

May 2021

The Negotiated Meaning of Brexit

Mapping the Process of a Unique Negotiation

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Key words: international negotiation, Brexit, normative power

Master in European Affairs

Europe in the World

Why should I read this research?

Brexit is over. Or is it?

The United Kingdom's vote on 23rd June 2016 has proven that European integration is not a one-way road. However, the process of withdrawal from the EU has also shown that it is unlike any other international organisation. Having provoked the downfall of two British Prime Ministers and headaches to many more people, it has raised fears ranging from the production capacity of Marmite to the preservation of the UK's constitutional integrity.

At the time of writing, Brexit is causing renewed conflicts between Northern Irish communities and flare-ups of trade disputes between two free market proponents that were just short ago indissociable. While 'no-deal' has finally been avoided, the EU and the UK have changed during the process, and their relationship has been severely strained. The accounts of the negotiations between the two will question whether the outcome could have been different.

This thesis tries to understand how the meaning of Brexit was forged through the incremental process of negotiation that was undertaken by both actors. The words of European leaders are often discarded as *jargon* and criticised for Potemkin-like odes to the European Union. However, the discourses constructed during these negotiations provide useful information about the way trade policy is conducted, and the way institutions cope with external shocks. Zooming in on the Brexit negotiations can thus provide useful lessons for when the next crisis hits.

The study centrally asks who mattered in the production of the Brexit outcome, and how the EU and the UK arbitrated between different policy interests. Putting a strong emphasis on negotiator's ability to enforce their preferred procedure for negotiating, it provides a case study from which lessons for future negotiations can be drawn.

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I. Introduction: Reckoning with Brexit

The vote for Brexit has given rise to a vast amount of different interpretations. It can be seen as a liberating and inevitable choice to preserve the United Kingdom's independence, or simply as poor economic reasoning about opportunity costs and the importance of innovation in the UK's growth model. Identity politics are the focus of a growing literature in political analysis (Fukuyama 2018), and Brexit could easily be analysed as an expression of such identity politics pitting the national identity of a sovereign state against the federalist identity of the European Union. However, research focussing on identities often adopts essentializing views about the interests of actors, which are derived from – their identity. If regime theory has told us something about interests in a context of interdependence, then it is that their realisation depends on cooperation with others (Keohane 1989: 110). In analysing Brexit, I will go further and argue that the preferences exhibited by the EU and the UK during these negotiations were considerably influenced by their interaction with one another.¹ For this reason, I will argue that the effective meaning of Brexit was *negotiated*, in a long and difficult process that had no predetermined outcome (see Hay 2020).

The relevance of such a project is to rehabilitate reciprocity in the explanation of the Brexit phenomenon. The importance of the Brexit process results from its location at a crossroads for the United Kingdom, the European Union, and most obviously for their relationship. Critical junctures like the UK's vote to leave the European Union are “moments of relative structural indeterminism in which agency matters and choices are possible” (Rixen and Viola 2016: 15). However, they also constitute “path-defining” moments which set relations and institutions on certain tracks rather than on others, narrowing the amount of future available choices (Hay 2010: 67). Moments of crisis like Brexit are important because “actors’ perceptions of their own self-interest become problematized” in their process (Hay 2010: 12). This applies to the EU just as much as to the UK. The withdrawal of a Member state was a major failure for the EU in the midst of a decade that had already seen the near collapse of the Eurozone, the suspension of the Schengen agreement, and the consolidation of anti-EU coalitions in Member States. With the UK, a Member state strongly aligned with the liberal design of the Union and a driving force behind the Single Market decided to leave (Moravcsik 1998: 325, Richardson and Rittberger 2020: 655). For the UK itself, the vote on 23rd June 2016 was a leap into the unknown, driven by contradictory understandings of an all-purpose slogan to “take back control.”² However, as Hay (2010: 14) argues, “[i]t is not clear that moments of crisis indeed lead to uncertainty about actors’ interests.” An early look at the EU's response to the UK vote would suggest just that. Amid expressions of sadness and regret, EU leaders declared in a statement read by Commission President Juncker on 23rd June: “The Union is the framework of our common political future.” (European Council 2016a). They enjoined the UK to “give effect” to its decision rapidly and start a negotiation on “the terms and conditions of its withdrawal” (European Council 2016a). The EU thus moved quickly to close the Pandora box opened by the UK: the withdrawal of one Member State was not to determine the future

¹ On the construction of interests, see Hay (2010: 69) Ideas and the Construction of Interests.

² Popularized by the ‘Vote Leave’ campaign, the slogan is said ([here](#)) to have originated in an unpublished report by Dominic Cummings, in which he wrote: “whether you think X or Y about Z, the most important thing is that *we take back control of Z*” (Goldsmith 2017).

orientation of the European Union.³ The resignation of David Cameron in the UK instead meant that the country's position on Brexit required, if not national, then at least intra-party consultation.

Each party in the Brexit negotiations brought different interests and expectations to the negotiation table. The EU has promoted different shades of a fundamentally liberal free trade policy since the 1990s, first multilaterally within the WTO, then increasingly by negotiating bilateral Preferential Trade Agreements (De Ville and Siles-Brügge 2018: 251; Young 2017). However, it is also known to leverage its trade power into political power in its external relations (Meunier and Nicolaidis 2006: 922). Without having to go back to the repeal of the Corn laws, one can reasonably say that the UK too is a free trader: for some Leave campaigners, this was even part of the rationale for leaving the EU, in order to recover the UK's commercial competence and develop a "Global Britain". Furthermore, each actor had strong political imperatives to fulfil, chief among which stood the legitimacy of their institutions, and for the UK accountability to the referendum vote of June 23rd. Brexit thus involved conflicting interests for both parties, the trade-off between which raised significant barriers against the prospects of a value-creating agreement. By showing how these dilemmas were resolved, I will provide an endogenous explanation of the Brexit process. The aim of this study is therefore to *assess how the negotiators appropriated the process of the UK's withdrawal from the European Union*.

The Brexit negotiation offers a confrontation between actors who strategically appropriated ideas (Jabko 2006) about the meaning of international cooperation to maximise their outcome within the constraints imposed by their institutions. Constructivist scholars have criticized the use of rationalist institutionalism in explaining EU external policy, and especially trade policy, on the premise that it reduces the explanation of policy to a form of exceptionalism grounded in the "sui generis institutional structure" of the EU (Siles-Brügge 2014: 8). While this is true as regards policy interests themselves, I argue that institutional design has an important influence on the nature of the negotiated outcome. This is mostly because multiple-level games provide an understanding of the opportunity structures encountered by each negotiator. For example, the relationship between the European Commission and the European Council may be of a different nature than that between the UK government and the House of Commons. My argument will therefore emphasize how the discursive competition among Brexit negotiators aimed at influencing their respective political context, and each other. Relying on multi-level bargaining literature (Meunier 2005, Putnam 1988) and constructivist theories of institutions (Hay 2008, Schmidt 2008), I will expand on the observation that the EU frequently manipulates its institutions to improve its international outcomes (Clark et al. 2000: 90). In particular, I will show how EU sequencing (see also Faucher and Hay 2020), transparency policy, and the reliance on horizontal principles like the integrity of the Single Market went so far as to endanger the UK's territorial sovereignty, leading the UK to reconsider its preferences during the Brexit negotiation. The structure of the talks, which provides a clear distinction between the negotiations on the terms of withdrawal and those of market access,

³ Ibid, Jean-Claude Juncker on 29 June : « We [EU 27, ECOMM and ECOUCIL] are expressing the view that, of course, the European Union needs further reforms, but these are not reforms being a complement or the contrary of what we are doing now [...] It's about speeding up the reforms, it's not about adding reforms to already existing reforms. The general view was that there would be no treaty change.»

constitutes the most consequential aspect of the negotiation. The next section (II.A.) will provide a review of the interdisciplinary state of knowledge on the Brexit process. I will then (II.B.) outline my working hypotheses based on contrasting theoretical assumptions, before delving into the subject matter of the Brexit negotiations (III.).

II. Researching Brexit as a Negotiation

A. Interdisciplinary State of Knowledge

Brexit is a political phenomenon that can theoretically be analysed with regard to its causes, its process, and its consequences (for a summary, see Fig.1). Within the literature on the causes of Brexit, authors deploy historical arguments to demonstrate there is a continuity between the vote on June 23rd and the ‘structural’ dynamics that made it likely. Helen Thompson (2017: 439) for example argues that the UK’s absence from Eurozone decision-making fora, despite being the Euro’s offshore financial centre, and its status as an “employer of last resort” for workers from a crisis-ridden monetary union eroded its membership benefits from the EU. A long-standing debate on whether or not the UK was always an “awkward partner” (George 1990) was revisited by other authors to evaluate whether Brexit was the result of a path dependent mismatch between two legal systems (Schmidt 2020, Richardson and Rittberger 2020: 652), or, to the contrary, to show that the outcomes of the law-making process in the EU were often close to UK interests (Hix 2015). What the UK’s history within the European Union shows is a permanent potential for conflict, based on the UK’s reluctance about the political integration involved in the construction of a European Internal Market (Moravcsik 1998: 164-176). At the same time, the EU was strongly influenced by the UK, notably in generalizing a ‘new approach’ to the mutual recognition of regulation (Moravcsik 1998: 325; Nicolaidis 2018: 2) which contributed to the deepening of the Single Market. However, the UK remained reluctant to new steps in the political integration of the EU and negotiated numerous opt-outs from common policies. By adopting the European Union Act 2011, the British Parliament put a “referendum lock” on any new power delegation to the EU (Nguyễn-Duy 2013). What was to become the last expression of the UK’s ambiguous membership is David Cameron’s attempt to renegotiate his country’s status in the EU, and especially his attempt to limit intra-EU migration to the UK. By promising “the best of both worlds” to the UK, Cameron tried to emphasize the advantages of EU membership while proving that the UK did not have to subscribe to the political implications of an “ever closer Union” (HM Government 2016). His bargain with the EU did not silence the domestic debate, however. The Sun’s cover thus reacted to the ‘new settlement’ by provocatively asking: “Who do EU think you are kidding Mr. Cameron?”, contributing to the ongoing polarization that had come to dominate this issue in the domestic debate (The Sun 2016). It is thus no coincidence if the referendum result was analysed as a political phenomenon rooted in a broader shift from valence to positional politics (Hay and Benoît 2020). By locating the causes of Brexit in a polarized confrontation of positions, the latter analysis also foreshadows a confrontational approach to the negotiation of Brexit. However, it also highlights the fundamental ambiguity of the UK’s relationship to the EU.

Figure 1. Potential avenues for research on Brexit

	<i>Causes</i>	<i>Process</i>	<i>Consequences</i>
Political (<i>politics</i>)	Electoral strategies in the United Kingdom leading to the 23 June 2016 referendum	Negotiations between the European Union and the UK: withdrawal and future relations UK and EU interest formation	Degree of EU-UK political cooperation Degree of recentring of British politics around the UK polity Balance of power within EU legislature and impact on common policies
Legal (<i>polity</i>)	Implications for the UK constitutional arrangement of legal integration into the European Union (e.g. Parliamentary sovereignty)	Implications and prescriptions of Art. 50 TEU (constitutional, international, or European law reading): settling of rights and obligations Transcription or replacement of EU Law in the UK (European Union Withdrawal Act 2018 ff.)	Implementation of Withdrawal Agreement, Trade and Cooperation Agreement within new institutional framework (Joint Committees)
Economic/Social (<i>policies</i>)	Welfare effects of EU public policy and Single Market integration on UK economy (wages, GDP, balance of payments, demography) Individual sociological factors	Level of reciprocal access to EU and UK markets Level of retained rights for EU and UK citizens living in the other jurisdiction	Levels of exposure to global competitive pressure Welfare effects of independent UK trade and regulatory policy

Extensive research has been published on the immediate causal determinants of the referendum outcome, highlighting either sociological factors like the differential rate of migration in certain constituencies (Goodwin and Milazzo 2017), differential voter turnout (Hay 2020: 197f.), and general categories like age, wealth, and education (Hobolt 2016), or broader trends of economic populism observable across Western democracies (Inglehart and Norris 2016). There has been less systematic research on the actual process of negotiations, and on the incremental way in which their outcome was shaped from the day of the referendum to the end of the negotiation process on 24 December 2020. This process shows that Brexit was not determined from day one – rather, it was slowly carved out through the reactions and preference constellations that

were set out in its aftermath. The process of withdrawal from the EU thus provides a crucial link between its stated reasons and its consequences, by constraining political actors to commit to a precise interpretation of the Brexit vote, with important implications for the possible future relationship between the EU and the UK.

1. Interest formation...

A democratic decision at its core, Brexit could arguably be dissociated from strategic and purely economic rationales for international cooperation, since such rationales include more political intermediation. However, the multiple purported reasons for Brexit had to be aggregated into a coherent negotiating position by each party.

a) ... within the EU

On the EU side, core interests were swiftly and jointly identified by EU institutions and voiced through official statements, which provided a unified EU position. The European Commission had largely been a silent bystander during the campaign, constrained by a customary rule that bans EU officials from interfering in domestic political debates, and reportedly asked not to do so by then UK Prime Minister Cameron.⁴ Its position was basically that the new settlement negotiated between the EU and UK in February 2016 constituted the EU's 'last offer' to satisfy UK demands. Many commentators derived the joint interests of the EU27 from the published declarations made early after the referendum vote (Ondarza 2020, Frennhoff-Larsen and Khorana 2020). An important question for researchers was therefore to explain the stability of these preferences, and to explore different avenues for influence on EU positions.

National preferences. Since Member states need to agree on negotiation mandates for the Commission negotiator, their social preferences necessarily influence the EU position. In the media, the interests of single member states and their influence on the Brexit process were often emphasized despite the existence of a single negotiator, especially in situations of deadlock. As Jensen and Kelstrup (2019:31) argue, the use of "rational-choice theoretical metaphors" instrumental in generating the understanding of a negotiation steered by the member states, who were alternately culprits⁵ or saviours⁶. However, publications mapping the interests of the EU Member states put us in front of an apparent puzzle regarding the different effects of trade disruption on them taken individually and their unanimous positioning. While Brexit was not highly salient across public opinions (Kassim and Usherwood 2017), governments had to face different realities in relation to their country's ties with the UK (Durrant et al. 2018). It nevertheless remains difficult to establish clear preference patterns from the existence of country-specific contexts like Euro-scepticism, sectoral interests and ideological commitments (e.g. to Ireland as a vulnerable MS). The most valuable conclusion from econometric impact assessments on Brexit is that the UK stands to lose most from it (Chen et al. 2016: 39). In

⁴ European Council (2016i): "Ich habe mich auf Bitten der britischen Regierung und auch auf Bitten führender Oppositionsvertreter in Großbritannien nicht in diesen Wahlkampf eingemischt [...]".

⁵ Jim Brunsden et al.: "France issues veto warning as Brexit trade deal talks drag on", *FT*, 04 December 2020.

⁶ Greg Heffer: "Angela Merkel boosts Theresa May's hopes of a bespoke Brexit deal", *Sky News*, 16 February 2018.

Trevor Kavanagh: "Next German leader Annegret Kramp-Karrenbauer could help salvage Theresa May's battered Brexit", *The Sun*, 21 January 2019.

addition, the opportunity cost of Brexit for Member states is not between ties with the UK and their rupture, but between ties with the UK and ties with the Single Market (Jensen and Kelstrup 2019: 33). Hix (2018: 19) reaches the same conclusion in arguing that despite its variable impact on countries, the common preference of EU countries for the integrity of the Single Market trumps the accommodation of UK interests.

Interstate alliances. Turning to the influence of intra-EU alliances, Brusenbauch Meislova (2019) argues that the Visegrád 4 were unable to play a decisive role, as opposed to the renegotiation of the UK's terms of membership in early 2016. Back then, Eastern states' stake in the free movement of persons as a source of comparative advantage was seen as the main reason for a tough negotiation stance on welfare benefits. Conversely, Meislova (2019: 1272) argues that the V4 settled only on a minimum position regarding the rights of EU citizens living in the UK when Article 50 negotiations were initiated. When it comes to the Franco-German couple, a lengthy joint declaration from both countries' foreign ministers for "A strong Europe in a world of uncertainties", issued just after the referendum, indicated a common stance for an integrated EU.⁷ During the entire process however, the tandem gave way to common positions by the EU27. Its consensus on the principles upheld during the negotiations therefore merely cemented the unity among Member States (Krotz and Schramm 2021: 51). The unity and restraint of Member states, rather than their influence, is generally noted by observers (Jensen and Kelstrup 2019, Chopin and Lequesne 2020:5) with regard to the withdrawal negotiations.

b) ... within the UK

UK attempts to derive a negotiating position from the referendum result were less consensual. A binary referendum question could impossibly reflect the complexity of the decision to leave the EU, so that it was possible to defend radically different proposals under the same option. Consequently, the Leave campaign was divided between a majority of nativist-conservative voters and a minority of liberals seeking to unleash Britain's global economic potential (Hix 2018: 17). This division was bound to disappoint many once a choice for a certain substantive solution to the Brexit problem would be made (Hay 2020: 201).

Domestic preferences. Article 50 TEU foresees a Member State to withdraw "in accordance with its own constitutional requirements." Since the UK's referendum outcome was only consultative, questions about 'who decides' on the triggering of Art. 50 and the UK roadmap for negotiations remained unsolved and thus open to speculation. Derrick Wyatt argued before the EU Select Committee that the negotiation position on future relations should have bipartisan support (HoL 2016a), however this was impossible in a political situation characterized by political brinkmanship and parliamentary insurgency. Due to divisions within the UK Parliament about the shape of Brexit, negotiation positions and government personnel changed frequently. The UK interest formation was therefore likened to "two-level games" consisting in a back and forth between the international level and the domestic level. Relying on Putnam's (1988) framework, Schnapper (2020: 10) shows how Theresa May was constrained at the domestic level by her mantra that "Brexit means Brexit", and at the international level due to a lack of actual leverage. She argues that May constructed a narrative of "taking back control" at

⁷ Jean-Marc Ayrault and Frank-Walter Steinmeier: „A strong Europe in a world of uncertainties“, 27 June 2016, URL: <https://www.auswaertiges-amt.de/en/aussenpolitik/europa/160624-bm-am-fra-st/281702> .

home that was not compatible with her demands for “frictionless trade” with the EU, and thus was bound to create a gap between her promises and the outcome. Schnapper mostly emphasizes that the divisions within the UK legislature made a coherent position impossible and ratification unlikely. Her findings are provocative: although the UK had a small set of acceptable outcomes, it was pushed around a lot. Schnapper further argues that the UK’s negotiating position was discursively constructed, while treating its actual leverage as a separate fact. This can be contested if one argues that interests are sourced from perceived material capabilities, in which case the UK’s actual leverage was not a given. It was rather constrained by the Prime Minister’s attempt to “reconcile the irreconcilable” by pleasing different domestic constituents (McConnell and Tormey 2020: 690).

Stakeholder engagement. While the Brexit process was highly contested in the UK, there was little actual consultation with and involvement of sectoral interests as the government outlined its Brexit policy. Brexit was depicted as a choice of politics over economics and against ‘expertocracy’ (Rosamond 2020: 1092-1094). Thus, it is not surprising that economic prediction was not most relevant to the UK’s bargaining position and was mostly avoided in public statements.⁸ In addition, sectoral interests gained little attention from government (Richardson and Rittberger 2020: 660). James and Quaglia (2020) argue that this lack of influence was especially notable in the financial services sector, which relies heavily on services liberalization to export its activities into the EU. Here, powerful multinational banks and investors failed to lobby the UK government into a ‘soft Brexit’ option, despite their heavy economic weight. The authors explain this outcome as a consequence of the divergent interests within the financial industry and the Bank of England’s distaste for becoming a rule-taker (Ibid: 566).

2. Organisation of the negotiation and implications for their conduct

In the first statement from the heads of the institutions and later of the EU27, the EU decided to rely on Art. 50 TEU in order to reach an orderly withdrawal. A right to withdraw was initially introduced into the Constitutional Treaty in light of the UK’s reservations against an “ever closer Union” and carried over into Art. 50 of the Lisbon Treaty (Eeckhout and Frantzou 2016: 12).

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

2. A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, *the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union.* That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union. *It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.*

3. The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2,

⁸ Peter Walker: “No-deal Brexit: No 10 refuses to say MPs will see full impact analysis”, *The Guardian*, 28 August 2018, ([here](#)).

unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period. [...]

While the provision refers to Art. 218(3) TFEU, which regulates the conclusion of agreements with third countries, the institution formally in charge of conducting negotiations is not evident from a textual interpretation. A classical turf war for competence therefore emerged between the Member States represented by the Council and the European Commission, raising questions about the level of preparation and of contentiousness regarding the legitimacy of either institution to represent the Union. The disagreement can be understood in the context of the institutional goals pursued by those institutions: while the Commission represents Union interests and implements EU policy, the Council is a platform for Member state interests, wary of the Commission's centralizing tendencies. On 25 June 2016, Didier Seeuws was nominated as head of a "Special Task Force on the UK" within the Council's General Secretariat, while the Commission named its "chief negotiator" Michel Barnier on 27 July. After a confrontation of legal opinions from both institutions, the issue was decided in favour of the Commission, due to its technical expertise and experience with commercial negotiations (Ondarza 2020:90). The TFEU's single procedure for negotiating international agreements (Art. 218) does indeed provide the Council with the possibility to choose a negotiator according to the content of the agreement – however, nothing in the provision suggests that the Council should conduct the negotiation. Another explanation for Council activism is suggested in a written question to the Commission by an MEP in August 2016 according to which some Member states would have preferred national governments to take charge of the negotiation with the UK, although Art. 50 does not plan for Member state involvement in the withdrawal process.⁹

The negotiator was officially announced on 15 December during an EU27 meeting on the fringes of a European Council (European Council 2016b). The Commission would thus negotiate on the basis of a Council mandate inspired from more general guidelines issued by the European Council. As in the case of trade negotiations, the Commission's work was embedded in a network of feedback mechanisms with other EU institutions. Its "Article 50 Task Force", later relabelled "UK Task Force" (UKTF) thus reported regularly to the Council and its technical body (COREPER), and to the "Brexit Steering Group" set up by the European Parliament to interact with the negotiating team. Unlike during the TTIP negotiations, interinstitutional consultation was written with capital letters and a special 'transparency policy' was issued for the negotiations (Heldt 2019). The division of labour between institutions was unambiguous, and negotiation with the UK remained the sole preserve of the Commission all along. The ability of its Task Force to cover all issues was interpreted as an informational advantage with regard to the individual Member states, in line with integrationist arguments for competence delegation (Frennhoff-Larsén and Khorana 2020: 862), whereas its feedback channels with the Council minimized Member States' alienation (Jensen and Kelstrup 2019: 34).

⁹ Question for written answer P-006151/16 to the Commission. Pavel Telicka (ALDE): " , some Member States have already signalled their preference for national governments to take the lead once London has triggered Article 50. [...] With regard to the interinstitutional debate in Brussels, can the Commission specify its vision of how the Brexit negotiations will be organised?"

In the UK, Prime Minister Theresa May dissolved the “Department for Business, Innovation and Skills”, and created two new Departments to deal with the policy problems created by Brexit. The “Department for International Trade” was to concentrate on the new commercial policy, whereas the “Department for Exiting the EU” (DexEU) under David Davis was to take charge of the negotiations, prepare legislation that would fill the legal void produced by the disapplication of EU law to the UK, and engage in contingency planning regarding the possible outcomes of the negotiation. Theresa May outlined her priorities for the negotiations in a series of speeches, first of which was the Lancaster Speech on 17 January 2017. Unlike for the European Union, the UK’s institutional deployment changed multiple times, both through personnel changes and competence shifting. The most notable reshuffle happened early on when the leading civil servant of DexEU leading the technical negotiations, Olly Robbins, was transferred into the Prime Minister’s Cabinet as Europe Advisor. This change was interpreted as the logical consequence of a conflict of competences: while the Prime Minister decided on the British position, she had created an independent department to lead the negotiations (Rutter 2017). During the entire process of Brexit, the Prime Minister, whether May or Johnson, led the negotiations to get out of deadlock.

Precisely which factors in each party’s approach to the negotiations were significant in explaining their outcome remains contested in the literature. Frennhoff Larsén and Khorana (2020) adopt the conceptual distinction between integrative and distributive behaviour developed by Fisher and Ury, who pioneered the managerial analysis of negotiations, to analyse the withdrawal negotiations. They argue that while the EU adopted an integrative approach based on interest-based consultation and a spirit of problem-solving, the UK set out a distributive strategy based on stubborn positioning and aiming to claim a bigger part of limited gains than its counterpart. These differences, according to them, transpire both through the internal consultation mechanisms of both parties and through their dealing with the other party. Thus, the EU’s institutions were well coordinated and adopted a policy of transparency by default, whereas the UK side was secretive and unprepared despite its commitment to find rapid solutions. Frennhoff Larsén and Khorana contribute to a literature questioning the reasons for ‘hard’ bargaining by the UK despite a presumably weak bargaining position grounded in less material resources, a lack of viable alternatives and a of credible domestic constraints (Martill and Staiger 2018). However, Frennhoff-Larsén and Khorana disregard the different contexts within which the EU and the UK conduct their negotiation. They also take the EU’s claims about integrative engagement with their counterparty at face value, without questioning the distributive components inherent to EU proposals and sequencing (see Patel 2018). By accepting the normative arguments of EU negotiators, they disregard the strategic aspect inherent to most of the EU’s proposals. This is what rationalist approaches to the negotiations show: in deadlock situations, compromise from both sides is necessary to reach an agreement (Felbermayr et al. 2019, Ott and Ghauri 2018).

Furthermore, many approaches to the negotiations ignore the actual goals of each party – these were not self-evident. It is questionable whether integrative bargaining is a category that finds its applications to negotiations that amount to the dismantling of cooperation. This difficulty also makes it difficult for theories of European integration to explain Brexit, whether their

argument is based on the functional need for cooperation or the preferences of governments. Andrew Moravcsik, writing before the referendum vote, thus argued:

“Britain looks unlikely to exit Europe even if its citizens voted to do so. [...] It would negotiate a new agreement, nearly identical to the old one, disguise it in opaque language and ratify it” (Moravcsik 2016).

By arguing this way, Moravcsik basically claims that the UK’s material interests have not changed. As he writes: “Eurosceptics propose that Britain negotiate with 27 frustrated European governments, under tumultuous economic conditions, simply to re-establish its current economic status outside the EU” (Ibid). Indeed, such an intention would seem irrational. As the House of Lords’ Select Committee on the European Union (House of Lords 2016b: 34-35) would argue after the vote, each possibility of future cooperation, if based on past models of cooperation, would involve real trade-offs between sovereign decision-making and access to certain parts of the Single Market:

- Membership in the EEA and a bespoke agreement based on the Swiss arrangements would imply some free movement of persons (Ibid: 27, 42).
- Higher access to the Single Market is coupled to acceptance of EU regulation and standards (Ibid: 43).
- Save for some limited provisions on mutual recognition of qualifications, precedent of service liberalisation is scarce. No third country has access to the Single Market for financial services.

The biggest question regarding the Brexit negotiations is thus what actually the UK was trying to achieve. If it had displayed an absolute preference for sovereignty, it could have left without organizing the terms of an “orderly” withdrawal. It will therefore be important to understand just what exactly the UK, and the EU for that matter, understood as representing an “orderly withdrawal.” This involves engaging with the communication of each party around the negotiations. Brexit was characterised by the frequent use of mottos, with often little substantial meaning. The tautological “Brexit means Brexit” slogan would suggest that it was quite difficult to define what the policy of the United Kingdom would be. However, by looking at what actors each side of the negotiating table said, it should become easier to understand on which premise they engaged with each other, and how these premises changed over time.

B. Negotiating with the European Union

1. The institutional channels of power and information

A realist adage has it that, in international politics, “the strong do what they can and the weak suffer what they must” (Rose 1998: 146). Realist approaches to negotiation interested in the differential allocation of power thus usually proceed on the premise that the outcome of a negotiation is a function of each party’s material endowments. Even in a world of relative gains, however, where opponents contend for the pieces of a fixed pie, bargaining is warranted because “the ability of one participant to gain his ends is dependent to an important degree on the choices or decisions that the other participant will make” (Schelling 1960: 5). Power- and preference-based approaches often constitute the first explanatory resource to claim knowledge about negotiations’ outcome. By most economic measures, the United Kingdom is a weaker party than the EU, further constrained by its dependence on trading relations with the EU.¹⁰ However, neo-realism offers no all-purpose explanation for the outcome of negotiations (see Meunier (2005: 41-44) for trade negotiations) and holds the problematic assumption that the interests of agents are exogenous, imposed on them by the structural context. This idea matches poorly with the fact that the Brexit negotiations are supposed to implement an inherently political decision. Neo-realism is equally problematic in relying on a unitary actor model that considers states as black boxes in the pursuit of a coherent goal. Among the parties contending in the Brexit negotiations, one consists of a multi-level system of decision-making, while the other is accountable to a wide range of contending social interests. For this reason, the process of negotiation under analysis needs to be considered with regard to the constraints of institutions on international negotiators and their importance in producing credible signals about each side’s interests.

Approaches to international negotiations that are interested in value-creation instead of value-claiming stress the role of information in shaping their process. According to regime theory, international cooperation occurs to correct market failures in an interdependent world economy and reduces the costs of uncertainty by imposing rules and monitoring on international actors (Keohane 1989: 108). Major theories of European integration offer variants of this argument: liberal intergovernmentalism stresses the role of governments endowed with perfect information about their interests in reaching positive agreements (Moravcsik 1998), whereas neo-functionalism emphasizes the role of supranational policy entrepreneurs in bridging information asymmetries and mobilizing domestic actors for the sake of integrated problem-solving (Niemann, Lefkofriedi, and Schmitter 2018: 5). For all their differences, both these approaches rely on rational actors pursuing efficiency gains through international cooperation. They might therefore seem singularly inept to analyse the Brexit negotiations, which are supposed to yield less cooperation instead of more. The negotiations for Brexit are unique, as the EU’s chief negotiator never tired of highlighting.¹¹ Yet, this does not prevent the analysis of Brexit as a case study of international negotiation with the use of existing heuristic tools.

¹⁰ In 2016, the UK represented 16% of EU GDP, and accounted for 10,5% of all its exports in goods and services (Eurostat 2016). In addition, 44% of the UK’s total exports went to the EU-27 in 2016 (HoL 2016b: 9). See Chen et al. (2017) for an estimate of economic exposure to Brexit.

¹¹ Press Conference of 08 February 2018: “C’est une négociation extraordinaire, et j’espère qu’elle le restera.”

What is missing from problem-solving approaches to international negotiation is the *strategic* use of information by negotiators. Instead of rationally pursuing given interests, negotiators juggle the expectations of different constituents and cope with the limits imposed on their action by institutional constraints. Their action is mediated by their values and interpretation of the context in which they act. While their context is selective of certain strategies, negotiators can also manipulate information to influence the context of their interaction both in relation with the opposite negotiator and with relevant stakeholders (for information about the relational-strategic approach, see Jessop 2005, and Hay 2002: 126-134). To return to Schelling (1960: 5), strategy is thus “not concerned with the efficient application of force but with the exploitation of potential force.” By locating the Brexit negotiations within the context of the EU’s and the UK’s bargaining systems, I will first identify the constraints on each party’s strategy, before showing how negotiators enforce their strategies. This conceptualization should establish a causal link between the management of contextual information and the exercise of power.

2. Two-level games and the delegation of bargaining competence

International negotiations usually constitute an act of delegation through a negotiation mandate from domestic political actors to a country’s executive. This distinction of ‘high politics’ and ‘low politics’ has motivated different scholars to examine the causal link between the two as flowing either from the international to the domestic sphere (“Second Image Reversed”), or from the domestic to the international sphere (“Second Image”).¹² Eager to bridge this divide, Robert Putnam (1988: 434) developed a framework for negotiations based on the reciprocal effects of negotiation at two metaphorical bargaining tables representing the domestic and the international sphere. “Two-level games” highlight the simultaneous activity of political leaders internally to forge coalitions between domestic interest groups (Level 2), and externally to “maximize their own ability to satisfy domestic pressures, while minimizing the adverse consequences of foreign developments” (Level 1) (Ibid). The to-and-fro between both tables means that actors are strategic more than rational, since they attempt to “spot a move on one board that will trigger realignments on other boards, enabling them to achieve otherwise unattainable objectives” (Ibid). This strategy is not frozen in time, it depends on the understanding of each party’s interests, which can change according to their standards of political legitimacy.

The crucial link that Putnam establishes between both tables is one of *ratification*. Indeed, any agreement reached at Level 1 needs to be ratified at Level 2, understood broadly as being politically acceptable to the relevant domestic veto players (Putnam 1988: 436). Putnam then argues for the relevance of domestic win-sets, that is “the set of all possible Level 1 agreements that would “win” [...] when simply voted up or down” (Putnam 1988: 437). In any event, the eventual international agreement must lie within the win-sets of both parties’ domestic players, or ZOPA (zone of possible agreement). The alternative to such an agreement is not a better agreement, but “no-deal” (Putnam 1988: 442). However, no-deal during Brexit was not simply a return to the status quo: as Michel Barnier warned during a press conference, “no deal will be a very bad deal” (European Commission 2017vii), implying that no-agreement was in fact an agreement, but one involving high costs for each party. In peace negotiations, no-agreement

¹² These terms were originally coined in Kenneth Waltz (1959) *Man, The State, And War*.

occurs when the cost of an agreement equals the “expected cost of war”, whereas in commercial negotiations, it is usually associated to a “walk-away price.” In a commercial negotiation including bargaining around the price of a single item, the “walk-away price” represents any option that is below a seller’s “reservation price” – however, the reservation price here cannot be understood in purely economic terms, since no-deal would be the worst *economic* outcome for each agent in the short term. The reservation price instead needs to be understood in terms of the last offer each side can make with respect to its interests.

If we simplify the Brexit negotiations into a spatial representation with a single dimension along which parties’ preferences at Level 1 are ordered, ranging from a return to the pre-Brexit status quo to a ‘no-deal’ withdrawal from all areas of cooperation, we expect each party to set a reservation price in accordance with their “red lines”. Since the relevant outcome for each party is one which is acceptable to its domestic constituents, the reservation price represents the Level 2 win-set as perceived by the Level 1 negotiator. Bargaining is then not so much about deceiving the opposite party about one’s own preferences, as about making credible statements about what a ratifiable deal is. In such a situation, power rests, in Schelling’s (1960: 19) words “on a manifest inability to make concessions and to meet demands.” This intuition led Putnam (1988: 440) to argue that the relative size of domestic win-sets is crucial to the distributive outcome of any agreement. Indeed, if one party can credibly signal that it is unable to compromise, concessions will fall back on the party with more ratifiable options. Credible signals can be made with reference to the institutional rules imposed on the authorization and the ratification stage. In the US for example, international agreements constitutionally require the consent of two-thirds of the Senate Chamber, although a fast-track procedure introduced in the 1960s (since renamed Trade Promotion Authority) enabled a vote by simple majority on trade-related matters. In the EU, as will be detailed below, specific voting procedures surround both the initiation of talks and the ratification of an agreement. These constraints are real but open to manipulation. However, the important point here is that an effective ‘tied hands’ approach might provide one side with more power in the negotiations. A first hypothesis is warranted to capture this link between domestic restraints and international power:

H1: A negotiator with ‘tied hands’ can extract more concessions from their counterpart.

Through this hypothesis, I am using Putnam’s intuition as a heuristic device to probe the effectiveness of a ‘tied hands’ approach. When considering H1, important caveats need to be pointed out. The first relates to the fallacious representation that it might provide of the Brexit negotiations, which include a high number of issues ranging from customs arrangements and citizens’ rights to foreign policy cooperation, making a single-matrix distribution of transitive preferences appear rather misleading. However, a ‘tied hands’ strategy can also deliberately be employed to conceal real divergences between the constituents of each party. This strategy presents the important risk of missing out on potential deals given the actual distribution of preferences at the domestic level. For this reason, Nicolaidis suggests that the more conflicting interests are among domestic constituents, the broader the initial mandate should be (Nicolaidis 1998: 116-117, also Putnam 1988: 444). The degree of flexibility provided by a mandate thus implies a trade-off between the likelihood of agreement and the likelihood of ratification. Moreover, a greater risk of non-ratification might motivate negotiators to require “risk

premiums” from their counterpart as a compensation for their risk-bearing (Nicolaidis 1998: 106). Second, the “nature of the negotiation context” (Meunier 2005: 58) is crucial for determining the effectiveness of hard bargaining. It is easier to take an uncompromising stance when trying to resist change than when trying to enforce change. This is especially true when parties have no outside option (no ‘best alternative to negotiated agreement’ or BATNA). The EU has been more successful in defending the Common Agricultural Policy during the Kennedy Round of the GATT (Meunier 2005: 92 ff) than in enforcing a human rights agenda on authoritarian countries (van Hüllen 2019). In this regard, the provision of Article 50 for treaties to stop applying to the withdrawing state two years after notification strongly shifts the balance of bargaining power towards the party least vulnerable to an unregulated withdrawal. Since the UK depended on the EU for over 40% of its exports and grossly half of its imports in 2016 (ONS 2016), the economic rationale for an agreement on future access to the Single Market was high.

In a debate about the use of “two-level games” for the analysis of EU external negotiations, Collinson (1999: 217) argued that an accurate analysis should not involve two but three levels, the international, Union, and domestic level. She bases her claims on a comment from Putnam (1988: 449) about the – then – EC’s “several levels of ratification,” and their role in making the analysis of ratifiable deals more difficult. Collinson’s (1999: 220) adaptation of two-level games to the specificities of the “EU as a governance system” does little but emphasize the permeability between and across ‘levels’ of political manoeuvring. However, it is a useful reminder of the imperfect nature of the separation of powers in the EU: the Commission President is represented within the European Council, and the Council of the EU can play a permanent role in monitoring Commission negotiators. The most thorough adaptation of “two-level games” to the context of EU negotiations remains Meunier’s (2005) study about the Common Commercial Policy (CCP), which focusses on the degree of competence delegation and the negotiation context of EU-US negotiations to explain their outcomes. Yet, Meunier (2005: 61) treats the EU’s negotiating opponent as a “‘black box’, whose internal institutional procedures have no impact on the international negotiation,” an assumption that needs to be relaxed for the case of the Brexit negotiations, since both sides are subject to domestic constraints on their negotiating position.

The institutional set-up of the EU throughout the Brexit negotiations strongly mirrors the traditional procedures found under the CCP, not least because the entire part under the ‘future relationship’ header is based on the EU’s trade competence. Some notable differences exist however in comparison with the CCP. First, the role of the European Council: traditionally EU (trade) negotiations are opened on the basis of a Commission recommendation to the Council, which then adopts negotiation directives to be followed through by the Commission (Meunier 2005: 34). In the Brexit process however, the European Council played a crucial role first by releasing informal statements (European Council 2016a, 2016b), then by publishing “guidelines” to be translated into a Council negotiation mandate. Furthermore, the Irish government played an active role in the negotiations on a solution to the Irish border problem, an involvement that is unusual for EU negotiations. Negotiations on the EU side were led by the ‘Article 50 Task Force’ (later ‘UK Task Force’) instead of DG Trade, which reported back to the Council and the European Parliament after every negotiation round. In terms of

ratification, the Brexit negotiations resembled a “two-level game”, with the Commission negotiating the agreement that was later “concluded” (ratified) by Parliament and the Council. Parliamentary consent for trade agreements was granted in the Lisbon Treaty (Ripoll Servant 2014) and is explicitly foreseen in the case of withdrawal negotiations as set out by Art. 50 TEU. The voting procedure for the conclusion of a withdrawal agreement in the Council is a ‘super qualified majority’, requiring the votes of 72% of the Council members.¹³ For the “future relationship,” voting would depend on the scope of the agreement, with qualified majority applying to a FTA covering only trade in goods and unanimity for an association agreement (pursuant Art. 218(8) TFEU). Unlike during the accession process, where the agreement is concluded between Member States and the applicant State, withdrawal grants no formal role to the Member States. They are represented only through the Council, which is an important distinction, since it is a Union institution acting in the common interest of the EU, where Member States can be outvoted. In relation to the “future relationship”, Member State ratification is equally restricted to the event of a mixed agreement involving retained competences.

The UK being a Parliamentary democracy in which government emanates from the sitting majority of the House of Commons, the executive negotiating Brexit was subject to Parliamentary control, both directly through Commons debates¹⁴, and indirectly through the possibility of withdrawing its support from government. This reality became even more tangible after Prime Minister May called and lost anticipated elections in June 2016. As a result, the Conservative Party formed a minority government involving a “confidence-and-supply” arrangement with the Democratic Unionist Party (DUP), a party with existential stakes in the outcome of the negotiations (Frenhoff-Larsen and Khorana 2020: 865). This instability provided a strong rationale for government to consider the interests of Parliament during the negotiation. Despite exercising political control over the executive’s action, Parliament has no formal role in treaty-making according to UK constitutional practice (Lang 2017: 3). Nevertheless, the UK Supreme Court ruled in its Miller 1 judgment that the Commons had to vote on the activation of Art. 50 TEU, providing it with the right to initiate the withdrawal procedure. Furthermore, the UK government is obliged by law since the Constitutional Reform and Governance Act of 2010 to lay before Parliament most treaties it wishes to ratify for a period of 21 days.¹⁵ While this provides Parliament with the ability to delay ratification, it cannot refuse a treaty. In February 2017, however, the UK Government yielded to pressure from pro-EU representatives and planned to hold a “meaningful vote” before any Brexit-related agreement comes into force (Hansard 2017b).¹⁶ This obligation was enshrined into the EU

¹³ The need for consensus within the Council was to some degree constructed during the negotiation.

¹⁴ The Secretary of State for Exiting the European Union provided regular updates on the state of the negotiations. Members of government were also questioned before Select Committees devoted to the European Union.

¹⁵ The 2010 Act formalised the ‘Ponsonby rule’, which provided Parliament with scrutiny over treaties since the 1920s.

¹⁶ Minister of State David Jones from DEXEU thus told the House during the debate on the Notification of Withdrawal Bill on 07 February 2017: “The Government have committed to a vote on the final deal in both Houses before it comes into force. This will cover both the withdrawal agreement and our future relationship with the European Union. I can confirm that the Government will bring forward a motion on the final agreement, to be approved by both Houses of Parliament before it is concluded.” The need for primary legislation to implement the Withdrawal Agreement was confirmed on 13 November 2017, see [here](#).

Withdrawal Act 2018, providing Parliament with an effective veto over the ratification of a Brexit deal.

Figure 2. EU institutional setup

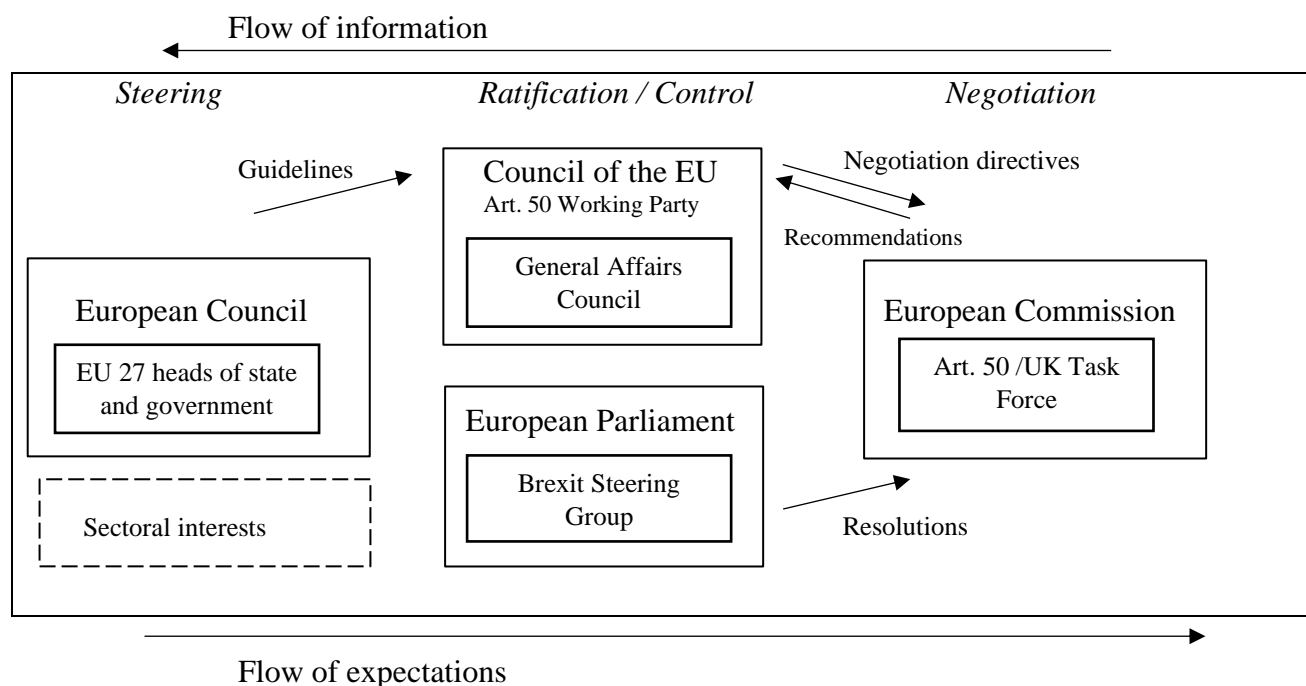
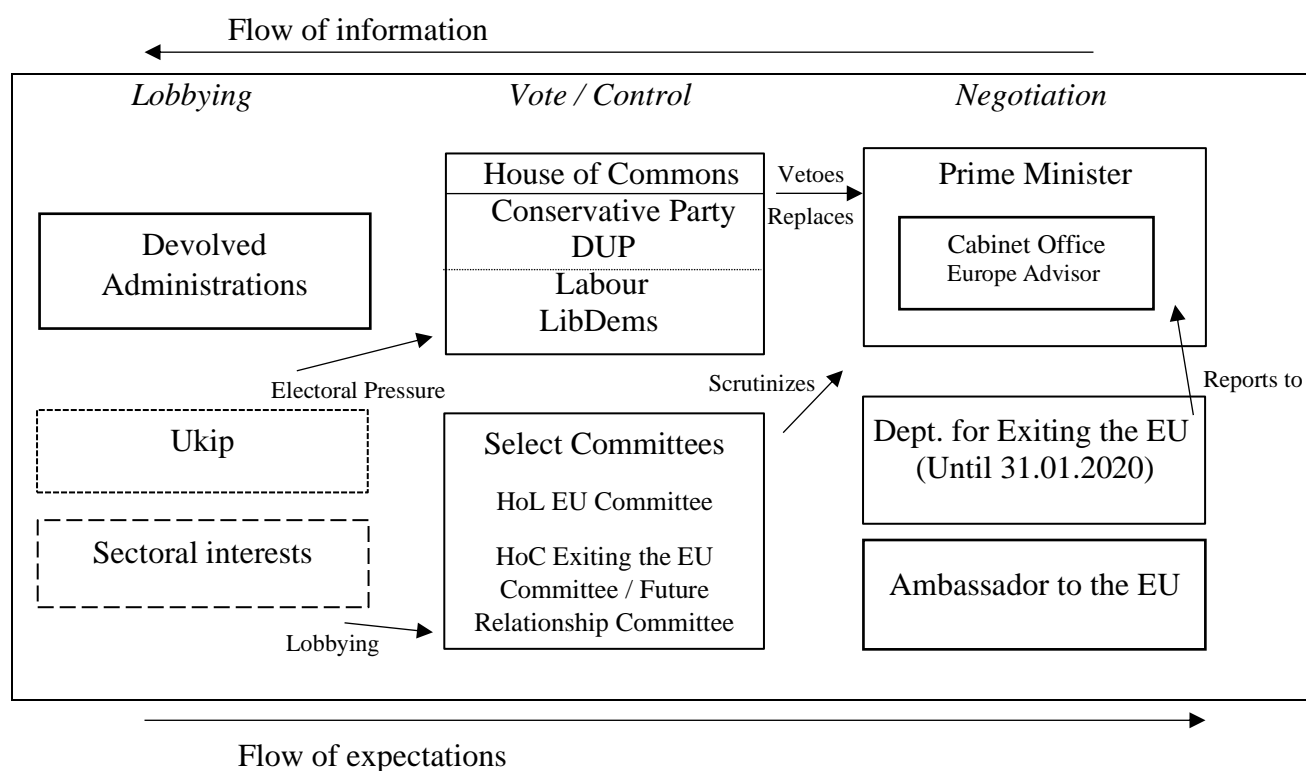


Figure 3. UK institutional setup



3. From rational assumptions to constructed strategies

Once the institutional and contextual constraints on international negotiators are accounted for, this does not yet determine their actions throughout the negotiations. According to constructivist institutionalism, institutions create opportunity structures that agents interpret strategically, but which do not offer directly a single, optimal and “rational” course of action (Hay 2008: 9; Hay 2010). Brexit negotiators did not instrumentally maximise a pre-ordained utility function during the entire negotiation process. It is therefore important to refrain from “post-hoc explanations” to explain the conduct of these negotiations by looking at their result (Hay 2004: 44). Indeed, action that is labelled as rational primarily proves that actors themselves adhere to standards of behaviour that they perceive as rational (Ibid: 42). When assessing why one side may implement a “tied hands” strategy, it is not sufficient to deduct its use from the assumption that it would provide that side with a bigger share of the joint gains. Instead, I will endogenize the explanation of the Schelling conjecture in my argument. Robert Putnam’s (1988: 434) understanding of two-level games already highlights the potential for “clever players” to engineer “realignments” between stakeholders in ways that can lead to a favourable agreement. This strategic thinking is central to the principal-agent relationships that characterize each negotiating party.

Authors adapting Principal-Agent theory to negotiating contexts mostly adopt Kenneth Arrow’s assumption that principals who lack perfect information about the work of their agents incur costs (Kurtzberg et al. 1999: 284). According to these accounts, “[a]gents are expensive” and “confuse issues of the “ownership” of ideas and of goals” (Ibid). At the same time, they emphasize the benefits from agents in adding expertise and credibility to their side, or in diffusing decision-making responsibility. It is possible to go a step further than these claims by arguing that in political negotiations where agents are part of institutions with an independent volition, they contribute to the construction of relevant information. Thus, the point that needs to be highlighted is not simply the intensity of information flows between actors, but rather the political struggle inherent to negotiators’ strategic appropriation of the negotiation context (Hay 2010: 68). Constructivist institutionalism highlights the role of agents in rendering interests “actionable” (Ibid: 81). In the context of Brexit, negotiators did that by adopting deliberate strategies aimed at their negotiating counterpart, their principals, and the broader public. Schnapper (2020) explores these strategies by wedding Putnam’s two-level games to an analysis of different discursive strategies deployed by Theresa May towards the EU and the UK’s domestic constituencies. While she convincingly shows that Prime Minister May dug her own hole by making claims that stood in stark contrast to her substantial achievements, Schnapper only focusses on one party’s strategy and thus accepts the EU’s bargaining position as a given fact. In this way, she concedes that one party kept the keys to a deal in their hand and that the outcome was structurally determined.¹⁷ This tendency to take the EU’s positions for granted shows that it proved – up to a point – more effective in enforcing a certain reservation price than the UK. I will argue that this effectiveness was linked to the EU’s ability to impose procedural norms on the conduct of the Brexit negotiations:

¹⁷ Hay (2008 :16) described the tendency of constructivists to fall back on structuralist explanations as “residual materialism”.

H2: A negotiator's ability to impose procedures and norms on its counterpart provides them with the power to restrict the number of potential outcomes.

This hypothesis is derived from the discussion about the EU's 'normative power' as restricting the number of possible outcomes in policy coordination (Diez 2014: 320). In this way, it complements H1 by setting the conditions of an effective tied-hands strategy. Indeed, by imposing a determined procedure in dealing with negotiation items and potentially compartmentalizing them, actors enforce a specific reservation price which prevents their opponents from achieving certain linkages that might help them to undermine certain 'red lines'. A tied hands strategy can therefore not be analysed in isolation from the norms and commitments that justify a reservation price, for example the commitment to view the financial settlement as a legal obligation rather than as a concession that can be leveraged against other benefits. Equally, the reference to overarching norms can be leveraged as a constraint imposing the common negotiation of issues that would otherwise have been dealt with separately (see the discussion on the Level Playing Field). This normative power is as much an act of procedural manipulation as it is the enforcement of one party's sincerely held values.

The rules governing the conduct of a negotiation are not mundane – they already constitute a part of it. By setting the agenda for items under negotiation, they act like a channel for the eventual agreement. For lacking 'hard power' resources, the EU is often likened to a "normative power" whose mere existence challenges what is seen as "normal" in interstate relations (Manners 2002: 239). This power rests on logics of appropriateness that are consistently defended during international negotiations. Like the ability to refer back to constraints imposed by domestic voting procedures, the reference to rules of procedure and to non-negotiable norms provides a potent limit on the issues that are seen as negotiable. Beyond the mere ability to uphold an understanding of due process, it allows negotiators to question the validity of the other party's reservation price, by appealing both to their 'common sense' and to the opponent's public opinion. This is not to say that normative ideas are only used strategically during a negotiation – as Schmidt (2008: 311) argues, "one can argue to defend one's interests while being strategic in persuading others as to the appropriateness of one's viewpoint." Surely, negotiations are always about more than persuasion. It will therefore be necessary to distinguish between speech that is purely strategic or 'rhetorical' in a deceptive manner, and speech that is embedded in a sincerely held belief of appropriateness (see Siles-Brügge 2014: 47).

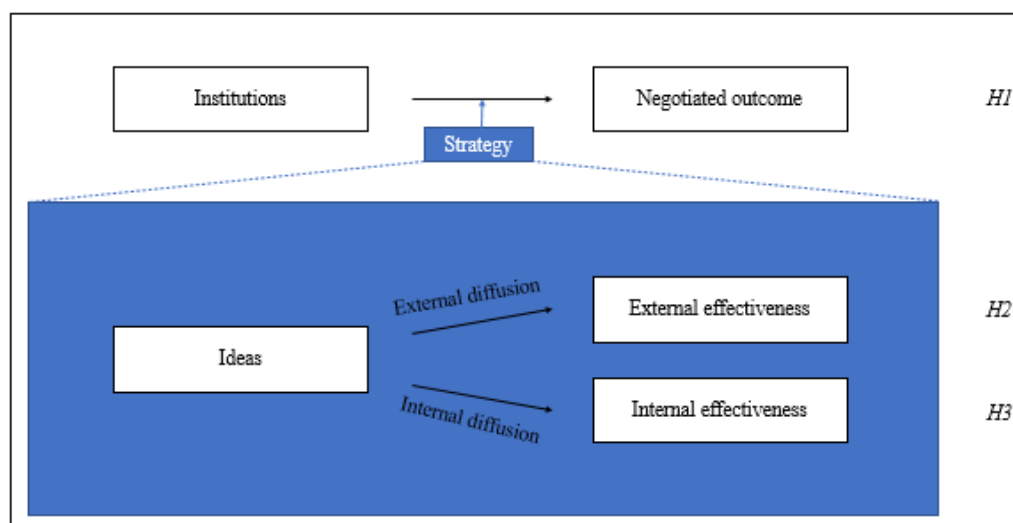
In addition to their external success in enforcing a reservation price, negotiators need to sustain good relations with their own principals in order to retain their trust and avoid a situation where a negotiated agreement might face non-ratification. As has been argued, the negotiators' task here is not to provide their principals with perfect information. Rather, they establish a frame of reference according to which the relevance of information is determined.¹⁸ The objective of the negotiating agent is then to ensure that its discourse is viewed as coherent and legitimate by its principals. Such a common understanding is notably essential to maintain a unanimous reservation price among domestic constituents.

¹⁸ According to Schmidt (2008 : 306), "frames of reference" are akin to policy paradigms under which specific "policy solutions" are brought forward. They "(re)construct visions of the world that allow them to (re)situate themselves in the world."

H3: A negotiator's ability to convince its own constituents about their reservation price increases their bargaining power.

H3 accounts for the fact that negotiators cannot take interest alignment with their principals for granted; in fact, when multiple principals are involved, the incentive for negotiators to “play a proactive role in shaping the principals’ aggregate interest” increases (Nicolaidis 1999: 91). This can be done both by coordinating positions and by raising the price of defection for single principals. The latter strategy, which involves a soft form of blackmailing, was highlighted by Schimmelfennig (2001) with regard to the context of the EU’s enlargement process. Schimmelfennig (2001: 73) argues that ‘brakemen’ states opposed to Eastern enlargement were progressively “rhetorically entrapped” in a discourse according to which enlargement was the necessary consequence of the EU’s pan-European liberalism. This forced them to either accept enlargement or suffer reputational costs as Community members (Ibid: 48). The case of Eastern enlargement involved numerous policy entrepreneurs pushing in the same direction, both through coordinative discourse aimed at policy elites, and through communicative discourse for public consumption. Its example shows that policy entrepreneurs, and in the case of Brexit, negotiators, can foster consent in their “home base” both directly by engaging with relevant veto players, and indirectly by mobilizing public opinion.

Figure 4. Linkages between the hypotheses



4. Data and methods

At the time of writing, the Brexit negotiations are barely over, and negotiations on the implementation of key provisions continue. Needless to say, some information remains classified, and details regarding the motivations of relevant policy actors or the coordination among them are not accessible to the public. There are, then, limits to the verified knowledge that the researcher on Brexit can use to make causal claims about the strategies and preferences of each actor. In political analysis, causal links are established through inference from consistent and converging evidence. I have chosen to do so by using qualitative data collected from political communication in speech and writing, which have both been, over the course of Brexit, prolific. Relying on an institutionalist literature to map the constraints faced by each negotiator, I will analyse their public confrontations with one another and the press during the

negotiations. In particular, I will analyse the press conferences that were organized, first jointly, then individually, by the negotiators at the different negotiation rounds and other meaningful political gatherings. These will be contrasted with relevant policy documents and joint reports of the negotiations. The comparison of primary sources, written and spoken, will serve to highlight the politics of information disclosure and the trade-offs between satisfying the public's expectations and ensuring negotiator confidentiality. It will also provide a comparison between the coherent policy frame that one would expect from official communication, and the *ad hoc*-communication encountered in press conferences.

The special interest with press conferences is that they provide a window into the negotiations and onto the wider political strategy of the involved parties. They allow actors to stage their interests and to engage with different publics. Vivien Schmidt (2008: 313) writes that “discourses succeed when speakers address their remarks to the right audiences (specialized or general publics) at the right times in the right ways.” This was a difficult task for Brexit negotiators, bound to each other in search for an agreement, to domestic institutions for ratification, and to their public opinion for political legitimacy. Public communication about negotiations implies both the strategic lure of antagonism and the practical need for cooperation. This ambiguity is fuelled by the distributive component inherent to every negotiation, which incentivises parties to use deceptive rhetoric. The most “intractable” methodological problem (Hay and Rosamond 2002, cited in Siles-Brügge 2014: 47) of political discourse analysis is therefore its inability to ascertain beyond any doubt that a public statement mirrors a sincere belief (or cognition) and is not part of a dishonest strategy.

In this context, the distinction between “coordinative” and “communicative” discourses has proven a useful analytical couple to contrast different statements from political actors (Schmidt 2008: 310). Coordinative discourse aims at substantial policy production and is oriented at those contributing to it – the negotiators themselves, their principals, or civil servants. Communicative discourse instead is more political insofar as it has a purely legitimating function geared at public opinion. By comparing discourses with regard to their private (coordinative) or public (communicative) consumption, the argument goes, the analyst can point to inconsistencies and establish the truthfulness of a statement (Siles-Brügge 2014: 49). In his analysis of EU trade policy paradigms, Siles-Brügge (2014: 203) relies on policy-making documents to establish coordinative discourses, a practice which I will replicate in the context of Brexit. The distinction between coordinative and communicative discourse is mainly behavioural: it is grounded in the intentions behind speech acts aimed at different audiences and formulated accordingly. Surely, a clear distinction between different target groups raises problems insofar as it appears to insulate policymaking from political questions of legitimation and strategy. This is even more true at a time of permanent media scrutiny and social media presence. However, as was stated *supra* (3.), there is no reason to oppose actual policy preferences to the idea of strategy: I can hold a belief about a policy idea, and nevertheless use it in strategic terms to restrain my interlocutor's choices. Despite its shortcomings in a context where purely internal communication is not available, the distinction between types of discourse should provide ‘backstage’ information about the intentions of negotiators during the Brexit process.

III. The Brexit Negotiations: Constructing Meaning

A. Setting the stage

The implementation of legal procedures always endows actors with a scope of interpretation which narrows as practice and precedent shape their contours. This is also true of the procedure for leaving the European Union: by resolving its ambiguities and interpreting its silences, negotiators constructed an institutional context that became binding on them. Institutionalism has acknowledged the importance of “path-shaping” moments in the development of institutions (see Hay 2008: 10). In this spirit, I will show how early choices regarding the unfolding of the withdrawal process had a lasting impact on the ways this negotiation could go. Pursuant Article 50 TEU, the ball is in the EU’s court once the withdrawing state has notified its intentions. The European Union took this opportunity to define the speed (1), the scope (2), and the setting (3) of the negotiations, with far-reaching implications for the bargaining space of an EU-UK agreement.

1. A two-speed negotiation ?

In the process of withdrawing from the EU, the triggering of Art. 50 launches a two-year phase after which, failing a withdrawal agreement, EU treaties stop applying to the concerned country. Arguing that the UK’s referendum outcome had driven the EU into a process of harmful uncertainty, European Commission President Juncker immediately called on the UK to translate its outcome into acts. In a common statement by the EU heads of institutions that Juncker read in the Commission press room, he emphasized that the EU “stand[s] ready to launch negotiations swiftly, *swiftly*, with the UK regarding the terms and conditions of its withdrawal from the EU” (European Commission 2016i). Instead, the personality most visibly associated with the Vote Leave campaign, Boris Johnson, stressed that “in voting to leave the EU, it is vital to stress that there is now no need to haste” (Johnson 2016a). Writing in *The Telegraph* shortly after, he argued that Leavers “must do everything [they] can to reassure the Remainers”, claiming that “I cannot stress too much that Britain is part of Europe, and always will be” (Johnson 2016b). Further, according to Johnson,

“British people will still be able to go and work in the EU; to live; to travel; to study; to buy homes and to settle down. As the German equivalent of the CBI – the BDI – has very sensibly reminded us, there will continue to be free trade, and access to the single market.”

For British politicians addressing an insecure public, this was a time for communicating that the situation was under control. When Theresa May, a Remainer, surprisingly became Prime Minister on the promise that “Brexit means Brexit”, she decided for Art. 50 to be triggered “no later than” March 2017 and called on her fellow citizens to “seize the day” in a speech at the Conservative Party Conference (May 2016). This speech, while seeking to prove May’s commitment to turn the referendum result into a bright programme for a sovereign United Kingdom, did little to appreciate the obstacles that lay in its way. The EU, for its part, demonstrated the readiness and united response of its institutions by setting out the conditions of an orderly withdrawal at an informal meeting by the EU-27 and the heads of the institutions (European Council 2016a). Once Michel Barnier was nominated and approved as Chief Negotiator (CN) for the EU, he rapidly became the authoritative voice on the EU’s negotiation position and carved out a public image of rigour and gravity. From the beginning, he stressed

that time to negotiate would be short (Barnier 2016), turning the idea into a motto by May 2017, when he stated for the first time that “the clock is ticking” (European Commission 2017i). In his numerous speeches, Barnier always emphasized the “mechanic” consequences arising from the UK’s withdrawal, and called on its responsibility in the timeline of events. Faced with remarks by Nigel Farage (UKIP) (2017) in the European Parliament that the EU was treating the UK “as if we’re some kind of a hostage”, and that PM May was unable to enforce a negotiation deadline on the EU, Barnier (2017) replied:

“We received Theresa May's letter notifying us of the UK's intention to leave on 29 March 2017. Because of the elections in the UK, we waited until the end of June 2017 to begin the negotiations. We are not using delaying tactics. You took your time, and we respected that, but frankly I cannot accept your criticism.”

Reminders about the UK’s responsibility for the pace of the negotiations can be ordered into a general narrative about the country’s responsibility in causing Brexit in the first place: “Le Royaume-Uni quitte l’Union Européenne, c’est pas le contraire” (European Commission 2017ii). While Michel Barnier adopted the precise language of policymaking when asked by journalists about the implications of Brexit, it was often combined to a hyperbolic level, proving an indirect rebuke of optimistic claims from UK government officials:

“Ceux qui disent et qui prétendent, ou qui ont prétendu que quitter l’Union Européenne n’aurait pas de conséquences ne disent pas la vérité. [...] il y a des conséquences humaines, sociales, économiques, techniques, financières, juridiques qui consistent à détricoter 43 années d’intégration.” (European Commission 2017i)

Barnier’s statements invariably aimed at creating an awareness of the complexity that would be encountered in the negotiations. The neutrality of their terms only reinforced the impression of an inevitable causal relation between Brexit and its substantial consequences for the UK. This was in sharp contrast to the voluntarist discourse of UK government officials like Liam Fox, who told the BBC on 20 July 2017 that a trade agreement with the EU “should be one of the easiest in human history [...] the only reason that we wouldn’t come to a free and open agreement is because politics gets in the way of economics” (Fox 2017). The Brexit negotiations are puzzling in that both parties accused each other of stalling the negotiations. Whereas Barnier regularly voiced his concern about British procrastination, the UK pushed for progress to be made on all issues.¹⁹ Holding out to force the other party to make concessions is a well-known feature of bargaining – it is thus worth questioning how parties managed the timeframe of these negotiations. A first element of response to this question resides in the EU’s control over the agenda of the negotiations, as Hay and Faucher (2020: 16) have already noted. The logics and implications of this agenda-setting deserve further investigation.

¹⁹ During a joint press conference on 28 August 2017 (European Commission 2017iv), Barnier stated: “To be honest, I am concerned. Time passes quickly.[...] We must start negotiating seriously”. Davis in turn urged: “For the UK, the weeks ahead is about driving forward the technical discussions about all the issues... all the issues.”

2. Putting things in order: the sequencing of Brexit

a) Conditionality revisited

Conditionality is the EU's most powerful tool of external governance, famously embodied in the "Copenhagen criteria" set out at the 1993 European Council in Copenhagen, which defined the political conditions Eastern European countries had to fulfil to qualify for membership. Conditionality usually links policy implementation to benefits (membership, financial aid, budget resources). In the Brexit process, the EU used its legal prerogative to initiate negotiations to require agreement on certain negotiation items before others were taken into consideration. The initial principles of this strategy were sketched out in the EU-27's first "Statement" on 29 June 2016 (European Council 2016a) and repeated ever after by the heads of the institutions.²⁰ First, the statement excluded any negotiation before notification, cutting short to British attempts to secure guarantees before they would launch the legal procedure. More importantly, it stated that any agreement on the UK's future relationship would "be concluded with the UK as a third country." The principles of a "phased approach" were again outlined in the European Council's guidelines (European Council 2017a: 4-6) for Art. 50 negotiations. Sequencing proceeded in multiple regards:

(1) While the main purpose of Art. 50 negotiations was devoted to the UK's "orderly withdrawal", only "*preliminary* and preparatory discussions" were foreseen for the future relationship in the European Council's guidelines (European Council 2017a).

(2) Only after determining "sufficient progress" on the issues of citizen rights, a "single financial settlement" and the protection of the Peace Process in Northern Ireland would the European Council "allow negotiations to proceed to the next phase."

(3) The Council directives on the future partnership agreement (Council 2020) and the Political Declaration both contain a "best endeavours" provision for negotiators to reach an agreement on fisheries by 01 July 2020 and required parallel progress on all sectoral aspects.

The EU thus steered early towards distinguishing an "institutional Brexit" from an "economic Brexit", as Barnier would later qualify them (European Commission 2020ii) and set reservation prices for every negotiation stage through the European Council's guidelines. The UK tried to oppose this way of proceeding throughout the negotiations, with David Davis (Secretary of State for Exiting the EU) telling the British press in May 2017 that it would be "the row of the summer."²¹ However, on the first day of negotiation, Davis also had to yield to "Terms of Reference for the Article 50 negotiations" which provided for an initial focus on the EU's preferred withdrawal issues. Asked by BBC's Katja Adler where the EU would compromise, Barnier reacted:

"Franchement, il faut être sérieux. Le Royaume-Uni quitte l'Union Européenne, c'est une affaire grave, très grave, avec beaucoup de conséquences [...] on s'est mis d'accord sur l'organisation, c'est pas une concession que nous avons demandée" (European Commission 2017iii).

²⁰ The minutes of the European Commission's (2016a) cabinet meeting on 27 June 2016 show that the institution engaged in "preparation of the important political meetings [...] in particular the meeting of the European Council, in the light of the results of the referendum in the United Kingdom" (PV 2016 2175 final).

²¹ Mance, H. (2017) "David Davis warns Brexit timetable will be 'row of the summer'", *FT*, 14 May.

A concession according to some observers, the European Commission preferred referring to its sequencing as a matter of organization, disconnected from the substantial negotiation. I will therefore show in the following which rationales were mobilized by the EU to justify sequencing, and how the UK tried to resist it.

b) Parallel discourses, sequenced negotiations

(1) A Legal or political imperative?

In its institutional communications and as outlined above, the EU made it clear very early that as far as EU law was concerned, any agreement on the future relationship would need to be concluded with a third country. Barnier nailed it down during his first appearance in the Berlaymont's press room: "Legally, these things can't be done together" (European Commission 2016ii). This is true insofar as Art. 50 could not function as a legal basis for mixed competence agreements, which need to be ratified by the Member States, whereas the withdrawal agreement was concluded at Union level. Indeed, the requirement of a legal competence for action is a general principle of EU law. However, Eeckhout and Frantziou (2016: 24) "do not see any significant barriers to a withdrawal agreement which also regulates the future relationship, on a legal basis different from Article 50 TEU." A similar opinion was defended by Professor Wyatt, who testified before the EU Select Committee of the House of Lords (2016a) that negotiations on a two-parts withdrawal agreement could be conducted in parallel. According to Heber (2017: 583-584), the thematic scope of the withdrawal negotiations depended on both parties' level of ambition, since Art. 50's reference to the "future relationship" was vague. Heber (2017: 586, 594) furthermore argues that the withdrawing Member state is already treated as a third country in procedural terms, as is indeed suggested by the fact that Art. 50 negotiations are conducted with reference to Art. 218 TFEU, which governs international treaty conclusions. For Michel Barnier however, the future relationship negotiations would need to be carried into a transition period,

"[t]ant entendu que cette relation future ne pourra être conclue, évidemment, comme c'est logique, qu'avec un pays tiers" (European Commission 2017ii).

This understanding was in line with the European Council's idea that "transitional arrangements" would need to be agreed "to provide for bridges towards the foreseeable framework for the future relationship" (European Council 2017a: 5), but it clashed with Theresa May's repeated call for parallel negotiations. In her Lancaster Speech, she had voiced her opposition to "some form of unlimited transitional status, in which we find ourselves stuck forever in some kind of permanent political purgatory" (May 2017a). Michel Barnier thus demonstrated his amusement as he reported the UK's first private mention of a transition period on 7 September 2017 (European Commission 2017vi).²² In any case, UK negotiators continued to refer to an "implementation period" instead, implying that its only benefit would consist in putting into place an agreement which would already have been reached by the end of the 2-year period. David Davis continued to uphold this understanding as he was questioned by the House of Lords' EU Select Committee on 1 May 2018:

²² Pressed by a journalist to disclose what Davis had asked him regarding a transition, he said: "Il est exact qu'il a évoqué cette question, brièvement." The silence that ensued eloquently communicated Barnier's impression of being confirmed in his predictions.

“If you have an implementation period for businesses, they need to know at the beginning of it what they are going to implement. So we have to have it pretty nailed down even legally at the beginning of the implementation period” (House of Lords 2018a).

Therefore, the implementation period was not for the UK “supposed to be an ongoing bit of further negotiation” (Ibid), since it needed to provide predictability and legal certainty to the business community. Where Davis was committed to parallel negotiations because they would address the uncertainty in the business community about disruptive change, the EU’s chief negotiator referred to the phased approach as a problem-solving tool (e.g. in front of the European Parliament 2017ii).²³ Every time he was challenged about sequencing, Barnier claimed that it was important to put things in order (“mettre les choses dans l’ordre”) so as to build the necessary trust on which any future relationship would have to rest. This trust was also seen as necessary by the European Parliament, for which the biggest uncertainty stemmed from unpredictable UK behaviour. On the day of notification, Brexit coordinator Verhofstadt stated being “totally against the idea that citizens should become bargaining chips during the negotiation” (European Parliament 2017i) and resisted any idea of trade-offs between security and economic cooperation, after Theresa May’s letter appeared to link these issues.²⁴ By associating sequencing to moral imperative and “common sense”, the EU’s communicative strategy shifted it on a discursive terrain where it was difficult for the UK to object without being perceived as uncooperative. It therefore carefully avoided antagonizing language during joint press conferences and tried instead to construct a parallel narrative of pragmatic realism.

(2) Elusive linkages: borders and money

The EU’s ability to impose binding conditions on every stage of the negotiations prevented the UK from establishing any linkages between negotiation items. According to the UK, linkages derived from the very problems at hand, as was shown with regard to the “implementation” period. On the issue of Northern Ireland, where the UK’s departure required effective border enforcement without implementing border restrictions which would undermine the Good Friday Agreement, David Davis repeatedly argued that a solution was necessarily linked to the future EU-UK partnership. Before the negotiations started, he said at “Peston on Sunday” (Peston on Sunday 2017):

“How on earth do you resolve the issue with the border with NI and the Republic of Ireland unless you know what our general border agreement is, what our Customs Agreement is, what the FTA is.”

He repeatedly pleaded during press conferences that there was an “unavoidable overlap between withdrawal and the future relationship”, and that it was important to “put people above process,” implying that the actual obstacle to an efficient agreement was bureaucratic rigidity (European Commission 2017v). These covert attacks were at the same time attempts to induce a more conciliatory approach to sequencing, which the EU however forcefully resisted. At the presentation of the EU’s guiding principles on the Northern Irish Dialogue, Barnier emphasized that

“the solution for the border issue will need to be unique. It cannot preconfigure the future relationship between the United Kingdom and the EU [...]. The UK wants to use Ireland as a kind

²³ In his closing statement, Barnier argued: “ce séquençage, il n’est pas fait pour créer des problèmes, pour je ne sais quelle punition du Royaume-Uni. Franchement, il est fait pour résoudre les problèmes.”

²⁴ May (2017b) “Weakening our cooperation for the prosperity and protection of our citizens would be a costly mistake.”

of test case for the future EU-UK customs relations. That will not happen” (European Commission 2017vi).

The EU rejected any attempt by the UK to settle the future relationship via the Northern Ireland Dialogue. Its ‘backstop’ solution, which was first included into an EU draft proposal for the Withdrawal Agreement in March 2018 (European Commission 2018a), proposed that Northern Ireland should enter into a “common regulatory area” with the EU failing agreement on a future relationship resolving the issue over the transition period. The ‘backstop’ solution would enter into force after the end of the transition period until agreement on another solution would be found. When the UK published its Chequers White Paper in July 2018, the EU again refused fusing the future relationship and the Northern Irish question on the same basis. When the EU accepted an UK-wide solution, this was again as part of a legally operable backstop and not as part of the broader future relationship (European Commission 2018iii). The substantial reasons for the EU’s stance on the future customs arrangement will be outlined below (III.B), however the Northern Irish solution as such is further evidence that the UK had to subscribe to tangible commitments before negotiations about benefits could seriously begin.

More illustrative still for the UK’s inability to establish linkages was the discussion surrounding the financial settlement or “exit bill” demanded by the EU as part of the withdrawal agreement. The EU first made explicit demands to that effect in the European Council’s (2017a) guidelines, according to which “the settlement should cover all commitments as well as liabilities, including contingent liabilities.” According to Michel Barnier, an agreement on the methodology for calculating outstanding liabilities was to be agreed by the end of the first phase of negotiations. Early agreement on the issue was seen as necessary to build trust and limit the uncertainty for businesses and recipients of Union programmes caused by the UK’s departure.²⁵ Commitments undertaken at 28 should not be honoured at 27, the Commission argued, explaining that the actual sum would be based on technical considerations and committed sums. Barnier even suggested that journalists calculate the outstanding sum themselves, and rejected the idea, advanced by a British member of the audience that the EU expected to be paid a “blank check”:

« pour moi, quitter l’Union, c’est pas un chiffre. C’est pas un prix à payer. C’est un retrait ordonné avec des comptes à solder [...] » (European Commission 2017i).

In essence, the EU signalled that the settlement was not negotiable, but rather a legal requirement for an orderly withdrawal. The UK however did not understand the settlement as a condition, but rather as a guarantee in exchange for a good future relationship. Faced with various figures from EU policy-circles, the House of Lords’ EU Select Committee published its legal advice on the subject in March 2017. It upheld the view that “the absolute sum of any posited settlement is hugely speculative,” and that “[a]lmost every element is subject to interpretation” (House of Lords 2017a: 14). The authors also argued that missing a withdrawal agreement, the UK could leave the EU “without being liable for outstanding financial obligations under the EU budget and related financial instruments” (Ibid: 38). Legal advice for Select Committees is not usually published and intended for internal consumption only; its strategic publication was therefore seen as an attempt to influence the government’s policy and

²⁵ Barnier thus warned (European Commission 2017i): « on peut imaginer des problèmes politiques et juridiques si ces programmes venaient à être amputés ou interrompus. »

to mobilize public opinion (Yong et al. 2019: 369). The subliminal message was that the UK had no international obligation to settle its dues if it did not achieve a commensurate withdrawal agreement, including a future relationship agreement.²⁶ Less subtle opposition came from Boris Johnson, who suggested that the EU could “go whistle” and that the UK would not pay an “extortionate” bill (Parker 2017). David Davis instead argued during the press conference on August 31st that the UK had a “very different legal stance” than the Commission on the question of the financial settlement (European Commission 2017v) and referred to Theresa May’s claim that the UK’s commitment should be in accordance with its future partnership. By December 2017, however, the UK had agreed to the principles set out by the EU. Yet, claims from the UK government about the necessity to link the eventual payment to the future partnership continued. In May 2018, Davis argued before the EU Select Committee that this was key to obtain Westminster’s consent:

“I would be surprised if parliamentarians were happy to vote for the expenditure of £35 billion to £39 billion without knowing, as it were, what we were getting for it. That is not quite a fair legal description. Nevertheless, people will see it in those terms. So it would be quite difficult to get the withdrawal agreement through the House if we did not have it [the future relationship] set out substantively” (House of Lords 2018a).

In this candid statement, Davis recognized that strictly speaking, the financial settlement was not a trade, but that it would be *perceived* as such by members of the Parliamentary majority. Yet he had shown unwilling from the beginning of the negotiation to prepare the UK public to change its perceptions. Pushed by a member of the EU Select Committee in October 2017 to counter fallacious media representations on the issue of finance, Davis had argued: “I would not start making arguments in the British public domain that gave away negotiating chips in the negotiation” (House of Lords 2017b). Davis was thus reluctant to adapting his communicative discourse despite making commitments towards the EU and resumed his elusive search for linkage in the negotiation.

(3) Nothing is agreed until everything is agreed

The final nail in the coffin of the UK’s linkage strategy was the EU’s ability to lock-in commitments into binding agreements. This intention was openly acknowledged by Commission negotiator Barnier even before negotiations began. During a press conference on the 3rd of May 2017, he anticipated an agreement on the principles of the withdrawal issues by November, which would be translated into an agreement:

“[...] ce ne sera pas du ‘window-dressing’, ça doit être des engagements clairs sur lesquels nous trouvons un accord, sur les principes des trois secteurs où la décision du Royaume-Uni de quitter l’Union crée depuis dix mois une incertitude totale” (European Commission 2017i).

The Commission negotiator equally vowed that no backtracking on these commitments would be allowed (Ibid). In fact, §5 of the “joint report” that was finally agreed on 8 December 2017, explicitly stated:

“Under the caveat that nothing is agreed until everything is agreed, the joint commitments set out below in this joint report shall be reflected in the Withdrawal Agreement in full detail” (European Commission 2017).

²⁶ This point of view was confirmed during the questioning of David Davis by said Committee on 31 October 2017 (House of Lords 2017b).

Only once this report was agreed did Barnier notify the European Council of “sufficient progress” on the withdrawal issues to carry forward the negotiations. However, the negotiations then did not turn to the framework of the future relations. Instead, Barnier referred to the joint report as the new basis for the translation of its commitments into a legal text, progress that was then weighed against a transition period. The most important provision in the joint report, §49, implied the possibility of continued UK-wide alignment to certain rules of the Single Market, and thus prepared the way for an ‘all-UK’ solution to the Northern Irish border problem, which would lock the entire country into regulatory approximation with the EU. This rigid organization required binding commitments from the UK during each phase without ever providing guarantees on the future relationship. Obligations thus piled up for the UK, without involving any obligation for the EU to perform on its pledge of a future relationship. The UK tried to enforce the latter in relation to the “political declaration” regarding parties’ aims for the future relationship, which was negotiated aside from the withdrawal agreement. At the joint press conference of July 27th 2018, Dominic Raab, who replaced David Davis after his resignation, required binding commitments to deliver on the political declaration:

“on the basis that there is no deal until we have the whole deal, there will need to be a clear time frame and *obligation* written into the withdrawal agreement to move expeditiously from this declaration to the conclusion of the binding agreements that will give it effect during the course of the implementation period” (European Commission 2018iii).

UK negotiators thus appropriated the EU’s vocabulary to convey a sense of control over the outcome. While the European Council’s guidelines stated that “nothing is agreed until everything is agreed” (European Council 2017a) to communicate that all the issues of withdrawal would need to be settled within a single agreement, British negotiators repeated it to emphasize that their commitments would only be honoured in the context of a deal on the future relationship. Both parties thus appropriated the same principle for leverage, providing further evidence that language designed to enable cooperation had to yield to the logic of competition which characterised the entire negotiation. In the end, the UK’s last attempt to link the issues of withdrawal to those of the future relationship failed just as well.

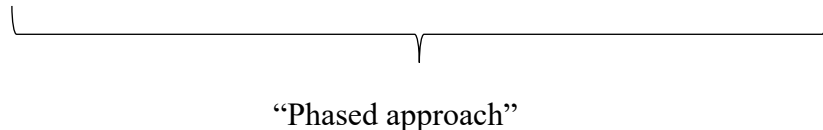
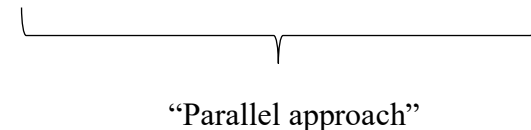
The success of the EU’s approach of phased commitments for the Withdrawal Agreement led it to try a similar method during the negotiations on the future relationship. The implementation of the Withdrawal agreement and of the Protocol on Northern Ireland thus became a condition for the future partnership (Council 2020: §5). EU negotiator Barnier referred to the “Political Declaration” agreed in October 2019 with the UK every time it was seen to backtrack from the commitments set therein, especially with regard to a Level Playing Field. Presenting the Council’s negotiating directives on 25 February 2020, he interpreted the negotiations simply as an exercise in legal transcription of the text agreed by Boris Johnson in October 2019:

“tous ces mots sont là, agréés par le Premier ministre, et nous entendons qu'ils soient mise en œuvre, que ces mots soient traduits dans un texte juridique. Nous ne demandons que ça, ni plus ni moins, et c'est ça l'objet de la négociation” (Council 2020i).

In addition, the EU – ironically – sought concomitant progress on all issues of the future relationship, relying this time on “parallelism between the various sectoral tracks of the negotiation” (Council 2020). Although a future relationship involving a trade agreement had been the UK’s object of desire during all the preceding stages, it became more reluctant to engage on the conditions set by the EU, such that the deadline set for a fisheries agreement in

July 2020 passed by without results. The reasons for this reluctance will be examined in the section III.B.

Figure 5. Negotiation Agenda – the European Commission’s approach

Phase 1 June-Dec 2017	Phase 1.2 Feb-Mar 2018	Phase 2 April-October 2018	Renegotiation October 2019	Future R. Negotiation Mar-July 2020	Future R. Negotiation July-Dec 2020
Citizen’s rights: principles	Translating the Joint Report into legal provisions	Solution for NI: first only NI, then UK-wide	Solution for NI: from a UK-wide backstop to regulatory alignment of NI	Best endeavours to conclude a fisheries agreement	Fisheries agreement
Financial Settlement: establish a “rigorous methodology”	Agreement on a transition period	Governance		All issues of the future partnership (LPF, governance, market access)	All issues of the future partnership
Northern Ireland Dialogue: “avoid a hard border”	Solution for Northern Ireland	Political Declaration: Scoping of the Future Relationship			
	Governance of the agreement				
→8 December: “Joint Report”	→19 March: Agreement on a transition period	→15 October 18’: Withdrawal Agreement and Political Declaration	→17 October 19’: Revised withdrawal agreement and Political D.	→1 July: /	→24 December: Trade and Cooperation Agreement
 <p>“Phased approach”</p>			 <p>“Parallel approach”</p>		

3. Transparency: Making commitments stick

a) Converted to transparency

The transparency policy of the Brexit negotiations was labelled by one EU official as a “game changer” during the Brexit negotiations (Interview 02 March 2021). This positive assessment is surprising if one considers that transparency, or the lack of it, has figured prominently in critiques regarding the EU’s accountability for two decades (on the democratic deficit, see Hix 2006: 538). While opaque decision-making was first seen as a problem specific to intergovernmental bargaining within the Council, it has also been problematized in the context of the EU’s trade policy (Gheyle and De Ville 2017). Increasing contestation against the secrecy surrounding the TTIP negotiations and their association with a neoliberal globalization agenda pressured the European Commission to publish key negotiation texts (Heldt 2019:216) and all its recommendations for negotiating directives for trade agreements from 2017 onwards (European Commission 2017c). On the premise that the Brexit negotiations were unprecedented and exceptional, EU institutions decided that the majority of negotiating documents would be made accessible to the public (Council 2017). The terms of reference agreed between the EU and UK negotiators on 19 June enshrined this commitment into a default policy.²⁷ During the joint press conference held that day, Barnier justified this decision by arguing:

« pour tout vous dire, moi je préfère la transparence aux fuites [...] le débat public est pour moi très important, et je me permets de vous dire que nous n'allons pas accepter de le suivre ou de le subir, nous voulons le conduire, et donc voilà pourquoi nous allons pratiquer le plus largement possible cette transparence » (European Commission 2017ii).

The Commission thus openly acknowledged its strategy to provide an authoritative narrative about the implications of the Brexit process, and Michel Barnier would leave out no opportunity to emphasize its consequences for the EU and especially the UK. Barnier’s reference to leaks could also be understood as an allusion to the leaked impact estimations of the UK government that circulated in the country’s press.²⁸ The UK negotiator mirrored Barnier’s comments, claiming that within the limits imposed by the negotiation, the UK government would be “more transparent than [in] any other negotiation in modern history [...] I think we’re in the same place, and we take the same view” (European Commission 2017ii). This statement contradicted the UK Prime Minister’s claim in October 2016 that providing a “running commentary” on the negotiations would not be in the UK’s national interest (May 2016). The EU thus took a driving stance in enforcing transparency, notably by organizing joint press conferences after the negotiation rounds to expose the differences in each party’s positions and preparation. Commission negotiator Barnier also repeatedly called on the UK to publish more material on its positions and manifested his disappointment when it refused to circulate its text proposals on the future relationship.²⁹ By that time, the UK refused to hold joint press conferences. Calls on the opposite party to implement a transparency policy is by no means a standard EU practice.

²⁷ Terms of reference for the Article 50 TEU negotiations, 19 June 2017, §11: “For both parties the default is transparency.”

²⁸ See e.g. Asthana (2016) “Government memo demanding end of Brexit leaks is leaked”, *The Guardian*, 4 December.

²⁹ On 19 June, Barnier said about a position paper on citizen rights : « Nous attendons avec beaucoup d'intérêt le papier que doit publier prochainement le gouvernement britannique en écho à celui que vous avez entre les mains » (European Commission 2017ii). See also the press conference of 24 April 2020 (European Commission 2020i).

In the context of TTIP, the EU was still reluctant to ask the US to publish “common negotiating texts” or to justify their non-disclosure, when asked by the Ombudsman to do so (Gheyle and De Ville 2017: 22). The terms of reference for the Brexit negotiations instead explicitly required negotiators to state which restrictions applied to selected documents.

Transparency is an end in its own right, since it makes public officials accountable in the exercise of their functions. During the Brexit process, it did however also prove a strong tool of strategic communication at the hands of the European Commission, which shaped the public perception of each party’s interests. This perception is relevant both among the principals of each negotiating party, and in public opinion. While opaque decision-making blurs the link between decisions and specific actors, transparency imposes restraints on their ambiguity and their ability to decommit from past promises, since public opinion tends to sanction inconsistency. With these constraints in mind, it is interesting to look at the way each negotiator managed information flows with their principals and with the broader public. Frennhoff-Larsén and Khorana (2020) have already commented on the differences between the EU’s and the UK’s management of information during the Brexit negotiations, the former going to great lengths to promote inclusive consultation and the latter indulging in solitary and uncompromising positioning. Without prejudging on the intentions behind each negotiator’s outreach, I will show that it was grounded in a different understanding of their strategic interests.

b) Enforcing a reservation price

(1) It’s the mandate, stupid !

The problem with transparency in negotiations is that it deprives actors of uncertainty, a strategically important resource for bargaining. That is how Hugo Paemen (cited in Meunier 2005: 49) describes the dilemma of EU Council mandates for commercial negotiations, which make it difficult for the EU to conceal its reservation price. However, as Meunier well notes, the publicity of negotiating mandates enables negotiators to claim that they act under the authority of a mandate, and that they have tied hands when it comes to concessions beyond this mandate (Meunier 2005: 50). The Brexit negotiations were a good illustration of this reality, with the European Council providing evolutive guidelines at every stage of the negotiation, and the European Parliament publishing six resolutions outlining its conditions for ratification between April 2017 and January 2020.³⁰ These guidelines, and the Council directives that implemented them, did not however start from an explorative stance and narrow as negotiations advanced – they simply made reference to different negotiation items, whereas the general principles did not change. Equally, the European Parliament’s resolutions mostly reproduced the words of the guidelines. EU negotiator Barnier ostensibly referred to the guidelines of the European Council every time a point of contention emerged.³¹ As journalists questioned whether his mandate was too restricted, Barnier simply referred back to the guidelines:

“Je vous invite toujours d’ailleurs à regarder, quand vous avez des doutes ou des questions, soigneusement les guidelines. Sur tous les sujets, pour bien comprendre comment je travaille, parce que, scrupuleusement, je mets en œuvre ces guidelines” (European Commission 2017v).

³⁰ European Parliament resolutions can be found [here](#).

³¹ During the press conference on 12 October 2017: “J’ai rappelé le contenu du mandat que j’ai reçu unanimement des 27 Etats membres, et ma responsabilité, c’est de respecter ce mandat, et de le faire aussi en tenant en compte les résolutions du Parlement Européen” (European Commission 2017vii).

Thus, when the UK released its Chequers white paper in July to drive the debate on the future relationship, Barnier refocussed the attention on the general outline of the European Council's guidelines:

“Moi je ne négocie pas sur le White Paper. Je vais travailler à partir des guidelines du Conseil européen que vous pouvez relire ; celles du mois de mars sont très précises sur l'offre du partenariat global que nous pouvons faire au Royaume-Uni” (Council of the EU 2018i).

The British side was left with little discursive room to contest the bottom lines set out in the guidelines. David Davis initially tried to reappropriate their language, for example by calling for “flexibility and imagination” (European Commission 2017v), with reference to the EC guidelines' wording on the Northern Irish question. By inverting the logic of the EU's rhetoric, Davis explicitly borrowed Henry Kissinger's idea of “constructive ambiguity”, according to which a shared language with initially opposed meanings could pave the way to a constructive deal over time (Sebenius et al. 2018, Ch.11).³² However, these attempts to bridge the differences in both parties' positions were rebuked by Barnier, who would not bow to UK attempts to depict the EU as inflexible and bureaucratic. Instead, Barnier stuck to solemn repetitions of the objective consequences of withdrawal and reiterated his impatience: “Ma recommandation pour réussir, c'est qu'on soit le plus constructif possible, et le moins ambigu possible” (European Commission 2017v).

EU frustration with UK ambiguity had already been voiced during the College meeting of the Commission which followed the first round of negotiations. According to the minutes of this meeting, which were passed down to journalists, Barnier stated that “he felt that the UK should genuinely commit to a precise mandate and regretted the lack of clarity and will shown so far by the British government” (European Commission 2017a: 20). As a consequence, the EU and the UK entered into a competition about who provided more position papers. Pushed by Barnier to make the British position clearer, Davis used his opening statements to enumerate the “detailed papers” his government had produced, and which represented “hard work and detailed thinking that has been going on behind the scenes across Whitehall over the past twelve months” (European Commission 2017v). While Davis referred to the landmark speeches of Theresa May to prove that the UK had outlined its positions and was well-prepared for the negotiations, ambiguity remained a key part of his strategy to achieve parallel negotiations.

(2) Enforcing unity

The references to negotiation mandates from each negotiator cannot be understood without a closer look at the strategic relationship that they entertained to those who arguably endowed them with these mandates – the principals. In fact, understandings of their role in the process differed to a large extent between the UK and the EU. Within Theresa May's government, the prevailing view was that Parliamentary scrutiny of the government's negotiation strategy needed to be limited. During the debate on invoking Article 50, David Davis argued:

“On the negotiation [...] we will be as open as possible subject to the overwhelming national interest of preserving our negotiating position. It is no good creating a public negotiating position, which has the simple effect of destroying our ability to negotiate—full stop” (Hansard 2016).

³² Davis credited Kissinger with inventing the notion during the press conference on 31 August 2017.

The UK government thus operated under the premise that Parliament should not impose a mandate on it which would constrain the amount of options for a Brexit deal. This rationale led Theresa May to call for a general election on the 8 June 2017 out of frustration with the opposition's hostility at the government's Brexit strategy. While May promoted the idea of a 'bespoke' deal which would provide the UK with access to the EU Single Market, the Labour party framed Brexit as a binary choice, which ran against the government's negotiation strategy (Hansard 2017a). The election was thus designed to enforce discipline within Parliament and to strengthen the government's autonomy from domestic constraints. In her speech justifying the election, the Prime Minister accused Parliament of misinterpreting the Brexit vote, or worse, trying to subvert it:

“At this moment of enormous national significance there should be unity here in Westminster, but instead there is division. The country is coming together, but Westminster is not” (May 2017c).

While unity in Parliament was seen as necessary to force more concessions on the EU, this reasoning was refused by the bloc, which argued, in the words of Commissioner Timmermans, that “internal matters of the UK are up to the UK” (Council 2017i), signalling that the EU would not compromise its interests to ensure ratification. Michel Barnier equally rejected the idea that the UK would obtain better results if it had a larger majority, although he welcomed the idea of a reliable and stable negotiation partner (European Commission 2017i). However, if not in terms of means, the UK's strategy to enforce “unity” among its ‘principals’ was quite similar to that of the EU in terms of its ends – creating a single narrative around Brexit. The EU outlined this strategy from the day of the vote, with institutions and Member states agreeing on common statements and a single approach early on. When the guidelines of the European Council for the negotiations were published on 29 April 2017, Presidents Tusk and Juncker ostensibly emphasized the lack of disagreement that had prevailed during their adoption and emphasized that decisions regarding “sufficient progress” in the first phase would be taken by consensus. Tusk and Juncker both warned that attempts to divide the 27 were futile. Donald Tusk thus said:

“if someone expects that some divisions among the 27 would help the UK to achieve something better for them - it's a pure illusion for me” (European Council 2017i).

Whether this was true is difficult to say; the withdrawal agreement could be ratified by a special qualified majority, and thus did not require unanimous support. However, division among EU leaders would have damaged the consistency of their negotiating position. Demonstrative unity instead allowed the EU to narrow its mandate. Unlike in the UK, engagement with the principals was permanent and information flows from the Commission negotiator to stakeholders were considerable. During a hearing in the French Senate in 2020, Barnier highlighted the importance of the EU's transparency policy to maintain the EU27's unity: “nous avons tout dit, chaque jour, à tout le monde en même temps” (Sénat 2020). Barnier thus met two times a week with representatives of the Member states from COREPER and the Council's Art. 50 Working Party, once a week with the head of the EP Brexit Steering Group, and visited each Member state at least one time (Sénat 2020, Ondarza 2020: 95). These extensive consultations were reflected in the four-week cycle for each negotiation round demanded by the EU, which involved internal preparations, an exchange of views, negotiations, and feedback sessions (European Commission 2017vi). Describing himself as a “worker” of the EU27's unity,³³ Barnier always emphasized that he accomplished his duty at the service and under the supervision of the EU27.

³³ At the General Affairs Council of 09 April 2019, Barnier said: “[...] à la place à laquelle je me trouve, je suis un ouvrier de l'unité des vingt-sept, et j'espère, un ouvrier qualifié.”

This view was challenged by journalists when the Commission presented a draft Withdrawal Agreement on 28 February 2018 that comprised a backstop option keeping Northern Ireland in regulatory alignment with the EU. It was questioned whether Member states would support such a proposal, which was immediately rebuked by the British Prime Minister for undermining the UK's territorial integrity.³⁴ However, the Commission negotiator refused any idea of divisions between the negotiator and his principals:

“ Un tel travail, [la Commission] elle devait le faire et elle l'a fait *comme un outil au service des Etats Membres et du PE*. Mais je suis sous un mandat du Conseil depuis le premier jour. Ne vous trompez pas. Ne perdez pas de temps à vous imaginer qu'il va y avoir des divergences entre le négociateur et les membres de l'Union, ça ne se produira pas” (European Commission 2018i).

However, by comparing the European Commission to a passive tool instructed by the Member states, Barnier eluded the role it played in shaping Union preferences. First, the Commission played an important role in pushing the European Council to adopt precise provisions regarding the organization of the negotiations in the guidelines (European Parliament 2017ii).³⁵ This allowed Barnier to claim in May 2017, with reference to the common work on the guidelines: “je ne suis pas surpris par le contenu et les limites de ce mandat, que j’ai moi-même souhaitées” (European Commission 2017i). These self-imposed constraints illustrate the EU’s “tied hands” approach and are coherent with the European Commission’s long-standing demand for narrow negotiation mandates in external negotiations to improve its bargaining power (Nicolaidis 1999: 106). Second, in its coordinative discourse towards the Member states, the European Commission set the priorities for the negotiation and defined the choices that were available to the UK for a negotiated agreement, most famously through the “stairs” slide, but also during the preparatory seminars on the future relationship, which took place in the beginning of 2018. The Commission’s role in the unity of the EU27 was thus more that of a party in the internal negotiations than that of a passive facilitator.

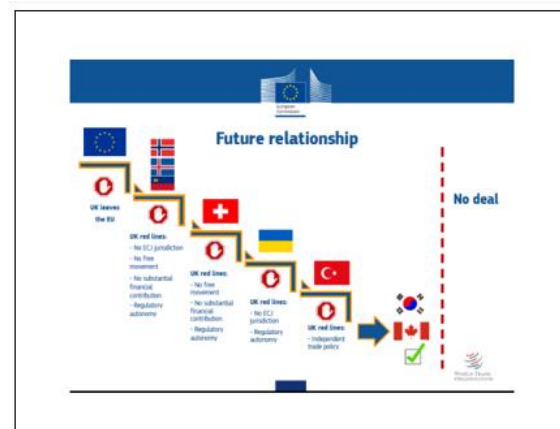


Figure 6. Slide Presented by Michel Barnier to Member States (19.12.2016)

(3) One-way transparency

The counterintuitive consequence of EU transparency policy during the Brexit process was that the EU consistently projected a single narrative through the European Commission, whereas the UK's debate on its negotiation position unfolded in open daylight, through Parliamentary opposition and extensive media coverage of the confrontations with the EU, swollen by regular provocative statements from Michel Barnier. The latter was often asked to comment on the events in London and met with Remainers from the UK, justifying such meetings as an information policy: "nous essayons de donner des clés, des informations, de répondre aux questions" (European Commission 2017viii). Barnier always denied commenting on internal UK matters; however, his comments were indirect aimed at the UK public debate, by arguing

³⁴ Theresa May famously said : “No UK Prime Minister could ever agree to it” (Staunton 2018).

³⁵ Barnier highlighted Commission President Juncker's role in the detailing of the guidelines during his closing statement at the European Parliament (29 April 2017).

that the metaphorical “stairs” the UK was going down could be climbed up again (European Commission 2018i). The implication of such remarks was to undermine the credibility of the UK’s reservation price during the negotiation. The UK government tried instead to show that it was not dependent on a deal with the EU to prosper, a line of argument that was regularly foiled by domestic events. Theresa May had stated in her Lancaster speech that “no deal for Britain is better than a bad deal for Britain” (May 2017a). However, her ability to sell the advantages of no-deal were hampered by Parliamentary demands for the government to release impact assessments, which it was forced to do after a vote on 1 November 2018 (Hansard 2017d). The UK also launched attempts to influence EU Member states’ interests on Brexit. David Davis argued in front of the EU Select Committee that he endeavoured to mobilize economic interests in Europe:

“Part of my task is to make sure that each country is aware of its own interests in Brexit. They do not necessarily automatically know. That is why, in the run-up to March, I went to 18 countries, from memory. That was very useful, because it both delivered information to me and influenced their interest in what the March Council guidelines looked like” (House of Lords 2018: 8).

However, he recognized all the same that many EU member states did not view Brexit as a priority (Ibid). Over the first year of negotiation, Davis’ only possibility to influence the EU’s negotiating position seemed to involve calling on the European Council during press conferences to widen its mandate, without reaching any results.³⁶ Bypassing the Commission negotiator indeed proved a vain effort, since all progress happened on the basis of Commission proposals. Unable to offer a strong counternarrative to that of the EU and forced into defensive lines of argument during joint press conferences, the UK did not draw any benefits from them. To the contrary, they provided a stage for Michel Barnier to highlight the inconsistencies between the polarisation in the UK domestic debate and the deliberate discourse of UK negotiators in Brussels. While some Member states seemed to disagree with the Commission’s line of argument, none contested it openly. A good example is the Salzburg summit in September 2018, which was reported by the British press as a humiliation for Theresa May because her Chequers proposal was flatly refused.³⁷ On his arrival in Salzburg, Hungarian Prime Minister Orbán said he “[didn’t] like the approach to punish the British just because they decided to leave” (European Council 2018i). Asked by journalists whether this approach was driven by Member states, he said:

“No, it’s a very general approach. But we have a camp, quite a number of countries who would. There are some others, like Hungary, who do not like that kind of approach, and we would like to have a fair Brexit. And I think the special envoy Barnier is doing a very good job” (Ibid).

Orbán managed to criticize the Union’s approach to Brexit and to congratulate its most ardent representative in the same sentence, providing evidence of Barnier’s ability to create positive momentum around his person despite substantial disagreement. Barnier himself argued that the EU27’s unity grew out of EU leader’s perception of “gravité” (gravity) stemming from the crises with which liberalism was confronted in 2016, and which produced a sense of responsibility (European Commission 2018iv). By seizing this momentum and constructing a pervasive discourse around it, the European institutions were able to maintain unity despite divergences on substance. Relying on a narrative that focussed on Brexit’s consequences for the UK rather than for the EU, the Commission linked Brexit to the essence of the EU, making

³⁶ He did so on 12 October and 19 March with regard to a wider negotiation on the future partnership.

³⁷ “Salzburg delivers Britain home truths about Brexit”, *Financial Times*, 21 September 2018.

it rather difficult for Member states to contradict this narrative without exposing their lack of solidarity with the European project: Member states were tied by their expressions of solidarity. At the same time, the clear separation of the withdrawal negotiations from other Union policies prevented linkages with subjects more openly contentious between Member states. The EU was thus able to set and enforce a coherent reservation price, whereas this was impossible for the UK due to its domestic debate around withdrawal.

B. Hard choices

1. Interests well understood

a) Conflicting paradigms

I have argued that the EU's transparency policy established EU unity as a *fait accompli* and pre-empted UK attempts to redesign the terms of the negotiation. The Commission negotiator skilfully exploited this discursive advantage by building a discourse around the identity of the EU and of the Single Market. Speaking before the European Economic and Social Committee in July 2017, Barnier thus said that the negotiation with the United Kingdom could have a “pedagogical virtue” (‘une vertu pédagogique’) by showing every Member state what being inside the EU meant (EESC 2017). The principles highlighted by the EC guidelines – integrity of the Single Market, indivisibility of the four freedoms, autonomy of EU decision-making – were thus described as constitutive parts of a coherent European identity, against which every UK proposal was measured. Barnier reiterated this after the UK published its Chequers proposal in July 2018:

“[...] évidemment, ces propositions, ces idées doivent respecter *ce que nous sommes*, les guidelines du Conseil européen : les quatre libertés, l'intégrité du marché intérieur. *On ne va pas négocier là-dessus*. Ça, c'est ce que nous sommes. Ce que les Britanniques veulent quitter.”

For the European Commission, the negotiation with the UK was thus not about making concessions³⁸, but rather about guaranteeing certain rights (those of citizens and fund recipients) and agreeing on arrangements that would be compatible with the principles set out as essential for the Single Market. The ‘integrationist’ values defended by the EU, which revolved around notions of due process and legal obligation, were at odds with the UK government's demands for flexibility and pragmatism. This ‘clash’ of approaches was not superficial, but rather at the core of the conflict between the EU and the UK (Figure 7).

³⁸ Barnier's first statement that his state of mind was not about making concessions was thus widely commented in the British press (“[...] je ne suis pas dans l'état d'esprit de faire des concessions ou de demander des concessions”, European Commission 2017ii).

Figure 7. EU and UK revealed paradigms

	Paradigm	Ends	Means	Implications
UK	Sovereignty	Independent cooperation	Pragmatism Flexibility	System of Mutual Recognition
EU	Integration	Binding framework for cooperation	Enforcement of EU treaties	Indivisibility of the 4 freedoms Legal harmonization

Early UK position papers, most importantly those about “future customs arrangements” and “Northern Ireland and Ireland” were thus rapidly refused by the EU institutions.³⁹ Within UK Parliament, most from the opposition also criticized them, with MP Keir Starmer (Labour) claiming that “[t]he time for floating fantastical ideas is over” (Hansard 2017c) and calling for a revision of the government’s red lines. Time and again, members of the opposition referred to arguments from the European Commission to question the government’s promises. However, the government was committed to widening the range of the politically negotiable: in front of domestic audiences, it continued to argue that a customs arrangement was about political will rather than legal constraints. In Brussels and in London, David Davis sought a solution to the Northern Irish border issue via the future customs arrangement. During a Commons debate on 13 November, he argued that every issue faced in the withdrawal negotiation would find a political solution:

“We were told that a free trade agreement was impossible to achieve, but the former EU Trade Commissioner, Karel De Gucht, said that, no, it was not impossible if the political will was there. The same is true in this case [on Northern Ireland]. If the political will is there, this can be done. I am quite sure that the political will is there both North and South of the border” (Hansard 2017d).

The UK’s customs proposals, reflected in its position papers on “Future customs arrangements” and copied into its position paper on Northern Ireland, proposed a “highly streamlined customs arrangement” involving the “UK mirroring the EU’s requirements for imports from the rest of the world where their final destination is the EU” (HM Government 2017a: 7), in order to avoid rules of origin for goods, which are controlled at the border. In order to overcome problems of future regulatory divergence, it was basically arguing for mutual recognition of regulatory requirements (de Brito et al. 2016: 18). To avoid controls on Sanitary and Phytosanitary standards, the position paper on Northern Ireland thus aimed for

“regulatory equivalence on agrifood measures, where the UK and the EU agree to achieve the same outcome and high standards, with scope for flexibility in relation to the method for achieving this” (HM Government 2017b: 19).

³⁹ “Britain’s Brexit position papers are not good enough, EU president Jean-Claude Juncker says”, *The Independent*, 29 August 2017.

This meant that regulation would be regarded as equivalent regarding its objectives, but not regarding the means to achieve them. The government's rationale for mutual recognition was that "it makes no sense to start again from scratch when Britain and the remaining Member States have adhered to the same rules for so many years" (May 2017a), as May had said in her Lancaster Speech. Such demands, which Barnier discarded as expressions of "nostalgia", collided with the EU's understanding of the Single Market. Barnier thus made the bloc's position unequivocal:

"The UK wants to take back control, wants to adopt its own standards and regulations, but it also wants to have these standards recognised automatically in the EU. That is what UK papers ask for. This is simply impossible" (European Commission 2017v).

Barnier's remarks exposed the contradictions in the UK's strategy, which was designed both to recover regulatory autonomy and to retain "unfettered" market access in the EU. Such an approach was described by Kalypso Nicolaidis (2017: 4) as an embodiment of "the idea of unilaterally doing the right thing." In fact, the EU's system of "managed mutual recognition," based on minimum common standards and the mutual recognition of regulation, only works through constant dynamic adaptation to the priorities of the day (Nicolaidis 2018: 2). Thus, requiring a system of mutual recognition within a Free Trade Agreement would amount "to reinvent the EU wheel, but without the gears and spokes that make it work, otherwise known as institutions" (Nicolaidis 2018: 2). The internal rules of the Single Market implicitly require safeguard mechanisms towards outsiders, who are not bound by the principle of mutual trust and by the EU's framework of rules and supervision. To guarantee the homogeneous application of its rules, the Single Market must therefore control its frontiers, both physically through border controls (e.g. to certify the conformity of goods) and legally through clear distinctions between insiders and outsiders (on the need of external border controls, see Schäper 2020: 170).

Theresa May's Chequers proposal, published in July 2018, internalized these realities, and contained a commitment to a "common rulebook" for all goods including ongoing harmonization (HM Government 2018: 8). In addition, the proposal committed to the non-regression of regulation, as well as to state aid discipline. This proposal, which was put forward after an internal dispute within the British Cabinet, led to the resignation of its two most visible Leavers, Boris Johnson and David Davis, in a testimony of the government's strategic shift from a "right to diverge" to regulatory alignment. However, it did not fit with Barnier's understanding of the Single Market. During a press conference following the White Paper's publication, he questioned whether its proposals were "workable" (Council 2020ii). Barnier's "questions" were manifold: the omission of regulation not controlled at the border⁴⁰, the risks for fraud involved in the proposal for a dual customs system, the difficulty of externalising the levy of customs duties to a third country (Ibid)... More fundamentally however, Barnier reiterated that sectoral participation to the Single Market would undermine the indivisibility of the four freedoms. Barnier tried to illustrate this problem by pointing at his mobile phone:

⁴⁰ Citing rules on pesticides, Barnier asked: "comment alors pourrions-nous protéger les consommateurs, et nous avons un devoir de protection dans le marché unique des consommateurs » (Council 2020ii).

“Quand on sait que dans tout produit que vous utilisez tous les jours – votre téléphone – entre 20-40% de la valeur du produit est liée aux services, comment on fait pour éviter une concurrence déloyale à travers les services” (Ibid) ?

This visual explanation of the indivisibility doctrine sent a strong political message: sectoral participation – “cherry-picking” – would not be allowed. In fact, it raised a claim to horizontal scrutiny of all UK regulation, irrespective of a direct link to trade. Theresa May still hoped that this proposal could help her meet ends between the future partnership and the Northern Ireland solution, since it was, according to her, the only proposal that would guarantee the frictionless movement of goods across borders (European Council 2018ii). In her press conference at the Salzburg Summit, she voiced her disbelief at the EU’s critiques:

“If there are concerns about the proposals we have put forward for frictionless goods, let’s actually understand what those concerns are. I understand references being made to the integrity of the Single Market, actually we believe... we looked at that, we recognize the EU’s desire to respect the integrity of the Single Market, and that’s why we’ve put forward a proposal which we believe does exactly that” (European Council 2018ii, Part 3).

After her Chequers proposal was refused, Theresa May found herself in a bind. The December 2017 Joint Report provided the basis for a backstop provision, whereas a veto from the DUP prevented May from applying this solution to Northern Ireland only.⁴¹ Faced with the refusal to translate her White Paper into an all-purpose solution to the future trade relationship and the Northern Ireland problem, May’s proposal ended up under the guise of a UK-wide backstop, allowing her to claim she had preserved the territorial integrity of the UK Single Market, and Barnier to argue that the EU had integrated the UK’s proposal into a common solution.

b) Exposed contradictions

The organisation of the Brexit negotiations exposed the UK’s conflict of interest between a commitment to economic cooperation and the political imperative of sovereignty which was interpreted as resulting from the Brexit vote. The EU consistently argued that Single Market access would require acceptance of its entire *acquis* and called on the UK to reconsider this possibility. Barnier’s understanding of a future agreement that would require “a balance of rights and obligations” therefore signified time and again that all outlined principles would need to be respected for access to the Single Market:

“nous respectons les lignes rouges britanniques. J’aimerais bien que les Britanniques respectent leurs propres lignes rouges aussi. J’ajoute aussi que si ces lignes rouges devaient évoluer du côté Britannique nous sommes immédiatement ouverts” (European Commission 2018ii).

The Commission’s holistic understanding of the Single Market meant that it could not accept a simultaneous resolution of the withdrawal questions and the future relationship, such that the persistent discursive link which British politicians established between the two entertained false expectations. A single solution to the Northern Irish problem was the only option the Commission negotiator would agree to. However, the Northern Irish border problem also showed that the EU’s communicative discourse about its proposed solutions did not represent the issue faithfully. To avoid a hard border in Northern Ireland, either the EU had to loosen its

⁴¹ “May’s weakness exposed as DUP derails Brexit progress”, *The Guardian*, 5 December 2017.

view on entry controls for the Single Market, or the UK needed to accept a substantial amount of alignment in terms of regulatory and customs questions. To say, in that context, that the EU respected all UK “red lines” was false: one of both parties had to give up a part of its decision-making autonomy, and thus of its sovereignty. When Michel Barnier was asked whether the EU was “meddling in the constitutional affairs of the UK” by proposing the regulatory alignment of Northern Ireland, Barnier eluded the question, arguing that he was simply translating the Joint Report into a legal text (European Commission 2018i). Barnier referred to precedent to show that regulatory differences between Northern Ireland and Great Britain already existed⁴², and called for “dedramatizing” the entire issue:

“à aucun moment notre intention n’est de créer une frontière sur la mer entre l’Irlande du Nord et le reste du Royaume-Uni [...] mais nous avons besoin de trouver le bon endroit et le bon moment d’effectuer les contrôles dont nous avons besoin pour protéger les consommateurs et protéger le Marché intérieur” (Council 2018i).

David Davis equally referred to precedent to resolve the Northern Irish problem – he, however, referred to the dematerialised controls which were already taking place between Northern Ireland and Ireland:

“One always has to start from the memory that it is not a non-border. There is a border on excise. There is a border on tax, whether VAT or corporation tax. There is a currency border. There is a judicial border. The border works very well, invisibly as it stands, dealing with all those things” (House of Lords 2018a: 13).

Both the EU and the UK thus called for “flexibility” and “pragmatism” on the Northern Irish question, while designating two different things. The UK government’s commitment to the DUP and the EU’s commitment to the Republic of Ireland thus led to the adoption of a UK-wide backstop, a solution which alienated swaths of the UK Parliament and led the withdrawal agreement to be voted down three times. To remedy the concerns in UK Parliament about the agreement’s implications for UK sovereignty, the EU offered a “legal instrument” that reiterated both parties’ “best endeavours” to move by the end of 2020 to an agreement replacing the Protocol on Northern Ireland, which contained the backstop (European Commission 2019a). Presenting the instrument at a joint press conference with Theresa May, Jean-Claude Juncker claimed the EU had done everything to reassure the British public: “We left no stone unturned” (European Commission 2019i). In parallel, the EU set its hopes into a realignment of domestic UK interests, with Barnier and Verhofstadt seeing possibilities in the cross-party consultations that began in early 2019. However, indicative votes in the House of Commons showed that there was no working majority for any proposal in the UK Parliament, questioning the existence of a UK ‘win-set’ on Brexit. This proved that neither the EU, nor the UK government had created the conditions of ratification between UK domestic interests. Both parties’ insistence on full sovereignty and autonomy of their legal systems were incompatible with their intention to cooperate, a hiatus which culminated in the Northern Irish cooperation dilemma (see also: Felbermayr et al. 2019).

⁴² He referred to the Irish island already constituting a single epidemiological territory.

2. The limits of lock-in

a) The ultima ratio of Brexit

The EU proved an unflinching defendant of its principles during the negotiation on the withdrawal agreement, spoke with one voice and maintained its unconditional support to the Republic of Ireland's interest in maintaining a single customs territory on the island of Ireland. Conscious about the divisions in the UK about its interests regarding the Single Market, it was able to undercut its government's claims to sovereignty, and to effectively limit the UK's right to regulate. The gap between this result and the optimistic discourse of UK officials led to a weak sense of ownership of the withdrawal agreement. The trade-off announced in the Chequers proposal between market access and integral sovereignty was not accepted by major Brexit proponents like David Davis, who wrote in his resignation letter that "the general direction of policy will leave us in at best a weak negotiating position, and possibly an inescapable one" (Davis 2018). Similar tones were hit by Boris Johnson, who accused the government of "volunteering for economic vassalage" during a Commons debate where he justified his resignation (Hansard 2018). His speech provided evidence of the gap between the expected advantages of Brexit among UK Leavers and the results of the negotiation. According to Johnson:

"[the government] allowed the question of the Northern Irish border, which had hitherto been assumed on all sides to be readily soluble, to become so politically charged as to dominate the debate" (Ibid).

In essence, Johnson argued that the government had failed its electorate, and deceived it as to the numerous limits to regulatory and commercial policy autonomy that the UK was in the process of agreeing to:

"If we pretend otherwise, we continue to make the fatal mistake of underestimating the intelligence of the public, saying one thing to the EU about what we are really doing and saying another thing to the electorate" (Ibid).

By claiming that the UK was heading towards "Brexit in name only", Johnson tapped into the grievances of many Brexiteers, all the while providing testimony of the inherent difficulty of having one's negotiation mandate transparently exposed in a negotiation where the outcome necessarily diverges from initial offers. Arguably a negotiation is just about that, changing one's position; however, this inconsistency is sanctioned by the public. Thus, while both parties worked towards an agreement, the publicity of their negotiation positions made ratification in the UK impossible because it was seen to conflict with the ultima ratio of Brexit: sovereignty.⁴³ This imperative was further imperilled by the existence of the 'backstop', which was perceived at home and abroad as a significant constraint on the UK's bargaining position on the future relationship, since it constituted a *de facto* reservation price. The French President was not shy of emphasizing this fact, speaking of the EU's red lines:

"[...] ça fait partie des lignes, en quelque sorte, qui sont les nôtres, ce qui est un levier puisque c'est l'intérêt mutuel d'avoir cette relation future et que je n'ai pas cru comprendre que la volonté de Theresa May ou de ceux qui la soutiennent était de rester durablement dans une union douanière, mais bien une relation future propre [...]" (European Council 2019).

⁴³ This mirrors Putnam's claim that some deals are favoured by both parties but derailed by becoming public and thus liable to ratification (Putnam 1988: 436).

As a consequence of the impossibility to ratify the Withdrawal Agreement, the UK principals changed their negotiating agent to regain control of the agenda: Theresa May's government was replaced by a government clearly committed to a Brexit putting sovereignty above market access and operating a clear distinction between the negotiations on withdrawal questions and on the future economic relationship. In the process, Prime Minister Johnson accepted a variant of the Commission's initial backstop proposal for Northern Ireland, transforming it into a permanent arrangement. However, he also paved the way for significantly less UK regulatory alignment with the EU: as Allan Matthews (2021) shows, the backstop provisions on environmental provisions covered almost all substantive EU legislation, regardless of a link to trade. They also provided the EU with the non-reciprocal power to adopt remedial measures where non-compliance by the UK undermined fair competition. After the completion of the revised withdrawal agreement, the change of the UK's negotiation positions put such levels of integration off the negotiating table.

b) Outlines for regulatory competition

"The EU is looking to the future, not the past, in these negotiations" (Barnier 2020a).

The reshuffling of the UK Parliament after Johnson's successful December 2019 elections enabled the UK to discipline its domestic constituents and to vehiculate an unambiguous discourse of sovereignty and of independence in its negotiations with the EU. In its White Paper outlining the UK's negotiation approach, the government thus announced that "at the end of the transition period provided for in [the withdrawal] agreement, the UK will fully recover its economic and political independence" (HM Government 2020a: 3). This document contained explicit clauses that foreclosed cooperation beyond the "friendly cooperation between sovereign equals" (Ibid).⁴⁴ The EU instead followed through with the approach set out by the European Council in 2016 and emphasized especially the need for fair competition with the UK, guaranteed through a "level playing field." This demand did not refer to a specific area of regulation but rather amounted to an encompassing non-regression requirement for all regulation regarding environmental, tax and social issues, in addition to a strict discipline on state aid and competition questions, as reflected in slides from the European Commission's (2020a) seminars that took place before the "future relationship" negotiations. EU demands for substantial approximation of rules however were rebuked by the UK, and both parties accused each other of uncooperative behaviour – this time from separate podiums. In a heated letter exchange, UK negotiator David Frost accused the EU of pursuing "a relatively low-quality trade agreement coming with unprecedented EU oversight of our laws and institutions," (Frost 2020a) referring extensively to previous arrangements between the EU and other third countries. The EU negotiator's answer refuted these accusations and justified the demands and safeguards advanced by the EU:

"Every agreement that the EU has concluded is unique, with its own balance of rights and obligations, tailored to the partner and era in which it is concluded. There is no model, no uniform precedent to follow in EU trade policy." (Barnier 2020a).

⁴⁴ "Whatever happens, the Government will not negotiate any arrangement in which the UK does not have control of its own laws and political life" (HM Government 2020a: 3).

What David Frost's letter showed was that the UK for its part had internalized that it was negotiating with a single actor. Unlike David Davis, Frost never appealed to individual Member states, and instead aimed at countering and systematically anticipating the EU's arguments. In the meantime, the structural context remained the same for the UK: with time running down towards the end of the transition period, it needed to substitute the arrangements that remained in place during that time. However, the confrontation turned to conflict as the UK maintained accusations that the EU had not "internalized and accepted that we will be an independent state [...],"⁴⁵ and delayed its implementation of the Protocol on Northern Ireland. Antagonism reached its climax in early September, when the UK government presented a bill that would override parts of said Protocol, to which the EU reacted by launching an infringement procedure (European Commission 2020b). By asserting its ability to disrespect its international commitments, the UK government sent the clearest possible signal of its resolve to leverage sovereign decision-making against the EU's approach of sequenced commitments to the negotiations. Unlike the previous government, it set out to prove that past commitments still depended on the UK's cooperation. The EU has no means of enforcing its counterpart's obligations in that case, a point that the UK government was eager to put on display. This shift in UK behaviour, from reluctant cooperation to defiant unilateralism, proved that it had strongly reconsidered the added value of continued cooperation.

By using this confrontative strategy, the UK fought back against the EU's understanding of a fair Free Trade Agreement. While the UK referred to precedent to legitimise its demands, the EU openly acknowledged that the EU-UK relationship would be firmly rooted in the reorientation of its trade policy towards a paradigm of embedded liberalism (on embedded liberalism in trade policy, see: De Ville and Siles-Brügge 2018: 250). In its relations to the UK, the European Commission simply implemented its commitment, made in several reflection papers in 2017, to "harness globalization" by organizing a regulatory "race-to-the-top" (European Commission 2017b: 13). The EU has long been an exporter of its legal *acquis* and governance tools, and this strategy rarely goes uncontested (Meunier and Nicolaidis 2006: 915). However, after experiencing strong public contestation of TTIP and CETA, and in a response to the surge of economic populism after the global financial crisis, the Commission's political commitment to the Level Playing Field had been strongly reaffirmed. This commitment was also reflected in the EU's agreement with China, negotiated until December 2020, which put strong emphasis on forced technology transfers and new rules for state-controlled businesses (European Commission 2020c). Referring to a Level Playing Field as a means of preventing a regulatory "race to the bottom" (Barnier 2020), the EU's starting position consisted in limiting regulatory divergence through substantial provisions in the agreement (European Commission 2020b). This objective was difficult to reconcile with the UK's assertion that it would not give up on its regulatory power. The compromise found by both countries enshrines this opposition: while the UK is free to diverge, the EU can react by imposing tariffs. As both the EU and the UK pursued a tied-hands approach and openly rejected one another's standards for cooperation, each was able to defend its principles. However, this also meant that cooperation was restricted to the smallest common denominator. The lack of conciliation between the two countries' interests thus laid the foundations for a form of regulatory competition that might emerge in the future between the EU and the UK.

⁴⁵ This affirmation was made during an interview with the Telegraph ([here](#)) on 23 July.

IV. Conclusion and Policy Recommendations

The Brexit negotiations are a case study in the management of fraught relations between close partners. While the vote on 23rd June 2016 forced both sides to manage a crisis with potentially existential consequences, this task was singularly more daunting for the UK, which had to define an independent approach to international economic cooperation within a very short timeframe. The inevitable domestic contest around this issue made it difficult for the UK to make credible commitments at the negotiation table. Conversely, the EU was able to enforce a policy of conditionality that put a clear limit on the range of the negotiable. The European Commission, under the clear political authority of the European Council, was thus able to prevent the resolution of contentious issues through informal negotiations, which all too frequently characterize bargaining in the European Union. Provided a sufficient degree of concertation among its actors, the European Union can resist calls for cooperation on transactionalist premises. This finding however is not self-explanatory – it needs to be evaluated against the background of the theoretically informed hypotheses which have guided this study.

H1 questioned the use of a “tied-hands” strategies as a means to pass on concessions to the opposing negotiating party. This hypothesis appears to be confirmed by the EU’s ability to credibly reclaim the limits of its negotiation mandate and to attribute a quasi-legal understanding to its requirements, whereas the UK was unable until the conclusion of the withdrawal agreement to make credible claims about its ‘reservation price’, that is about the red lines that were first set out by the Prime Minister. Against Putnam’s intuition however (Putnam 1988: 440), the Brexit negotiations do not confirm that a leader “whose domestic position is relatively weak [...] should be able to drive a better bargain.” A possible explanation for this finding lies in the nature of the domestic conflict about the negotiation outcome. While it would be reductive to simplify UK domestic positions into a spectrum ranging from a ‘hard’ to a ‘soft’ Brexit, it is true that a considerable part of the opposition to the government came from either more ‘integrationist’ or more ‘sovereigntist’ constituents, which made it difficult for UK negotiators to maintain a credible reservation price. Nevertheless, the division within Parliament after the 2017 election also made ratification difficult, since there was no clear majority for either option. In fact, by trying to conciliate contradictory priorities, the UK negotiator ended up with a deal that was non-ratifiable (see Putnam 1988: 446).

Once recognized, this observation does not yet explain why negotiators were actually able of enforcing a specific reservation price, or rather how negotiators created the conditions of an effective “tied hands” approach. This ability was linked to the negotiators’ skill in claiming an authoritative meaning of Brexit’s implications. In public, the European institutions spoke with a “single voice”, upholding the same principles and leaving the task of formal negotiation to the European Commission’s designate, Michel Barnier. The latter’s communicative discourse was identical independently of the forum within which he defended the EU’s positions. By providing explicit accounts of the internal process of policy coordination that legitimated his positions, Barnier left little room for discursive contestation of his approach. The EU’s approach was described by the UK as legalistic: however, by linking its claims to the material basis of EU law, the EU credibly justified its reservation price at the negotiation table. Nowhere was this as important as in defining the scope of Art. 50 TEU, which enabled the EU to resist

issue-linkage. The UK first tried to reappropriate the EU's language, and to show that the Commission's understanding of legal procedure was arbitrary. However, these attempts proved inconclusive, first because of their contestation by home constituents and second because the UK progressively accepted different EU demands. Trying to settle all issues at once in the final phase of the negotiation, the UK's communicative discourse of voluntarism was undermined by the publicity of its concessions.

The transparency policy that was upheld by the EU during the entire negotiation played a central role in consolidating its positions. Transparency allowed the EU to provide a well-coordinated account of the *outcomes* of its internal policy process, putting the European institutions collectively at the centre of media attention. Unity thus became a self-referential frame of language that perpetuated the EU's appearance as a 'black box' with well-defined interests grounded in its economic identity. UK negotiators, were they to play by the rules of transparency, were confronted with the *fait accompli* of EU positions, whereas the contradictory nature of the UK domestic debate exposed the inconsistencies of their own positions. This finding highlights the fact that transparency is a political tool: it does not provide a complete account of the twists of policy coordination but rather a dominant narrative which constrains both the negotiating opponent and the different constituents of a party – in this case, the EU Member states.

For the UK, this made it difficult even to negotiate with the EU, with the consequence that it began to refuse the EU's standard operating procedures once it disciplined its domestic constituents. The EU's strategy of non-negotiable reservation prices therefore runs the risk of aborting negotiations upfront and of creating zero-sum dynamics if its negotiating opponent does not yield to its terms of cooperation. "Discursive struggle" has an antagonizing potential: this finding is in line with Diez's observation that discourses are more apt at constraining policies than at enabling new ones (Diez 2014: 320). This needs to be considered in the EU's insistence on creating a 'Level Playing Field' for competition, a policy which it can hardly enforce unilaterally.

The discussion of Brexit inevitably leads us to consider the EU's ability to act as a "normative power" (Manners 2002) in global politics. No other international organization has a similar power to impose its 'standard operating procedures' on its counterparts in international negotiations. The withdrawal procedure of Brexit shows that through its mere existence, the EU imposes standards of legitimacy on policy choices and on the interaction between sovereign equals. By forcing the joint negotiation of some questions and refusing the use of negotiation leverage for the settling of other issues, the EU is redrawing the lines of legitimate bargaining strategies in the international arena. As the EU becomes increasingly politicized, transparency can thus help it to generate coherent policy narratives, provided the balance of power between institutions is clearly enforced.

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