

The EU's governance of Brexit and its impact on the negotiations

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BACKGROUND – NEGOTIATIONS ARE FAR FROM OVER

Nearly three years after the Brexit referendum, it remains uncertain how the United Kingdom's (UK) withdrawal from the European Union (EU) will look like, nor when – or even if – it will take place. However, these three years were marked by intense preparations for the UK's departure, including, from June 2017 onwards, withdrawal negotiations that eventually led to the conclusion of a Withdrawal Agreement and a political declaration on 25 November 2018. After repeated rejection from the House of Commons and Prime Minister Theresa May's request to delay Brexit, the European Council agreed to extend the withdrawal period until 31 October 2019 at the latest. Yet, even after the UK's departure from the EU, negotiations between the EU and the UK are far from over. Indeed, it is only after their withdrawal that negotiations on their future relations will begin, ranging in areas such as trade, mobility, security and foreign policy.

Throughout the Brexit negotiations, unity among the EU27 was the ultimate prerequisite for ensuring that the Union would be able to deliver a result that respected both the EU's red lines and member states' interests.

Independent from the final outcome of the Brexit process, it is pertinent to examine how the EU governed the negotiation process internally, in order to draw conclusions for the future. This paper argues that throughout the negotiations, the EU managed to set up an inter-institutional governance that not only ensured unity but also the full support of all institutions for the negotiation outcome, and strengthened the Union's

negotiation position. It thus helped to reach a negotiation outcome that respects the EU's red lines. Summed up, this governance constitutes a complex system of interaction that can be described as a model file of inter-institutional and -member state cooperation and diplomacy.

STATE OF PLAY – THE EU'S BREXIT GOVERNANCE

Institutional division of responsibilities

Throughout the Brexit negotiations, unity among the EU27 was the ultimate prerequisite for ensuring that the Union would be able to deliver a result that respected both the EU's red lines and member states' interests. The UK repeatedly tried to split the EU27 by approaching member states separately in an attempt to negotiate side deals. If London had been successful with this strategy, the Union's negotiating position would have been seriously weakened and the former would have been able to use potential divisions among the EU27 to gain the upper hand. Yet, British efforts remained unsuccessful – why was this the case?

Keeping the EU27 in line with each other would not have been possible without a close steering process between EU institutions and among member states that was pursued throughout the negotiation process.

Undoubtedly, strong interests shared among the EU27 during the withdrawal negotiations contributed to this unity: securing the rights of their citizens living in the UK, finding a solution to the Irish border issue, negotiating the

best possible deal concerning the UK's financial obligations towards the EU and defying a rise of Eurosceptic populists and a Brexit domino effect. These common interests and objectives were strong motivating factors, but they do not fully explain why the EU27 remained united throughout the process. Keeping the EU27 in line with each other would not have been possible without a close steering process between EU institutions and among member states that was pursued throughout the negotiation process. In fact, by December 2016 – more than three months before the UK's official withdrawal notification – the EU had established the framework for a complex, informal system of governance between the European Council, Commission, Council and European Parliament (EP) to steer Brexit negotiations internally.¹

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Institutionally, the **European Council** sits at the top of the Brexit governance system. It receives the formal withdrawal notification, agrees on the negotiation guidelines, oversees the negotiation process, and is the only body that can extend the two-year withdrawal period by unanimous decision. In the first week of negotiations, the EU and UK also agreed that the European Council would determine the “sufficient progress” of the negotiations. It thus acted as a general framing actor for the withdrawal process and also took the centre stage at a number of significant moments in the Brexit process.

However, it was not the European Council that was negotiating with the UK – rather, the **European Commission** was at the centre of the negotiation process, given that it was the EU's effective and only direct negotiator. The Commission appointed Michel Barnier, former Vice-President of the Commission for Internal Market and Services, as its chief Brexit negotiator. He is supported by a Task Force on Article 50 (TF50), which consists of experts for all the policy areas affected by the negotiations as well as the Commission's negotiation experts. The TF50 can also rely on the Commission's services and is supported by a representative of the rotating Council Presidency and of the President of the European Council.

The **General Affairs Council** (GAC) represents the member states in the Brexit process. While not involved in the negotiations with the UK, the GAC was in charge of adopting the negotiation directives and must agree on the final deal. The GAC is supported by a Working Party on Article 50, in which representatives of all member states are included. As its chair, the Council appointed Didier Seeuws, former Chief of Staff to Herman Van Rompuy, then President of the European Council. The aim of the Working Party is to channel the Council's efforts regarding Brexit within the General Secretariat of the Council to ensure

optimal internal coordination of the withdrawal process, streamline the member states' interests and positions before and during the negotiations, and support the work on all necessary levels.

Finally, the **European Parliament's** Brexit Steering Group constitutes the last part of the governing structure. The Steering Group was chaired by Guy Verhofstadt and included members of the EP's mainstream political groups. Due to this selective composition and its role according to the Treaties, the Steering Group's part during the negotiation process was limited. However, the group regularly adopted positions on Brexit and formulated its red lines. Given that the EP will have to adopt a final deal, its inclusion into the coordination process was imperative.

The Brexit governance in practice

Right after his appointment as chief negotiator, Barnier adopted a cooperative, diplomatic approach to exchange with all those involved in the entire negotiation process, leading to a high level of trust vis-à-vis Barnier and the TF50. He travelled to all member states and met with the EP to discuss their interests and concerns regarding Brexit. From the onset, inter-institutional and -member state coordination was identified as particularly crucial for a successful negotiation outcome.

To keep up the cooperation between the EU institutions and EU27 throughout the negotiations, a four-week cycle was established for each negotiation round: only weeks two and three included interactions with the UK, namely the exchange of negotiation papers in week two and negotiations in week three. Meanwhile, weeks one and four were dedicated to meetings with the Council's Working Party and the EP's Steering Group. Week one was used to keep them informed about the upcoming negotiation round and the Commission's proposals so that they could coordinate their approach and discuss the possible concerns of the various institutions. Here, the TF50 circulated detailed position papers in order to have an informal process with the member states and Parliament, to be sure about their full backing before approaching the UK. Post-negotiations, the TF50 would meet again with both groups for a debrief and to coordinate further action. This four-week cycle ensured that negotiations from an EU side did not only remain at a technical level but also had the political backing of the EP and member states at every step of the way.

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In fact, the interactions between institutions went even further. The work of TF50, Working Party and Steering

Group was characterised by constant informal discussions on how to approach the negotiations and prepare the EU for all the measures necessary to untangle the UK's EU membership. While the Council and Parliament were in principle treated equally, both institutions were, due to their role in the process and in accordance with Article 50, involved differently by the TF50: Whereas both institutions were informed equally via the Commission's briefing papers, the cooperation between the Commission and Council was especially high. This led to a nearly seamless interaction between the TF50 and Working Party throughout the main phases of negotiations, when they often met numerous times per week to have an intense exchange on the upcoming or past negotiation round.

However, this did not mean that the Commission treated the EP as a second-order part of the Brexit governance. On the contrary, the TF50 regularly discussed with the Steering Group about the negotiations and the EP's concerns. Furthermore, either Barnier or Jean-Claude Juncker were present in all the plenary debates on Brexit in order to be able to address the Parliament about the state of negotiations. Despite their different roles regarding the inter-institutional steering of the negotiations, both the EP and Council were treated equally and involved in all steps of the process.

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In sum, one can say that the EU's Brexit governance was a thorough and highly interactive process in which the Commission constantly remained in touch with the Council and Parliament to ensure mutual trust, uphold unity and create common understanding among the EU27. This interaction initiated an inter-institutional governance that led to unbroken and sustainable unity throughout the entire negotiation period as well as perfectly complementary resolutions and positions among institutions. It can thus be described as a model file of inter-institutional and -member state cooperation and diplomacy.

The impact on negotiations and outcome

By establishing the outlined Brexit governance, the Commission was able to:

- **Ensure unity.** Full transparency towards all institutions, member states and the public during the negotiations and constant meetings under the governance established high levels of trust among the EU27. Involving all the actors in every negotiation step avoided institutional rivalry and led to a joint approach both internally and externally, namely towards the UK and broader public. To ensure unity, it was also

indispensable that member states and the EP felt a high degree of ownership of the process and all of its principles. Their constant inclusion allowed for them to (co-)shape the principles, and be fully aware of why certain issues were raised or specific paths taken. Especially during the hot phases of negotiations and concerning detailed, technical issues, member states and EU institutions would have easily gotten lost in the overwhelming amount of information developing week by week if it were not for the constant coordination of information. This confusion would have made it easier for the EU to be torn apart by the UK.

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- **Ensure full support for the outcome.** Going one step further, namely by constantly confirming support and jointly defining priorities with the institutions, the Commission's negotiators could be confident that the entire political level was fully supportive of the content of a potential withdrawal agreement. In this way, the EU was able to minimise the risk of a no-deal scenario from their side, specifically due to a rejection by the Council or Parliament.
- **Use red lines as a negotiation tool.** By constantly being in touch with the Council and Parliament, the TF50 were made aware of all their concrete red lines and principle standpoints and could rely on their full backing at any given time. According to one Commission official, the negotiators even actively used other institutions' red lines as bargaining chips throughout the process, signalling a lack of room of manoeuvre in those issues towards the UK. In this way, the Brexit governance further strengthened the Commission's negotiation position and thus led to an improved negotiation outcome from an EU27 perspective.

PROSPECTS – KEEP THE GOVERNANCE AND USE IT

As official negotiations on the Withdrawal Agreement are concluded, the Article 50 provisions put member states in the driving seat of the current phase of the Brexit process. On the EU side, they take the decisions related to a possible extension of the withdrawal period and thus on the actual Brexit date.² However, provided that the UK will actually leave the Union, regardless of when or how – whether orderly on the basis of the Withdrawal Agreement or sans deal – the part of the negotiations which is crucial for the future relationship between the UK and EU will only start *after* Brexit. These negotiations will be even more complex than those in phase one, as the member states and EU institutions will have diverging priorities and interests on

a plethora of policy issues. Disunity of a certain degree will thus be inevitable during the negotiations on this future relationship. Having said that, unity on certain core positions – such as the indivisibility of the four freedoms of the Single Market – and common objectives will remain imperative for successful future negotiations. It is therefore essential to continue the constant exchange between all institutions.

While the Commission, Council and EP have developed a standard and utterly efficient procedure when it comes to conducting trade negotiations with third countries over the last four decades³, this level of coordination will certainly not suffice the negotiations on their future relationship with the UK. Not only will there be negotiations on trade, but also on mobility, energy, financial services, investment, justice and home affairs, and security and foreign policy. Due to the UK having been a member state for decades, these negotiations will be more complex than that of the usual mixed agreements with third countries and, more importantly, more significant given that its economic and social ties with the EU27 are much stronger than that of any other state. Consequently, the level of interaction between the EU institutions will have to be higher than that of previous negotiations with third countries, and thus be treated differently by carrying on the coordination process employed since 2016.

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This means that the Commission should maintain a Brexit Task Force led by a chief negotiator to ensure the inclusion and coordination of all the involved policy areas, and therefore acting more efficiently. In addition, the continuation of the Brexit governance will be useful in mediating and mitigating possible divisions between member states and the EP so that reaching compromise positions on disputed issues can be ensured and unity towards the UK maintained. Accordingly, the Council should keep its Brexit Working Party to make sure that the coordination process across Rue de la Loi is as close as possible. Finally, the newly constituted EP post elections should establish a new Brexit Steering Group for the negotiations on the future relations, in order to ensure close cooperation between all three institutions.

If the EU is able to maintain unity across disputed areas by coordinating closely throughout the continuation of Brexit governance, the Commission will be able to use those hard-fought compromises to its advantage. As seen during the withdrawal negotiations and numerous trade negotiations throughout the last 40 years, the EU has repeatedly used diverging positions among member states as a negotiation tool by emphasising this little room for manoeuvre. The lack of room for concessions resulting from internal discussions can create advantages when negotiating.⁴ In other words, the harder the internal negotiations among member states – and certainly also with the EP – to find a common position, the stronger the Commission's negotiation stance towards the UK will be. A prerequisite for this, however, is a well-functioning inter-institutional and -member state governance.

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To sum up, the EU has created a complex Brexit governance to maintain control over the withdrawal process. In doing so, it has established a model file of inter-institutional cooperation and coordination and thus developed the perfect instrument for handling and steering Brexit, consequently making the negotiations as successful as possible for its citizens, economy, member states and EU institutions. With this well-functioning governance in place, the Union should continue to apply it during the negotiations on their future relationship with the UK in order to maintain unity and control and allow for a successful negotiation outcome.

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¹ European Council, "[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](#)" 15 December 2016.

² See also Zuleeg, Fabian (2019), "Designing the next extension – Conditional and time-limited", Brussels: EPC.

³ See inter alia Frennhoff Larsén, Magdalena (2017), "The Increasing Power of the European Parliament: Negotiating the EU-India Free Trade Agreement", *International Negotiation*, Volume 22, Number 3, pp. 473-498.

⁴ Schelling, Thomas C. (1960), *The Strategy of Conflict*, Boston: Harvard University Press, p.9.