

The EU and the Brexit Negotiations: Institutions, Strategies and Objectives

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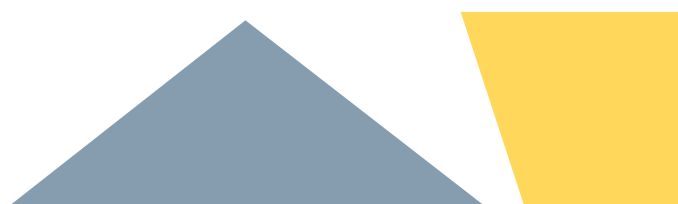
Introduction

Analysis abounds of what Brexit means for the UK, how the UK government is handling the withdrawal negotiations, and what the UK's main political factions want from Brexit. Much less is available, by contrast, on the EU's approach and position on Brexit. Given the asymmetrical nature of the process, this is unwise. In order to understand how the Brexit process really works, and how it is likely to end up, the EU's perspective has to be carefully considered.

This paper addresses three questions:

1. What role do the EU institutions play in the withdrawal process?
2. What have been the EU's strategies in the withdrawal negotiations?
3. What does the EU want from Brexit?

Institutionally, first, the Commission has been responsible for the negotiations, and is in close contact with the Council, which provides political leadership and oversight. This institutional dynamic resembles how the EU usually conducts international negotiations. In addition, the European Parliament has taken on a stronger and more influential role than it usually does in such negotiations.



Second, the EU's strategic approach has been to exert control over the negotiations and further increase its already strong bargaining power by manipulating the structure and sequencing of the negotiations, by ensuring that all negotiations are conducted through a single, inflexible channel, and by trying to control public narratives through the use of transparency. These strategies have been underpinned and enabled by high levels of unity between both the EU27 and the EU institutions.

The EU's position on Brexit, third, has been that there must be a cost to leaving, and that any future relationship must encompass an appropriate balance of rights and obligations. Regarding the future economic relationship, the EU's line is that the UK must be treated as any other third country, and can choose between existing models, such as 'Norway' or 'Canada'; 'Chequers' is off the table. In other domains such as security, the EU is less rigid, but still insists on an appropriate balance of rights and obligations. Despite some divergent interests, the unity of the EU27 is likely to last long into negotiations on the future relationship, which will occur during the transitional period.

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1) What role do the EU institutions play in the Article 50 withdrawal process?

The role of the EU institutions in the Article 50 withdrawal process is outlined in the EU treaties.² It is similar to how the EU conducts negotiations and concludes agreements with third countries. It was further elaborated in the European Council guidelines for Brexit negotiations, agreed on 29 April 2017.³

European Council and the Council of the EU

The **European Council**, led by President Donald Tusk, is comprised of the leaders of each EU member state, and the **Council of the EU ('the Council')** is the forum for the member states' national ministers. Together, these bodies direct and oversee the withdrawal process, and formulate the EU's position. The European Council has ultimate political control over the process.

The EU's official position and decision-making is formulated through a complex interaction between the European Council, the Council, the preparatory bodies of these forums, and the European Commission. The process begins with the '**Ad hoc Working Party on Article 50**', the official Council working group in which member states develop and flesh out the EU's position in detail. This group is comprised of Brexit attachés from each of the 27 member states. The position is then discussed at **Coreper**, the committee of the member state Permanent Representatives in the EU. After Coreper approves the position, it moves to the **General Affairs Council (Art. 50)**, for assessment and approval by the member state foreign ministers. Finally, the position is formally adopted by member state leaders at a European Council summit.

A similar set of steps are taken each time the EU's position is developed. First, a broad statement is issued, the tenets of which are repeated by EU leaders. This eventually turns into Council negotiating guidelines. As the negotiations have progressed, this cycle has repeated itself, and each new set of negotiating documents reference and align with all the previous ones. These are the key documents in which the EU's official position is outlined:

29.04.2017 European Council (Art. 50) guidelines for Brexit negotiations

22.05.2017 Brexit: negotiating directives

15.12.2017 European Council (Art. 50) guidelines for Brexit negotiations

29.01.2018 Negotiating directives on the transitional period

23.03.2018 European Council (Art. 50) guidelines on the framework for the future EU-UK relationship

Much of the detailed work in developing these documents is done by the Ad hoc Working Party on Article 50 and Coreper, and then only rubber stamped by ministers and leaders. These preparatory bodies of the Council do often go beyond a mere technical discussion, and are important forums for diplomacy and political decision-making.⁴ By the time the position reaches the European Council, it is invariably adopted without much debate, not least because representatives of each member state government have already been involved in its formulation at various levels. The member states are the political masters of this process even if their leaders are not heavily involved in the detailed formulation of the EU's position. This is delegated instead to Permanent Representatives and Brexit attachés, usually via the Europe Minister.

No representatives of the UK government are involved in discussions, groups, or forums relating to Brexit in the European Council or the Council. This is a legal requirement, specified by Article 50. Until Brexit happens, UK officials and representatives remain involved in all other EU business not relating to Article 50.

² See Article 50 of the Treaty on European Union and Article 218 of the Treaty of the Functioning of the European Union.

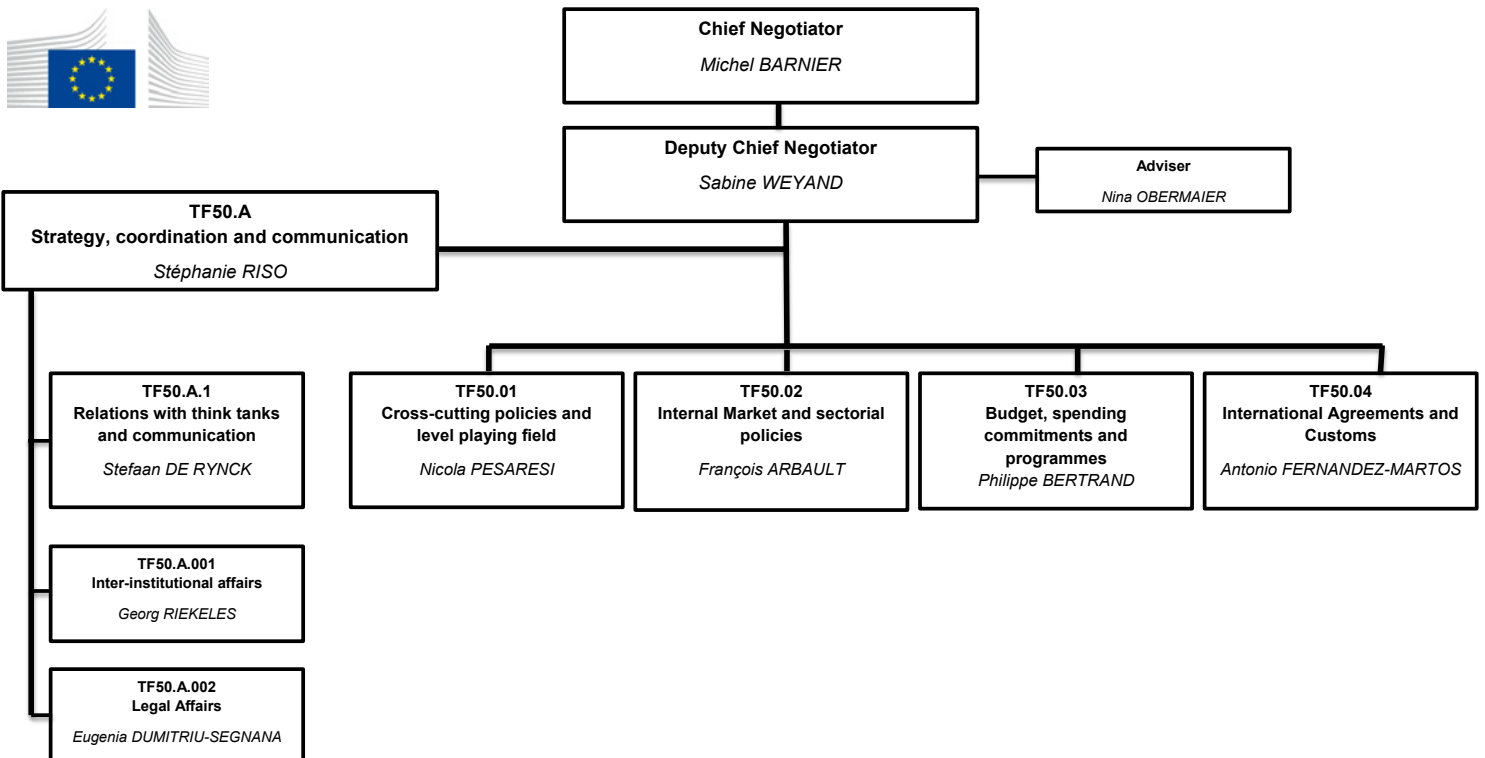
³ European Council, 'European Council (Art. 50) guidelines for Brexit negotiations' (2017).

⁴ Eves Fouilleux, Jacques de Maillard & Andy Smith, 'Technical or political? The working groups of the EU Council of Ministers' (2007) *Journal of European Public Policy*, pp. 609-623.

European Commission

The **European Commission** is the EU's executive arm and civil service. It conducts the withdrawal negotiations on behalf of the EU, following authorisation from the Council. The Chief Negotiator, Michel Barnier, leads the Commission's **Taskforce on Article 50 (TF50)**, the team responsible for the negotiations. As well as conducting the negotiations, the Commission also plays an influential role in formulating the EU position. It works closely with the Council and its preparatory bodies, and regularly reports to them. Michel Barnier regularly briefs the General Affairs Council (Art. 50) and the European Council. The relationship between the Commission and the Council is highly developed and institutionalised as they interact in this way during each trade negotiation.⁵

Task Force for the Preparation and Conduct of the Negotiations with the United Kingdom under Article 50 TEU (TF50)



Source: https://ec.europa.eu/info/sites/info/files/organisation_charts/organisation-chart-tf50_en.pdf

The position developed by the Council takes the form of negotiating guidelines and directives. These are relatively broad and general, outlining core principles. This leaves room for the Commission's TF50 to further develop the EU's position in detail. TF50 has published dozens of position papers on specific policy areas and sectoral issues such as citizens' rights or the Irish border. It also published the draft withdrawal agreement in February 2018. The European Commission thus plays a key role in setting the EU's position by filling in the details.

⁵ Magdalena Frenhoff Larsen, 'The Increasing Power of the European Parliament: Negotiating the EU-India Free Trade Agreement' (2017) *International Negotiation*.

Significant documents pertaining to the progress of the negotiations have also been jointly published by the European Commission and the UK government:

08.12.2017	Joint report from the negotiators of the European Union and the United Kingdom Government on progress during phase 1 of negotiations
19.03.2018	Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community
19.06.2018	Joint statement from the negotiators of the European Union and the United Kingdom Government on progress of negotiations under Article 50 TEU on the United Kingdom's orderly withdrawal from the European Union.

Crucially, TF50 is constrained by the mandate given to it by the Council. It must stick to the core principles outlined in the European Council's guidelines. TF50 is only allowed, furthermore, to negotiate and discuss issues on which the Council has adopted an official position.

The Commission has made explicit attempts to make sure that all the work on the negotiations goes through TF50, instead of seeping into other Directorates-General (DGs) and units. Besides TF50, and distinct from it, the Commission also has a centralised **Brexit Preparedness Group**. This unit does not work on the negotiations but on preparing for different scenarios relating to the impact of Brexit, such as 'no deal'.

European Parliament

The European Parliament's formal role in the withdrawal process is limited to ratifying the withdrawal agreement. However, it has sought to influence the process in various ways. The early establishment of the **Brexit Steering Group**, chaired by Guy Verhofstadt MEP, signaled that the Parliament wanted to be a key player. Since then, the Parliament has exploited its constitutional right to be consulted and make its views heard in full. It has passed a number of Brexit resolutions detailing the priorities of the Parliament. All have been passed by large majorities of MEPs. The purpose of these resolutions, which are developed by the Brexit Steering Group and then voted on in plenary sessions, is both to highlight the European Parliament's position on Brexit and to influence the negotiations. These are the Resolutions, and the number of MEPs which approved of them:

28.06.2016	European Parliament resolution of 28 June 2016 on the decision to leave the EU resulting from the UK referendum	395 (52.6%)
05.04.2017	Negotiations with the United Kingdom following its notification that it intends to withdraw from the European Union	516 (68.7%)
03.10.2017	State of play of negotiations with the United Kingdom	557 (74.2%)
13.12.2017	State of play of negotiations with the United Kingdom	556 (74%)
14.03.2018	Guidelines on the framework of future EU-UK relations	544 (72.4%)

The Parliament, via its Brexit Steering Group, also engages with the Council, its preparatory bodies and TF50, trying to influence the development of the EU's position. Although the European Parliament's resolutions do not constitute the EU's official position and hold no legal weight, they are taken seriously by Michel Barnier, who regularly meets with Guy Verhofstadt and has repeatedly emphasised the importance of the European Parliament's stance.⁶ This is wise, given that the European Parliament can veto the final deal, and has not been afraid to do so in the past when it has felt excluded from an international negotiation.⁷

⁶ See for example 'Speech by Michel Barnier at the Plenary Session of the European Parliament on the state of play of negotiations with the United Kingdom' (3.10.2017).

⁷ Agata Gostyńska-Jakubowska, 'Parliamentarians in Brexit talks: Bulls in a china shop?' (2017) *Centre for European Reform*.

That the European Parliament has successfully influenced the Brexit process thus far is evident from how the European Parliament's position is reflected in the EU's official negotiating position, or from the prominence of Guy Verhofstadt in the Brexit debate. The parliament has weighed in more heavily than in previous trade negotiations, continuing a longer trend. The Lisbon Treaty, which entered into force in 2009, gave the Parliament the right to veto trade agreements and the right to be kept informed of their progress by the Commission. Since then, it has become more assertive and influential.⁸

Ratification procedures for the withdrawal agreement

If the Commission and the UK negotiating teams do agree on a withdrawal agreement and political declaration on the future relationship, this needs to be approved by the European Parliament and the Council. The European Parliament needs to approve the withdrawal agreement in a full plenary vote, by simple majority in a yes/no vote, and its decision cannot be overruled. This will take some time, as the agreement first needs to be scrutinised by the European Parliament Committee on Constitutional Affairs (AFCO), which will produce a report with recommendations.⁹ Guy Verhofstadt has said that three months were needed for this process.¹⁰

If the Parliament approves the deal, its ratification then requires a qualified majority vote in the Council; that is, at least 72% of members states (which is 19), representing at least 65% of the EU population. The UK will not vote on the ratification of the withdrawal agreement in the Council. The UK's 73 MEPs, however, can vote on the withdrawal agreement in the European Parliament.

In addition, ratification requires the UK parliament to approve the deal. UK MPs will vote on the withdrawal agreement and political declaration before the European Parliament's vote.

The withdrawal agreement will not require the domestic ratification of each member state. This is because Article 50 confers exclusive competence on the EU institutions to negotiate and conclude the withdrawal of the departing state,¹¹ and the withdrawal agreement does not classify as a 'mixed' agreement requiring domestic ratification. The final agreement on the future relationship, however, would almost certainly be a mixed agreement, which is an agreement between the EU and a third country which contains elements of both EU and member state competence. That is to say, the final agreement will need to be ratified in each member state, potentially involving over thirty national and regional parliaments.

The UK will formally leave the EU on 29 March 2019 whether there is a ratified withdrawal agreement or not – unless the UK requests an extension of Article 50, or revokes Article 50. The former requires the unanimous consent of the European Council, whereas the legality of the latter is open to debate. Most lawyers think Article 50 can be revoked, but the **European Court of Justice (CJEU)**, which is the ultimate legal arbiter of the Article 50 process, will formally decide in November 2018 whether and under which circumstances the Article 50 notification could be revoked.¹²

2) What have been the EU's strategies in the withdrawal negotiations?

The EU's approach to the Brexit negotiations is similar to its approach to most international negotiations: strategic exploitation of its powerful position to extract concessions and get what it wants. The EU is known for taking a rigid, inflexible and legalistic approach in international negotiations, with Commission negotiators tightly constrained by Council mandates, which often have the unanimous support of member states. This institutional dynamic, coupled with the fact that the EU is usually the stronger party, makes it hard to extract concessions from the EU, who instead tends to 'toe the line' and offer countries 'take it or leave it' deals. Trade negotiators from third countries have reported that EU negotiators often take a 'relentless, dominant and uncompromising approach'.¹³ The Brexit negotiations have been no different.

There are some structural factors that meant that the EU's bargaining power was greater than the UK's from the outset. In particular the relative size of the two economies, their varying levels of economic dependence upon one another, and the likely negative impact of 'no deal' on the UK compared with the EU.¹⁴ Also, the Commission, which has been negotiating trade agreements since the 1970s, is a well-oiled machine, with large numbers of experienced negotiators and trade specialists. It has been well prepared for Brexit from the outset, as evidenced, *inter alia*, by the speed at which TF50 was set up and began publishing detailed position papers after the referendum.

The EU has employed various strategies to further increase its bargaining power and exert significant control over the withdrawal process.¹⁵ In these ways it has forced

8 Laura Puccio, 'A guide to EU procedures for the conclusion of international trade agreements' (2016) *European Parliament Briefing*.

9 Matt Bevington, Jack Simson Caird and Alan Wager, 'The Brexit Endgame: A Guide to the Parliamentary process of withdrawal from the European Union' (2018) *UK In a Changing Europe*, p. 29.

10 Comments made by Guy Verhofstadt in giving oral evidence to the House of Commons Exiting the European Union Committee (20.06.2018).

11 Piet Eeckhout and Eleni Frantziou, 'Brexit and Article 50 TEU: A Constitutionalist Reading' (2017) *Common Market Law Review*, p. 717.

12 Harriet Agerholm, 'European Court of Justice to consider whether UK can backtrack on Brexit' (5.10.2018) *Independent*.

13 Luis Gonzalez Garcia, 'Understanding the EU's negotiating position on trade in the Brexit negotiations' (2018) *UCL Brexit Blog*.

14 Benjamin Martill and Uta Staiger, 'Cultures of Negotiation: Explaining Britain's hard bargaining in the Brexit negotiations' (2018) *Dahrendorf Forum working paper*, pp. 3-4.

15 David Allen Green, 'Brexit by timetable: the evolution of the EU's position Part 3' (2017) *Financial*

the UK to make multiple concessions. Four of the most pertinent strategies are:

- **the use of transparency**
- **manipulation of the structure and sequencing of the negotiations**
- **the restrictions on the role of different actors in the negotiations**
- **unity and cohesion of the EU institutions and the EU27**

The use of transparency

From the outset, EU leaders have argued that the Brexit negotiations should be conducted in the most open and transparent way possible. In April 2017, European Commission President Jean-Claude Juncker stated that the EU's approach to transparency would be 'unique and unprecedented'.¹⁶ In May 2017, the EU published its official 'guiding principles for transparency in the negotiations'.¹⁷

The EU has stuck to its promise of maximum transparency. All EU negotiating guidelines and directives have been published, including draft guidelines, enabling observers to track modifications. Dozens of position papers and technical presentations have also been published, which outline the EU's position in a range of areas. Crucially, the agendas for each negotiating round have been published, including an annotated draft withdrawal agreement, showing how much progress has been made and which areas are still unresolved.¹⁸ This is all in contrast to the UK government's initial position of not wanting to provide a 'running commentary' on the negotiations, and the initial reluctance of the UK to outline its position in public documents.¹⁹

The EU's approach to transparency has served as a useful negotiating tool. Specifically, it has given the EU an advantage in shaping the public narrative or public perceptions around Brexit, including in the UK.²⁰ By publishing its position in detail and early on in the negotiations, the EU created the impression that it was prepared for Brexit, and ready to deal with the consequences. EU leaders have also repeatedly asked the UK to outline its position in greater detail, and have urged the UK to speed things up several times. Whether the EU actually cares about the rate of progress is secondary. What matters is the public perception that the UK is unprepared and struggling to formulate a position, in contrast to the prepared and united EU. The EU seems to have learnt here from the experience of its trade negotiations with Canada and the US, in which it

lost control of the public narrative due to damaging leaks, resulting in major protests.²¹

Making the EU's position transparent and outlining it early and in detail has put the UK in a position where it is forced to respond and react. It has succeeded in making public debate – as well as the actual negotiations – centre on EU demands, and in imposing the EU's terms on how they take place. An example of this is the publication of the draft withdrawal agreement in February 2018. That the EU got in first and published a draft before the UK gave the EU an advantage in that it made the negotiations revolve around what was essentially their position.²² The EU's transparency agenda has also closed the option of hiding behind secrecy from the UK government, forcing it to engage publicly and with its many adversaries in the Brexit process at home.

In sum, the EU has used transparency as a negotiating tool to control the public narrative, exert control over the content of the negotiations, and put pressure on the UK. It has used it efficiently to expose the UK's difficulties, and to increase its bargaining power.

Manipulation of the structure and sequencing of the negotiations

A second way in which the EU has increased its bargaining power relates to various strategies designed to manipulate and control the structure and sequencing of the negotiations.

The principle of 'no negotiation before notification' (i.e. that no negotiation would take place before the UK triggers Article 50) was resolutely adhered to by the EU and all of its member states. This meant that the UK's attempts to conduct informal, bilateral negotiations in the period immediately after the referendum were unsuccessful. Some have criticised the EU for being too legalistic and inflexible, arguing that, for a matter as important as Brexit, preliminary discussions would have been useful.²³

Another example was the decision to take a *phased approach* to the negotiations. Accordingly, withdrawal issues, transitional arrangements, and the future relationship are all discussed separately, and only after there is political agreement, on each phase, between the UK and the Commission, in addition to approval by the European Council. This phased approach was not a legal necessity. Article 50 does not necessitate this sequencing, and the final withdrawal agreement and political declaration will contain aspects of all phases as one single package. Rather, the decision to phase the negotiations was a political decision, by which the EU gained leverage over the structure and scope of the negotiations.

¹⁶ Comments made in letter which Jean-Claude Juncker sent to the European Ombudsman (27.04.2018).

¹⁷ Council of the European Union, 'Guiding principles for transparency in negotiations under Article 50 TEU' (17.05.2017).

¹⁸ Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community' (19.03.2018).

¹⁹ 'Theresa May: No 'Running Commentary' On Brexit Negotiations' (07.09.2016) *Sky News*.

²⁰ Oliver Ilott, 'In Brexit, transparency is a tool – and Europe is using it' (2017) *Institute for Government blog*.

²¹ Maria Laura Marceddu, 'Transparency and international negotiations: Stranger Bedfellows?' (2017) *UK Trade Forum blog*.

²² David Allen Green, 'Brexit: 10 observations on the draft withdrawal agreement' (2018) *Financial Times*.

²³ Tim Oliver, 'Critical Reflections on the EU's Approach to Brexit' (2018).

Before negotiations began, the UK had advocated that talks on withdrawal issues and the future relationship should be conducted simultaneously. The UK's preference was for all issues to be on the table in parallel, as it wanted to link issues such as market access and the financial settlement. This would have allowed it to use its strength in certain areas, such as security, to obtain wider concessions from the EU in other areas.

This has not happened thus far. In June 2017, both sides agreed to the EU's phased approach. The UK spent the period between June and December 2017 trying to achieve 'sufficient progress' on citizens' rights, Northern Ireland, and the financial settlement, so that the negotiations could move on to the transitional period and future relationship. 'Sufficient progress' was a vague, political formulation which allowed the EU flexibility to decide as and when to move on to the next stage of negotiations. The need to achieve 'sufficient progress' pressured the UK to concede to the EU position on many issues, as it was important for the UK that the talks move on as quickly as possible.

The EU's move of phasing the negotiations has enabled the EU to dispel potential sources of UK leverage, preventing it from 'trading-off' its strengths in security, for example, against concessions in other areas. It has ensured that political agreement on withdrawal issues like the financial settlement was treated separately from the nature of the future relationship. As a result, the EU has been able, time and again, to pocket UK concessions, close the issue, and move onto the next stage, insisting that what has already been agreed must be respected.

The role of different actors in the negotiations

A third way in which the EU has tightly controlled the withdrawal process and increased its bargaining power is by ensuring that the UK only negotiates with Michel Barnier and the Commission's TF50. In this respect, the mantra of 'no negotiation before notification' was updated to 'no negotiation with anyone except Barnier'. It would be in the UK's interests to negotiate with member states separately, exploiting divergent national interests and playing them off against each other. Thus far, the EU has ensured that this has not happened.

The UK has repeatedly tried, and ostensibly failed, to make substantive breakthroughs in the negotiations by going directly to the member states. Some embassies have privately expressed surprise and exasperation that the UK still bothers to do this.²⁴ There is little evidence that Theresa May has been successful in achieving substantive progress in her interactions with member state leaders at European Council summits. Indeed, the fallout from the September 2018 Salzburg Summit was, in part,

caused by the other leaders' annoyance that Theresa May brought an uncompromising message to the dinner table.²⁵ The following day Donald Tusk reminded her that the negotiations were a matter for Michel Barnier, not the EU27.²⁶

Not only does the UK negotiate solely with the Commission, the Commission is only allowed to discuss matters for which it has been given a mandate by the Council, and cannot stray from the principles of that mandate. This has limited the scope of the negotiations and has restricted, conveniently at times, Barnier's ability to compromise, frustrating UK officials, some of whom have complained that they would much rather be negotiating with the member states, where the political implications of Brexit would be felt, than with rigid Commission officials.²⁷

Once again, there is no legal reason why TF50 alone should negotiate with the UK. Rather, the EU designed the process in this way because it was in its interest for everything to go through a single, inflexible channel – and because it could. This setup – an inflexible Commission negotiating team with a tightly constrained Council mandate – is standard procedure for all EU trade negotiations.

The phased approach to the negotiations complements this setup, as it means that the Commission can only discuss an issue with the UK once the European Council adopts official guidelines on it. Any compromises which diverge from existing guidelines have to wait until new guidelines are issued, which of course takes time – a precious commodity for the UK. This is how the EU has successfully exploited the two-year Article 50 timeframe to put pressure on the UK and increase its bargaining power.

Unity and cohesion of the EU institutions and the EU27

The unity and cohesion of the EU has taken many by surprise, and is in stark contrast to some previous international negotiations. The TTIP negotiations with the US, for example, were marked by divisions between member states and political groups. On Brexit, not only have there been no meaningful differences between the position of the EU27 thus far, EU leaders and the EU institutions have also been consistent in their positions, with everyone on message and singing from the same hymn sheet. Much of the language from the European Parliament resolutions, for example, is practically copy and pasted from the European Council guidelines. EU leaders from Michel Barnier to Angela Merkel use the same phrases, expressions and arguments as these official negotiating documents.

24 Comments made in research interviews conducted with diplomatic staff in member state EU Permanent Representations.

25 Tony Connelly 'Salzburg: How a chronic misreading has brought Brexit to the brink' (22.09.2018) RTE.

26 'Statement by President Donald Tusk on the Brexit negotiations' (21.09.2018).

27 Comments made by officials in private roundtables with government departments.

Maintaining a united front has been the EU's core strategy, and it has served it well. Explicitly outlined in the EU's negotiating guidelines and constantly referenced by EU leaders, the strategy of unity underpins and complements all the strategies and procedures detailed above. After the European Council adopts official positions, it is very difficult for the UK to extract concessions from Michel Barnier or garner flexibility from individual member states, all of whom point to unanimously agreed guidelines which have to be adhered to. Also, without unity, the EU would not be able to ensure that all meaningful negotiation only goes through TF50. Indeed, member states have not engaged in bilateral negotiations with the UK and have publicly supported Michel Barnier and the official process throughout.

This unity is, in part, facilitated by the transparency agenda outlined above. Michel Barnier has been on a perpetual tour of European capitals, discussing the EU's Brexit policy with member states and other stakeholders, thereby enhancing the legitimacy of the EU's position and securing buy-in. Also, the EU is happy for the European Parliament to have a strong role in this process, as it imbues it with democratic legitimacy and adds to the impression that the EU is united. Finally, putting the Irish border issue at the centre of the negotiations, and resolutely expressing solidarity with Ireland over the border problem, has further served to enhance the cohesion of the EU27.

3) What does the EU want from Brexit?

Broadly speaking, the EU's position is that the result of the referendum result should be respected, and that the UK's withdrawal from the EU needs to be orderly. 'No deal' is seen as highly undesirable and to be avoided if possible. Despite regularly implying that the UK would be welcome to change its mind on Brexit, the EU has not pushed for this. Nonetheless, the EU has been vocal in arguing that Brexit is about damage limitation, with Donald Tusk repeatedly stating that there can be no winners from Brexit, only losers.²⁸

The EU's principal concern is to ensure that Brexit does not act as a source of inspiration for other Eurosceptic movements and parties. The EU is also keen to avoid a situation where a favourable Brexit arrangement creates incentives for other member states, Eurosceptic or not, to request opt-outs or even consider leaving. Preventing a Brexit contagion, by ensuring that the UK isn't given an appealing, 'sweetheart' deal, is the motivation behind most aspects of the EU's approach. EU leaders assert that there must be a cost to leaving, and that the UK cannot retain all the benefits of membership whilst simultaneously emancipating itself from the aspects of the EU it does not like.

The EU's position on the withdrawal agreement

The withdrawal agreement will cover the issues of citizens' rights, the financial settlement, Northern Ireland and transitional arrangements, as these were the priority issues negotiated first. The citizens' rights, financial settlement and transitional arrangements chapters have largely been finalised. The draft withdrawal agreement mostly reflects the EU's original position on these issues and it is hard to identify a single meaningful concession that the EU has made. For example, the UK will continue to pay into the EU budget and follow all EU rules during the transitional period, without any representation in the EU institutions. Also, the UK has agreed to pay approximately £39bn to the EU to cover its existing liabilities. Finally, the rights of citizens living in the UK and the EU have by and large been guaranteed, including the rights of those who arrive before the end of 2020, with an eight-year role for the CJEU in enforcing these.

The biggest remaining obstacle to finalising the withdrawal agreement is the protocol on Northern Ireland. Both sides agree that there must be a legally operative 'backstop' which ensures that there is no hard border in Ireland in any circumstance. The UK and the EU agree that a backstop

²⁸ See for example 'Remarks by President Donald Tusk on the next steps following the UK notification' (31.03.2017).

is necessary as an insurance policy, but they disagree on what it should be. The EU proposed that Northern Ireland remains in the EU Customs Union and aligned with relevant Internal Market rules on goods, to avoid the need for customs and regulatory checks at the Irish border. The EU insists that the backstop would apply ‘unless and until’ an alternative solution is found. The UK rejects this model on the grounds that it would create a new goods border between Britain and Northern Ireland, and that it could permanently tie Northern Ireland to the EU. At the time of writing, it remains unclear whether a compromise on this issue can be found. The EU is resolute that there can be no withdrawal agreement without a backstop.

To date, the EU has driven a hard bargain, stuck to its principles and adopted an uncompromising approach. It is possible that it has done so on the assumption that the UK will continue to compromise if faced with the prospect of ‘no deal’. The EU has raised the stakes of this prospect by insisting that in the event of ‘no deal’, there would be no more discussion or negotiation to try and strike mini deals in key areas, such as aviation and intelligence sharing.²⁹ This contradicts the UK’s position on what would happen if no withdrawal agreement was concluded.

The EU’s position on the future relationship

Attached to the withdrawal agreement will be a political declaration on the framework for the future relationship. Unlike the withdrawal agreement, the political declaration will not be legally binding, which means it could be vague and aspirational. Although EU leaders have said they are against a ‘blind-Brexit’ and want the political declaration to be as detailed and precise as possible,³⁰ they have also repeatedly said that the actual negotiations on the future relationship will occur long into the transitional period. Some reports suggest that the EU might be willing to accept a vague political declaration to ensure the withdrawal agreement is smoothly ratified.

The EU has not engaged in much blue-sky thinking about what Brexit should mean, and very little strategic work is being done in the EU on the nature of the future EU-UK relationship. It has left it up to the UK to choose the model it wants from the existing models of EU-third country relations, thereby frustrating UK hopes that a bespoke relationship could be creatively tailored.³¹

Market Access

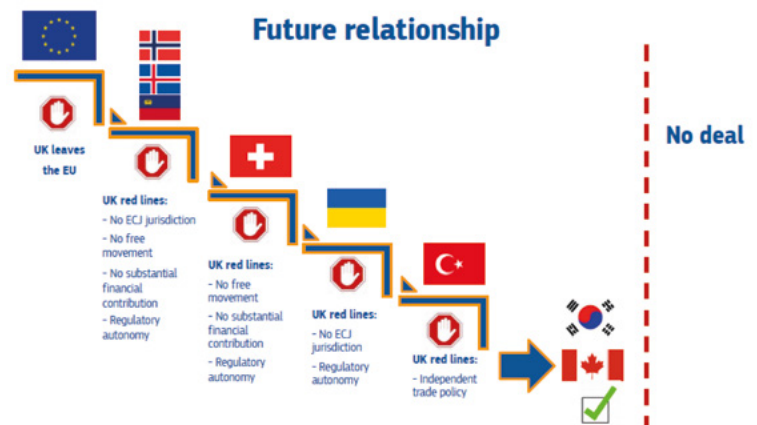
The EU’s position on market access and trade is that the UK should be treated as any other third country. As long as an appropriate balance of third-country rights and obligations is ensured, the UK is free to choose between either participation in the Internal Market via an EEA-type agreement or a more limited Canada-style free

trade agreement (FTA) (bar no deal). If the UK wants the benefits of Internal Market participation, it must respect the obligations, such as free movement of people and continued budgetary contributions. If the UK, however, wants to regain regulatory sovereignty and autonomy, it needs to accept the limited Internal Market access of the FTA model. If it does opt for this model, however, there needs to be a backstop that keeps Northern Ireland in the EU Customs Union and Internal Market for goods.

This broad position is underpinned by some core principles, which the EU has repeated from the outset:

- **the integrity of the Internal Market must be preserved**
- **the four freedoms of the Internal Market (goods, capital, services and people) are indivisible**
- **no cherry picking (i.e. no Internal Market participation on a sector-by-sector basis)**
- **the autonomy of EU decision-making must be respected**

The below slide produced by TF50 outlines the choice of models for the future relationship that the EU is willing to offer the UK. They are all based on existing third-country relationships, thwarting UK ambitions to achieve a new type of relationship, and all come with an ‘appropriate balance of rights and obligations’. The slide details clashes between each of the models and the UK’s ‘red lines’. The UK government has criticised the EU for, in effect, offering the UK a binary choice between two inadequate models: ‘Norway’ and ‘Canada’. The EU has consistently indicated that it would prefer the UK to remain as closely aligned to the EU as possible. One member state Brexit attaché candidly said, ‘we prefer the EEA model’ (i.e. Norway).³²



Source: https://ec.europa.eu/commission/sites/beta-political/files/slide_presented_by_barnier_at_euco_15-12-2017.pdf

29 See for example comments made by Michel Barnier in giving oral evidence to the House of Commons Exiting the European Union Committee (3.09.2018).

30 Ibid.

31 Tim Oliver, ‘Critical Reflections on the EU’s Approach to Brexit’ (2018).

32 Comments made in research interview conducted with Brexit attaché in member state EU Permanent Representation.

The economic aspect of the UK's Chequers proposals, detailed in the July 2018 White Paper,³³ have been rejected by the EU on the grounds that they undermine the integrity of the Internal Market.³⁴ Put simply, the Chequers proposals argue that the UK should continue to benefit from the free flow of goods by effectively remaining in the Internal Market for goods (i.e. following EU regulations on goods) and collecting tariffs on behalf of the EU for goods destined for the EU market. On services, the UK would accept market access restrictions, but would have increased regulatory autonomy. The EU has rejected these proposals for a number of reasons:

- The EU views attempts to separate the four freedoms – goods, services, capital and people – as cherry picking. It worries that if the UK is given a special deal, then other member states and third countries would also demand special treatment and opt-outs, and the whole system could unravel.
- Current UK proposals for supervision and enforcement are inadequate. If the UK wants participation in the Internal Market (for goods) to continue on similar terms, it needs to follow the rules *and* be policed by the CJEU.
- The EU does not think that goods and services should be separated, as it would give the UK an unfair competitive advantage. If the UK remained in the EU's Internal Market for goods, but was free to diverge in other areas such as labour and environmental standards, this could lead to a competitive advantage for UK firms.³⁵

One could reasonably accuse the EU of cherry picking, on its desire to ensure a 'level playing field' post-Brexit. Although the EU's position is that the UK's policy on the CJEU and freedom of movement preclude all options but a limited FTA, the EU wants this FTA to include level playing field provisions, which, according to its own analysis,³⁶ go beyond existing state aid and taxation provisions in any previous FTA.³⁷

The future relationship: wider issues

Other aspects of the future relationship are, for now, less politically controversial than questions regarding market access. On these wider issues, such as security, foreign policy, research, and data protection, the EU's broad approach is similar, as its main emphasis is that the model must encompass an appropriate balance of rights and obligations, whilst respecting the autonomy of EU decision making. This means that as long as the UK makes appropriate financial contributions, there is a role for the CJEU in governing the arrangements, and the UK does not expect to retain a seat at the table or exert significant

influence over the direction of EU policies, it should be possible for the UK and EU to continue with close cooperation in many domains, including UK participation in EU programmes and frameworks.

EU leaders have said that they are willing to offer the UK an unprecedented future relationship in terms of scope and ambition, especially with regards to security cooperation.³⁸ Indeed, the EU were content with the Chequers proposals in virtually all areas not relating to market access. Michel Barnier said that there is convergence between the UK and the EU on the UK's participation in cooperation programmes, and in the area of internal and external security.³⁹ This is because the UK has acknowledged that in order to continue participating in programmes such as Horizon and Erasmus+, which is what it wants, it will need to make financial contributions and follow the rules and regulations of these programmes.

The UK also acknowledged that the CJEU is the ultimate arbiter of EU law, and implied that it would still follow CJEU case law if participating in EU programmes. This is significant, as, from the EU's perspective, it opens the door to participation in security frameworks like the European Arrest Warrant. It is the EU's stated aim to maintain existing levels of security cooperation with the UK, so long as this does not undermine the autonomy of EU law and decision making.

The EU insists that there must be a significant role for the CJEU if aspects of the future agreement are based on EU law concepts, or if the UK continues to participate in EU programmes and agencies, which are embedded in – and underpinned by – the wider framework of EU law and the EU institutions. This relates to the principle of the autonomy of EU law. This principle, heavily emphasised in recent CJEU case law, establishes that the EU is an autonomous legal order, with the CJEU as the ultimate legal authority. As a result, the CJEU does not permit other legal bodies to have ultimate legal authority on the interpretation of EU law.⁴⁰

33 HM Government, 'The Future Relationship Between the United Kingdom and the European Union' (2018).

34 See for example comments made by Donald Tusk after the Salzburg summit (20.09.2018).

35 See for example comments made by Michel Barnier at the closing session of Eurochambre's European Parliament of Enterprises 2018 (10.10.2018).

36 European Commission TF50, 'Internal EU27 preparatory discussions on the framework for the future relationship: Level Playing Field' (2018).

37 Jill Rutter, 'The EU hints at what it means by "Canada plus" for post-Brexit trade' (2018) *Institute for Government* blog.

38 See for example comments made by Michel Barnier in giving oral evidence to the House of Commons Exiting the European Union Committee (3.09.2018).

39 Ibid.

40 See in particular Opinion 2/13 re ECHR Accession EU:C:2014:2454.

Conclusion

From both an institutional and strategic perspective, the EU has approached the Brexit negotiations in a way that resembles its usual approach to international negotiations. Institutionally, the Commission has been responsible for the negotiations, and is in close contact with the Council, which provides political leadership and oversight. The European Parliament has been more actively involved and influential than usual. If there is a withdrawal agreement and political declaration (which the UK parliament approves), the negotiations will culminate with a vote in the European Parliament and then the Council.

The EU began these negotiations from a position of strength, due to its economic size, institutional experience and capacity, and the likely negative impact of ‘no deal’ on the UK. Its strategic approach has been to use exert control over the withdrawal negotiations and further increase its bargaining power by controlling public perceptions through the use of transparency, by insisting on strict sequencing and a phased approach, and by ensuring that all negotiations are conducted through a single, inflexible channel. These strategies have been underpinned and enabled by high levels of unity, between both the EU27 and the EU institutions.

This unity was relatively easy to maintain in the first phase of the negotiations, as there was broad agreement on the issues of citizens’ rights, Northern Ireland and the financial settlement. As the negotiations go deeper into aspects of the future economic and security relationship, maintaining this unity could become harder. Will member states ‘break ranks’ and pursue divergent national interests?

Different member states have different levels of economic exposure to Brexit, with Ireland particularly exposed, and countries like the Netherlands, Sweden, Denmark, Malta, Cyprus, Luxembourg, and Germany also exposed, due to their high levels of trade with the UK.⁴¹ Some of these states might be expected to prioritise a close economic relationship with the UK. Others, like Poland or the Baltic states, might be primarily concerned with migration and freedom of movement, as well as foreign policy and defence cooperation.

France, Germany, and the Commission have been driving the EU’s tough approach, especially on the importance of preserving the integrity of the single market.⁴² However, there is little evidence of any member states disagreeing with this approach. Although some have adopted a more positive and encouraging tone towards the UK, none have spoken out against the EU’s official position, or shown any signs that they are going to. This is probably because the EU27 and businesses across Europe believe that preserving the integrity of the Internal Market is a greater priority, politically and economically, than minimising barriers to trade with the UK.⁴³

As the EU’s unity has lasted for this long, member states might be reluctant to take the diplomatic risk of breaking it, not least due to the upcoming – and guaranteed to be fraught – negotiations on the next EU budget.⁴⁴ Dissent is rare in the Council, even for controversial proposals.⁴⁵ The reluctance of member states to object to EU proposals at the highest level can, in part, be explained by the fact that states do not want to undermine relationships with key allies, with whom they may need to form alliances with in future. Simply put, objecting and eroding the EU’s unity might not be considered worth it, even if states disagree with aspects of the overall position. This bodes well for the EU.

41 'Brexit: The View from Europe' (2017) *KPMG Economics Insights*.

42 Charles Grant, 'Europe holds all the cards in the Brexit talks' (1.12.2017) *Financial Times*.

43 Tim Durrant, Alex Stojanovic and Lewis Lloyd, 'Negotiating Brexit: the views of the EU27' (2018) *Institute for Government*, p. 18.
https://www.instituteforgovernment.org.uk/sites/default/files/publications/IfG_views-eu-27-v5_WEB.pdf

44 John Springford, Sam Lowe and Beth Oppenheim, 'Will the unity of the 27 crack?' (2018) *Centre for European Reform*, p. 10.

45 Javier Arregui and Robert Thomson, 'Domestic adjustment costs, interdependence and dissent in the Council of the European Union' (2014) *European Journal of Political Research*.

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