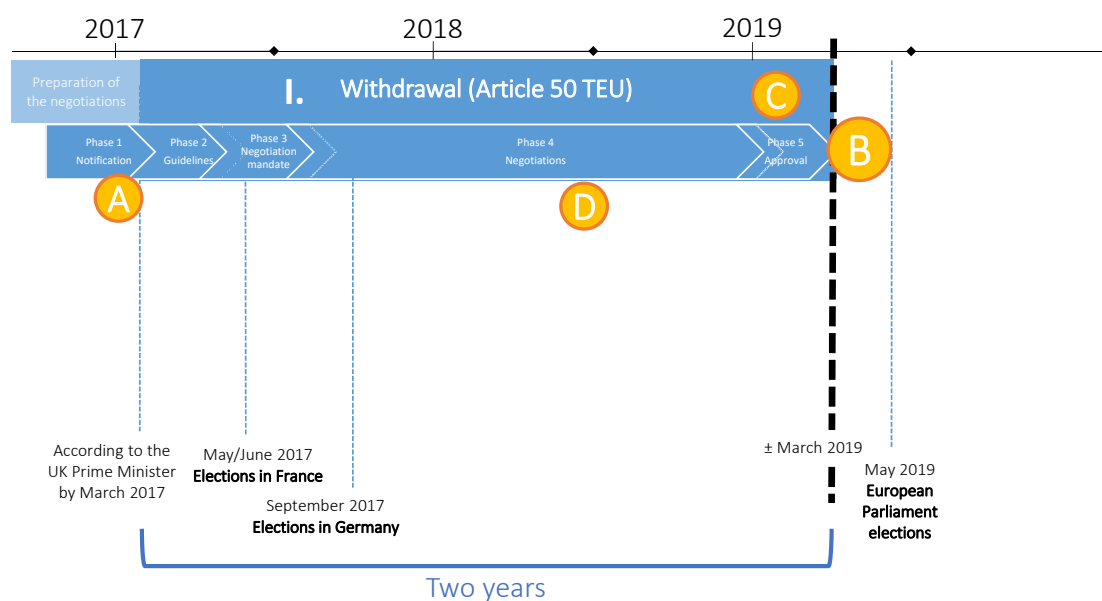
33. Wessels, Rozenberg, Hefftl, Kreilinger, *Democratic Control in the Member States of the European Council and the Euro Zone summit*, European Parliament, 2013.

negotiations, the so-called “sunset clause” specifies that the EU treaties will cease to apply in the member state concerned two years after the withdrawal declaration, without transitional arrangements of any kind. However, pursuant to Article 50 paragraph 2 TEU, this deadline can be extended by a unanimous decision of the European Council acting by mutual consent with the member state concerned. In this spirit Jeroen Dijsselbloem, the head of the Eurogroup, said in November 2016 that he expected the negotiations to last well over two years.³⁴

1.6. Summary

If the United Kingdom submits its withdrawal declaration by the end of March 2017 (see Figure 1, letter A), withdrawal will come into effect automatically (B) in March 2019 (two years later) unless there is an extension. The legal and political provisions and assessments relating to the withdrawal negotiations say that within the two-year period the EU member states, the European Parliament and the United Kingdom must give their consent to the withdrawal agreement (C) so that it can enter into force when British membership of the EU expires. Michel Barnier, the EU chief negotiator, therefore mentioned October 2018 as the date by which the negotiations (D) should be completed.³⁵

FIGURE 1 ► Possible timeline of the withdrawal negotiations



Source: Authors. Figure © Jacques Delors Institut - Berlin

The aim of the withdrawal negotiations is **to organize an orderly withdrawal**. Furthermore, it is possible or even probable that the agreement on the future relationship cannot enter into force at the same time as the withdrawal agreement because the negotiations may not have been completed. However, the time until the agreement on the future relationship enters into force should not become a vacuum. The shock could be absorbed with the help of special transitional mechanisms or a special agreement (e.g. a temporary free trade agreement³⁶).

34. Brexit talks will take ‘a lot longer’ than two years, Eurogroup head says, Reuters, 16.11.2016 (most recent retrieval 30.11.2016).

35. European Commission, Task force for the preparation and conduct of the negotiations with the United Kingdom under Article 50 of the TEU, Press Statement, Introductory comments by Michel Barnier, 06.12.2016 (most recent retrieval 12.12.2016)

36. Lippert and von Ondarza, A European “Special Relationship”, SWP-Comments, November 2016 (most recent retrieval 30.11.2016).

2. The future: Negotiations and the shape of the future relationship between the EU and the United Kingdom

The withdrawal agreement and a possible separate agreement on the future relationship are closely connected with regard to time, content, and political terms. As envisaged in Article 50 TEU, **the withdrawal negotiations should therefore already take into account and discuss the “framework for its future relationship”**. Secondly, the time and goal of the “future negotiations” should be clarified beforehand. Whether or not the withdrawal negotiations with their five phases (as described above) pursuant to Article 50 TEU will have made a great deal of progress by this point is an open question. They will, however, probably have reached phase 4.

”ELEMENTS IN THE WITHDRAWAL AGREEMENT WOULD TO SOME EXTENT ANTICIPATE THE RESULTS OF THE NEGOTIATIONS ABOUT THE FUTURE RELATIONSHIP.”

If the respective negotiators will already have developed a common idea on the future relationship during the withdrawal negotiations, the forthcoming framework for this relationship could already be specified in this agreement. The passages in question would then go beyond vague expressions (such as “close partner”) and name a specific option, and possibly even a timetable.³⁷ Such elements in the withdrawal agreement would to some extent anticipate the results of the negotiations about the future relationship. Prime Minister Theresa May even wants to have reached an agreement about the future relationship by the time the two-year withdrawal negotiations have concluded. In her speech of 17 January 2017 she said that “a phased process of implementation, in which both Britain and the EU institutions and member states prepare for the new arrangements that will exist between us will be in our mutual self-interest. This will give businesses enough time to plan and prepare for those new arrangements.”³⁸

Generally speaking the European Union can conclude agreements with non-EU states in four different cases (see Article 216 paragraph 1 TFEU). The United Kingdom would be such a third country after Brexit. First, if that type of agreement is stipulated in the treaties (for example in Article 207 TFEU [trade agreement], Article 217 TFEU [association agreement] and Article 37 TEU [CFSP agreement]). Second, if an agreement is necessary to realise the objective of an objective of the treaty (in other words, if there is an EU competence.) Third, if an agreement is envisaged in a binding legal act of the Union. Fourth, if common regulations could be negatively affected or if their area of application could be altered,³⁹ or in other words, to protect the *acquis communautaire*. When it comes to the future relationship between the EU and the United Kingdom, three variants of the stipulated right to conclude treaties could be considered, namely a customs or trade agreement pursuant to Article 207 TFEU, an association agreement pursuant to Article 217 TFEU and an agreement on developing a special relationship with neighbouring European countries pursuant to Article 8 paragraph 2 TEU.

The procedural preconditions will depend on the kind of future relationship the UK and the EU have in mind. If the United Kingdom simply wishes to join the EEA and EFTA, then the non-EU member states which are parties to this agreement would have to be included. In the case of a simple bilateral relationship between the EU and the United Kingdom it is important to know whether we are dealing with a mixed agreement, or with one which only touches on areas that the EU is competent to regulate itself. A mixed agreement would also have to be ratified in every single member state on the basis of national procedures, which usually involve parliaments.

This paper now discusses four broad outcome scenarios. These are a free trade agreement (2.1), a neighbourhood agreement (2.2), a new closer partnership format (2.3), and access to the internal market (2.4). Generally speaking a free trade agreement tends to be construed as a “hard Brexit” and the other three models as a “soft Brexit.” The first scenario corresponds to what Theresa May called a “new, comprehensive, bold

37. See Duff, *After Brexit*, Policy Network, October 2016.

38. Prime Minister’s Office, *The government’s negotiating objectives for exiting the EU*: PM speech, 17 January 2017.

39. See also EuGH, Rs. 22/70, Slg. 1971, 263 – AETR

and ambitious free trade agreement” in her Lancaster House speech on 17 January 2017. However, taken as a whole, the references in the speech to a “customs agreement” (that would not be the EU’s customs union) or to taking in “elements of current Single Market arrangements in certain areas” make it necessary to consider the whole range of legal options.⁴⁰ All of these outcome scenarios for the negotiations on the future relationship are based on the condition that the withdrawal negotiations pursuant to Article 50 TEU will be (successfully) completed beforehand. A political agreement on the future relationship seems unlikely if there is an agreement on the withdrawal arrangements.

2.1. Outcome scenario 1: Free trade agreement

” THE STARTING POINT
IN THE NEGOTIATIONS
IS THE REGULATORY
EQUIVALENCE BETWEEN
THE TWO PARTNERS.”

The negotiations about a future a relationship mirror the continued bond between the parties that already characterised the withdrawal negotiations. In the first outcome scenario the goal is no more than a free trade agreement that creates a market for goods and is thus closest to the outcome of the referendum on 23 June 2016.⁴¹ The negotiations on the future relationship would come to a successful conclusion with an agreement on a Trans Channel Trade Partnership (TCTP).⁴² It is **a tailored bilateral free trade agreement between the United Kingdom and the EU 27**. The timetable is still an open question, since other negotiations on free trade agreements have tended to take between four and seven years.⁴³ However, there is reason to believe that in the case of the United Kingdom such negotiations could be completed more quickly: The starting point in the negotiations is the regulatory equivalence between the two partners. Unlike in cases of other trade agreements, this equivalence is not the goal that has to be reached in the negotiations.

The legal framework for the **European Parliament’s information rights** in the case of EU negotiations on free trade agreements and other international accords with non-EU states is the inter-institutional framework agreement of 2010.⁴⁴ This right puts the European Parliament on equal footing with the Council. It receives amendments to the previously adopted negotiating mandate, drafts of the negotiating texts, and the final versions of negotiated provisions of the agreement. **The case of the free trade agreement between the EU and Canada (CETA) shows that other parliaments—national or even regional parliaments—also have a role to play.** In the wake of the European Commission’s decision to treat CETA as a mixed agreement, the Commission may take a similar view of a free trade agreement between the EU and the United Kingdom. A free trade agreement or other types of association between the United Kingdom and the EU 27, inasmuch as they are deemed to be mixed agreements,⁴⁵ must obtain the consent of the national parliaments, which thus become genuine veto players (as do the regional parliaments in Belgium).⁴⁶

2.2. Outcome scenario 2: Neighbourhood agreement

The Treaty of Lisbon not only contains a withdrawal clause in Article 50 TEU. A completely unrelated provision in Article 8 TEU provides for the EU to “develop a special relationship with neighbouring countries.” Furthermore, the treaty does not link the neighbourhood policy to enlargement policy (Article 49 TEU) or to the external action of the EU (Title V TEU and Part V TFEU).⁴⁷ Andrew Duff, the former British Liberal Democrat MEP, recently suggested using **Article 8 TEU as the legal basis for the regulation of the future relationship between the EU 27 and the United Kingdom as a “neighbour.”** His model for this is the

40. Prime Minister’s Office, The government’s negotiating objectives for exiting the EU: PM speech, 17 January 2017.

41. Bertoncini, Enderlein und Lamy, *ibid.*, p. 7.

42. Henrik Enderlein, presentation at “EU to go”, Jacques Delors Institut - Berlin, 20.10.2016.

43. House of Lords European Union Committee, The process of withdrawing from the European Union, 11th report of Session 2015-16, paragraph 54 (most recent retrieval 25.11.2016)

44. Framework Agreement on relations between the European Parliament and the European Commission, 2010, Annex III, OJ L 304/47.

45. The forthcoming ruling of the CJEU on the trade agreement with Singapore (EUSFTA) will shed some light on this question, see Request for an opinion submitted by the European Commission pursuant to Article 218(11) TFEU, Case 2/15.

46. Kreilinger, Watchdogs and Vetoplayers: Europe’s parliaments will keep an eye on Brexit negotiations, Blog Post, Jacques Delors Institut - Berlin, 25.11.2016.

47. Hillion, The EU neighbourhood competence under Article 8 TEU, in Fabry (ed.) Thinking Strategically about the EU’s external action. Paris: Notre Europe - Jacques Delors Institute, 2013, pp. 204-214.

association agreement between the EU and Ukraine.⁴⁸ The advantages he sees are especially to be found on the institutional level. There would be an annual summit meeting, a council of ministers, preparatory committees, and a joint parliamentary body.⁴⁹ Whether such an outcome fits to the Prime Minister's exclusion to aim for "partial membership of the European Union, associate membership of the European Union, or anything that leaves us half-in, half-out"⁵⁰ is an open question. The United Kingdom does "not seek to hold on to bits of membership."⁵¹ From a legal point of view, it is important to stress that whereas Article 8 TEU actually stipulates that there is a duty to develop a special relationship with neighbouring countries, it is rather vague with regard to the modalities. One possibility would be an association agreement, but it might also be feasible on this basis to develop an agreement of a completely new kind, since Article 8 TEU specifies nothing. However, in the case of the association agreement between the EU and Ukraine, the ratification process was interrupted in April 2016 by a non-binding referendum in the Netherlands and only parts of the agreement (which apply solely to EU competences) could enter into force on a provisional basis.

2.3. Outcome scenario 3: New partnership format

The third scenario about the course of the withdrawal negotiations outlined the fundamental reorganisation of the relationship which, with the help of transitional deadlines and a series of innovative solutions, could be implemented within a short space of time in order to closely tie the UK as an associated member to the EU. It is perfectly possible that the idea of a new partnership format such as the "Continental Partnership" proposed by the think tank Bruegel will be looked at more carefully in the future. In this scenario **the United Kingdom would be given complete access to the European internal market without having to accept the free movement of persons.**⁵² As a non-EU state the United Kingdom could then have a closer relationship with the EU than is envisaged in the case of normal trade agreements pursuant to Article 207 TFEU. Such an arrangement would be conceivable within the framework of an association agreement pursuant to Article 217 TFEU, which could go hand in hand with the establishment of joint procedures and institutions (e.g. association councils capable of making binding decisions and association committees) and the limited participation of a non-EU state in the EU system without conferring the participation rights of a member state. To date, there have been three forms of association agreements which differ with regard to their objective: free trade agreements, accession agreements, and association agreements to promote economic development. It might be possible to create a new association agreement for former member-states. The procedure used to conclude an association agreement is based on Article 218 paragraph 6 and paragraph 8 TFEU. In contrast to the provisions of Article 50 TEU, the Council is required to act unanimously (Article 218 paragraph 8 subparagraph 2 sentence 1 TFEU). Moreover, most association agreements are concluded as mixed agreements, since they affect both EU competences and member state competences. In this case, the agreement will also have to be ratified by all member states.⁵³ In early 2017 neither the UK nor the EU 27 are pushing for solutions that correspond to the outcome of a completely new partnership format.

2.4. Outcome scenario 4: Access to the internal market

Finally, even though the British Prime Minister explicitly excluded "single market membership", access to the internal market can be construed as a scenario in which the United Kingdom, based on its withdrawal from the EU is also leaving the EEA, and will rejoin the latter (or rather EFTA).⁵⁴ This corresponds to the "Norwegian" model. If the UK only did this for certain sectors or industries, there would be great legal and regulatory challenges. The regular procedure to join an international organization based on an international

48. Duff, *After Brexit: learning to be good neighbours*, EPC Commentary, 18 November 2016 (most recent retrieval 20.11.2016).

49. *Ibid.*

50. Prime Minister's Office, *The government's negotiating objectives for exiting the EU: PM speech*, 17 January 2017.

51. *Ibid.*

52. Pisani-Ferry, Röttgen, Sapir, Tucker and Wolff, *Europe after Brexit: A proposal for a Continental Partnership*, Bruegel, 29.08.2016.

53. Becker, Enderlein, Kuhlmann, Wolfstädter, *UK will den Brexit und was für ein Europa will die EU?*, Policy Paper, Jacques Delors Institut - Berlin, 24.06.16. On the other hand, a status as EU member with restricted institutional integration (e.g. internal association) is not envisaged by the EU treaties and is thus impermissible.

54. Miller, Lang, *Brexit: how does the Article 50 process work?* House of Commons Library Briefing Paper, June 2016, (most recent retrieval 19.11.2016)

treaty probably applies in the case of such an accession which derives from international law and not from EU law. This means that it will have to be ratified by all of the states which are party to the treaty, i.e. the EU, Norway, Liechtenstein, Iceland and Switzerland. **Access to the internal market** is, as German finance minister Wolfgang Schäuble emphasized in an interview with the Financial Times in November 2016⁵⁵, **incompatible with restrictions on the free movement of workers**: “There is no à la carte menu. There is only the whole menu or none.” Looking at the debate in the United Kingdom from a political point of view, it would seem unlikely that the British “leave” camp would accept access to the internal market with completely free movement of persons. This scenario therefore seems politically impossible to implement.⁵⁶ The British Prime Minister also “respect[s]” that the EU 27 see the four freedoms as indivisible.⁵⁷

2.5. Summary

” THE ARRANGEMENTS RELATING TO THE FUTURE RELATIONSHIP BETWEEN THE EU 27 AND THE UNITED KINGDOM ARE DIFFICULT TO PREDICT.”

The arrangements relating to the future relationship between the EU 27 and the United Kingdom are difficult to predict. The existing models and legal possibilities suggest that there is a broad range of options when it comes to the actual shape of the relationship. The signals emanating from the British government have been contradictory, and the uncertainty is bound to last until 2018. Although the disengagement of the United Kingdom from the European Union and their future relationship have been examined separately in this Policy Paper, they are in fact mutually dependent and could to some extent be dealt with simultaneously.

Thus the conceptual tripartition of this Policy Paper should not hide the fact that the different legal objects are closely interlinked, even though they have their own logic, their own timetable, and their own ratification process. This applies in particular to the four options relating to the future relationship that have been discussed above (free trade agreement, neighbourhood agreement, new partnership format, internal market access) and that are summarized in the following table.

TABLE 1 ► Outcome scenarios for the negotiations on the future relationship between the EU 27 and the United Kingdom

	PROPOSAL	MODEL	LEGAL BASIS
Free trade agreement	various	Canada	Article 207 TFEU
Neighbourhood Agreement	Duff (2016)	Ukraine	Article 8 TEU
New Partnership Format	Pisani-Ferry, Röttgen, Sapir, Tucker and Wolff (2016)	n/a	Article 207 TFEU or Article 217 TFEU
Internal Market Access	various	Norway	Article 217 TFEU

55. Wolfgang Schäuble sets out tough line on Brexit, Financial Times, 17.11.2016 (most recent retrieval 19.11.2016)

56. Bertoincini, Enderlein and Lamy, *ibid.*, p. 7.

57. Prime Minister’s Office, The government’s negotiating objectives for exiting the EU: PM speech, 17 January 2017.

3. The rest: The reconfiguration of the EU Treaties

Changes in the EU Treaties will be unavoidable in order to complete the Brexit process. The requisite formal amendments could additionally lead to fundamental constitutional reforms.⁵⁸ According to the prevailing interpretation of the EU Treaties even small formal amendments require treaty change as specified in Article 48 TEU, since the withdrawal agreement of Article 50 TEU or an international agreement cannot introduce a change in primary law.⁵⁹ Since the United Kingdom is withdrawing from the EU, it does not take part in this process.

3.1. Necessary formal adjustments

” THREE KINDS OF
FORMAL ADJUSTMENT
WILL HAVE TO BE MADE,
AND WILL REQUIRE THE
UNANIMOUS APPROVAL OF
THE 27 MEMBER STATES.”

Three kinds of formal adjustment will have to be made, and will require the unanimous approval of the 27 member states. If nothing else, **the territorial scope of the Treaties** defined in Article 52 TEU and all references to the United Kingdom as a member state in the EU Treaties will have to be changed in the wake of the withdrawal. Furthermore, the EU institutions and the member states will have to adopt new rules and regulations governing the distribution of seats in the European Parliament.⁶⁰ Moreover, the forthcoming withdrawal will have an impact in the run-up to the negotiations relating to the next **Multiannual Financial Framework** (after 2021). Despite the country’s “rebate” the withdrawal of the United Kingdom marks the loss of an important net contributor.

The European Council unanimously decides on the precise distribution of the 751 seats in the European Parliament among the member states at the behest and with the consent of the European Parliament. If the withdrawal of the United Kingdom comes into effect before the next European elections in May 2019, the 73 British seats will have to be redistributed for the election. If the withdrawal comes into effect only after the next elections, it could well lead to additional problems within the political system. It would beg the question what kind of role the MEPs elected in the United Kingdom in 2019 might play in the ensuing period. Many observers thus believe that the British withdrawal declaration will be submitted by May 2017 at the latest.

It seems doubtful that for small formal adjustments (such as changing the area of application and scope of the EU treaties in Article 52 TEU) the procedure specified in Article 50 paragraph 2 TEU in conjunction with Article 218 paragraph 3 TFEU would suffice⁶¹ This seems to be ruled out by the bilateral character of the withdrawal agreement, which does not include the other member states in terms of procedure or content.⁶² Article 218 paragraph 11 sentence 2 TFEU clearly says that EU agreements cannot change the EU Treaties without adducing the procedure specified in Article 48 TEU, and thus confirms the strict view of the matter. **Comprehensive treaty amendments have to meet the preconditions of the ordinary treaty revision procedure specified in Article 48 TEU that requires ratification by all member states.**

3.2. Major reform of the EU treaties

There could also be a major reform of the EU Treaties⁶³ designed to complete the Economic and Monetary Union by integrating the Fiscal Compact (pursuant to Article 16 TSCG) and the ESM treaty into the EU Treaties and by rendering the institutional architecture crisis-resistant.

58. See F. Fabbrini, *Der Brexit als Möglichkeit für eine Vertragsreform in der EU*, spotlight europe 2016/01; Tiilikainen, *Brexit's Impact on the EU Institutions: Immediate implications and possibilities for reform*, FIIA Briefing Paper 203 (2016).

59. Craig, *The Treaty of Lisbon: Law, Politics and Treaty Reform*, Oxford University Press, 2010, p. 401.

60. F. Fabbrini, *Der Brexit als Möglichkeit für eine Vertragsreform in der EU*, spotlight europe 2016/01.

61. Regulations relating to the withdrawal of a member state are possible here and there according to Kumin in Hummer and Obwexer, *Der Vertrag von Lissabon*, 302 (319f.); the same applies in so far as the interests of the United Kingdom are concerned, Michl, *NVwZ* 2016, 1365 (1367).

62. Calliess, in Calliess and Ruffert, *EUV/AEUV*, 5th ed. (2016), Article 50 EUV, marginal note 7; Thiele, *EuR* 2016, 281 (300).

63. A number of authors, e.g. F. Fabbrini, *Der Brexit als Möglichkeit für eine Vertragsreform in der EU*, spotlight europe 2016/01, have suggested that Brexit could be a “window of opportunity”.

”NOT A GREAT DEAL OF ENTHUSIASM FOR SWEEPING TREATY CHANGE.”

However, the most important decision-makers are not showing a great deal of enthusiasm for sweeping treaty change at the moment. Many of the comments made in the wake of the British referendum show that people want to use the existing Treaties. At the EU summit immediately after the Brexit referendum end of June 2016, EU leaders declared that **there would not be any treaty change in view of the fact that the existing treaties provided sufficient room for reforms.**⁶⁴

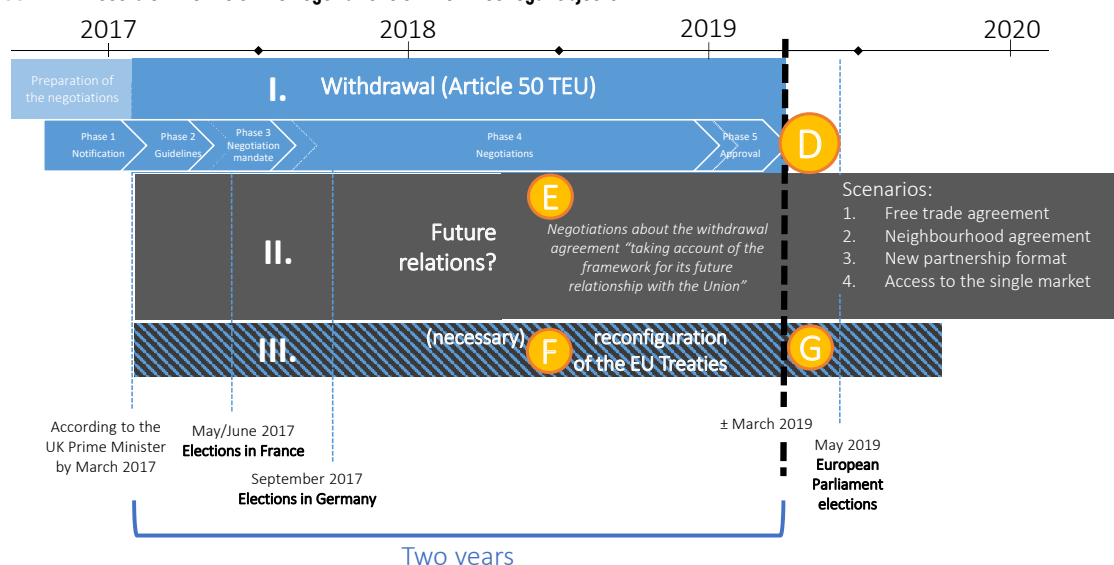
However, a report by European Parliament, drafted by Guy Verhofstadt⁶⁵ who is also the chief Brexit negotiator of the European Parliament, is trying to find ways and means for far-reaching treaty change.

Any treaty change made under the ordinary revision procedure specified in Article 48 TEU makes it necessary to convene a Convention. After the negotiations have been completed the modifications to the Treaties **will have to be ratified by the national parliaments.** It may also be necessary to hold referendums in accordance with the respective constitutional requirements of the 27 member states.

3.3. Summary

Each of the three different legal objects (withdrawal agreement, agreement on the future relationship and the necessary adjustment of the EU Treaties for the remaining 27 member states) has been examined in turn in this policy paper, although they are in fact interdependent. **It is not clear to what extent the negotiations of the three acts of the Brexit drama will overlap.**⁶⁶ All three negotiating processes are heading for the same date two years after the UK has submitted its withdrawal declaration (see Figure 2, letter D). Whereas the negotiations on the future relationship do not have to be completed by then, and the negotiations on the withdrawal agreement are merely “taking account of the framework for its future relationship with the Union” (E), most lawyers are of the opinion that it is necessary to reconfigure the EU Treaties. This should be tackled as early as 2018 (F) so that the necessary adjustments can enter into force when the withdrawal of the United Kingdom comes into effect, and before the European elections in May 2019 (G).

FIGURE 2 ► Possible timeline of the negotiations on the three legal objects



Source: Authors. Illustration © Jacques Delors Institut - Berlin

A major reform of the EU Treaties would probably begin only after the European elections in 2019, and would extend over several years. The final arrangement for the future relationship between the EU 27 and the United Kingdom might itself require treaty change.

64. EU-Staaten verschieben Reformdebatte, ZEIT online, 29 Juni 2016 (most recent retrieval 15.12.2016).

65. European Parliament, Report on Possible evolutions of and adjustments to the current institutional set-up of the European Union, prepared by Guy Verhofstadt (Rapporteur). Brussels 2017.

66. The same terminology is used by Paul Craig in "Brexit: A Drama in Six Acts" (2016) 41 European Law Review 447. In Craig's article the Brexit negotiations discussed in this policy paper form the sixth and final act.

CONCLUSION

What is generally referred to as “Brexit”, consists of **negotiations on three different legal objects**. These are the disentanglement of the United Kingdom from the European Union, their future relationship, and the necessary modifications of the EU Treaties for the remaining 27 member states. Although one should look at these three acts separately, they are in fact mutually dependent and can to some extent be negotiated simultaneously. **The process leading to Brexit will not begin without the United Kingdom’s formal withdrawal declaration, which the British prime minister has announced to issue by the end of March 2017.** The outcome of one phase of the process has a direct influence on the progress and outcome of the next phase. After the EU 27 has come together and agreed its positions, the proper withdrawal negotiations will begin in the course of 2017 (see Figure 3).

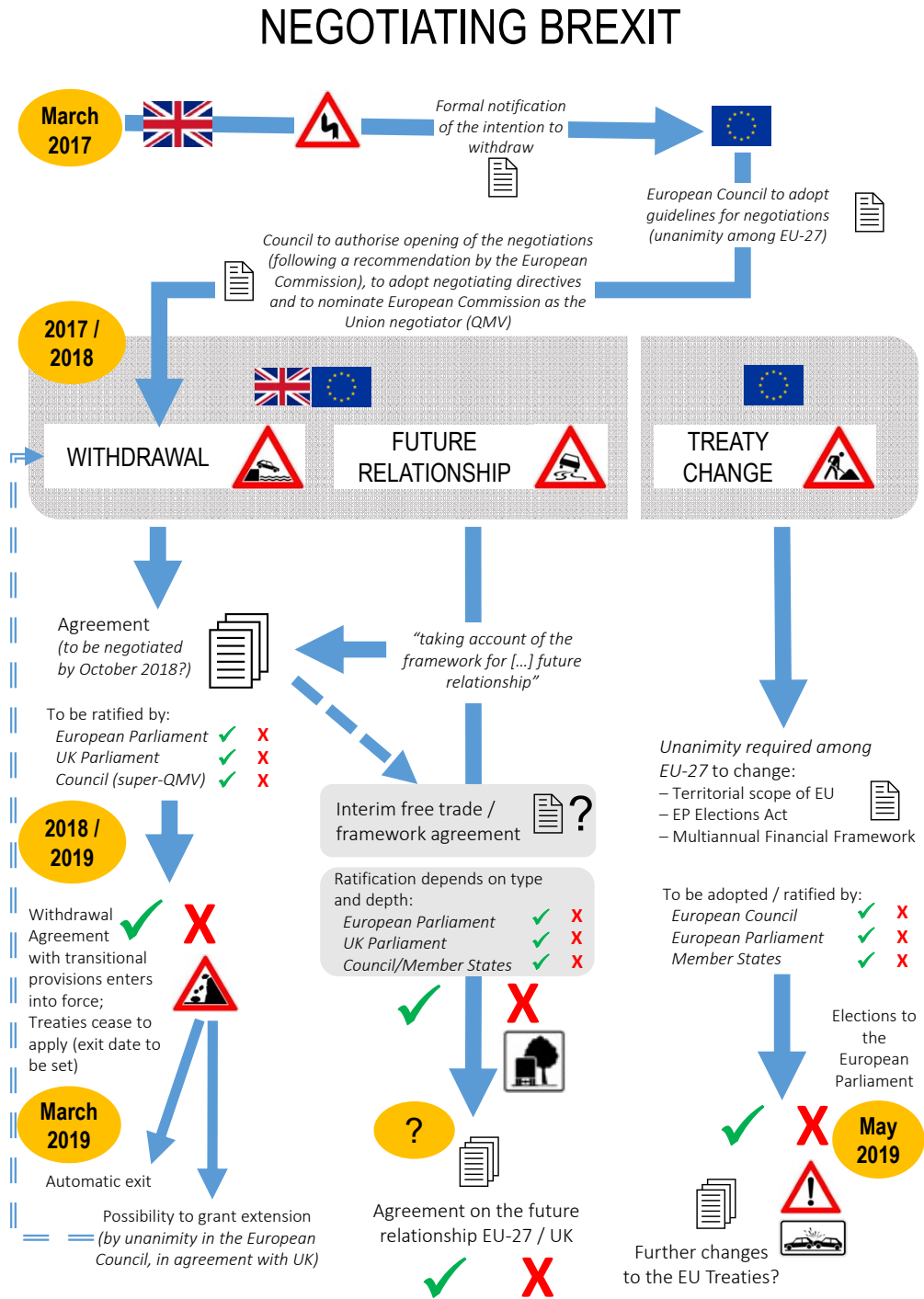
The conceptual and visual tripartition should not hide that the three different legal objects are closely inter-linked. Thus the individual agreements will have to contain transitional mechanisms which take into account the fact that each of the legal objects follows its own logic, its own timetable and its own ratification process. **For this reason each of the three acts (withdrawal negotiations, future relationship and the re-configuration of the EU Treaties) contains specific risks.**

” IN THE NEGOTIATIONS, THE END OF 2018 AND THE BEGINNING OF 2019 ARE OF PARTICULAR IMPORTANCE.”

In the negotiations, the end of 2018 and the beginning of 2019 are of particular importance. There will be three key moments: First, if the United Kingdom submits its withdrawal declaration by the end of March 2017, **October 2018 will be the informal deadline** which Michel Barnier has set for the conclusion of the negotiations in his press briefing on 6 December 2016.⁶⁷ Second, **withdrawal automatically comes into effect after two years—** unless the UK has obtained an extension or unless another date is specified in the withdrawal agreement. Third, **there are elections to the European Parliament in May 2019.**

⁶⁷ European Commission, Task force for the preparation and conduct of the negotiations with the United Kingdom under Article 50 of the TEU, Press Statement, Introductory comments by Michel Barnier, 6.12.2016 (most recent retrieval 10.12.2016).

FIGURE 3 ► Summary: Possible timeline of the Brexit negotiations



Source: Authors. Illustration © Jacques Delors Institut - Berlin

Michel Barnier has said that “the period of actual negotiations will be shorter than two years.”⁶⁸ This is true, since **the concluded withdrawal agreement will have to be ratified by the contracting parties within the two-year period.** He pointed out that October 2018 (the first key moment) is the point in time when the withdrawal negotiations will have to be completed.

In the second key moment (probably March 2019) on the one hand the goal is **an orderly withdrawal**, even if the entry into force of the withdrawal agreement pursuant to Article 50 TEU is held up (with unpredictable consequences). On the other hand, if the agreement on the future relationship cannot enter into force together with the withdrawal agreement, **the time until the entry into force of the agreement on the future relationship should not be allowed to become a vacuum, and the blow should be cushioned with the help of special transitional mechanisms.**

The third key moment (May 2019) follows hard on its heels. The reconfiguration of the EU Treaties will have to be completed by then in order to allow orderly elections to the European Parliament if by that point the United Kingdom has already withdrawn from the EU. If this is not the case, a reconfiguration of the Treaties is unnecessary at this point. However, a later withdrawal, which is certainly on the cards, would raise more legal questions, **especially with regard to the composition of the European Parliament**, since the newly elected British MEPs would possibly withdraw in the course of the 2019-2024 parliamentary term.

”TRANSITIONAL ARRANGEMENTS COULD FILL THE GAP UNTIL THE FINAL AGREEMENT FOR THE NEW RELATIONSHIP.”

At present (January 2017) the outcome of the negotiations on the relationship between the EU 27 and the United Kingdom is extremely difficult to predict. It depends very much on the shape and content of these talks. **Transitional arrangements could fill the gap until the final agreement for the new relationship. In this area the various political actors in the EU and in the United Kingdom have not committed themselves one way or the other.**

Finally it should not be forgotten that after the various negotiating phases the results will always need **the consent of or ratification by a several veto players** (e.g. the UK parliament or the European Parliament). The history of European integration shows that there may well be negative surprises. However, the procedural rules relating to different aspects of the Brexit negotiations include majority rules, super qualified majorities and automatic mechanisms which are supposed to contribute to faster and less complicated decision-making. **The better the actors in Brussels, London and the other capitals know the procedures and prepare themselves to deal with different scenarios and outcomes, the easier it will be to nudge the Brexit negotiations and to make progress in a more predictable manner.**

⁶⁸. European Commission, Task force for the preparation and conduct of the negotiations with the United Kingdom under Article 50 of the TEU, Press Statement, Introductory comments by Michel Barnier, 6.12.2016 (most recent retrieval 10.12.2016).

APPENDIX: ARTICLE 50 TEU

Article 50 TEU⁶⁹

1. Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.

2. 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 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.

3. 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.

4. For the purposes of paragraphs 2 and 3, the member of the European Council or of the Council representing the withdrawing Member State shall not participate in the discussions of the European Council or Council or in decisions concerning it.

A qualified majority shall be defined in accordance with Article 238(3)(b) of the Treaty on the Functioning of the European Union.

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

⁶⁹. Consolidated Version of the Treaty on European Union, OJ C 326, 26.12.2012.

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