Professor Danuta Hübner, Ph.D.
Chair of the Committee on Constitutional Affairs, European Parliament

The EU after Brexit

European System of Central Banks - Task Force on Brexit
29 November 2018, Brussels

I am sure it will not come to you as surprise if I say that as many of us here, I continue to regret that the UK has decided to leave the European Union but, as we have been repeatedly saying, we respect this decision. I am also convinced that the best choice in this context would be an orderly exit on the basis of a withdrawal agreement.

However, even after yesterday's European Council, the risk of a no deal scenario is not gone.

The procedure ahead of us can lead to a failure. I would definitely see much stronger risk on the British side where the political situation continues to be rather fragile. In particular, the outcome of the so called meaningful vote which will start the process of political approval of the Withdrawal Agreement and of the political declaration is far from certain.

And the clock continues ticking. Article 50 is the only procedure envisaged by the Treaty where a deadline applies with serious consequences.

While extension of Article 50 or revoking Article 50 seem to be legally possible, I would insist that there is no political space for either. There is also the challenge of the European elections in May next year.

Let me say in this context a few words on the whole Article 50 process. Article 50 TEU is so succinct that it does not provide all details on many important issues, also regarding the phase of negotiations of an agreement on an orderly exit.

Issues of institutional nature such as the role of the European Parliament in the negotiations or some aspects of the status of the withdrawing State, issues of procedural nature such as the possibility to revoke the withdrawal, and indeed issues of substantial nature, such as the possibility of agreeing a transition period or the terms of the framework for a future relationship between the EU and the withdrawing Member State have been solved on the basis of successive enactments made by the Institutions involved in the process.

All European institutions have been involved in the Brexit process. In general terms, the European Parliament has been fully exercising its functions of political control and scrutiny as laid down in the Treaty. However, the unique position of the Parliament has been a corollary of its role in the consent procedure. There is no doubt that we have been very present and very active in the debate on the withdrawal of the UK from the European Union, looking carefully at the consequences of the withdrawal for all those involved and affected.

The Parliament was present since President Tusk, President Schulz and Dutch Prime Minister Mark Rutte met the day after the United Kingdom referendum, and made a joint statement regretting the decision of the British people but respecting and accepting it. On this occasion the presidents of the institutions also declared the unity among member states as well as between European institutions, in addressing the common future challenges, related to Brexit. This unity has been maintained throughout the process.

Parliament has responded to the challenges posed by Brexit through its resolutions, the first of which was passed after the referendum was voted, as early as 28 June 2016. In that resolution, we have acknowledged, accepted and taken stock of the results of the referendum for the process and for the debate on the future of Europe.

For this unprecedented process of a withdrawal of a Member State, the institutions agreed that the relationship between the institutions and in particular between Parliament and Commission had to be unprecedented regarding openness of the process. The level of transparency has been, indeed, remarkable. In line with the requirement expressed by the Parliament at the outset of the process. We called for

negotiations to be conducted in good faith and full transparency. While this demand for transparency was shared across the institutions, the Council not only reiterated this principle, but also took concrete action to enact specific guiding principles.

The European Parliament has been involved from the day one of the process at political and at technical level. It has been kept informed of and closely involved in the progress made throughout the whole negotiation cycle until the very moment of the conclusion of the negotiations last week. The proper involvement of Parliament is crucial, as according to Article 50 TEU, the withdrawal agreement can only be concluded with its consent.

In terms of internal organisation, Parliament has responded to the demands of its role and prepared itself extensively, politically and technically, in order to understand and deal with the challenges associated with the Brexit talks, and ensuring a proper consent procedure not reduced to mere rubber-stamping. We have established a specialized structure - the Brexit Steering Group - gathering the main political groups of the Parliament and the Chair of AFCO, coordinated by Guy Verhofstadt.
AFCO, as committee responsible for the consent procedure has become a platform for exchanges of views and information, open to all stakeholders of the process. Through these structures Parliament has obtained information from and gave regular input to the EU negotiator before and after each round of negotiations. The Parliament has thus mobilised its resources to be up to the task to be a responsive, responsible and constructive actor in the talks and in the procedure as a whole.

As Chair of the Committee on Constitutional Affairs and Member of the Brexit Steering Group I have myself participated and been wholeheartedly engaged in the effort of listening to all sectors of society who are affected by or concerned with Brexit. This is the role of parliaments and the role of elected representatives. I have met and heard over the past two years a very high number of interested institutions, bodies and individuals, from larger trade conglomerates, to medium sized businesses, from groups of citizens to representatives of smaller communities, from Member States representatives to national parliaments' delegations. I have brought their concerns and input to the debate. I had more than 350 meetings in this context with stakeholders coming from UK, EU as well as third countries.

After rather difficult negotiations, a text of the withdrawal agreement was presented on 14 November. The negotiations on an orderly withdrawal have been concluded. The negotiators managed as well to complete talks on the joint political declaration ahead of the European Council summit. And yes, the European Council endorsed yesterday the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community. On this basis, the European Council invited the Commission, the European Parliament and the Council to take the necessary steps to ensure that the agreement can enter into force on 30th March 2019, so as to provide for an orderly withdrawal.

The European Council also approved the Political Declaration setting out the framework for the future relationship between the European Union and the United Kingdom of Great Britain and Northern Ireland. The European Council restated the Union's determination to have as close as possible a partnership with the United Kingdom in the future.

So much on the process. Let me now comment shortly on the withdrawal agreement as such.
What is of particular importance in the agreement?

The first part of the WA deals with the Common Provisions. The agreement must have the same legal effect for the UK as EU law does for EU Member States – including the principles of direct effect meaning that the agreement as such can be enforced in national courts and implicitly supremacy meaning that national law which breaches the agreement must be disapplied by national courts.

Part Two deals with the Citizens' rights which was the most sensitive issue fr us in the European Parliament. This part will mostly not apply until after the end of the transition period, since free movement of people will continue during that period. In principle, it provides that EU27 citizens in the UK before the end of that period and UK citizens who are in the EU27 before the end of that period will retain the same rights as those who arrived before Brexit day. To that end, it requires the two sides to keep applying EU free movement legislation to the people concerned, including legislation on social security coordination and the recognition of qualifications.

When comparing the European Parliament's position to the current version of the Withdrawal Agreement, considerable progress can be noted in the area of citizens' rights since the start of the negotiations, notably:

- The inclusion of all benefits and social security coordination.
- The inclusion of future children for family reunification.
- The direct effect of the Withdrawal Agreement.
- The role of the European Court of Justice (CJEU) and application of future case law (8 years).
- The cut-off date for citizens' rights part being at the end date of the transition period.
- The establishment of an independent authority to act on citizens' behalf.

Not all of the European Parliament demands have been included in the Draft Withdrawal Agreement though, notably:

- The inclusion of future partners for family reunification.
- Future freedom of movement of UK citizens living in EU27
- A lifelong right to return to the UK for EU citizens.
- Voting rights in local elections for all citizens.

We hope that some of these could possibly be addressed in the negotiations on the future relationship.

The implementation of the UK's Settlement Scheme for EU citizens is a crucial aspect of this part of the draft Withdrawal Agreement. The current state of the scheme contains a number of undesirable features and the European Parliament has expressed the need for certain improvements, notably:

- The administrative procedure should be declaratory in nature and the burden of proof should be on the UK authorities to challenge the declaration.
- The registration, at least for those who lived in the UK before the date of the notification, should be cost free.
- The registration scheme should be user-friendly in practice and with the necessary assistance, particularly for the most vulnerable.

While the UK Government has committed to the system being user-friendly and with the necessary assistance, it has firmly rejected the scheme being declaratory in nature and cost free. The Draft Withdrawal Agreement allows for both the constitutive registration system and the fee opted for by the UK Government.

Part Three of the WA deals with separation provisions and tells out exactly how EU law ceases to apply at the end of the transition period, for a list of different issues. It was mostly agreed in March, with a few more Articles agreed in June, and the rest agreed since. The biggest difficulties were over geographical indications and what happens to cases pending before the CJEU on Brexit day. More precisely, this part sets out rules for ending the application of EU law as regards thirteen issues: goods placed on the market; ongoing customs procedures; ongoing VAT and excise procedures; intellectual property protection; police and criminal law cooperation; cross-border civil litigation; personal data; public procurement; Euratom; judicial and administrative procedures; administrative cooperation; privileges and immunities; and other issues, such as the European Schools.

Part four regards transition period. This is a short part of the withdrawal agreement, yet it has the biggest effect: it keeps substantive EU law in place in the UK until the end of 2020. It was agreed by March, except the negotiators have now added a new Article allowing for a possible extension.

This brings us to the new clause on extension of the transition period. It's possible for the Joint Committee set up by the withdrawal agreement – which works by the mutual consent of the EU and UK – to decide by July 2020 if the transition period will be extended, for a period of up to a date to be decided (reportedly that date could be the end of 2022).

In that case, the transition period rules continue to apply to the UK for that extended period, except there would have to be an ad hoc negotiation on how much the UK pays into the EU budget during the extended period. There are also special rules on agricultural support.

Part Five of the WA incorporates the earlier agreement that the UK takes part in the EU's spending until the end of the current budget cycle (end 2020), which matches the end of the transition period (unless that period is extended). The application of the financial settlement provisions in the WA means that the UK stays within the current MFF with all the rights and obligations during the transition period. This essentially includes:

- UK participation in the 2019 and 2020 EU budgets
- UK paying its share of the outstanding commitments at the end of 2020
- UK paying its share of the EU liabilities at the end of 2020 taking account of EU assets.

The draft WA does not set the amount of the UK's financial obligation, but merely defines the methodology for calculating it. The final value of the UK contribution is unknown as it depend on future uncertain events. The UK Government estimates the amount to be £35-39 billion.

An important change compared to the March draft WA is the possibility of extending the transition period once beyond 2020 and thus beyond the term of the current MFF, if both parties agree. An extension of the transition period would require the two sides to agree a new financial settlement.

However, during a possible extension of the transition period, the UK will be treated as a third country for the purposes of the future MFF. This means that the UK will be able to participate in EU programmes based on the legal bases for third countries that will be agreed in the relevant MFF regulations.

Extending the transition period will require a fair financial contribution from the UK to the EU budget, which will have to be decided by the Joint Committee established by the WA rather than through the usual MFF mechanism.

Though any UK participation in future MFF programmes is technically not to be decided as part of the next MFF, the decision on whether to extend the transition period may nevertheless impact the general MFF discussions. The decision would

need to be taken by 1 July 2020, which may collide with the final negotiations on the future MFF.

Let me say now few words about the Governance.
It concerns the rules and Institutions that will manage and supervise the Agreement, will decide on disputes and will ensure the enforcement of the provisions. It has remained one of the outstanding issues until the end, in particular as regards the dispute settlement mechanism.

The Governance structure seems to represent a good compromise, including on the role of the CJEU, which has always been one of the most problematic areas.

Parliament oversight with respect to the EU component of the Governance structure, particularly the work of the Joint Committee will need to be addressed.

The institutional provisions concerning the Joint Committee are mutatis mutandis the same as in the March draft. A couple of additions, in Article 164 d) and e) permit the Committee to adopt decisions concerning the Withdrawal Agreement (i.e. minor amending decisions on the agreement itself and on the rules of procedure)

In the previous version of the agreement, the relevant sections dealing with how disputes concerning the agreement would be resolved were clean — i.e. no agreement. The parties had agreed on the creation of a new mixed “Joint Committee”, and on the way it should have worked. What was going to happen if a dispute arisen was a matter of severe friction.

The system tabled by the EU foresaw that any dispute not settled in the Joint Committee should have been referred to the CJEU (whether the UK had liked it or not). Indeed, the Committee would have been able to involve the CJEU at any point in the event of disputes and, if after three months the Joint Committee had not reached an agreement in a dispute, the parties to be capable of unilaterally call the CJEU for a ruling. This would have been impossible to accept for London, as this would have meant that the CJEU was the ultimate arbiter of disputes between the

U.K. and the EU after Brexit (the EU was accused of “judicial imperialism” from U.K. for this position).

Instead, Article 170 of the new draft sets out the mixed Arbitration Panel, whose ruling is binding on the UK and EU.

Furthermore, the panel can apply temporary remedies for non-compliance for both parties, equilibrating what has been defined as a “unilateral punishment” set up in the previous draft for UK non-compliance with the rules.

Another relevant novelty concerns the Direct Application and the supremacy of the Agreement. While in the previous draft this only applied to citizens’ rights, Article 4 makes that applicable to the whole Agreement. This will represent a heavy political and legal challenge for the UK.

Finally the issue most present in the media in the last days - Protocol on Northern Ireland.

The Protocol establishes a Single Customs Territory between the UK and the EU. The EU’s Common External Tariff and Common Commercial Policy will apply to the Single Customs Territory. Goods within this Single Customs Territory can circulate freely (except for fishery and aquaculture products pending an agreement on fishing rights before the end of transition) without tariffs, quotas or rules of origin checks.

The UK would not benefit from the EU’s trade agreements. It would have to replicate these agreements with identical EU tariffs and rules of origin provisions. There would be no “cumulation” of rules of origin.

The UK-wide application of the CCT and CCP is to be accompanied by a series of commitments by the UK to a level playing field (LPF). This covers taxation, environmental protection, labour and social standards, state aid and competition. Future EU changes to state aid and competition rules will be complied with by the UK. Environmental protection and labour/social standards will be subject to a non-

regression provision. On taxation the UK will follow EU principles on good governance on tax.

We could ask then what is so specific to Northern Ireland in terms of goods?

To enable goods produced in Northern Ireland to enter friction free into the EU single market specific parts of the EU acquis and other existing arrangements will apply only to Northern Ireland. They are:

- the Union's Custom Code
- legislation on VAT
- legislation on goods standards
- sanitary rules for veterinary countries
- rules on agricultural production/marketing
- state aid rules.

Northern Irish products would have their own certificate for goods to be placed on the EU's single market. Northern Ireland would also remain part of the EU's single electricity market. Northern Irish businesses would continue to enjoy unfettered access to the GB market.

What is specific to Northern Ireland in terms of goods?

The arrangements for Northern Ireland are somewhat close to the Chequer's proposals in relation to the common rule book but applied only to the province (and not the whole of the UK). Northern Irish businesses would be in the very privileged position of having friction-free access both to Great Britain and the EU's Single Market.

The corollary is that there would be increased checks on goods moving from Great Britain to Northern Ireland though the intention is to keep these as unobtrusive as possible. SPS checks would be increased.

Northern Ireland would be subject to direct supervision by the Commission, which in terms of overseeing the EU's state aid regime would be particularly rigorous.

To that end, let me please sum up that the options as regards the withdrawal agreement are therefore to support it, to overturn the Brexit process, or to leave the EU without a withdrawal agreement, and therefore without a trade agreement.

Each of these three options may individually lack a majority in the British Parliament, but the no deal option – although it probably commands the least support – is the default if one of the two other options does not command a majority.

A no deal outcome – damaging UK exports to their largest market, leaving the position of UK citizens in the EU27 and EU citizens in the UK less secure, disrupting the UK security relationship with the EU, significantly limiting flights and commercial lorry transport with the EU, and raising barriers to transfers of data from the EU to the UK – is manifestly not in the UK's interest, and no responsible politician should support it.

Finalizing this painful process was not a time to rejoice, as, indeed, the UK leaving the EU in few months, creates a lose lose situation and these negotiations in reality were mostly, if not exclusively, about damage control. This language has been used by many on the EU side and reflected our deep concerns. Main objectives of the withdrawal agreement are, indeed, to minimize disruption on both sides for citizens and businesses, to protect citizens' rights and to avoid a hard border between Northern Ireland and Ireland.

As regards the future relationship, the understanding of Parliament has consistently been that, remaining close neighbours and sharing many interests in common, the EU and the UK should forge the closest relationship possible, which would protect and promote such interests.

We have reached a crucial stage in this painful process. We have a compromise which can organize the exit in an orderly fashion, ensures no hard border on the Island of Ireland and offers a ground for an ambitious future new partnership.

We have a concise legal document providing legal security to all stakeholders in areas considered from the beginning crucial ones.

An orderly withdrawal is in my view a prerequisite for confidence based future relationship and agreement on it. It is hard to imagine negotiations about the future on the basis of a no deal scenario.
For an agreement on issues like internal and external security, FTA and cooperation on regulatory and custom matters confidence between partners is fundamental.

So what is ahead of us in terms of process?
The Parliament is analysing the deal against criteria and requirements, expressed in the treaties, guidelines and negotiations directives, and, last but not least, in the Parliament's resolutions. We will analyse in detail all the provisions of the withdrawal agreement, including those on its governance and enforcement, which are of utmost importance for ensuring the credibility and the trust necessary through its implementation.
The formal consent procedure, for which the Committee on Constitutional Affairs that I have the honour to chair is responsible, will be formally kicked off upon reception by the EP of the Council decision on the agreement.

Before I conclude, let me mention one more issue. In the meantime, parallel to the Brexit negotiations of Withdrawal Agreement, so-called preparedness process has been taking place. While all efforts must be put into a successful conclusion of the withdrawal agreement and political declaration, appropriate emergency measures must be identified and designed aiming at mitigating effects of consequences of the most undesirable solution which is exit without a withdrawal agreement, hence, without transition. This preparedness process takes place at European, national and corporate levels. Neither European institutions, and in particular the European Commission, nor the government's can substitute for what must be done by firms. Nevertheless one should bear in mind the sheer reality that most of European small and medium size companies have never had any experience of economic and trade activity outside single market and customs union.

In the financial sector, the work on preparedness has been very important. Banks are preparing both for a no-deal scenario and for the future situation created by the departure of the UK.

Large firms and large banks have been seriously working on their Brexit contingency planning, at multiple levels: at the level of individual products and services, at the level of legal structures and business models and at the level of communication with clients.

Four areas of risk have been identified by the joint ECB/Bank of England technical working group that you know well: centrally cleared derivatives, uncleared derivatives, insurance and personal data transfers.

Work has been done on all of them, with access to clearing probably the major issue for banks.

Supervisory authorities have also been taking action and assessed contingency planning done by firms.
The UK Prudential Regulatory Authority (PRA) and the ECB/SSM have been engaging with euro area banks having physical presence in the UK in order to assess their Brexit plans and their applications to set up third country branches.
The issue we are seeing there is that the EU side would be worried of the UK PRA would force euro area banks to create subsidiaries instead of branches.

The ECB is also engaging with banks supervised by the SSM in order to ensure that their plans are fit for purpose and adequately include the risks faced by SSM banks clearing at UK CCPs in the case of a disorderly hard Brexit.

In this context, we also have this risk that UK CCPs would not wish to retain EU members. Legally, it will no longer be possible to use UK CCPs to fulfill the clearing obligation under EMOR after Brexit but nothing prevents EU members from keeping an account in UK CCPs, as long as they do not engage in new activities.

However, there was a statement from the Bank of England that UK CCPs could face penalties under laws of EU member States if they are not recognised by ESMA and keep providing services to SSM-supervised clearing members. We also know that LCH is saying that if they have no certainty regarding the future recognition regime for UK CCPs, they might consider offboarding EU members at the time of Brexit.

So, authorities need to clarify the implications of banks losing access to CCPs to clear contracts when they have an obligation to do it. Vice-president Dombrovskis stated in the press a few weeks ago that the Commission would come up with a temporary recognition regime for UK CCPs, based on equivalence, but there were no further details provided. I trust those details will come in due course.

Another issue that banks will be facing with Brexit is the creation of the new investment firms regime, which will carve some of those firms out of the CRR and provide for a bespoke regulatory regime for them. It is now under discussion \n will impact on third country access, as the Directive and Regulation proposed by the Commission include third country provisions. We should make sure the new regulatory regime for investment firms does not open the door to regulatory arbitrage.

Let me now conclude. We, the European Institutions, after the November Summit will be awaiting the results of the meaningful vote of the British Parliament. It will be fundamental for the completion of procedure on the EU side - consent of the Parliament where simple majority is required and decision of the Council where qualified majority is required. Let me also underline that EU institutions are committed to proceed as fast as possible with preparation of mandate to start negotiations of the agreement on the future relations when UK becomes a third country.