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The European Parliament and Article 50 TEU

A study of the European Parliament's role in the withdrawal process under Article 50 TEU

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Summary

This thesis discusses the European Parliament's role in the procedure for concluding a withdrawal agreement under Article 50 TEU. The theoretical base for the discussions is *multi-level governance*. Through the Multi-level governance perspective, the European Parliament can be seen as an independent actor from the Member States that might want to influence the negotiations and content of the withdrawal agreement. According to Article 50(3) TEU the European Parliament must give its consent to any withdrawal agreement. The European Parliament could use this form of veto-power to influence the negotiation process from start to finish, and force the other Unions institutions and the United Kingdom to listen to its demands. This would be consistent with how the European Parliament has acted under previous negotiations of international agreements. This thesis also shows that the general procedure for concluding international agreements in 218 TFEU probably also applies on the procedure for concluding the withdrawal agreement. That the general procedure applies would mean, among other things, that the European Parliament could argue for access to information on the progress of the negotiations of a withdrawal agreement.

Sammanfattning

Denna uppsats behandlar Europaparlamentets roll i förhandlingarna om ett utträdesavtal enligt artikel 50 FEU. Det teoretiska perspektivet är *multi-level governance* genom vilket Europaparlamentet ses som, från medlemsstaterna oberoende aktör som kan ha intresse av att påverka förhandlingarna och utträdesavtalet. Europaparlamentet måste enligt Artikel 50(3) FEU ge sitt godkännande till utträdesavtalet. Uppsatsen visar att, på samma sätt som Europaparlamentet gjort under tidigare förhandlingar, kan Europaparlamentet använda denna veto-makt till att påverka hela förhandlingsprocessen. Detta ger Europaparlamentet möjligheten att pressa de övriga institutionerna och Storbritannien att ta hänsyn till dess krav. Uppsatsen visar också att den generella proceduren för att sluta internationella avtal i 218 FEUF med stor sannolikhet också är tillämpligt på proceduren för att sluta ett utträdesavtal. Genom den generella proceduren för att sluta avtal antagligen är tillämplig på proceduren för att sluta utträdesavtalet så ökar blandat annat Europaparlamentets möjlighet till tillgång till information om förhandlingarnas utveckling.

Preface

Nu får det räcka. Jag tackar Mamma, Pappa, Maria och Farmor för allt stöd genom åren.

Ett särskilt stort tack till Sara!

Abbreviations

ACTA	Anti-Counterfeiting Trade Agreement
AG	Advocate General
CCP	Common Commercial Policy
CFSP	Common Foreign and Security Policy
CJEU	Court of Justice of the European Union
EC	European Council
ECHR	European Convention on Human Rights
GAC	General Affairs Council
IGC	Intergovernmental Conference
IIA	Inter Institutional Agreement
SWIFT	Society for Worldwide Interbank Financial Telecommunications
TEU	Treaty on European Union
TFEU	Treaty on The Functioning of the European Union
TFTP	The Terrorist Finance Tracking Program
UK	The United Kingdom of Great Britain and Northern Ireland
US	The United States of America

1 Introduction

This introductory chapter gives a background, explaining the relevance of the European Parliament's (henceforth the Parliament) involvement in the withdrawal procedure under Article 50 TEU[1]. The purpose of this thesis and its research question is presented followed by a discussion on theory and method used in this thesis. The sources of this thesis, disposition and delimitations are thereafter discussed.

1.1 Background

The background to the wide sudden interest of Article 50 TEU, the provision on withdrawal from the Union, is well known. The results of the British referendum on membership of the European Union (henceforth the Union) on the 23rd of June 2016 put the procedure for a Member State leaving Union in the spotlight. Since the referendum, the brief and the, arguable, ambiguous formulation of Article 50 TEU has been much discussed. The provision, which was introduced through the Lisbon Treaty, has never been used before and if the United Kingdom of Great Britain and Northern Ireland (henceforth the UK) ultimately leaves the Union it will be the first time in the Union history a Member State leaves the Union. The example of Greenland's departure from the Union cannot be taken as precedent. Greenland was not a Member State; but a territory belonging to a Member State and therefore the characteristics of the process is fundamentally different.[2] Thus, there is a lot of uncertainty concerning the withdrawal process. There is a lively debate on what the future relations will and should be like between the Union and the UK. This thesis deals however with the process of withdrawal and not any possible legal arrangement for future relations. This thesis's main focus is instead on the procedure for concluding the withdrawal agreement, according to Article 50 TEU, and in particular the Parliament's role in the withdrawal process.

The Parliament's role in the procedure for concluding the withdrawal agreement is one of the issues that have not yet received a lot of attention in the legal commentary of Article 50 TEU. It is, therefore, interesting to look more closely at the Parliament's role in the withdrawal procedure. Leading Members of Parliament have also made known that they will not be follow the negotiations passively and will not accept any deal being made.[3]

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[1] Consolidated Version of the Treaty on European Union [2016] OJ C202/16 (henceforth TEU).

[2] E Poptcheva, 'Article 50 TEU: Withdrawal of a Member States from the EU' (*European Parliamentary Research Service* February 2106), http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/577971/EPRS_BRI(2016)577971_EN.pdf Accessed on the 23 May 2107, 3.

[3] M De La Baume, ' European Parliament to play 'bad cop' in Brexit Talks' *Politico* (Brussels, 28 March 2017) http://www.politico.eu/Article/european-parliament-to-play-bad-

Members of the current British cabinet have however indicated, that they only see a marginal role for the European Parliament in the withdrawal process.[4] Consequently, it is in that context interesting to investigate from a legal perspective, the Parliaments possibilities to influence the process of negotiating the withdrawal agreement.

It is also interesting to look at the Parliament's involvement in the process of negotiating the withdrawal agreement negotiations from the perspective of its functions as an assembly of elected representatives. A prominently discussed theme from the Brexit-campaign leading up to the Brexit referendum was that the British people needed to *take back control* from the *Brussels' bureaucrats* and that the Union Membership eroded the British democracy.[5] Regardless whether or not the claims that the decision-making at the Union level is not sufficiently democratic are valid; the proclaimed *democratic deficit* of the Union has for a long time been debated. One of the major approaches to increase the Union's democratic legitimacy has been to increase the Parliament's powers in the decision-making. The idea being, that increasing the feature of representative democracy would provide the Union with more democratic legitimacy.[6] With this background, it is interesting to investigate the European Parliament's involvement in the procedure for negotiating a withdrawal agreement. Which possibilities do the representatives, elected by the people of the Union, have to influence the agreement with a withdrawing Member State?

1.2 Purpose and research question

According to Article 50(2) TEU the Council can only conclude an agreement with a leaving Member State setting out the arrangement for an orderly withdrawal[7] after obtaining the consent of the Parliament. The Parliament's involvement is therefore fundamental for the conclusion of such an agreement. Hence, the Parliament has a role to play in the process of negotiating a withdrawal agreement. This thesis purpose is to evaluate this role; how and in which ways the Parliament could influence the negotiations of a withdrawal agreement with a leaving Member State.

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cop-in-brexit-talks/?utm_source=POLITICO.EU&utm_campaign=b42e28d377-EMAIL_CAMPAIGN_2017_03_28&utm_medium=email&utm_term=0_10959edeb5-b42e28d377-190014845 accessed on 18 May 2017.

[4] General elections are scheduled to be held in the UK on 8th of June 2017: C Cooper, 'David Davis: The Guy Verhofstad won´t make Brexit decisions' *Politico* (Brussels, 26 January 2017) http://www.politico.eu/Article/david-davis-guy-verhofstadt-wont-make-brexit-decisions/ accessed on 18 May 2017.

[5] M Hall 'Boris Johnson urges Brits to vote Brexit to 'take Back Control"' *Express* (London, 20 June 2016) http://www.express.co.uk/news/politics/681706/Boris-Johnson-vote-Brexit-take-back-control accessed on 18 May 2017.

[6] P Craig and G de Búrca, *EU Law: Text, Cases, and Materials* (6th edn, OUP 2015) 56-57, 151-152.

[7] Henceforth referred to as the *withdrawal agreement*.

To achieve the purpose of this thesis, I will answer the following research question:

What is the European Parliament's role in the negotiations for a withdrawal agreement according to Article 50 TEU?

1.3 Theory

Defining or categorising the Union as an institution is not an easy task. How to understand the European integration is far from undisputed and there are different theories of how the integration started, what drives it, and how to explain it. When discussing the role of a Union institution, like the Parliament, it is, therefore, important to be explicit with which view of the European integration the analysis is based on. This subchapter gives a short overview of the debate of what causes and which actors drive the European Integration. After the overview, the theory used in this thesis, *multi-level governance,* is described. The theory of multi-level governance is also shortly discussed concerning the development of the Parliament's increasing legislative powers. In the last part of this subchapter, I develop on how the multi-level governance perspective is used as a theoretical base in this thesis.

1.3.1 Intergovernmentalism vs. Supranationalism

There is an ongoing debate among scholars whether the control over the European integration is exclusively in the hands of the Member States or if the integration is caused by other factors and is in fact out of the Member States' hands. The debate is, put simply, taking place between proponents on one side of the spectrum, *intergovernmental* theories, and on the others side proponents of *supranational* theories.[8]

The earliest supranational theory on European integration was the *Neo-functionalist theory*.[9] The central part of the classic version of neo-functionalism was the concept of the *spillover* effect. The concept means that integration in one sector leads to further integration also in other sectors. The integration in one area spills over into other areas. The underlining idea with the spillover effect is that several sectors are so interdependent and that integration in one sector inevitable would affect these other sectors. The integration in one sector often only works if other sectors are also integrated.

[8] S George, 'Multi-level Governance and the European Union' in I Bache and M Flinders (ed), *Multi-level Governance* (Oxford University Press 2004) 108-111.
[9] The groundbreaking book on neo-functionalism by Ernst B. Haas was published in 1958: *The Uniting of Europe: Political, Social, and Economic Forces 1950-1957* (Stanford University Press).

[10] One example is that the removal of tariffs leads to a need to remove other kinds of trade barriers that hinder the free trade on the single market. The integration process would in this fashion progress without direct control of the Member States. Political spill-over effects are also to be expected, in those areas where a certain degree of integration has been reached, and pressure from interest groups builds up to remove other barriers to trade.[11] The neo-functionalist theory consequently has a *pluralist* view on integration, meaning that states are not the only relevant actors but instead that regional integration is driven by a number of different actors. These are not only active in the domestic arena but also interact with other actors on the European level, for example forming alliances.[12] This pressure is directed towards the Member states, the European Community and those with regulatory power. For the integration and spill-over effects momentum, the early neo-functionalist believed the national elites would have a crucial role. The national elites must come to the perception that problems must be lifted to the inter-state level due to the importance of integration in sectors that are interdependent. This pressure will then result in further integration. Neo-functionalists regard the Commission as a key-player for the, somewhat elitist project, of enhancing the European integration. The neo-functionalist theory received criticism and lost support during the sixties and onwards because of the stagnation of the European integration. The theory was also challenged on theoretical, not only empirical grounds, for its difficulties in explaining the political realities.[13] During the first half of the 1990s, with the renewed momentum of European integration, the interest in neo-functionalism rose again.[14] Influential contribution to the revival of neo-functionalism has come from Stone Sweet and Sandholtz. Stone Sweet and Sandholtz abandoned the concept of the spill-over effect and instead refer to a *transaction-based* theory. According to the transaction-based theory, a growing number of transactions, for example in travels and trade, results in demand for regulation at a European level. This, eventually, will lead to a institutionalization-process. The institutionalization-process, will in, turn lead to the forming of *supranational governance*.[15]

On the other side of the spectrum, the supporters of the intergovernmentalist theories object to the existence of the pluralist political system.[16] The classic intergovernmentalism theory started out as a criticism against neo-functionalism. Intergovernmentalism has connections to the *realist* and *neorealist* theories in the field of International Relations theory. Intergovernmentalism place a large amount of emphasis on the preferences of states and, in the case of the Union, the Member States. Member States actions are rational, and they evaluate their partaking in the Union from the

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[10] A Nieman and P C Schmitter, 'Neofunctionalism' in A Wiener and T Diez (ed), *European Integration Theory* (2th edn, Oxford University Press 2009) 49.
[11] P Craig and G de Búrca (n 6) 24.
[12] A Nieman and P C Schmitter (n 10) 47-49.
[13] P Craig and G de Búrca (n 6) 24.
[14] C Strøby Jensen, 'Neo-functionalism' in M Cini and Pérez-Solórzano Borragán (ed), *European Union Politics* (5th edn, Oxford University Press 2015) 55.
[15] Ibid. 61-62.
[16] S George (n 8) 109-110.

expected costs and benefits. This cost-benefit analysis is done to protect the national interests. The increase in trade between states creates incentives for coordination between states. The level of integration is decided by bargaining by the states and is carried out through strategic reasoning. These negotiations can be carried out through supranational institutions, like the Union, because it is more time and cost effective. The Union's existence can, therefore, be explained by its Member States will of decision making in an efficient manner. [17]The European integration is seen as a pooling of sovereignty, rather than transferring sovereignty to a supranational level. Because of its state-centric view on the European integration, intergovernmentalists do not consider the Union's institutions as independent actors but are, when it comes to critical issues, at the mercy of the Member States. The only institution that really matters is the European Council.[18] The initial intergovernmentalist perspective was later developed into different versions of which *Liberal Intergovernmentalism* has been the most influential. The Liberal Intergovernmentalism theory, is the theory most other integration theories are compared too. The theory of Liberal Intergovernmentalism, which has been advanced by Andrew Moravcsik, considers the Union to be an intergovernmental regime whose task is to manage the economic interdependence. The Union's decisions are made through interstate bargaining and are usually the result of the lowest common denominator among the Member States.[19]

In this thesis, I view the integration in the European Union from a *multi-level governance perspective*. Some authors argue that the multi-level governance perspective should not be regarded as belonging exclusively to the intergovernmental perspective or the supranational perspective but instead be seen as the bridge between these two perspectives. Others, like George (2004), argue that the multi-level perspective clearly belongs to the supranational perspective.[20]

1.3.2 Multi-level governance

Multi-level governance was introduced in the 1990s and differed from the prevailing theories at that time which put great emphasis on the Member States' actions. The proponents of the multi-level governance perspective argued instead that the integration process is driven by different agents, both private and public, at different levels of government. These levels are subnational, national and supranational. According to the multi-level governance perspective, the authority and power of the policy-making is not exclusively owned by the Member States, meaning that member states are not in absolute control.[21] Multi-level governance's inclusion of the regional level

[17] P Craig and G de Búrca (n 6) 25.
[18] M Cini, 'Intergovernmentalism' in M Cini and Pérez-Solórzano Borragán (ed), *European Union Politics* (5th edn, Oxford University Press 2015) 69.
[19] S George (n 8) 109-110; M Cini (n 18) 73.
[20] S George (n 8) 108.
[21] P Craig and G de Búrca (n 6) 25-26.

was a new feature, that distinguished multi-level governance from the earlier supranational theories. Instead of arguing that the Member States aggregate the national preferences, the multi-level governance views regional actors, like regions and municipalities, as independent actors that can develop relations with actors at the Union level. Regional actors can in that way influence EU-institutions, as the Parliament and the Commission, without the involvement of the Member States executives.[22] The multi-level governance perspective argues that EU-institutions, including the European Parliament, cannot solely be considered as agents of the Member States' national governments. The multi-level governance perspective differs from the theories of integration which claims that the Member States have a monopoly on influencing the decision and the policy making at the European Union level and therefore also controls the level of integration. The ability for member state as *principals* to control the EU institutions as *agents* are undermined because of different reasons, such as an information gap between *principals* and *agents*, mistrust between the Member States and the substantial number of Member States. [23]

Rittberger describes the development of the Parliament's role in the Union's decision-making process from a multi-level governance perspective.[24]
Rittberger points to the fact that the European Parliament's power in the Union's decision making has steadily increased since the Single European Act from 1986. The increase in legislative power can be traced to two different paths of empowerment. The first is the path of *interstitial institutional change*. This kind of change transpires between the Intergovernmental Conferences (henceforth IGC).[25] The Parliament uses the fact that treaty rules can be ambiguous and incomplete. The Parliament uses these ambiguities as leverage against other EU-institutions, like the Council and the Commission, to enhance its legislative powers. This means that institutional change is generated by the interpretation of rules and following bargaining among the EU-institutions. The bargaining among the Institutions can lead to informal practices being put in place. At upcoming IGCs there is an expectation on the Member States to turn these informal practices into to formal rules. The second path points to the changing of formal rules because of a perceived undermining of the prerogatives of the parliaments at the national and sub-national level. The deepening of the Union's integration and shifting competences from the Member States to the Union leads to the perception of the existence of a *democratic deficit*. This leads to demands for increasing the Parliament's legislative powers to reduce the democratic deficit. Rittberger emphasises that the crucial factor for this to happen is that the Member States are in a *liberal democratic community*. The Member

[22] T Christiansen, 'Multi-level Governance and the European Union' in M Cini and Pérez-Solórzano Borragán (ed), *European Union Politics* (5th edn, Oxford University Press 2015) 101.
[23] P Craig and G de Búrca (n 6) 25-26.
[24] B Rittberger, 'Multi-level governance and Parliaments in the European Union' in H Enderlein et al. (ed), *Handbook on Multi-level governance* (Edward Elgar 2010).
[25] The Conferences in which Treaty reforms are negotiated. See Article 48 TEU.

States’ identity as democratic states forces them to accept and act in line with basic norms of a liberal democracy. When national parliaments and the representative democracy at the national level is under stress due to the transferral of power to the European level, the answers become to enhance the powers of the European Parliament. The increase of power of the parliamentary assembly at the European level is supposed to compensate for the reducing powers of the parliamentary assemblies at the national and, in some cases, regional levels. [26]

1.3.3 Multi-level governance in this thesis

The multi-level governance theory is, in this thesis, used as theoretical basis and tool when discussing the Parliament’s involvement in the negotiations for a withdrawal agreement. The multi-level governance perspective acknowledges the Parliament as an actor that is not at the behest of the Member States but instead recognises that the Parliament could have its own agenda. Rittberger explains how the Parliament have used interpretation of treaty rules in arguing for increased legislative powers and also that the perceived existence of a democratic deficit leads to granting the Parliament more legislative powers. Rittberger’s explanations will be used in my analysis when I discuss the Parliament’s role in the negotiations for a withdrawal agreement.

1.4 Method

In this thesis, I will answer my research question with the help of the multi-level governance theory. The theoretical base that the multi-level governance perspective provides, sees the Union’s institutions as actors separated from the Member States. Multi-level governance also argues that the Union Institution’s decision-making is influenced by other actors operating at different levels and that the also forms relations with actors at other levels.

The different actors use the legal arguments to support their views. These legal arguments aim to explain how the Court of Justice of the European Union (henceforth CJEU) should decide if the Court is asked to resolve the issue. It is therefore relevant what these actors’ possible legal arguments are. In this thesis, the Parliament’s legal arguments are the central focus.

The CJEU is to 'ensure that in the interpretation and application of the Treaties the law is observed' according to Article 19(1) TEU. This also means that the CJEU has jurisdiction over the issue if the process for concluding the withdrawal agreement has been carried out in accordance with Union law. The CJEU has the authority to decide on disputes over competences between

[26] B Rittberger (n 24) 242-244.

the Union's institutions.[27] In its Opinion from 2014 over the Union's accession to the European Convention of Human Rights, the CJEU clarified that it has jurisdiction over any agreement concluded by the Union and a third country and an international organisation. The CJEU reasoned that according to 216(2) TFEU[28], an agreement becomes binding on the Member States and EU-institutions and therefore becomes an integral part of Union law.[29] Legal proceedings over the legality of the withdrawal agreement could, possibly, end up before the CJEU after a Member States, the Parliament, the Council or the Commission request an opinion from the CJEU over the compatibility with the Treaties according to Article 218(11) TFEU. Another possible route the withdrawal agreement's legality could be decided by the CJEU would be an infringement proceeding according to Article 263 TFEU.

I will in this thesis discuss the legal arguments for the Parliament's involvement in the negotiations for a withdrawal argument that would be relevant in a dispute decided on by the CJEU.

Proponents of the multi-level governance perspective points to the CJEU's importance in creating the integrated polity which the Union has evolved into.[30] The CJEU has not merely taken a role as impartial monitor making sure that in the interpretation and application Treaty law is observed (see Article 19(1) TEU). The CJEU has not viewed the Union being based on simply intergovernmental agreements and has instead constitutionalized the Union law. It has taken a more active role than only provided a solution to future contingencies created by incomplete contracting problems. The CJEU has used that the treaties have not strictly specified the Union institutions competencies but rather provided *purposes* and *tasks*, for example the completion of the internal market and custom union, for the cooperation in the Union. The CJEU has expanded the Union competencies in other policy fields with the reasoning that it is needed to reach the functional tasks provided for by the treaties. The CJEU has proven it to be an independent actor from the Member States and has in some instances pushed the European integration forward. The CJEU's room to manoeuvre is, however, decided by the other actors such as the Commission, Member States, through the Council, and the Parliament. These other actors can change the legislation and reform the Treaties and it these ways restrain the CJEU's possibility to push the integration forward. [31] The CJEU must, therefore, take the interest of these different institutions into consideration when deciding cases, especially in disputes between the different institutions on their prerogatives in policy decision making. Because the CJEU must take the different institution's legal arguments in consideration in its decision-making, it is relevant to identify the legal arguments that could be addressed to the CJEU for and against the

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[27] U Bernitz and A Kjellgren, *Europarättens grunder* (5th edn, Norstedt Juridik 2014) 181; P Eeckhout, *EU External Relations Law* (2th edn, Oxford University Press 2011) 267-268.
[28] Consolidated Version of the Treaty on the Functioning of the European Union [2016] OJ C202/16 (henceforth TFEU).
[29] *Opinion 2/13 EU Accession to the ECHR* [2014] EU:C:2104:2454 para. 180.
[30] G Marks, L Hooghe and K Blank 'European Integration from the 1980s: State-Centric v. Multi-level Governance' (1996) 34 J.Com.Mar.St. 341, 369-371.
[31] Ibid.

Parliaments' involvement in negotiations for a withdrawal agreement under Article 50 TEU. In other words, the legal arguments which could persuade the CJEU that the level of Parliamentary involvement in the negotiations of the withdrawal agreement is either required or not in breach of the Treaties.

Since both the primary and secondary law provisions many are the result of political compromises there can arise difficulties in interpreting the often general and ambiguous formulations.[32] The CJEU uses different interpretation principles when analysing EU-law provisions. The central interpretation principles are *Literal interpretation* or *Textualism, Contextual interpretation* and *Teleological interpretation.*[33] Because these interpretations methods are central when the CJEU interprets the law and assess legal arguments; these methods must also be used when analyzing the Parliament's legal arguments.

1.5 Sources

A fundamental source is the Treaty on European Union and the Treaty on The Functioning of the European Union. As mentioned above, the Article 50 TEU has never been applied by the CJEU before and there is no predecessor to the provision that has been used either. There is, therefore, no case law from the CJEU dealing directly with withdrawal process provided for by Article 50 TEU. Nonetheless as will be demonstrated below (see chapter 2) the withdrawal procedure is, to a large extent, carried out through the same processes which applies for when the Union concludes international agreements with third countries and international organisations. The Union's international relations and its competences to conclude international agreements has evolved through the case law of the CJEU.[34] This case law can, therefore, provide support for legal arguments in the context of the procedure on negotiating a withdrawal agreement.

Another important source of Union law, which can be used for legal arguments, are the *General Principles.* The General Principles, as in several other areas, have been influential in developing the legal framework for international relations. In this thesis, the principles of institutional balance, the principle of sincere cooperation, both set out in 13(2) TEU, and of representative democracy will in particularly be discussed.

The use of the *travaux préparatories* and reference to the Treaty drafters' intentions have increased in later years and will probably play an even bigger

[32] U Bernitz and A Kjellgren (n 27) 185.

[33] For more on the CJEU's interpretation methods see K Lenaerts and J A Gutiérrez-Fonz, 'To say what the law of the EU is: methods of interpretation and the European Court of Justice' (2014) 20(3) Colum. J. Eur. L.

[34] P Craig and G de Búrca (n 6) 317, 321-322.

role in the future.[35] Due to the efforts to make the draft-process for the Constitution for Europe transparent and that, later, many of Articles in the failed Constitutional Treaty was directly incorporated into the Lisbon Treaty, the CJEU has used the *travaux* in a larger degree.[36]

I will refer to the positions of the Union's institutions and of the UK government in official documents and other public statements such as press-briefings. These sources are not used to support any legal arguments or conclusions but to connect this theses discussion to current development of the anticipated UK withdrawal from the Union. Through doing this, the intention is to make this thesis discussions and conclusions more relevant in the light of the withdrawal process, which is currently unfolding.

Until the referendum in the UK on the exiting from the European Union, the legal commentary on Article 50 TEU and process of negotiating a withdrawal agreement was sparse. There was, however, some legal commentary by scholars when Article 50 TEU was established with the Lisbon treaty and its forerunner provision in the failed Constitution of Europe.[37] Leading up to and following the British referendum the legal commentary has increased exponentially. The publications of academic books and Articles in academic journals considering the different legal aspects of the withdrawal procedure according to Union law have though not yet been extensive, though, but more publications will surely follow.[38] There has however been a considerable amount of legal commentary at blogs specialising in Union law. [39] It is of course necessary to use these blogposts with some caution due to the lack of peer review and other forms of scrutiny that is done before in comparison with publications in academic journals. The arguments in these blogposts must yet be evaluated on their own merit and provides input on how to interpret law, especially when there are only a few academic publications available.

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[35] K Lenaerts and J A Gutiérrez-Fonz, 'To say what the law of the EU is: methods of interpretation and the European Court of Justice' (2014) 20(3) Colum. J. Eur. L. 23-24.
[36]Ibid.
[37] See among others: A F Tatham, 'Don't Mention Divorce at the Wedding, Darling!: EU Accession and Withdrawal after Lisbon' in A Biondi, P Eeckhout and S Ripley (ed.), (*EU law after Lisbon*, Oxford University Press 2012); A Łazowski, 'Withdrawal from the European Union and alternatives to membership' (2012) 37(5) E.L. Rev 523; [37] R J Friel, 'Providing a Constitutional Framework for the Withdrawal from EU: Article 59 of the Draft Constitution' (2004) ICLQ 33 407.
[38] See among others P Eeckhout and E Frantziou 'Brexit and Article 50 TEU: a constitutional reading', working paper, (UCL European institute, 10 January 2017) https://www.ucl.ac.uk/european-institute/brexit-hub/Article-50, accessed 22 April 2017; T Tridimas 'Article 50: An Endgame without End?' (2016) 27 KLJ 297.
[39] Steve Peers, 'Guide to the Brexit Negotiations' (EU Law Analysis, 4 April 2017)http://eulawanalysis.blogspot.se/2017/04/guide-to-brexit-negotiations.html accessed 28 April 2017; H Flavier and S Platon 'Brexit: A Tale of Two Agreements' (*European Law Blog,* 30 August 2016) http://europeanlawblog.eu/2016/08/30/brexit-a-tale-of-two-agreements/ accessed 19 April 2017; Andrew Duff, 'Everything you need to know about Article 50 (but were too afraid to ask)' (Verfassungsblog: on matters constitutional, 4 July 2016) http://verfassungsblog.de/brexit-Article-50-duff/ accessed 3 February 2017.

1.6 Disposition

After the introduction chapter follows chapter 2 where I first discuss the reasons why the withdrawal agreement should be seen as an international agreement. The general procedure for how the Union concludes international agreements is also discussed. In chapter 2 the increasing powers of the Parliament's when it comes to international agreement is discussed and as well as the Parliament's inter-institutional agreement with the Commission on, among other things, the procedure for concluding international agreements. Chapter 3 gives a short overview over the origin of Article 50 TEU. In the following chapter 4, the procedure for concluding a withdrawal agreement according 50 TEU and 218(3) TFEU (which Article 50 TEU refers to) is discussed. Chapter 5 provides a brief discussion on the scope of the withdrawal agreement determined by its legal base Article 50 TEU. In chapter 6 is where I discuss the concrete different ways the Parliament could influence the process of negotiating the withdrawal agreement but also the main factors determining the Parliament's possibilities to influence the process of concluding a withdrawal agreement. The thesis is ended with a conclusion and analysis chapter where I will summarise and discuss my findings.

1.7 Delimitations

This thesis deals with the Parliament's role in negotiations for a withdrawal agreement according to Article 50 TEU. The Parliament's involvement in negotiations on an agreement regulating future, and more permanent, relations between the Union and UK will most likely (see chapter 4), be based on other provisions than Article 50 TEU. Therefore, the Parliament's role in such possible negotiations will not be discussed at length in this thesis. For this reason, the possibility for the Parliament to bring proceedings against the, anticipated, withdrawal agreement after it has been concluded through the infringement procedure in Article 263 TFEU will not be discussed. The same goes for the possibility for the CJEU to decide on the legality of the withdrawal agreement through a preliminary ruling according to Article 267 TFEU. In addition, the Parliament cannot ask the CJEU for a preliminary ruling and is therefore not relevant for the research question of this thesis.

Even though this thesis discusses the procedure for concluding a withdrawal, there is not room to discuss all aspects of the procedure but a selection must be made in the light of the research question of this thesis. For instance, will not the much-debated question if a notification, of a Member State intention to leave, according to 50(1) TEU is possible to revoke will not be discussed. This thesis, furthermore, not cover the parliamentary procedure for ratification in the UK of the expected withdrawal agreement.

There is not room in this thesis to discuss the evolution of the historic development of the Union's external relations. There is also, not room for

discussions on the rich case law from the CJEU on the Union's competences, expressed or implied, to conclude international agreement. The same goes for discussion on whether competences are to be considered to be exclusive or shared.

Due to time constrains, the developments of UK's withdrawal procedure after the 19th of May is not considered.

2 EU and International agreements

First in this chapter, I discuss if the withdrawal agreement should be seen as an *international agreement*; an agreement which is binding under international law. Thereafter, a background is given over the general Union procedure for concluding international agreements. In particular, the process for concluding international agreements under Article 218 TFEU is discussed, this because Article 50(2) TEU refers to Article 218 (3) TFEU. The background for how the Union negotiates and concludes international agreements is given, in order to explain the similarities and differences between concluding international agreements in general and the procedure for concluding the withdrawal agreement under Article 50 TEU. It is not entirely clear, if the Union can conclude the withdrawal agreement on its own or if the Member States also need to become contracting parties. Therefore, the concept of *mixed agreements* is shortly described. Mixed agreements are agreements where both the Union and all, or some of the Member States also become parties to the agreement. Thereafter, I discuss, the over time, increased powers for the Parliament in the field of the Union's external relations. The chapter ends with a discussion about the Framework Agreement between the Commission and the Parliament (henceforth the Framework Agreement)[40], which, among other things, regulate the Parliaments right to be informed by the Commission on the process of concluding international agreements.

2.1 The withdrawal agreement as an international agreement?

An important question is how to characterise the withdrawal agreement. For some scholars, it is undisputed that it should be characterised as an *international agreement.*[41] An alternative interpretation would see the withdrawal agreement as a *suis generis* agreement between the Union and one of its Member States. What is clear though, is that the framework provided for reaching a withdrawal agreement in Article 50 TEU, which refer to 218(3) TEUF, means that several futures in the ordinary process of concluding an international agreement also applies to the negotiations for a withdrawal agreement. The implications of this is that the UK will under the negotiation process to, a large degree, be regarded as a third country.[42]

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[40] Framework Agreement on Relations between the European Parliament and the European Commission [2010] OJ L304/47.

[41] A Łazowski, 'Withdrawal from the European Union and alternatives to membership' (2012) 37(5) E.L. Rev 523, 528.

[42] This will further be discussed in chapter 4 and 6.

The Treaties do not define what constitute international agreements.[43] The CJEU has, though, defined an international agreement as 'any undertaking entered into by entities subject to international law which has binding force. The formal designation does not have an effect on its legal status, whatever its formal designation.'[44] What matter is if the parties' intentions were that the document was supposed to have a binding effect.[45]

Article 47 TEU states that 'the Union shall have a legal personality.'[46] In the seminal *ERTA*-case the CJEU declared, from then Article 218 EC, that the Union (then *Commmunity*) has an international legal personality.[47] Because the Union has an international legal personality, the Union has different abilities, such as to conclude agreements and become part of international conventions. The legal personality also means that the Union is subject to legal rights and responsibilities under international law.[48]

Further guidance on what constitutes an international agreement can be found in international law. According to the Vienna Convention on the Law of Treaties[49] Article 2(1)(a):

> 'Treaty' means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation;

The withdrawal agreement will regulate the relations between the UK and the Union after the withdrawal, therefore, it will regulate the relations between two different entities which are subject to international law. The withdrawal agreement should, consequently, be regarded as an international agreement. The procedure for concluding the international agreement according to Article 50 TEU and its relation to the Union's general framework for concluding international agreements will be discussed further in chapter 4 and chapter 6.

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[43] B Van Vooren and R A Wessel, *EU External Relations Law* (Cambridge University Press 2014) 40.
[44] *Opinion 1/75 re Local Cost Standard* [1975] ECR 1355, 1359-1360; C-327/91 *France v Commission* [1994] ECR I-03641 para 27.
[45] P Craig and C de Búrca (n 6) 350-351.
[46] See also Article 335 TFEU
[47] C-22/70 *Commission v Council (AETR/ERTA)* [1971] ECR 263 paras 13-14.
[48] P Craig and G de Búrca (n 6) 321-322.
[49] United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331.

2.2 International agreements and 218 TFEU

Before the Lisbon Treaty, the procedure for concluding international agreements was regulated in each of the different pillars. With the Lisbon Treaty and the removal of the pillar-system, there is now a general provision for the procedure of concluding international agreements in 218 TFEU.[50] The CJEU has stated that 218 TFEU 'constitutes, as regards the conclusion of international treaties, an autonomous and general provision of constitutional scope'[51]. International agreements in the field of the Common Commercial Policy (henceforth the CCP) and in the field of international monetary and exchanges are however governed through special procedures.[52]

As mentioned in subchapter 2.1, the concept of international agreements is to be interpreted broadly, meaning any legally binding provision entered into by entities that are subject to international law. The form of the legally binding provision does not matter.[53] International agreements are a central legal instrument for the Union to establish legal relations with international organisations and third states.[54] 218 TFEU deals with the internal procedure of concluding international agreements. The external procedure, the conclusion procedure for international agreements between the Union and third countries, is however governed by public international law.[55]

Article 50(2) TEU states that the negotiations are to be conducted in accordance with Article 218(3) TFEU. According to 218(3) TFEU the process for concluding international agreements is, normally, initiated by the Commission, or the High Representative when the 'agreement envisaged relates exclusively or principally to the [CFSP]'[56], through submitting recommendations to the Council on authorising the opening of negotiations. Even though it is the Commission that recommends to the Council to start negotiations, the EC often gives political guidance on the need for international agreements.[57] As will be discussed further in chapter 3, the process of initiating the procedure for concluding a withdrawal agreement, starts instead with the notification by a Member State to the EC of its intention to withdraw from the Union.[58]

The next step is the Council authorising the opening of the negotiations. The Council, usually, also adopt directives for the negotiation according to Article

[50] R Geiger, 'Article 218' in R Geiger, D-E Khan and M Kotzur (ed), *European Union Treaties* (C.H.Beck, Hart 2015), 791.
[51] C-425/13 *Commission v Council* [2015] OJ C 274, para 62.
[52] See Articles 218(1) TFEU, 207 TFEU and 219 TFEU.
[53] C-327/91 *France v Commission* [1994] ECR I-03641 para 27.
[54] B Van Vooren and R A Wessel (n 40) 34.
[55] R Geiger (n 50) 791.
[56] 218(3) TFEU.
[57] P Craig and G de Búrca (n 6) 349-350.
[58] Article 50(1) TEU.

218(4) TFEU, often informally referred to as *negotiating mandates*.[59] These directives are not published because of the advantage this would give to the counterpart in the negotiations. The directives to the negotiator are not usually very detailed but often quite general. Except for the directives, the negotiator must also often take into account the views of *special committees,* which are normally formed by representatives from the Member States.[60] This, according to some authors, means that the Union-negotiator needs to negotiate against two counterparts.[61]

The Council also appoints the negotiator or head of the negotiating team. Typically, that is the Commission but when the agreement falls under the CFSP-area, it is usually the High Representatives.[62] The Council can exert control over the negotiations through the directives but also by forming a special committee which is to be consulted throughout the negotiations, according to Article 218(4) TFEU.

Article 218(3) TFEU does not mention the Parliament. The Parliament has therefore not any formal role in decisions on initiating negotiations. The Parliament does, moreover, not have a formal say on deciding the directives to the appointed negotiator according to 218(4) TFEU.

The Council concludes, together with the consent or consultation of the Parliament, and signs the agreement. In most cases the decision on opening the negotiations is taken through a qualified majority vote in the Council, this is also the case for the decision on concluding and signing an agreement.[63] A qualified majority is also needed to authorise the opening and on the decision to conclude the withdrawal agreement according to Article 50(2) TEU. Unanimity is, though, needed in the Council when the agreement covers a field in where adopting internal rules requires unanimity, when it is an association agreement according to 217 TFEU, when concluding a cooperation agreement with an official candidate state for accession and when the agreement concerns the Union's accession to the European Convention on Human rights (ECHR).[64] The Council also needs for most agreements the Parliament's consent before it can conclude an agreement. The Parliament must give its consent before concluding five types of agreements according to 218(6) TFEU: associations agreements[65], agreements on the Union's accession to the ECHR, agreements establishing a specific institutional framework by organising cooperation procedures, agreements with important budgetary implications, and finally, on agreements which covers a field where either the ordinary legislative procedure apply or where the special legislative procedure applies and when the consent of the Parliament is required.

[59] See 218(4) TFEU; P Craig and G de Búrca (n 6) 350.
[60] See Article 218(4) TFEU.
[61] P Eckhout (n 27) 197.
[62] Ibid.
[63] Article 218(8) TFEU; P Eeckhout (n 27) 202.
[64] Article 218(8) TFEU.
[65] See 217 Article TFEU.

According to 218(6) TFEU the Council and the Parliament can agree on a time-limit for the Parliament giving its consent in urgent situations.

Because the Parliament must give its consent for most agreements (see also subchapter 2.3) this means that the Commission and Council must take the Parliament's views into consideration at the initiating and negotiations stages. I will discuss this at further length in chapter 6.

The procedure in Article 218 TFEU also applies for *mixed agreements*.[66] A mixed agreement is when, besides the Union, the Member States also become contracting parties. The solution with a mixed agreement is used when the desired agreement covers matters of which not the Union or the Member States have *exclusive competence*. Also, when the agreement covers matters of *shared competence* between the Union and the Member States, it can be concluded as a mixed agreement.[67] The significant difference is that all the Member States' different standpoints must be considered. For the withdrawal agreement with the UK, that is 27 Member States views and red lines which would have to be considered in addition to the Parliament's views. The fact that the Member States become parties to mixed international agreements means that they need to sign and conclude the agreement. The Member States must, therefore, ratify the agreement which can be in some Member States and situations a time-consuming process. Due to the risk for delays, the Council usually does not sign the agreement before all the relevant Member States have ratified the agreement.[68]

The Parliament also has a right to 'be immediately and fully informed at all stages of the procedure' according to Article 218(10) TFEU. I will discuss Article 218(10) TFEU in relation to the withdrawal agreement further down, see 6.3. There is also an Inter-Institutional Agreement between the Commission and the Parliament on the role of the Parliament in international agreements negotiations conducted by the Commission, see subchapter 2.6.

Article 218(11) TFEU regulates the possibility for a preventive judicial control of international agreements. The judicial preventive control can generally be used; there are however certain limitation on agreements in the Common Foreign and Security Policy (henceforth the CFSP).[69] A Member State, the Parliament, the Council or the Commission can ask for an opinion by the CJEU on whether a proposed agreement is compatible with the Treaties. If the CJEU considers the proposed agreement not to be compatible with the Treaties, the agreement must be amended, or the Treaties be revised for the agreement to be allowed to enter into force. The agreement does not need to be already negotiated and ready for signing, it is not even necessary for negotiations to have begun. The threshold for the CJEU to give its opinion is that, with sufficient accuracy, the content of the agreement can be

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[66] B Van Vooren and R A Wessel (n 40) 56.
[67] P Craig and G de Búrca, (n 6) 352.
[68] B Van Vooren and R A Wessel (n 40) 55-57.
[69] See Article 24(1) TEU, Article 275 TFEU and Article 40 TEU.

estimated.[70] I will discuss, further down in 6.5, the possibility of the preventive judicial control in relation to the withdrawal agreement. The possibility for preventive judicial control does not prevent legal control after concluding the agreement. This can be done through, for instance, an annulment procedure according to Article 263 TFEU.[71]

2.3 The Parliament's increasing powers in external relations

In this subchapter, I will discuss the Parliament's over time increased powers when it comes to Union process of concluding international agreements. I will also discuss with a couple of examples, how the Parliament has previously used its powers to influence negotiations of international agreements.

The *parallelism paradigm* has been guiding the evolution of the Unions external powers. The parallelism paradigm means that Union's external powers should not be separated from the system of internal union measure. This paradigm, though, has not applied to the power balance and institutional roles among the Union's institutions. The Parliament has been empowered in relation to the internal measures, but not to the same degree when it comes to external relations and measures. The Parliament has had a less powerful position than the Commission and the Council when it comes to the Union's external relations. This follows the traditional system in democratic states where the executives, relatively, often have a more powerful role in external relations than the Parliaments.[72]

The lagging role of the Parliament in external relations and in the process of concluding international agreements changed when the Lisbon Treaty entered into force. Through the Lisbon Treaty, the Parliament's role in concluding international agreement was enhanced in several ways. This development has changed the institutional balance in a direction towards the *parallelism paradigm;* the Parliament now enjoys a position more similar in external relations as it does in the internal legislative process. The Parliament must now give their consent before any international agreement can be concluded by the Council, Article 218(6)(a) TFEU, which is governed by the ordinary legislative process. Also, before the Lisbon Treaty, only 40 policy fields were subject to the ordinary legislative process. With the Lisbon Treaty, the number of policy fields in which the ordinary legislative process must be used rose to around 80 policy fields.[73]

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[70] R Geiger (n 50) 794
[71]Ibid.
[72] D Thyme, 'Parliamentary Involvement in European International Relations' in in M Cremona and B de Witte (ed) *EU Foreign Relations Law: Constitutional Fundamentals* (Hart Publishing 2008) 203-204.
[73] C Eckes, 'How the European Parliament's participation in international relations affects the deep tissue of the EU's power structures' (2014) 12 ICON 907.

After the Lisbon Treaty, Parliament has used its veto-power and rejected international agreements, which have resulted in both academic and media attention.[74] Two of the most famous examples are the *TFTP-agreement*[75], also known as the *SWIFT-agreement*[76], and the *ACTA- agreement*. According to some scholars, the Parliament has managed to assert its powers beyond its formal Treaty powers.[77] These two examples show how the Parliament has used its powers under Article 218 TFEU to influence the negotiation process and that it not been a passive bystander during the negotiations. These examples provide insight in how the Parliament sees its role under the process of concluding international agreement and might give a clue of how the Parliament could act under the withdrawal agreement negotiations process.

The TFTP-agreement was about the sending of financial data between the United States of America (henceforth the US) and the Union. The background was that, in practice, a Belgium company (SWIFT) denied the US access to such data because this kind of information had appeared in media outlets. In 2009, a few months before the Lisbon Treaty came into force; the Council decided on a negotiating mandate for the Presidency to start negotiations. The proposed agreement belonged to the Third Pillar, which meant that Parliament did not take part in the decision-making.[78] The day before the Lisbon Treaty entered into force, 30 November 2009, the agreement was signed, and it was to be provisionally applicable from February 2010. With the Lisbon Treaty, the Parliament now had to give its consent to the agreement because parts of it fell under the ordinary legislative procedure. The Parliament had in September 2009 released a resolution that acknowledged the importance of a concluded agreement but stated that several concerns needed to be addressed before the Parliament would give its consent to the agreement.[79] These concerns were about securing data protection rights. On the 11th of February 2010, the Parliament voted to reject the TFTP-agreement. Although the Parliament rejected the agreement with reference to the data protection rights not being secured, the rejection was widely regarded to be motivated by political motives.[80] The agreement, though, was quickly renegotiated after the Parliament issued a recommendation for the adoption of a long-term TFTP-agreement. The Parliament gave its consent to the new agreement even though it only contained a few amendments which indicated

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[74]Ibid. 909.

[75] Agreement between the European Union and the United States of America on the processing and transfer of Financial Messaging Data from the European Union to the United States for purposes of the Terrorist Finance Tracking Program, 2010 O.J L 8/11.

[76] Due to the agreement would facilitate the transfer information from the company Society for Worldwide Interbank Financial Telecommunication (SWIFT).

[77] K Meissner, 'Democratizing EU External Relations: The European Parliament's Informal Role in SWIFT, ACTA, and TTIP' (2016) 21 E.F.A.Rev. 269.

[78] C Eckes (n 73) 909-910.

[79] For example, that the information was only to be used to combat terrorism and that the principle of proportionality was to be respected.

[80] C Eckes (n 73) 910.

that, at least partly, the Parliament had been disappointed with its involvement leading up to the conclusion of the agreement.[81]

Another example is the proposed Anti-Counterfeiting Trade Agreement (ACTA).[82] After the Council's approval of the envisaged agreement, the Parliament did not give its consent to the agreement in 2012. One explicit reason for the Parliament's rejection of the proposed agreement was the lack of information and documents being shared to the Parliament under the negotiating phase. The ACTA-agreement was not later concluded by the Union.[83]

These two examples show that the Parliament has used its power to increase its influence over decision-making process of concluding international agreements. In the process of concluding the TFTP agreement, there were substantive differences between the EU-institutions on how to interpret the new procedural requirements, introduced through the Lisbon Treaty. The Parliament used its new veto-power to assert its influence over the negotiations.[84]

Putting aside the discussion among scholars and politician if the increase of the Parliament's powers is really making the process more democratic. It is clear that the Parliament has used its new veto-power, which it was given to render the EU's external relations more democratic legitimacy, in a way to increase its role when the Union concludes international agreements.

2.4 Access to information (on relations between the Parliament and the Commisssion).

In addition to the right to be informed at all stages of the negotiations according to 218(10) TFEU, there is also a framework agreement between the Parliament and the Commission that, among other things, regulates the Commission's obligation to share information on the process of negotiation and conclusion of international agreements. If the Parliament want to influence the negotiations for a withdrawal agreement, it is crucial that it has insight into how the negotiations are progressing and what the standpoints of the UK as well as the Commission and Council are.

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[81] C Eckes (n 73) 911.
[82] See council decision on Anti-Counterfeiting Trade Agreement (ACTA) between the European Union its member states, Australia, Canada, Japan, the Republic of Korea, the United Mexican States, the Kingdom of Morocco, New Zealand, the Republic of Singapore, the Swiss Confederation and the United States of America, 12195/11, 23 August 2011.
[83] C Eckes (n 73) 912.
[84] A Ripoll Servent 'The role of the European Parliament in international negotiations after Lisbon' (2014) 21 J.E.P.P 578-579.

Through the Framework Agreement on relations between the European Parliament and the Commission[85] (henceforth the framework agreement), the Parliament has strengthened its right to be informed of the negotiations process. The framework agreement is an Inter-Institutional Agreement under Article 295 TFEU, which means that it is binding as long as it complies with the Treaties. The framework agreement, could be argued, gives the Parliament greater rights to be informed than what the can be read out from the Treaty texts. The Commission is under an obligation to provide the Parliament with the information provided for in the framework agreement, and the agreement could be enforced by the CJEU with support of the principle of sincere cooperation.[86]

Annex III to the framework agreement from 2010 states that the Commission shall inform the Parliament and the Council of its intention to start negotiations at the same time. It also states that when the Commission proposes draft negotiations directives, which are to be adopted by the Council, the Commission shall also present these draft directives to the Parliament and the Council at the same time. Furthermore, the framework agreement states that the Commission shall take account of the Parliament's comments during the whole negotiation process and that the Commission shall also report if and how the Parliament's comment were incorporated in the negotiated text. If the Parliament's comments were incorporated, the Commission must report back the reason for this.[87] In the cases where the Parliament's consent is needed to conclude the international agreement, the framework agreement also states that the Commission must provide the Parliament with all the relevant information it provides to the Council. This includes the information provided by the Commission to the *special committee* the Council can appoint (see subchapter 2.2). The Commission is also obligated to keep the responsible Parliament Committee informed on the negotiation and especially how the Parliament's views have been accounted for.[88]

Eckes argues that especially the Commission obligation to justify why the Parliament's comments were not incorporated and that the Parliament is to be informed in order 'to be able to express its point of view'[89] gives the Parliament significant help. The time-factor is important because the executive often makes quick decisions when it comes international relations and the concluding of international agreements.[90]

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[85] Framework Agreement on relations between the European Parliament and the European Commission 2010 O.J L 304/47.
[86] C Eckes (n 73) 908, 916.
[87] Annex III Framework Agreement on relations between the European Parliament and the European Commission 2010 O.J L 304/47 paras. 1-4.
[88]Ibid 5.
[89] Framework Agreement (n 79) point 24.
[90] C Eckes (n 73) 909.

The Council has been critical of this framework agreement and has argued that the agreement challenges the institutional balance and undermines the limits of the different institutions' powers (see Article 13(2) TEU). A competing principle though is that one of representative democracy (see Article 10 TEU) which can justify the strengthened role of the Parliament in the process of concluding international agreements.[91]

As discussed in subchapter 2.1, there are good reasons for regarding the withdrawal agreement as an international agreement. There is therefore also possible to argue that the framework agreement between the Commission and the Parliament should apply to the process of negotiating and concluding the withdrawal agreement. The Framework agreement provides a legal argument for the Parliament to be informed of the developments in the negotiations. Without the access to the information, the Parliament's possibilities to influence the negotiations of a withdrawal agreement are limited. This will be further discussed in chapter 6.

[91] P Eeckhout (n 27) 201.

3 The origin of Article 50 TEU

In this chapter, a short background to the establishment of the Article 50 TEU will be presented. The background gives the later discussions a context and will also shed some light on the wording of the Article.

The first suggestions on introducing a provision which regulated a Member State's possibility of leaving the Union was proposed under the Convention on the Future of Europe in 2002-2003.[92] A secession clause was supported by the Federalists who wanted an established way out for those member states that did not want to take part in the ever-deepening integration.[93] The original provision on a Member State's voluntary withdrawal from the Union was in form of Article 46 of the Constitution. Article 46 was introduced since the UK did not share the objective of closer Union which the envisaged Constitution entailed.[94] According to Andrew Duff, then a member of the European Parliament, who took part in the Convention; the writers of t Article 50 TEU never actually thought it was going to be used.[95]

Article 50 was introduced through the Lisbon Treaty. Before Article 50 TEU the dominating view was that EU treaties did not give member states a unilateral right to leave the union. There were, generally speaking, conflicting views between scholars who subscribed to the view of the Union with state-like features and those who saw the Union as an intergovernmental organisation. The former considered that the Member States simply could not withdraw from the Union while the latter held the view that it was possible to leave according to customary law and the Vienna Convention on the law of Treaties from 1969[96]. There was, tough, evidence that Member States had a right to leave after some kind of negotiations.[97]

Under the Convention, the proposals ranged from provisions that the Member State would have an unrestricted right to leave to a provision stating that the Member States could not leave the Union at all. Friel classifies three principal categories of withdrawal mechanisms. The proposal that a Member State should have an unrestricted right to leave the Union belongs to a *State primacy* category. On the other side of the spectrum, the proposal that the new

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[92] P Eeckhout and E Frantziou 'Brexit and Article 50 TEU: a constitutional reading', working paper, (UCL European institute, 10 January 2017) https://www.ucl.ac.uk/european-institute/brexit-hub/Article-50, accessed 22 April 2017, 15.
[93] A Duff, 'Everything you need to know about Article 50 (but were too afraid to ask)' (Verfassungsblog: on matters constitutional, 4 July 2016) http://verfassungsblog.de/brexit-Article-50-duff/ accessed 3 February 2017
[94] P Eeckhout and E Frantziou (n 92) 15.
[95] A Duff (n 93).
[96] Vienna Convention on the Law of Treaties (Vienna, 23 May 1969: UNTS 331).
[97] A F Tatham, 'Don't Mention Divorce at the Wedding, Darling!: EU Accession and Withdrawal after Lisbon' in A Biondi, P Eeckhout and S Ripley (ed), *EU law after Lisbon* (Oxford University Press 2012) 142-143.

treaty should have a provision declaring that a Member State could not leave the Union belongs to *Federal primacy* category. Between these two fundamentally conflicting views there is a *Federal control* category. The Federal control category, even though it acknowledges a right to leave, says that a Member State can only leave if the other, remaining Member States approve this. There were submissions on the right to leave the Union that adhered to all three categories.[98]

The French representative, Dominique Villepin, suggested that a situation of *irreconcilable differences* must arise before a Member State would be allowed to leave.[99] Robert Badinter's, a former minister of justice in France, proposal was fairly close to the end result.[100] Badinter's proposal acknowledged the Member States' sovereign right to withdraw but in a negotiated matter and the decision to leave must be taken according to the Member State's national constitution Badinter's proposal, though, did also contain provisions on that the leaving Member State would be responsible for any losses inflicted on the Union because of the Member State's withdrawal.[101] The provision on responsibility did not, however, make into the Constitution. The Convention did not settle for Villepin's or Badinter's proposal. The Convention settled for a formulation that is similar in substance to the one in Article 50 TEU. A formulation that acknowledges a Member State's right to withdraw but introduces a framework for an agreement between the Union and the leaving Member State setting the arrangement for the withdrawal.[102] After some non-substantial changes the provision was incorporated into the Lisbon Treaty.[103]

Friel criticises the end result for not strictly adhering to any of the principal categories of withdrawal mechanisms. The formulation could be placed in the state primacy category, but because it does not allow for an instant withdrawal but require a negotiation period for two years (see the following chapter 4) it could be viewed as a hybrid. Friel's main reason of criticism is that the provision is not principally stringent on where the authority lays on the right for withdrawal.[104] I will return to the issue on the necessity of a withdrawal agreement or not in subchapter 4.1.

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[98] R J Friel, 'Providing a Constitutional Framework for the Withdrawal from EU: Article 59 of the Draft Constitution' (2004) ICLQ 33 407, p. 423-24.
[99] P Eeckhout and E Frantziou (n 92) 13.
[100] A F Tatham (n 97) 147-148.
[101] Article 80, Contribution from M. Robert Badinter, alternate member of the Convention "A European Constitution" 30 September 2002. http://register.consilium.europa.eu/doc/srv?l=EN&f=CV%20317%202002%20INIT accessed on 22 May 2017.
[102] Article I-59, Praesidium's Draft Constitution Volume 1 – Revised text of Part , 28 May 2003,http://register.consilium.europa.eu/doc/srv?l=EN&f=CV%20724%202003%20REV%201 accessed on 22 May 2017.
[103] A F Tatham (n 97) 148.
[104] R J Friel (n 98) 424-425.

4 The negotiation process according to Article 50 TEU

Article 50

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.

Article 50 TEU declares that a member state can leave the European Union. The Article also outlines the process of withdrawal. The provision has received criticism for being far from clear and that it does not give enough guidance.[105] In this chapter, I will outline the process of the withdrawal process according to the provisions Article 50 TEU and Article 218(3) TFEU. First, in subchapter 4.1, I will discuss the necessity of reaching a withdrawal agreement in order for a Member State to leave the Union. In subchapter 4.2 I outline the process in Article 50 TEU and 218(3) for leaving the union and what is known after the EC has adopted their guidelines and the Commission has published their recommendations for negotiating directives. This chapter provides a description of the process of negotiating and concluding the withdrawal agreement as regulated by Article 50 TEU and 218 TFEU. Later, in chapter 6 will focus on how the Parliament could influence the process.

[105] C Hillion 'Accession and withdrawal in the Law of the European Union' in A Arnull and D Chalmers (ed), *The Oxford handbook: in European law* (Oxford University Press 2015), 135.

4.1 Must there be a withdrawal agreement?

There is not any compelling legal argument for there being a requirement to reach a withdrawal agreement in order for a Member State to leave the Union. From a textual interpretation of only Article 50 TEU, it may seem like a Member State could not withdraw from the Union without a negotiated withdrawal agreement. The wording in 50(1) TEU 'Any Member State may decide to withdraw' indicates that the Member State can leave the Union if it is decided according to its own constitutional requirements. It is also possible for a Member State which has notified the EC of its intention to leave, according to Article 50(1) TEU, to simply wait out the two-year limit in 50(3) TEU. The wording of Article 50 TEU seems, though, to indicate a preference for a negotiated withdrawal agreement.[106]

Łazowski argues that even though there might be legally sound arguments, for the possibility for a unilateral withdrawal, Łazowski considers it not being a realistic option due to the large economic and legal entanglement that exists through the Union. A unilateral withdrawal without a framework for the terms of the exit and future relations would have too big negative consequences.[107]

4.2 The process in Article 50 TEU

The withdrawal process starts when a Member State decides that it wants to leave the union in accordance with its own constitutional requirements.[108] It is unclear if the *constitutional requirement* is to be decided solely by the Member State's national law or if certain aspects of Union law must be considered. Some scholars have argued that the decision should at least be valid in the light of the values listed in Article 2 TEU, such as the Union's rule of law standards.[109]

The next step is the notification of the Member State that wants to leave the Union, to the European Council.[110] The UK notified the European Council on the 29th of March 2017 of its intention to withdraw from the Union.[111] The

[106] A Łazowski 'Withdrawal from the European Union and alternatives to membership' (2012) 37 E.L. Rev. 523, 526-528
[107] A Łazowski 'Unilateral withdrawal from the EU: realistic scenario or a folly' (2016) 23 J.E.P.P 1294, 1300.
[108] Article 50(1) TEU.
[109] C Hillion (n 105), 137; A F Tatham (n 97) 149.
[110] Article 50(2) TEU.
[111] D Tusk 'Remarks by President Donald Tusk following the UK notification' (consilium.europa.eu 29 March 2017) http://www.consilium.europa.eu/en/press/press-releases/2017/03/29-tusk-remarks-uk-notification/ Accessed 23 May 2017.

European Council is then supposed to set out guidelines according to which the Union is supposed to negotiate and conclude a withdrawal agreement with the leaving member state.[112] The European Council's guidelines is not a legally binding instrument because the it cannot exercise any legislative functions (Article 15(1) TEU). The guidelines will though have a major political weight.[113] On the 29th of April the European Council (henceforth: the EC) adopted guidelines following UK's notification under Article 50 TEU.[114] In the guidelines the EC reserves the right to revise the guidelines while the negotiations are in progress.[115]

The withdrawal agreement is supposed to set out the arrangement for the withdrawal while also taking account of the framework for the future relationship between the Union and the Member State. The possible scope of the withdrawal agreement and the uncertainties surrounding it are discussed in chapter 5. Regarding the process for negotiations Article 50(2) TEU refers to the procedure described in 218(3) TFEU:

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

The Commission shall according to Article 218(3) TFEU submit recommendations to the Council, which then authorises the opening of the negotiations of the withdrawal agreement. The Council's decision is taken with the same voting rules that apply to the conclusion of the agreement.[116] The Council also decides the Union's negotiator.[117] 218(3) TFEU does not state that the Commission must be the negotiator. In a statement, however, that followed the informal European Council in Brussels on the 15th of December 2016 with the 27 Heads of State or Government, it is stated that the Council will nominate the Commission as the negotiator for the Union. The statement is also positive to the Commission's appointment of Michael Barnier as chief negotiator.[118] The statement on the procedure, which is endorsed in the European Council's guidelines[119], also points out the General

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[112] Article 50(2) TEU.
[113] B Van Vooren and R A Wessel (n 40) 24.
[114] European Council's Guidelines Following the United Kingdom's Notification Under Article 50 TEU (European Council, 29 April 2017) EUCO XT 20004/12, www.consilium.europa.eu/en/.../04/29-euco-guidelines_pdf/ Accessed on 23 May 2017.
[115] Ibid. 2.
[116] P Eckhout (n 27) 197.
[117] In a statement from the informal European Council meeting (without the UK) in Brussels on the 15th of December in 2016 the European council declare it will invite the General Affairs Council to authorize the opening of the negotiations and to deal with the subsequent steps in the process. http://www.consilium.europa.eu/en/press/press-releases/2016/12/15-statement-informal-meeting-27/ Accessed on 23 May 2017.
[118] Ibid paras. 2-3.
[119] European Council's Guidelines Following the United Kingdom's Notification Under Article 50 TEU (n 114) para. 28.

Affairs Council (GAC) as the Council figuration which will authorise the negotiations to start and will also deal with the subsequent steps of the negotiation process. The heads of state or government also declare that a representative from the rotating presidency will be included in the Union's negotiating team as well a representative from the European Council President.[120] The inclusion of the rotating presidency and the EC president is a new feature applied to these negotiations.[121] The statement from the 15th of December describes a working party with a permanent chair which will make sure that the negotiations are conducted in line with the EC's guidelines and the Council's negotiations directives. The Working Party will help the negotiator with guidance.[122]

The Commission published recommendation to the Council to authorising the opening of the negotiation and recommendations for negotiation directives on the 3 of May 2017.[123] Usually, the directives are not made public.[124]

The withdrawal agreement is to be concluded, according to 50(3) TEU, by a qualified majority of the Council after the Parliament has given its consent. Qualified Majority translates to 72 % of the Member States compromising at least 65 % of the population according to 338(3)(b) TFEU. This means that at least 20 of the 27 Member States must be in favour of concluding the agreement. How the Parliament gives it consent will be discussed in chapter 6. The laid down procedure for the conclusion of the withdrawal agreement in Article 50 TEU is silent on the matter on ratification by the Member States, if the agreement would be considered to be *mixed*. This issue will be discussed in Chapter 5.

Article 50(3) contains the, widely noted, two-year time limit from the date of notification to when the Treaties automatically cease to apply to the leaving Member State. In other words, the time limit gives the Union and the UK two years to agree to a withdrawal agreement and for it to enter into force, or else the UK will be out of the Union automatically. This, under the precondition that unless the remaining 27 Member States agree with the UK to extend the time period. The two-year time limit is by many considered to be a short

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[120] Informal meeting of the Heads of State or Government of 27 Member States, as well as the Presidents of the European Council and the European Commission Brussels, 15 December 2016. (n 117) para. 2.

[121] S Peers, 'Guide to the Brexit Negotiations' (EU Law Analysis, 4 April 2017) < http://eulawanalysis.blogspot.se/2017/04/guide-to-brexit-negotiations.html> accessed 28 April 2017.

[122] Informal meeting of the Heads of State or Government of 27 Member States, as well as the Presidents of the European Council and the European Commission Brussels, 15 December 2016. (n 117) para. 4.

[123] The Commission, Annex to the Recommendation for a Council decision authorizing the opening of the negotiations for an agreement with the United Kingdom of Great Britain and Northern Ireland setting out the arrangements for its withdrawal from the European Union COM (2017). (3 May 2017), https://ec.europa.eu/info/sites/info/files/annex-recommendation-uk-eu-negotiations_3-may-2017_en.pdf Accessed 10 May 2017.

[124] See subchapter 2.2.

amount of time to negotiate an agreement that deals with the complicated issues of withdrawal. In a press briefing, the Commission appointed chief negotiator Michel Barnier, stated that the time for negotiations is short and will be shorter than two years. Barnier anticipates there will be time for 18 months of negotiations and that an Article 50 Agreement could be reached in October 2018.[125] However, Eeckhout has argued that the time limit in Article 50(3) TEU must be interpreted in the light of the Union's broader constitutional principles. With regard to these constitutional principles, Eeckhout argues that the in certain situations the *clock* could be stopped and the time limit prolonged. Eeckhot argues that the two-year time limit only expires if the parties agree that they will not reach an agreement. Hence, Eeckhout argues that clock would *stop* if example the UK would revoke its notification, if the CJEU is asked of an opinion according to 218(11) TFEU, if UK's Parliament does not approve of the negotiated terms and asks the UK government to renegotiate or if the European Parliament would not give its consent to negotiated agreement. In addition, Eeckhout also interprets Article 50(3) TEU as enabling to set an entry into force date which lay beyond the two-year period. This interpretation is based on that the treaties will cease to apply if 'failing' to agree in Article 50(3) TEU.[126]

[125] Michel Barnier, the Commission, Press Briefing (6 December 2016), https://ec.europa.eu/info/news/introductory-comments-michel-barnier_en. Accessed 23 May 2017.
[126] P Eeckhout 'Can the Brexit clock be stopped?' (*UCL Brexit Blog*, 5 April 2017) https://ucl-brexit.blog/2017/04/05/can-the-brexit-clock-be-stopped/#more-2679 Accessed 2 May 2017.

5 The possible scope of the withdrawal agreement

In this chapter I provide an overview of the possible scope of the withdrawal agreement. It is unclear if there is, and if so, what the limitation of the possible scope of the withdrawal agreement is. Therefore, I will give an overview of the discussion of what the withdrawal agreement could entail, before it changes character and possibly could become *a free trade agreement* (under Article 207 TFEU) or an *association agreement* (under Article 217 TFEU). If the agreement would change character this could potentially have an impact on the Parliament's role in the negotiations. Besides the potential implications for the Parliament's chances to influence the withdrawal agreement, these discussions also provide a context of the importance and effects of the withdrawal agreement. For similar reasons, Article 50 TEU as a legal basis for a transitional arrangement and the possibility for the withdrawal agreement being concluded as a mixed agreement, is discussed.

5.1 The scope of the withdrawal agreement

As mentioned above, Article 50(2) TEU states that the Union shall negotiate and conclude an agreement with the withdrawing Member State which sets 'out the arrangement for its, withdrawal, taking account of the framework for its relationship with the Union'. From this wording, it is unclear if there are any limits to the material scope of the withdrawal agreement. On both the UK and the Union side there seems to be a common understanding on the need for, at least, two separate agreements. The EC's guidelines divide the negotiating process into two phases. The first phase focuses on the arrangement of an orderly withdrawal. Only when *sufficient progress* has been made on the 'arrangement for an orderly withdrawal', an overall understanding on the framework for future relationship can be discussed under this *second phase* of the negotiations. The anticipated agreement on future relationship can however, according to the EC, only be concluded once the UK is a third country.[127] The guidelines are also open for possible transitional arrangements to the necessary extent and if legally possible.[128]

In its white paper from the 2nd of February 2017[129], the UK government lay out its priorities for the negotiations of a withdrawal agreement and the future

[127] European Council's Guidelines Following the United Kingdom's Notification Under Article 50 TEU (n 114) para. 5.
[128] Ibid.
[129] Department For Exiting the European Union, Policy paper, 'The United Kingdom's exit and new partnership with European Union'. (2 February 2017) https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/589189/The_United_Kingdoms_exit_from_and_partnership_with_the_EU_Print.pdf Accessed 23 May.

relationship between the UK and the Union. The UK government wants to reach an agreement on the future relationship before the end of the two-year limit on negotiations in Article 50(3) TEU. The underlining reason for this ambition is to avoid a gap period between the withdrawal and until the new relations are established. The UK government also wants to see a phased implementation from when the Article 50-process is concluded. The UK government pictures differentiated implementation phases for different areas, where the implementation is quicker in some areas than others.[130]

Eeckhout and Frantziou argue in their working paper *Brexit and Article 50: a constitutional reading* that Article 50 TEU, *on its own*, is not likely to confer to the Union the competence to exclusively regulate the issues of withdrawal and fully regulate the future relationship between the Union and UK. They argue, tough that there is no legal impediment for the possibility to combining Article 50 TEU with another legal base. Depending on what the agreement would entail, if the agreement would be confined to the trade area, another legal base would be 207 TFEU on the CCP. Eeckhout and Frantziou also mention Article 217 TFEU on association agreement as a possible additional legal base if the future relations would cover a wide field of substantive areas.[131]

In contrast to Eckhout and Frantziou's views there is a reasonable interpretation of the wording of both 218(1) TFEU and in 207(3) TFEU, on the Common Commercial Policy), that refers to an agreement between the Union and a *third country*. Because the leaving Member State is not a third country until it has left the union, 207 TFEU and 218 TFEU cannot be used as legal base alone or in combination with Article 50 TFEU.[132]

Flavier and Platon discuss the Article 50 TEU as a basis for the withdrawal agreement and make a separation between whether the article's applicability is based on the leaving Member State's, UK's, *status* as a Member State until the withdrawal-day[133] or the *content* of the withdrawal agreement. If it is the leaving Member State's *status* which is the deciding factor, the material scope of the withdrawal agreement is possibly unlimited. As long as the withdrawal agreement is concluded when the leaving Member State is still a member of the Union, Article 50 TEU can serve as the only legal basis for the withdrawal agreement. This means that such an agreement could also provide the basis for future relations between the UK and the Union and not only regulate the withdrawal issues but also set down an extensive *framework* for the future relationship. Flavier and Platon point out that this interpretation might contradict the principle of conferral in that the Union might not have the mandate to negotiate a withdrawal agreement that is unlimited in material

[130] Ibid p. 65.

[131] P Eeckhout and E Frantziou (n 92) 23-25.

[132] H Flavier and S Platon 'Brexit: A Tale of Two Agreements' (*European Law Blog,* 30 August 2016) http://europeanlawblog.eu/2016/08/30/brexit-a-tale-of-two-agreements/ accessed 19 April 2017.

[133] The day the on which the Member State leaves the Union which can be when the withdrawal agreement enters into force or when the two years time limit expires without it being extended. See chapter 4 above.

scope. The interpretation that the use of Article 50 TEU only depends on the leaving Member State's status would certainly have its practical advantages. With such an interpretation either side does not need to be concerned with limiting themselves to a narrow interpretation of laying down *the framework for a future relationship with the Union*. The implications are almost opposite if the applicability of the Article 50 TEU as a legal basis depends on the *content* of the withdrawal agreement. If the applicability depends on the withdrawal agreement's content the, possibly, difficult issue of maintaining the distinction between the agreement that regulates the withdrawal and the agreement that regulates the future relationship arises.[134]

If it is as Eechkhout and Frantziou claims, that the Article 50 TEU could be combined with 207 TFEU or 217 TFEU and the withdrawal is regarded as a free trade or association agreement, the Parliament must still give its consent to such an agreement.[135] As will be discussed in subchapter 6.2 the fact that the Parliament must give its consent to the withdrawal agreement gives it a powerful position to influence the negotiations and the final content of any agreement. If the agreement were considered to be a Free Trade or an Association agreement, then it would enable the Parliament to argue for the application of the general framework for concluding international agreements would apply. This would provide the Parliament with the possibility for example to argue that it should be fully informed according to 218(10) TFEU and for the possibility to ask the CJEU for an Opinion on the agreement's compatibility with the Treaties according to 218(11) TFEU.[136]

5.2 Article 50 TEU as legal base for a transitional agreement

From the European Council's guidelines adopted on the 29 April.[137] It appears that the guidelines also are meant to apply on any form of transitional arrangements.[138] The adopted guidelines also allow for the negotiations to determine transitional arrangements. This, however, is under the important preconditions that it is necessary, and more interestingly, *legally possible*. The guidelines declare that this must be in the Union's interests and provide bridges for future relations. The, possible, transitional arrangement must be limited in time, clearly defined and subject to effective enforcement mechanisms. If the Union acquis still would apply after withdrawal 'this would require existing Union regulatory, budgetary, supervisory, judiciary and enforcement instrument and structures apply'.[139] The Parliament's

[134] H Flavier and S Platon (n 132).
[135] See Articles 207(2) TFEU and 218(6)(a)(v) TFEU; Article 217 TFEU and 218(6)(a)(i) TFEU.
[136] See the chapter 6 and the Conclusion and Analysis.
[137] European Council's Guidelines Following the United Kingdom's Notification Under Article 50 TEU (n 114).
[138] Ibid 3.
[139] Ibid para. 6.

resolution also allows for transitional agreement but the resolution also sets a maximal time limit on the transitional arrangement for three years.[140] The British government has in its white paper expressed it would want to see a phased implementation of the new future relationship.[141]

It is clear from the guidelines, that the EC accept the possibility of a transitional agreement. The guidelines are not clear on whether Article 50 TEU is to be the legal base by itself or in conjunction with another legal base. The guidelines do not explicitly rule out that the withdrawal agreement is concluded before the withdrawal as they are on any agreement on more permanent future relations. As Peers point out, it is unclear if Article 50 TEU can serve as a legal base for a withdrawal agreement, which regulates transitional arrangements.[142] The guidelines seem to reflect this boundary issue on the scope for transitional agreements in that they allow for the negotiations on withdrawal agreements to the extent that it is *legally possible*.

The objection towards Article 50 TEU as a single legal basis for a transitional agreement or the withdrawal agreement containing transitional arrangements, is the same as discussed in the previous subchapter, namely it is unclear if transitional arrangement falls in under the scope of Article 50 TEU.[143]

5.3 A mixed withdrawal agreement?

The most common view on the nature of the withdrawal agreement is that it is exclusive, meaning that the Union can conclude the agreement without ratification by the Member States. The wording of Article 50(2) TEU could also be interpreted as supporting this; '[the withdrawal agreement] shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament'. The silence on any requirement on ratification by the Member States could therefore be interpreted as if the Union has the exclusive competence to conclude the withdrawal agreement. This interpretation would also make the task for the withdrawal agreement to enter into force possibly easier, which may be why it does not require the ratification by the Member States. The absence of parliamentary involvement from national, and in some cases regional level,

[140] 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)) (European Parliament 5 of April 2017) http://www.europarl.europa.eu/RegData/seance_pleniere/textes_adoptes/provisoire/2017/0102/P8_TA-PROV(2017)0102_EN.pdf Accessed 10 May 2017, Parliaments resolution para. 28.
[141] Department For Exiting the European Union, Policy paper, 'The United Kingdom's exit and new partnership with European Union' (n 129) 65.
[142] S Peers, 'Guide to the Brexit Negotiations' (n 116).
[143] Cf. ibid.

might seem questionable considering the possible width of the withdrawal agreement in relation the principle of conferral.[144]

In its recommendations for Council decision authorising the opening of negotiations between the Union and the UK[145] the Commission states:

> The Agreement **will be negotiated and concluded by the Union.** In this respect, Article 50 of the Treaty on European Union **confers on the Union an exceptional horizontal competence to cover in this agreement all matters necessary to arrange the withdrawal.** This exceptional competence is of a one-off nature and strictly for the purposes of arranging the withdrawal from the Union. The exercise by the Union of this specific competence in the Agreement will not affect in any way the distribution of competences between the Union and the Member States as regards the adoption of any future instrument in the areas concerned.[146]

The Commission rejects that the withdrawal agreement should be concluded as a mixed agreement. The Commission also claim that it has, for this particular type of agreement, an unrestricted horizontal competence for arranging the withdrawal from the Union. This interpretation assumes, that the normal division of competences between the Union and the Member States do not apply. The Commission might reason that because of the fact that Article 50 TEU is silent on the on the matter of ratification by the Member States that it may indicate it was left out on purpose to make it easier to reach an agreement that enters into force.

Flavier and Platon do not agree with the Commission on this. They argue that because the competence to conclude the withdrawal agreement is not listed in Article 3(1) TFEU and that there is substantial doubt on whether it can be regarded as an implied competence according to Article 3(2) TFEU. Due to the fact that 4(1) TFEU states that the Union shares competence with the Member States except when it comes to the ones in Article 3 TFEU and 6 TEU (supplementary competences). Therefore, Platon and Flavier argue that it is questionable if the competence to conclude the withdrawal agreement can be regarded as an implied exclusive competence. If the withdrawal agreement only extends some common rules with the withdrawing state, it could be argued that the requirement in 3(2) TFEU of the conclusion of the international agreement affects 'common rules or alter their scope'. Flavier and Platon also point out that the withdrawal agreement could contain a provision in areas where the competence belongs to the Member States.[147]

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[144] C Hillion, 'Leaving the European Union, the Union Way – A legal analysis of Article 50 TEU.' (2016) 2016(8) EPA 6.

[145] The Commission, Annex to the Recommendation for a Council decision authorizing the opening of the negotiations for an agreement with the United Kingdom of Great Britain and Northern Ireland setting out the arrangements for its withdrawal from the European Union COM(2017). (3 May 2017), https://ec.europa.eu/info/sites/info/files/annex-recommendation-uk-eu-negotiations_3-may-2017_en.pdf Accessed 10 May 2017.

[146] Ibid 5 (authors emphasis).

[147] Flavier and Platon mentions provisions on provisions that is regulated by the Montreal Convention for the Unification of Certain Rules for International Carriage 28 May 1999 or the Aarhus Convention on access to information, public participation in decision-making and access to justice in environmental issues 25 June 1998.

That the withdrawal agreement must be concluded as a mixed agreement would subsequently render the process provided for in Article 50 TEU pointless. Flavier and Platon, therefore, recommend that the Union only exercise its exclusive competence in the withdrawal agreement and that the agreement does not contain provisions that are considered to be shared competences.[148]

Eeckhout and Frantziou have a different perspective on whether the withdrawal agreement should be mixed agreement or not. They reason that the Member States have conferred the competence to Union to regulate the relationship with one of its Member States in areas covered by the Treaties. They refer to the example of free movement for the UK's citizens, which is strictly regulated at Union level in contrast to the immigration from third countries. An agreement that would limit free movement would effectively return the competence to the Member States. Eeckhout and Frantziou mean that giving the Member States back their national competences must lie within the Union's exclusive competence.[149]

I found the arguments that the Union could conclude the agreement without the Member States most convincing. The wording of Article 50 TEU, which includes the silence on ratification by the Member States, supports this interpretation. The procedure in Article 50(2) TEU with arranging the withdrawal through an international agreement, the reference to 218(3) TFEU, seems to underline that it is a Union procedure. The procedure can be contrasted to the Accession procedure which explicitly calls for an agreement between the Member States and applicant State.[150]

If the withdrawal agreement covers matter on the future relations and that it should be viewed as Free Trade agreement or Association agreement this could change the situation. Such an agreement would probably cover a wide range of matters and therefore make it necessary to conclude it as a mixed agreement.[151] If the agreement would be concluded as a mixed agreement it would not directly have an implication for the Parliament's role in the process for concluding the withdrawal agreement under Article 50 TEU. It is possible that it would be politically harder for the Parliament to get its way if also consideration had to be made to the Member States' national parliaments and in some cases also regional parliaments.

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[148] H Flavier and S Platon (n 132).
[149] P Eeckhout and E Frantziou (n 92) 25.
[150] C. Hillion, (n 105) 140.
[151] H Flavier and S Platon (n 132); See also the recent *Opinion 2/15 Free trade Agreement with Singapore* EU:C:2017:36 on the issue of necessity of concluding extensive free trade agreements as an mixed agreement.

6 How the Parliament can influence the negotiations

In this chapter I will discuss the more specific aspects that have bearing on the Parliament's role in the negotiations for a withdrawal agreement. First, I discuss the procedure for concluding the withdrawal agreement in Article 50 TEU and its relation to the general framework for concluding international agreements in 218 TFEU. Then I discuss the implication that the Parliament must give its consent to any withdrawal agreement under Article 50(2) TEU. In connection to discussing the Parliaments *veto-power* I briefly discuss the Parliament's tool to adopt resolutions manifesting their standpoint. Then follows to subchapters discussing the requirement to inform the Parliament in 218(10) TFEU and possibility for the Parliament to ask the CJEU for an Opinion on an envisaged agreement compatibility with the Treaties according to 218(11) TFEU.

6.1 Article 218 TFEU in its entirety, or only 218(3) TFEU?

Article 50(2) TEU explicitly refers to 218(3) TFEU. This has created uncertainty on whether the rest of Article 218 TFEU, the general procedure for concluding international agreement, is applicable on the withdrawal agreement, including, the much discussed the provisions in this thesis 218(10) and 218(11) TFEU.[152] If the general procedure for concluding international agreement would apply to the process of negotiating a withdrawal agreements this would consequently have direct implications for the Parliament's role and possibilities to influence the negotiations for a withdrawal agreement.

A literal interpretation of Article 50(2) TEU, which states that '[the withdrawal] agreement shall be negotiated in accordance with Article 218(3)' could lead to the conclusion that only 218(3) TFEU is applicable on the procedure for negotiating the withdrawal agreement. Such an interpretation could be supported by a literal interpretation of Article 218(1) TFEU, which states that procedure laid down in the provision is for 'agreements between the Union and *third countries* or international organisations',[153] because the leaving Member States is not yet a third country and in fact becomes a third country with the withdrawal agreement entering into force (Article 50(3) TFEU). Therefore, it would be contradictory to 218(1) TFEU if the general framework laid down in 218 TFEU would apply to the procedure for concluding a withdrawal agreement. From a literal interpretation is though not clear if the wording excludes application of the rest of Article 218 TFEU.

[152] E Poptcheva (n 2) 5.
[153] Article 218(1) TFEU, emphasis added.

Another argument for the non-application of the general procedure for concluding international agreements in 218 TFEU is that the rationale for Article 50 TEU and the reference to only 218(3) TFEU was to ease the process of concluding a withdrawal agreement. The exclusion of the other provisions in Article 218 could be to ease the conclusion of a withdrawal agreement and therefore avoid the complicated consequences that would arise if the Treaties simply would cease to apply.[154]

It is, however, questionable if 218(3) TFEU could be applied without the general framework it belongs to in Article 218 TFEU as a whole. It is also questionable if was intentions of the drafters of the Treaties that only 218(3) TFEU would apply to the procedure and not the general framework in 218 TFEU which 218(3) TFEU belongs to. It could be argued it is necessary to look at 218(3) TFEU in its context as part of Article 218 TFEU. 218(3) TFEU could be argued is interlinked with the rest of its Articles and that it could not be carved out and applied on its own. The negotiations process as it laid down with 218(3) TFEU is complemented through 218(4) TFEU which gives the Council the possibility to 'address directives to the negotiator and designate a special committee in consultation with which the negotiations must be conducted.' In its recommendations for Council decision on authorising the opening of the Commission gives a proposal on directives for the negotiations, without explicitly referring to 218(4) TFEU.[155] This is indicative of the necessity to read 218(3) TFEU in its context.

As will be discusses further below in subchapter 6.3 and 6.4, in consistence with the CJEU's previous case law, a teleological interpretation of 218(10) and 218(11) TFEU shows that there are sound legal arguments for these provisions being applicable on the withdrawal agreement negotiations.

6.2 Consent to the withdrawal agreement

According to Article 50(2) TEU the withdrawal agreement is to be concluded by the 'Council, acting by a qualified majority, after obtaining the consent of the European Parliament'. Article 231 TFEU states that unless otherwise provided by the Treaties the Parliament is to decide by a majority vote. The quorum is to be decided by the Parliament's rules of Procedure[156]. Rule 168(2) of the Parliament's Rule of Procedure states that a quorum exists when one third of the competent of Members of Parliament are present. The Parliament's Rules of Procedure on the withdrawal agreement, Rule 81, also states that the Parliament shall decide on giving its consent by a majority of

[154] Cf. C Hillion (n 105) 140.
[155] The Commission, Annex to the Recommendation for a Council decision authorizing the opening of the negotiations for an agreement with the United Kingdom of Great Britain and Northern Ireland setting out the arrangements for its withdrawal from the European Union (n 145).
[156] 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 (n 140).

the votes cast. Therefore, if at least a third of the competent members of parliament are present the Parliament decides with a majority vote.

What is also worth mentioning is that the Members of Parliament from the UK are allowed to vote. Article 50(4) TEU only refers to the UK's participation in the Council and the European Council in the discussion and decision referred to in 50(2) and 50(3) TEU. There is no restriction on their participation until the UK has left the Union.

The undisputed fact that the Parliament must give their consent to negotiated withdrawal agreement to Article 50(2) TEU gives it a form of *veto-power*. The Parliament has through the veto-power the possibility to force the Council, the Commission and the UK government to take its views into account. The time limit of two years, in Article 50(2) TEU, does not provide ample of time to negotiate the complicated issues of withdrawal and in addition a general understanding of a framework for the future relationship. It might, therefore, arise a situation in where the Parliament comes under enormous pressure to give its consent to an envisaged agreement. If it not gives its consent, the time could simply run out and the UK would be regarded as a third country. As, discussed above in subchapter 4.2, Piet Eeckhout argues that *forcing* the Parliament to give its consent would be contrary to the broader constitutional norms of the Union.[157] In a lecture, *Article 50 TEU: the secret and lies*, held by Eeckhout on the 28 of March 2017, he argues that the Parliament giving its consent to an agreement is based on the principal of representative democracy. This should mean that the Parliament is not left with merely *rubberstamping* but if the Parliament does not give its consent, there should be the possibility for a renegotiation of the agreement.[158] The Parliament's ability to debate and reach a reasoned decision is dependent on access to information. The Parliament needs to receive information on the envisaged agreement which, consequently, lead to the discussion on the applicability of the information requirement in 218(10) TFEU, see the discussion further down. As discussed in subchapter 2.3 the Parliament has also previously used its veto-power to force the Commission and Council to acknowledge its views.

6.2.1 The Parliament's resolution: red lines for the withdrawal agreement

On the 5th of April 2017, the Parliament adopted a resolution declaring its standpoints on the negotiations for withdrawal and the future relations between the Union and the UK.[159] The Parliament explicitly requested that

[157] P Eeckhout (n 122).
[158] P Eeckhout, Article 50 TEU: Secret and Lies, lecture, (UCL Faculty of Laws, 28 March 2017) https://www.youtube.com/watch?v=R4zRgenrqGw&feature=youtu.be Accessesd 2 May 2017.
[159] 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 (n 140.

the EC take the resolution into account when formulating its guidelines.[160] The Parliament states that the development and results of the negotiations will be accessed on basis of the resolution.[161] The Parliament is also making that it will only give its consent to an agreement under the precondition it has been fully involved in the negotiations process for the withdrawal agreement.[162]

The Parliament's resolution from the 5th of April supports the EC's guidelines in that the withdrawal agreement is to concern the withdrawal agreement and transitional arrangement being based on the account for the future relationship can only be discussed when *substantial progress* has been made towards the withdrawal agreement. In its resolution, the Parliament also adheres to the EC's view that the agreement on future relationship can only be concluded once the UK has become a third country.[163]

The Parliament could adopt more resolutions throughout the negotiation process and in that way, publicly, put pressure on the other Institutions and the UK to consider their standpoints and red lines.

6.3 218(10) TFEU

> The European Parliament shall be immediately and fully informed at all stages of the procedure.

I will in this subchapter discuss the duty laid down in 218(10) to inform the Parliament at all stages of the procedure in concluding an international agreement. The CJEU has in two cases elaborated on what this requirement entails and what the consequences are if the requirement is not met. I will, therefore, go through the CJEU's reasoning in these two cases, C-658/11 and C-263/14, which are the two existing cases to date where the CJEU has elaborated on the purpose behind 218(10) TFEU. These two cases also concern the issue if the agreements relate *exclusively* to CFSP in the meaning of Article 218(6) 2 subparagraph and the Council therefore can conclude the agreement without the consent or consultation of the Parliament. Because this procedure is not of direct relevance to this thesis's research question, they will not be discussed at length. The subchapter continues with a discussion about 218(10) TFEU and the withdrawal agreement. The uncertainty, based primarily on textual interpretation of Article 50 TEU and 218 TFEU, on whether 218(10) TFEU is relevant in the procedure for concluding the withdrawal agreement has already been discussed in subchapter 6.1.

[160] Ibid para. 34.
[161] Ibid para. E.
[162] Ibid para. 12.
[163] Ibid para. 13-15.

6.3.1 C-658/11 *Parliament v. Council* (Pirate Transfer Agreement with Mauritius)

In C-658/11[164] The CJEU annulled a Council decision on signing and concluding an Agreement between the Union and the Republic of Mauritius (henceforth Mauritius), on the transfer of suspected pirates and associated seized property from a Union-led naval force to the Mauritius, due to failures of the Council to inform the Parliament according to 218(10) TFEU. The Parliament had two pleas, first that the Council had infringed the second subparagraph of Article 218(6) TFEU and the second, that the Council had not informed the Parliament according to the requirements in 218(10) TFEU.

The Parliament's first plea was based on a textual interpretation of the second subparagraph of Article 218(6) TFEU according to which the Council only can conclude an international agreement that 'relate exclusively to the [CFSP]'. The Parliament did not dispute that correct substantive legal basis for the agreement was Article 37 TEU. The Parliament, though, argued that the disputed agreement also related to judicial cooperation in criminal matters, police cooperation and development cooperation and, therefore, that the agreement did not *exclusively* relate to CFSP according to Article 218(6) second paragraph.[165] The Parliament, with support from the Commission, argued that Article 218(6) TFEU should be read as saying that the Parliament must give its consent or be consulted if the international agreement also has other aims than those that exclusively belong to CFSP-area, because the agreement in those situations do not exclusively relate to CFSP.[166]

In its second plea, the Parliament argued that the Council had not fulfilled its duties according to 218(10) TFEU and kept the Parliament fully informed under all stages of the procedure.[167] The background was that the Council had on the 22nd of March 2010 authorised the High Representative to open negotiations to conclude an international agreement with Mauritius. The same day the Council informed, by letter, the Parliament. On the 12th of July 2011, the Council decided to authorise the signing of the agreement. The decision was published on the 30th of September 2011 in the Official Journal of the European Union (henceforth: Official Journal). The Parliament was though only informed of the Council's decision after 3 months and 17 days after its publication in the Official Journal.[168]

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[164] C-658/11 *Parliament v Council* [2014] OJ C 292
[165] Ibid. paras. 22, 44.
[166] The Parliament referred here to that the wording of 218(3) TFEU would make a distinction between agreements relating *exclusively or principally* to CFSP because Article 218(6) TFEU only refer to agreements which *exclusively* relate to CFSP.
[167] C-658/11 Parliament v. Council (n 164) para. 22.
[168] C-658/11 Parliament v. Council (n 164) paras. 64-65.

Both Advocate General (henceforth: AG) Bot in his opinion[169] and the CJEU rejected the Parliament's first plea[170]. The CJEU states that following on the entry into force by the Lisbon Treaty and Article 218 TFEU regarding the objectives of Article 218 TFEU:

> As regards the objectives of Article 218 TFEU, it must be noted that, following the entry into force of the Treaty of Lisbon, in order to satisfy the requirements of clarity, consistency and rationalisation, that Article now lays down a single procedure of general application concerning the negotiation and conclusion of international agreements which the European Union is competent to conclude in the fields of its activity, including the CFSP, except where Treaties lay down special procedures.[171]

The CJEU proceeds with confirming AG Bot's statement in his opinion that Article 218(6) TFEU 'establish symmetry for adopting EU measure internally and the procedure for concluding international agreements in order to guarantee that the Parliament and the Council enjoy the same powers in relation to a given field, in compliance with the institutional balance provided for by the Treaties.'[172] The CJEU reasoned when a legitimate substantive legal basis is established, in this case Article 37 TEU, which belongs to the CFSP-area, the Parliament does not need to be consulted or give its consent. The CJEU did consequently also reject the Parliaments textual interpretation.[173]

The Council and the intervening Member States argued that the CJEU did not have jurisdiction because the decision falls exclusively under the CFSP area where CJEU does not have jurisdiction, Article 24(1) TEU and Article 275 TFEU. The Council was also of the opinion that the Parliament was duly informed according to the requirements in 218(10) TFEU. [174] The CJEU, as well as AG Bot[175], considers that it has jurisdiction over the application of 218(10) even though it is agreement that relates exclusive to CFSP. This is because the procedural provisions in Article 218 TFEU are not included in the exemption from the CJEU's jurisdiction over the CFSP in Articles 24(1) and 275 TFEU.[176]

Concerning the Parliament's second plea, AG Bot considers 218(10) to be applicable in all of the Union's areas. This means that the requirement to inform the Parliament applies generally when the Union concludes international agreements, including agreement that relate to CFSP.[177] AG Bot though considers that the level of information and with which frequency the Parliament should be informed depends on whether the Parliament's consent or not is needed for conclusion. AG Bot, consequently, argues that the Parliament should be informed more quickly and more thoroughly when the

[169] C-658/11 *Parliament v. Council* [2014] OJ C 292, Opinion of AG Bot, para. 131.
[170] C-658/11 Parliament v. Council (n 164) paras. 49-63.
[171] Ibid. para. 52.
[172] Ibid. para. 56.
[173] Ibid. paras.59-61.
[174] Ibid. paras. 66-67.
[175] Ibid. paras.134-137.
[176] Ibid. para.73.
[177] C-658/11, Opinion of AG Bot (n 169), paras.137-138.

conclusion of an international agreements requires the Parliament's consent. AG Bot point to the need for the Parliament to be fully informed and in good time to be able to give a reasoned opinion. AG Bot further states that assessment of whether or not the Council has fulfilled its duty to inform the Parliament depends on the character of the international agreement and what authority the Parliament has to influence the substance of the treaty according to Article 218(6) second paragraph. That the Council's duty to inform the Parliament varies, depending on the type of agreement, does not however mean that the Parliament loses its right to be fully informed on all stages because the international agreement relates exclusively to the CFSP.[178]

AG Bot did not, however, consider that the Council had not performed its duty to such a degree that the Council decision on concluding the agreement should be annulled.[179] AG Bot did, though, point out that, that it would have been more in line with Article 218(10) TFEU if the Council had informed the Parliament of the decision before it was published in the Official Journal and not three months after the contested decision was taken.

The CJEU then addresses the Parliament's next claim, that the Council's decision to conclude the agreement with Mauritius should be annulled due to the failure to fully inform the Parliament at all stages of the negotiation as provided for in 218(10) TFEU.

The CJEU decides that the Council did not sufficiently inform the Parliament and thus infringed Article 218(10) TFEU. The CJEU states that the procedural rule in 218(10) TFEU constitutes an essential procedural requirement in the second subparagraph of Article 263 TFEU. An infringement of that procedure therefore leads to that the measure should be annulled.[180] It was an infringement because it took over three months for the Council to inform the Parliament that it had adopted the decision. It was, furthermore, not enough that the Council had published the decision in the Official Journal. The CJEU established that the obligation arising from 218(10) TFEU is in place in order for the Parliament to be in a position so that it can exercise democratic scrutiny and, especially, verify that the correct legal basis has been chosen so it can protect its prerogatives. The CJEU repeats that the Parliament's involvement in the Union's decision-making is an expression of the democratic principles Union is founded on, in that people should take part in the exercise of power through the intermediary of a representative assembly. The CJEU further states that with the Lisbon Treaty and the introduction of this new separate provision, which is applicable on all procedures that are envisaged in Article 218 TFEU, the importance of this rule has been enhanced. Even though the Parliament has a limited role in the CFSP area, it still has the right to scrutinise the Union Policy. The Parliament needs to be informed on all stages of the procedure of concluding international

[178] Ibid. paras. 139-144.
[179] Ibid. paras.155.
[180] Ibid. paras. 80.

agreements to be able to scrutinise the measure, especially for making known its standpoint concerning the right legal basis for the measure.[181]

Though the decision was annulled, and in extension the agreement with Mauritius, because both the Parliament and Council requested the effects of the annulled decision, through Article 264 TFEU the second subparagraph, be maintained until it is replaced the CJEU the ruled that the effects of the annulled decision would be maintained.[182]

6.3.2 C-263/14 Parliament vs Council (Pirate transfer agreement with Tanzania)

In the case C-263/14 the background was similar to the one C-658/11, though this agreement was with the United Republic of Tanzania (henceforth Tanzania). In a letter from the Council on the 22nd of March 2010 to the Parliament, the Council states it was important to start negotiations with, among other countries, Tanzania. On the same day, the Council authorised the High Representative to start negotiations. Then the Council informed the Parliament on the 19th of March 2014 that it had decided to conclude the agreement on the 10th of March 2014.[183] When informing the Council on 19th of March 2014 the Council did not present the wording of the contested decision or the text of the disputed agreement.[184]

The Parliament sought an annulment through Article 263 TFEU of the Council decision on concluding the agreement with Tanzania. The Parliament had two pleas that were similar to them in C-658/11. The first plea was that the Council decision to conclude the agreement had been based on the wrong legal basis, Article 37 TEU, and the procedure for agreements that exclusively relates to the CFSP. The Parliament considered the correct legal basis for the agreement to be Article 37 TEU, although not alone. The Parliament argued that the provisions on judicial cooperation in criminal matters and police cooperation, Articles 82 and 87 TFEU, must also be seen as correct legal bases, in combination with Article 37 TEU, for the agreement. The Parliament, therefore, thought the decision should have been adopted through the procedure prescribed for in Article 218(6) in point (a)(v). This means the Parliament must give its consent for the agreement to be concluded. The Parliament here challenges the substantive legal basis in contrast to in C-658/11 where the Parliament accepted Article 37 TEU as the correct sole legal base.

The Parliament's second plea was, as in C-658/11, that the Council had infringed Article 218(10) TFEU by not informing the Parliament at all stages of the negotiations.[185]

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[181] C-658/11 Parliament v. Council (n 164) paras. 77-86.
[182] Ibid. Paras. 88-91.
[183] C-263/14 Parliament v Council [2016] EU:C:2016:435, paras. 19-20.
[184] C-263/14 Parliament v Council [2016] EU:C:2016:435, Opinion AG Kokott para. 22.
[185] C-263/14 Parliament v Council (n 183) 25.

The CJEU reached the conclusion, like in C-658/11, that the aim of the agreement with Tanzania falls predominantly within the scope of the CFSP. The aim does, consequently, not fall within the scope of judicial cooperation in criminal matters or police cooperation. The CJEU, therefore, holds that the decision could be based on only Article 37 TEU, and hence, the Parliament's consent was not needed to conclude the agreement.

On the second plea AG Kokott, elaborates on the purpose of the requirement of informing the Parliament in 218(10) TFEU. AG Kokott considers the requirement in 218(10) TFEU to keep the Parliament immediately and fully informed at all stages of the procedure is a reflection of the democratic principle that applies to all decision-making process at the Union level.[186] In contrast to AG Bot's reasoning in his Opinion in C-658/11, AG Kokott does not consider that the duty to inform the Parliament is more or less strict depending on whether the Parliament is to give its consent or not. AG Kokott considers the information requirement is not just there for the Parliament to be able to exercise its formal rights, but that there is a value in itself that the Council must inform the Parliament. The duty to inform the Parliament creates transparency, which in itself produces an element of democratic control which has an inherent value. AG Kokott expands on the transparency aspect on the requirement of informing the Parliament. Kokott belives the 'transparency is a corollary of the fundamental principle that decisions in the European Union are taken as openly as possible and as closely as possible to the citizen (second paragraph of Article 1 TEU).'[187]AG Kokott means that this gives those involved in the Union's external relations an incitement to act more responsibly and 'ensures that the elected representatives of the citizens of the Union have an opportunity, in full knowledge of the facts, to have a public debate on foreign policy matters of general European interest and to scrutinise the entire procedure for the conclusion of an international agreement critically through spontaneous expressions of opinion.'[188] AG Kokott means that this gives the elected representatives a possibility to, in a legitimate way, influence the content of the agreements. AG Kokott also states that the lessons from the recent examples, among others the TFTP-agreement and the Union's accession to the ECHR, of the Union conclusion of international agreements show the importance of parliamentary democratic control.[189] AG Kokott ends her general remarks with stating that, besides what is mentioned above, 218(10) TFEU 'ensures that the Parliament is able to examine critically the Council's choice of the – formal and substantive – legal basis and, if appropriate, make known its views on the matter'[190].

After making these general remarks, AG Kokott evaluates if the Council had fulfilled the duty in 218(10) in the present case. AG Kokott evaluates the requirement in different steps, first if the Council *informed the Parliament at*

[186] C-263/14, AG Kokott Opinion (n 184) para. 76.
[187] Ibid. para. 78.
[188] Ibid.
[189] Ibid.
[190] Ibid. para. 81.

all stages, then if the Parliament was *fully informed* and finally if the Parliament was *immediately informed*. AG Kokott considers that even though the Council informed the Parliament of the initiating of the negotiations and of the Council's decision to conclude the agreement, the Council did infringe 218(10) TFEU by not informing the Parliament during the ongoing procedure. The Parliament's right to information cannot be the same as the special committee under 218(4) TFEU nor to be notified of purely preparatory internal process, such as discussions in Council working groups.[191] AG Kokott, though, considers that the 'Parliament must be informed about intermediate results achieved, significant progress in negotiations and any major difficulties arising during the negotiations. Information must always be provided – having regard to all circumstances of the individual case and, if necessary, with appropriate steps being taken for the confidential treatment of sensitive information – in such a way as to allow the Parliament sufficient room effectively to exercise its power of control.'[192] AG Kokott consequently finds that because the Parliament did not receive information on the ongoing procedure, the Council infringed Article 218(10) TFEU.[193]

AG Kokott does though not stop there but moves on and finds that the Council infringed 218(10) TFEU through not *fully* informing the Parliament. The two letters, on the decision on initiating negotiations and on the decision to conclude the agreements, the Council did send to the Parliament should have included information on the negotiations directives, based on Article 218(4) TFEU, and they should also have contained information on the desired content of the planned agreement.[194] In connection to this, AG Kokott dismisses the Council's argument that the publication in the Official Journal would mean that the Parliament was sufficiently informed, partly because it would have adequately time to launch an annulment action according to Article 263 TFEU. According to AG Kokott the judicial review that is possible through Article 263 TFEU is not all the same as *democratic review* as 218(10) TFEU provide for. The democratic review would be much less effective if it only could take place after the agreement is concluded but if it is exercised on an early stage it can prevent legal disputes between the Union's institutions.[195]

AG Kokott also considers that the Council, furthermore, did not *immediately* inform the Parliament when it first notified the Parliament a week after it decided to conclude the agreement. AG Kokott considers that this delay 'shows a lack of respect for the representative body of the people which is not consistent with the wording and spirit of Article 218(10) TFEU or the principle of sincere cooperation among the institution'[196]. In conclusion AG

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[191] Ibid. paras. 82-87.
[192] Ibid. para. 87.
[193] Ibid. Para. 88.
[194] Ibid. Paras. 90-95.
[195] Ibid. para 99.
[196] Ibid para 102.

Kokott founds the Parliament's second plea is well-founded and the Council decision should be annulled.[197]

On the second plea, the CJEU first confirms what it said in C-658/11, namely that the duty to inform the Parliament at all stages of the negotiations, apply on all the Union's international agreements, including the ones that belong to the CFSP. Also, the CJEU, as in C-658/11, stated that 218 TFEU 'in order to satisfy the requirements of clarity, consistency and rationalisation, lays down a single procedure of general application concerning the negotiation and conclusion of international agreements by the Union in all the fields of its activity, including the CFSP which, unlike other fields, is not subject to any special procedures'.[198] The CJEU also reiterates that the information requirement is there to make sure that the Parliament is in a position so it can exercise its democratic control. The Parliament's democratic control over the Union's external action, and especially to verify that the chosen legal basis, does not inflict on the Parliament's prerogatives.

The CJEU also clarifies that the duty to inform the Parliament, in particular, covers the negotiation phase. The duty to inform includes the stages of:

> […] inter alia, the authorization to open negotiations, the definition of the negotiations directives, the nomination of the Union negotiator and, in some cases, the designation of a special committee, the completion of negotiations, the authorization to sign the agreement, where necessary, the decision on the provisional application of the agreement before its entry into force and the conclusion of the agreement.[199]

Also, in addition to these stages, the information requirement also applies to intermediate results including the draft agreement and draft decision approved by the Council's Foreign Relations Counsellors. Because the agreement at hand falls exclusively under CFSP the information requirements do not apply to the Council's preparatory process.[200] The CJEU rejects the Council's arguments that because the agreements was similar to previous agreements and the publication in the Official Journal, once again, the Parliament was sufficiently informed and in a position to exercise its prerogatives. The CJEU concludes that the infringement of Article 218(10) TFEU is detrimental to the ability for the Parliament to perform its duty and must be seen as an infringement of an essential procedural requirement.[201] The CJEU, therefore, found that the contested decision must be annulled. The CJEU decided however, being requested by both the Parliament and the Council, that the effects of the decision should be maintained through the second subparagraph in Article 264 TFEU not to hamper the conduct of the operations carried out on the basis of the Union-Tanzania Agreement.[202]

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[197] Ibid. paras 103-104.
[198] C-263/14 Parliament v Council (n 183) para. 68.
[199] Ibid. para 76.
[200] Ibid. paras. 75-77.
[201] Ibid paras. 79-84.
[202] Ibid. paras. 85-89.

6.3.3 218(10) TFEU and the withdrawal agreement

From these two cases the aim behind 218(10) TFEU becomes clearer. The information requirement is there so that the Parliament can exercise its democratic control over the Union's external relations. Particularly, so that the Parliament can verify that the choice of legal basis was made with due regard to the powers of the Parliament. This requirement applies to the Union's agreements in any policy field even though its exclusively relates to the CFSP and, therefore, the Parliament does not need to be consulted or give its consent for the conclusion of the agreement.[203] The CJEU considers that the rule is an expression of one the founding principles of the Union; that the people should participate in the decision-making through a representative assembly. [204] The CJEU also found that the infringement of the information requirement must be seen as an infringement of an essential procedural requirement according and therefore can lead to the annulment of the measure.

Given that the CJEU has stated that there is no restriction of the information requirement to certain Union policy fields, indicates that it should apply on the procedure for concluding the withdrawal agreement also. The rule gives the Parliament the possibility to take part in the decision-making in the Union's external relation. The Parliament's involvement in the Union's decision-making is an expression of the principle of representative democracy. It would, therefore, be contradictory to this principle if the Parliament was not informed of ongoing procedure for concluding the withdrawal agreement. Also, in contrast to the two cases where the Parliament does need not to be consulted or give its consent, the Parliament needs to give its consent the withdrawal agreement according to Article 50(2) TEU. In order for the Parliament to be able to conduct a genuine democratic control over the negotiation process it needs to be informed of all stages. If the Parliament can only either give its consent to or reject the substance of a proposed agreement it cannot publicly deliberate on the agreement. To publicly deliberate, could be argued, is one of the fundamental tasks of the Parliament.[205] In conclusion, by looking at the purposes behind the information requirement in Article 218(10) TFEU there are convincing arguments for this requirement to be applicable also on the procedure for concluding the withdrawal agreement.

The next question is what this requirement entails in the context of the procedure for concluding the withdrawal agreement. In C-263/14 the CJEU gave some concrete meaning to when in the procedure and what kind of information must be transmitted to the Parliament. In addition to informing

[203] See Article 218(6) first part of the second subparagraph.
[204] C-658/11 Parliament v. Council (n 164) para. 81.
[205] C Eckes (n 73) 908.

of the formal steps on deciding on initiating the procedure and of the decision to conclude the withdrawal agreement. The Council is probably required to inform the Parliament of intermediate results as draft agreements and the draft Council's decision reached by the working parties in the Council.

The Parliament's access to information during the procedure for conclusion of the agreement is vital for its ability to influence the direction and content of the withdrawal agreement. Article 218(10) TFEU could provide an important legal argument for the Parliament to put pressure on the Council to share information to the Parliament on the ongoing procedure for concluding a withdrawal agreement. With the framework agreement, discussed in subchapter 2.5, that is concluded with the Commission 218(10) TFEU provides a possibility to access to information from not only the Commission but also the Council.

6.4 218(11) TFEU

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

The possibility for the Parliament to request an opinion from the CJEU on the envisaged withdrawal agreement creates further incitement for the Council and Commission to take the Parliament's standpoints into consideration. If the Parliament raises any hesitations on the envisaged agreement's compatibility with the Treaties and it refers, or threatens to refer, the agreement to the CJEU against the other institutions or Member States' will. Beside that the Council and Commission might not agree on legal issue at hand and do not want to risk, for them, an unwanted decision by the CJEU the process can also be delayed. Even though the reference to the CJEU does not suspend the process. 218(11) TFEU does not have a suspensory effect on the process of negotiating and concluding the international agreements because it is still possible for the Union institutions and Member States to bring an annulment procedure after the international agreement has been concluded.[206] It is not obvious that the time-limit on 2 years in 50(3) TEU would be pushed forward, as Eeckhout and Frantziou argues[207], thereby risking the Treaties ceasing to apply automatically if it is not concluded before the CJEU gives its opinion. It is, therefore, relevant to discuss the possibility for the Parliament to ask the CJEU for an opinion because it could have real practical consequences on the outcome of the negotiations.

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[206] Van Elsuwege 'The Potential for Inter-Institutional Conflicts before the Court of Justice: Impact of the Lisbon Treaty' in M Cremona and A Thies (ed) *The European Court of Justice and External Relations Law: Constitutional Challenges* (Hart Publishing 2014) p. 134; Opinion 3/94 *Framework Agreement on Bananas* [1995] ECR I-4577, paras 20–22.
[207] See subchapter 4.2.

The primary legal arguments for that the general framework for concluding international agreements in 218 TFEU does not apply has been discussed in 6.1. I will not repeat these arguments here.

The need for a pre-judicial review of the Union's international agreement is to avoid the easily imagined difficulties that could arise if the agreement was deemed to be unlawful after its conclusion. The Union would still be bound under international law if the strict conditions under the Vienna Convention Article 46 were not fulfilled.[208] This would lead to a situation where the Union must rely on the contradicting parties good will in re-negotiating the agreement or to terminate it. This is also the foundation in the CJEU's reasoning on the purpose behind the possibility for asking it for an opinion.

In *Opinion* 1/75, *Understanding on a Local Cost Standard,* the CJEU discussed the purpose behind the possibility to ask for an opinion. It stated that agreements' compatibility with the Treaties 'must be assessed in the light of all the rules of the Treaty, that is to say, both those rules which determine the extent of the powers of the institutions of the community and substantive rules'. The CJEU thereby established that a request for an opinion could also include the issue of whether the Union has the competence to conclude the agreement. The CJEU meant this was necessary, if the agreement was found not to be compatible with the treaties, to prevent the

> […]in a Community Context but also in that of international relations, serious difficulties and might give rise to adverse consequences for all interested parties, including third countries. To avoid such complications the CJEU stated that the 'Treaty had recourse to the exceptional procedure of a prior reference to Court of Justice for the purpose of elucidating, before the conclusion of the agreement, whether the latter is compatible with the Treaties.[209]

Article 218(11) TFEU gives the Parliament a possibility to get an opinion from the CJEU before the EU can conclude an international agreement. The court can only give an opinion on an envisaged treaty, not one that has have already entered in to force.[210] In *Opinion 2/94* on accession to the ECHR, the CJEU stated that in order for it to be able to give an opinion, as minimum the purpose of the envisaged agreement must be known.[211] The CJEU did not however consider it to be necessary that the Council had taken a decision[212] as long it had sufficient information on the specific arrangement. In this particular case, the CJEU did not consider it to have sufficient information on the proposed mechanism for judicial control under ECHR and could not, therefore, give its opinion on that issue.[213]

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[208] P Eckhout (n 27) 270.
[209] *Opinion* 1/75 *Understanding on a Local Cost Standard* ECR 1355, 1360-1361.
[210] P Eckhout (n 27) 198.
[211] *Opinion 2/94 EU Accession to the ECHR* [1996] ECR I-01759 para. 8.
[212] Ibid. para. 13.
[213] Ibid. paras. 20-22.

The withdrawal agreement under Article 50 TEU as discussed in subchapter 2.1 would be binding under international law and the complications that could arise if the CJEU annulled the agreement after its conclusions or other complications due agreement's incompatibility with the Treaties could potentially be grave. In line with the provision purpose as stated in Opinion 1/75 it would be reasonable to argue that the possibility to ask the CJEU for an opinion would apply also in context of the withdrawal agreement.

As discussed, primarily in chapter 5, the limitations of the scope of the withdrawal agreement and also the possibility of the withdrawal agreement being mixed, is unclear. There could therefore realistically be a need to get an opinion on these matters and others before conclusion of the withdrawal agreement. It would, therefore, arguable be contradictory to the rationale behind the provision to exclude its applicability in the procedure for concluding the withdrawal agreement.

Conclusions and analysis

In this last chapter, the conclusions of thesis will first be summarised. These conclusions will then be further analysed. The discussion will lay out which minimum level of involvement by the Parliament is needed for the conclusion of the withdrawal agreement. Through the multi-level governance perspective, the Parliament must be seen as an independent actor, separated from the Member States, with its own possible agenda for the content of the withdrawal agreement. It is, therefore, interesting to discuss the possibilities for Parliament to influence the negotiations and content of an anticipated withdrawal agreement.

As discussed in chapter 4 and 6.2, according to Article 50 TEU and Article 218(3) TFEU, the Parliament does not formally take part in formulating the EC's guidelines for the negotiations. The Parliament does not either, formally, have a say in the authorising of the opening of the negotiations and appointing the Union's negotiator. The Parliament does not either have a formal say in formulating the negotiation directives according to Article 218(4) TFEU. The Parliament's formal participation in the procedure is to give or not give its consent to the withdrawal agreement according to Article 50(3) TFEU.

The fact that the Parliament must give its consent provides it a form of *veto-power*. As showed in subchapter 2.4 the Parliament has used this veto-power before to increase its role in the negotiation process or alter the content of the international agreement. The Parliament has also, in the context of the expected negotiations between the Union and UK, adopted a resolution (see subchapter 6.2.1) where it states that it will not give its consent to a withdrawal agreement if it has not been fully involved in the negotiation process. The Parliament's resolution was adopted on the 5th of April 2017, one week after UK's notification of its intention to withdraw from the Union and a little more than three weeks before the EC's adopted its guidelines.[214] As already mentioned, the resolution explicitly demands that the Parliament must be allowed to be involved in the negotiations as well, or it will not give its to consent to any agreement.[215] The Parliament clearly shows it intention to take an active role in the negotiations for a withdrawal agreement.

A crucial factor in order for the Parliament to be able to influence the outcome of the negotiations, is access to information. With information on the development of the negotiations it is possible for the Parliament to formulate reasoned standpoints. To be informed at an early stage of the negotiations is also important in order to influence the general direction of the agreement. It is, arguably, easier to influence the content of an agreement while it is being developed than demanding fundamental alterations to a draft agreement which has taken months to negotiate. The two year time-limit in 50(3) TEU

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[214] See subchapters 4.2 and 6.2.1.
[215] Subchapter 6.2.1.

before the Treaties cease to apply could also pressure the Parliament to give its consent to a withdrawal agreement it, given other circumstances, would not give its consent to. Without speculating too much on how the political context may be when the Parliament eventually is asked to give its consent, it is easy to foresee that it would probably be politically difficult not to give its consent to the suggested withdrawal agreement. In conclusion, if the Parliament would want to influence the content of the withdrawal agreement with the UK, it is important to play an active role from the start.

In addition to using its veto-power to argue for its right to be involved in negotiations, the Parliament could also argue in favour of the applicability of the general framework of concluding international agreements in Article 218 TFEU on the procedure for concluding the withdrawal agreement. As shown in chapter 6, there are credible legal arguments that the general procedure in 218 TFEU for concluding international agreement should apply on procedure for concluding the withdrawal agreement as well. The procedure in 218 TFEU prescribes different roles for the Union's Institutions in the procedure of concluding international agreements. These roles must be respected by the other Institutions according to the principle of institutional balance. The general framework in Article 218 TFEU provides the Parliament the right to be immediately fully informed at all stages of the procedure, 218(10) TFEU, and the possibility to ask the CJEU for an Opinion on the envisaged agreements compatibility with the Treaties, 218(11) TFEU. A contextual interpretation supports the applicability of the general framework in Article 218 TFEU on the withdrawal process. Article 218(3) TFEU its need to be applied together with its framework in Article 218 TFEU.[216] For instance the possibility to assign directives to the negotiator according to 218(4) TFEU is arguably needed for such a complicated agreement which most, likely will have, significant effects for the Union and the Member States. This clearly indicates the need to apply the general framework in 218 TFEU on the withdrawal procedure.

In addition, as discussed in subchapters 6.3 and 6.4, the purposes behind Articles 218(10) and 218(11) TFEU are highly relevant in the context of the procedure for concluding the withdrawal agreement. The Parliament needs to be fully informed at all stages of the procedure to be able to deliberate on the envisaged agreement. Not informing the Parliament at all stages of the negotiations could contradict the principle that people should take participate in the exercise of power through the intermediary of a representative assembly; the principle that Article 218(10) TFEU is based on, according to the CJEU. It would be contradictory to the rationale behind 218(11) TFEU if the Parliament would not have the possibility to ask for an Opinion from the CJEU on the envisaged agreement's compatibility with the Treaties. If the withdrawal agreement in some aspects would breach the Treaties; the complications could further down the line be dire. The CJEU might have to deal with such complications in an annulment proceeding according to 263 TFEU or after requests for preliminary rulings pursuant to Article 267 TFEU.

[216] See subchapter 6.1.

The fact that Article 50 TEU contains unclear and vague formulations makes it possible for the Parliament to argue that it should have an influential role in the negotiations. In line with Rittberger's writing, the incomplete nature of Treaty provisions open up for bargaining between the Union's Institutions. The Parliament could argue that because of the principle of representative democracy, and to battle the notion of a democratic deficit in the Union's decision making, the Parliament should have a central role in the procedure for negotiating the withdrawal agreement.[217] This enables the Parliament to argue for a favourable interpretation of its role under Article 218 TFEU and also for the application of the Framework agreement discussed in subchapter 2.4. As discussed in Chapter 5, the possible scope of the withdrawal agreement under Article 50 is unclear. The Commission argue that Article 50 TEU gives it an exceptional horizontal competence when it comes to negotiate and conclude a withdrawal agreement. In light of this, the Parliament could argue that as the representative of the Union's people it is crucial that the Parliament receives information on the progress of the negotiations so it can publicly debate the agreement and protect the people's interest. Especially given the background, that the withdrawal agreement will probably not be concluded as a mixed agreement and therefore the participation of the national parliaments will be excluded. As Rittberger writes, the shift of power to Member State's executives due to the Union-integration creates pressure to enhance the elements of representative democracy at the European level.[218] The criticism from the Brexit-campaign in the UK that the decision-making in the Union is undemocratic might also make it harder, politically, to ignore the Parliament's requests for involvement.[219]

According to the multi-level governance theory it is also to expect that sub-national actors will try to form relations with interest groups in the Parliament.[220] This kind of lobbying might also pressure the Parliament to play an active role in the procedure of concluding the withdrawal agreement.

It is today unknown how the UK's expected withdrawal from the Union will turn out. Which role the Parliament will have is also too early to say. This thesis has though, hopefully, shown that the Parliament could potentially play a fundamental role in procedure for concluding a withdrawal agreement under Article 50 TEU.

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[217] See subchapter 1.3.2.
[218] Ibid.
[219] See subchapter 1.1.
[220] See subchapter 1.3.2

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