

Brexit: What Role did Process Play?

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Abstract

The outcome of the UK referendum on 23 June 2016 was a major political event in the history of European integration. A member state voted for exit over voice and was on a journey to third country status. The objective of this article is twofold. First, it analyses the EU's response to Brexit, including the role of process, up to the departure of the UK from the Union on 31 January 2020. Second, it explains why the EU adopted the approach that it did. The analytical lens builds on Kooiman's three governing orders, all of which were deployed in managing Brexit.

1 | INTRODUCTION

The outcome of the UK referendum on 23 June 2016 was a major political event in the history of European integration. A member state voted for exit over voice and was on a journey to third country status (Hirschmann, 1970). Notwithstanding the enormity of the referendum outcome and its aftermath, EU leadership sought to play down Brexit, to convey the impression that the EU could successfully navigate Brexit and was capable of governing the UK's departure. Brexit was high politics for the EU but the collective opted to de-emphasise the drama of a member state leaving. Those in the UK leave campaign, who had informed the electorate that becoming a third country would be relatively straightforward and dominated by the politics of EU capitals and major governments, failed to grasp what the EU was and how it functioned. David Davis, who served as Secretary of State for Exiting the European Union from July 2016 to July 2018, had predicted one month before the referendum that 'the first calling point of the UK's negotiator immediately after Brexit will not be Brussels, it will be Berlin, to strike a deal' (Davis, 2016). This was not how events unfolded. The objective of this article is twofold. First, it analyses the EU's response to Brexit, including the role of process, up to the departure of the UK from the EU on January 31, 2020. Second, the article explains why the

EU adopted the approach that it did. The analytical lens builds on Kooiman's three governing orders, all of which were deployed in managing Brexit (Kooiman, 2003).

2 | ANALYTICAL FRAMEWORK

The European Union is a compound polity consisting of the whole, the Union, and the member states that collectively participate in the pooling of sovereignty and joint decision making. It is a voluntary project that relies on a shared constitutional framework based on treaties and a set of institutions that represent the member states (European Council/Council), Europe's peoples (European Parliament) and the collective (Commission, Court, ECB). The binary distinction between intergovernmental and supranational institutions fails to capture the intensity of interaction and activity within and across all EU institutions. Collective action in and by the Union emanates from multiple actors, addressing multiple issues in complex institutional settings. Lacking as it does the ideational, territorial and functional qualities of a nation state, the Union relies on the glue provided by rules, shared institutions, agreed principles and predictable and inclusive processes to lubricate decision making and to maintain a cohesive and collaborative approach to problem solving.

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As a complex compound polity, the Union was forced to establish how it would handle the endogenous shock of Brexit. Brexit was part of an EU transformation aptly defined by Van Middelaar (2019, p. 11) as the transition ‘from a system based purely on the politics of rules to a system that can also engage in the politics of events’. The EU is a formidable negotiating machine, both internally and in its dealings with third countries. Faced with the departure of a member state, the Union was compelled to deploy its capacity to manage the UK’s withdrawal with the least damage possible. Creating institutional capacity and EU dominated process was central to this. Sir Ivan Rogers, the UK’s permanent representative to the EU until January 2017, highlighted the importance of process to the EU in the following terms:

The European side is very good at process and processology. The EU does processology better than any organization on earth. That’s both a good thing and a bad thing. It set up a legalistic and technocratic process.
(IIEA, 2019)

Analysing the role of process in the EU’s management of Brexit is essential to an understanding of how the Union dealt with the shock of losing a large member state. However, process was embedded in a strategic approach that called on the Union’s collective power across different governing orders. Since its inception, and notwithstanding the heterogeneity of the member states, the distinctive balance of competences between the EU and the domestic and the need to maintain the commitment of the member states to collective governance, the EU has developed formidable governance capacities (Börzel, 2010; Tommel, 2016). Tommel (2016) argued that EU governance was predominantly about the creation of appropriate procedures and institutional settings, what Kooiman defined as second order governing.

When seeking to steer Brexit, the EU relied on all three orders of governance elaborated by Kooiman (2003). The three orders should be imagined as three concentric circles, with first order governance the outer circle, second order governance in the middle connecting to third order or metagovernance at the core (Kooiman et al., 2008). First order governance according to Kooiman (2003, p. 153) was ‘governing as process’ or day-to-day problem solving. This is the most visible governing order as it refers to the nuts and bolts of getting things done. It begins with the identification and formulation of the problem and then moves to the search for solutions by the actors involved. Although Kooiman does not pay that much attention to framing, problem identification is an exercise in framing, especially when the problem has emerged from a major political event. Political actors were forced to develop an understanding of the event and the challenges

associated with it. These challenges are not simply givens but are matters of interpretation and decoding. Snow and Benford (1992, p. 137) defined a frame as ‘an interpretive schemata that signifies and condenses the “world out there”’. The process of framing was inherently political; Kingdon (2011, p. 110) argued that there are ‘great political stakes in problem definition’. Second order governance consisted of the institutional arrangements and procedural avenues that structure how first order governing takes place. This is a matter of rules, roles, and a multiplicity of organisations.

For Kooiman, metagovernance or third order governance referred to the overarching governance framework that binds the system together, which in the case of the EU was based on the treaties that together with the judgements of the European Court of Justice form the constitution of the Union. At the heart of metagovernance were the ground rules for governing. The Brexit shock compelled the EU to draw on its governing capacity across all three governing orders, to act in concert as collective power Europe in a very purposive manner. In order to be purposive, the EU had to frame Brexit, define what it meant to the Union and how the Union would govern it. It also needed to agree on a set of substantive and organising principles around which members and institutions could coalesce. In other words, it had to establish an institutional ecology that would manage and steer the negotiations, setting out roles and responsibilities in Brussels and in the national capitals. This meant extensive homework as the impact of Brexit across the entire *acquis communautaire* had to be assessed. Negotiations with the UK thus necessitated both command of a vast array of substantive technical details concerning EU policies and the high politics of new governance arrangements and a future relationship with a former member. Before the EU could govern Brexit, it had to frame what Brexit meant.

3 | FRAMING BREXIT: PROBLEM DEFINITION

The Union had to collectively ‘frame’ Brexit: to understand and project what this major event meant to it. Frames are ‘powerful nudges’ that affect the ‘choice architecture’ of what follows (Thaler & Sunstein, 2008). Problem definition as noted above is highly political and public framing is an act of political communication. The most significant dimension of EU framing was its collective nature; the EU spoke as one, not as individual member states or EU institutions. The EU response to the referendum result was rapid, with major statements from the leadership of EU institutions on 24 June followed by a European Council of the 27 on 29 June. Between 24 and 29 June there were intensive contacts across EU institutions and with the national capitals including a meeting of the

representatives of the European Council leadership, the Sherpas on Sunday 26 June. In less than one week, the EU framed its interpretation of Brexit and communicated it.

There were four substantive elements to the Union's framing of Brexit: unity, a commitment to the future of the Union, the UK as a third country in the making and the importance of the legal avenue to exit. The 24 June statement from Donald Tusk, Jean-Claude Juncker and Martin Schulz, representing respectively the Council, the Commission and the Parliament, as well as Mark Rutte representing the Dutch presidency, was emphatic about the metagovernance of withdrawal: 'We have rules to deal with this in an orderly way. Article 50 of the Treaty on European Union sets out the procedure to be followed if a Member State decides to leave the European Union. We stand ready to launch negotiations swiftly with the United Kingdom regarding the terms and conditions of its withdrawal from the European Union' (EU, 2016). The informal European Council held the week after the referendum affirmed the importance of Article 50:

There is a need to organise the withdrawal of the UK from the EU in an orderly fashion. Article 50 TEU provides the legal basis for this process. It is up to the British government to notify the European Council of the UK's intention to withdraw from the Union.
(European Council, 2016a,b)

The Council underlined the importance of the balance of rights and obligations to be assumed by the departing state and added greater weight to this by stating that 'access to the single market requires acceptance of all four freedoms' (European Council, 2016a, 2016b). The EU was intent on establishing a road map for Brexit based on Article 50, the only available legal route for exiting the Union, to avoid a unilateral withdrawal by the UK and the chaos that would have ensued. The UK was shunted onto the Article 50 track from which there was no escape.

In fewer than three hundred words, Article 50 contained significant procedural pathways setting out how the UK would exit (Craig, 2017). It went from being a relatively obscure article in the Lisbon treaty to becoming part of the day-to-day narrative of Brexit; a search of the term on the UK parliament website returned 24,100 hits (UK Parliament, 2020). Article 50 set out a number of stages for negotiations between the Union and the UK. Stage one referred to the triggering of Article 50 by the departing state, which would open the way for formal negotiations. Stage two related to the substantive negotiations on the terms of withdrawal which would take place within the framework of negotiating guidelines set out by the European Council. The Commission under Article 218 (3) TFEU would be responsible for the detailed negotiations and the European Parliament would

have to be kept informed as its consent was required for the agreement. Article 50 also provided a bridge from stage two, the withdrawal agreement, to stage three, the negotiation of a future relationship because the withdrawal agreement should be concluded 'taking account of the framework of its future relationship with the Union' (Article 50, TEU). The time limits contained in Article 50 meant that Brexit would be 'shaped in time and through time' (Armstrong, 2017, p. 285). Article 50 specified that the treaties would cease to apply to the departing state two years from the notification date unless there was agreement by all parties to extend the negotiations and that the departing state would not take part in the internal deliberations of the 27 on the exit negotiations. The latter implied that the EU and its institutions would be constituted as EU-27 for the purposes of Article 50 negotiations. This procedural rule effectively meant that exit negotiations were akin to negotiations with a third country, an external agreement, rather than an intra-EU agreement (Armstrong, 2017). Thus, the Union's deployment of Article 50 placed the UK in a special category, a departing state, from 24 June 2016 onwards. In effect, EU framing and the provisions of Article 50 transformed an endogenous shock to the Union into an exogenous one.

The 29 June informal European Council added an additional procedural mechanism which was not required by Article 50 when it stated that 'there can be no negotiations of any kind before this notification has taken place' (European Council, 2016b). This became known as the NNWN mantra – no negotiations without notification – within the EU institutions and the Union adhered steadfastly to it until the UK's formal notification in March 2017. The addition of this procedural mechanism reflected collective power Europe and the determination of the EU to 'avoid any risk of *divide et impera*', whereby the UK would undermine the unity of the 27 by engaging bilaterally with the member states, as envisaged by David Davis during the referendum campaign (Bradley, 2020, p. 8). The UK as a third country in the making was placed in 'purdah' by EU institutions and the national capitals on matters relating to the exit negotiations (Bradley, 2020, p. 8). There was no opportunity for pre-negotiations, which tend to be a feature of international negotiations. In sum, Article 50 provided the EU with a legal framework, the metagovernance of Brexit that established procedural pathways for exiting the Union. However, the Union went beyond Article 50 to structure the negotiations (Kooiman's second order governance) by elaborating procedural elements not in the original treaty article.

The nine months between the referendum and the formal triggering of Article 50 by Prime Minister Theresa May on 29 March involved an extensive number of institutional and further procedural choices that would structure the negotiations. Of particular significance were decisions taken about how to manage the

negotiations with the UK in EU institutions, second order governing. Key EU decisions were made about establishing institutional arrangements for steering Brexit. The Council secretariat moved with speed and within one week of the referendum had set up a Council taskforce on Brexit directed by Didier Seeuws, the former chef de cabinet to European Council president Herman Van Rompuy. The taskforce, which became the Article 50 Working Party when negotiations began, was the central node that managed the interface between the Council and other EU institutions – and, crucially, with national capitals via their permanent representations. The taskforce was also the internal link to the EC president and European Council. When the Brexit negotiations began, the Council was especially configured as 27 member states, at the level of the Council (Article 50) working group, Coreper, General Affairs Council (GAC) and European Council. Within the Commission, responsibility for Brexit was assigned to a special Article 50 taskforce established on 1 October 2016. Governing Brexit was not just a matter of institutional responsibility but critical choices about roles. A momentous political choice relating to the negotiations was the decision by Jean-Claude Juncker, Commission president, to appoint Michel Barnier as head of the Article 50 taskforce. Barnier, a former Commissioner and French minister, was a political heavyweight who would lend his experience and standing to the negotiations. The Barnier appointment was a statement of intent by the Commission president. President Juncker's judgement was that the Brexit process had to be steered by a politician rather than a senior Commission official because of the need to gain the trust of the member states and bring political judgement to bear. The December 2016 European Council confirmed Barnier as the Union's chief negotiator. The final institutional node was the establishment of a Brexit steering group in the European Parliament under the auspices of the Conference of Presidents in April 2017. Chaired by the Brexit coordinator, Guy Verhofstadt, it had five additional members.

According to President Tusk, the 27 'adopted the organisational structure with the European Council maintaining political control over the process, and the Commission as the Union's negotiator' (Tusk, 2016). The European Council would establish the parameters of the negotiations with the Commission taskforce as the Union's key interlocutor with the UK, mandating the Council to appoint Barnier as the Union negotiator. This was an exercise in laying down the train tracks for the negotiations based on European Council guidelines and Council negotiating directives. The European Council emphasised that it would 'remain permanently seized of the matter'. In other words, the European Council was to be the crucial source of EU political authority on Brexit (European Council, 2016a): it was the enabler of the Union for the Brexit negotiations. The conclusions of the European Council of 27 placed

considerable importance on the need for the Union negotiator to maintain transparency and build trust by sustaining close links with the Council as the negotiations proceeded (European Council, 2016a). Thus by December 2016, well before the negotiations began, a form of collective and collaborative governance on Brexit was fashioned within the EU. Rather than turf wars, the Union's intergovernmental and supranational institutions fulfilled their roles in a cooperative manner and placed the interests of the Union as a whole above than of any one institution. This minimised opportunities for interinstitutional competition and created the conditions for unity, a core goal of the Union. The dominance of the European Council contained sectoral interest within the overall EU goals and preferences. For the Brexit talks, EU-27 was on one side and the departing state was on the other.

The establishment of a distinctive and separate Brexit institutional ecology served two purposes for the Union. First, it allowed the institutions to create horizontal and vertical nodes of coordination that lubricated internal EU processes and facilitated unity. This was important as the commitment to unity in June 2016 was rhetorical and had to be transformed into a practice norm. Second, it insulated EU day-to-day policy making and legislation from contagion by Brexit. Senior leaders in the EU institutions were determined to have a positive EU agenda and to deal with Brexit in a dedicated institutional ecology. The Union created an institutional bypass or cordon so that Brexit did not spill over into the rest of the EU. This institutional separation accentuated the character of the UK as a member state en route to becoming a third country. In this phase, the Union deployed all three governing orders as defined by Kooiman (2003). This involved the rapid framing of what the Brexit problem was, first order governing, the metagovernance established by Article 50, Kooiman's third order governing, and elaborated on it with second order governance by specifying additional procedural pathways and institutional arrangements for the negotiations. This was about protecting the polity and the achievements of the EU and projecting its future. Day-to-day EU politics is dominated by distributive power but the EU's response to Brexit was characterised by collective power.

4 | FIRST ORDER GOVERNING: PREPARING FOR NEGOTIATIONS

In the period leading up to the formal triggering of Article 50 by the UK, the focus of the Union was on internal preparations, organisation and capacity building – in other words, first order governance. Michel Barnier made his first detailed Brexit statement to the press on 6 December 2016 in the leadup to the December European Council meeting. The objective

of the statement was to set out transparently how the Commission taskforce was preparing for the negotiations. He emphasised engagement with the capitals, including 18 visits to member states (all were visited by the end of January 2017) in two months, and multiple bilateral meetings with the Sherpas of the heads of state and government. The Barnier press conference was followed by an informal European Council of the 27 on 16 December, which outlined additional procedural avenues for the negotiations (European Council, 2016a).

Preparing for Brexit went beyond procedural pathways and institutional arrangements to core substantive issues that would affect millions of European citizens, companies and countries. The Union was intent on minimising the damage of Brexit to the greatest extent possible. During autumn 2016 and early 2017, the EU did its homework. The taskforce of approximately 30 officials and the Commission services screened the entire 35 chapter *acquis* to ensure that the likely impact of Brexit was understood in terms of depth and range. At the end of November 2016, the taskforce held a crucial seminar with the 27 governments and institutions to ensure that there was widespread engagement with the legal, technical and financial dimensions of Brexit. Joint seminars with the member states and institutions became a key feature of the EU preparations across all domains, especially on issues that were likely to feature in the withdrawal negotiations. The seminars had an educational role but also offered an opportunity for deliberation involving the key actors. Michel Barnier used the December 2016 press statement to emphasise the main principles that were guiding the taskforce, notably, unity, a balance between rights and benefits, and no negotiations without notification (Barnier, 2016). He went on to say that ‘cherry picking is not an option’ (Barnier, 2016). The original framing was reinforced throughout the negotiations.

In this same period, the Council taskforce began to prepare the guidelines that would shape the negotiations from an EU perspective. This involved intensive work in the Council system with the permanent representations in Brussels and the national capitals. The guidelines that were adopted by the European Council on 29 April 2017, in approximately four minutes, consisted of five sections, which specified the overarching blueprint for the negotiations. Section one addressed core principles which built on the Council statement of 29 June 2016. The principles were:

- *Defending the union*: need for a balance between rights and obligations and level playing field; preserving the integrity of the single market thus excluding sector by sector engagement; no cherry picking; preservation of the autonomy of EU decision making and role of the EU Court of Justice.
- *Process principles*: negotiations conducted in transparency and as a single package; nothing agreed

until everything agreed; unified EU positions; engagement with UK only based on channels set out in guidelines; no separate negotiations between individual member states and UK (European Council, 2017a).

The Union translated these principles into practice by further specifying the procedural arrangements, namely a phased approach to the Withdrawal Agreement negotiations. The UK would be asked to make ‘sufficient progress’, to be determined by the European Council, on the terms of withdrawal, before the Union would turn its attention to the framework for the future relationship and the possibility of a transition period (European Council, 2017a). In addition, the key substantive issues for the negotiations were identified, notably citizens, budgetary issues and the border in Ireland. The EU highlighted the importance from its perspective of a robust governance architecture, both for the withdrawal agreement and the future partnership, particularly in relation to dispute settlement and enforcement procedures. The European Council guidelines were subsequently elaborated in a set of detailed negotiating directives adopted by a Council decision on 22 May 2017. The negotiating guidelines and directives provided the Commission with a framework for the negotiations and identified the priority issues for the Union. Michel Barnier negotiated within the terms of his mandate.

The UK opposed the phased approach and wanted parallel negotiations on the terms of exit and the future relationship. Speaking at Lancaster House in January 2017, Theresa May said that ‘I want us to have reached an agreement about our future partnership by the time the 2-year Article 50 process has concluded’ (May, 2017b). This was reiterated in the UK letter of notification, which stated that ‘we believe it is necessary to agree the terms of our future partnership alongside those of our withdrawal from the EU’ (May, 2017a). Donald Tusk in contrast stated before the April European Council that ‘before discussing the future, we have to sort out our past’ (Tusk, 2017). Although clearly signalled by Brussels, the Secretary of state for Exiting the European Union, David Davis, was still suggesting that sequencing would be the ‘row of the summer’ before formal negotiations began (Financial Times, 2017). However, when formal negotiations opened in June 2017, the UK had to agree a phased approach as this was the only basis on which the EU was prepared to talk. The EU was unwilling to allow the UK to trade the future relationship off against the key divorce items. This is an example of the EU using process as power to structure the negotiations in a way that gave it maximum advantage. The decision to include the border in Ireland as a withdrawal issue was hotly disputed by the UK, which argued that the impact of Brexit on the border would very much depend on the future relationship.

However, by then the EU and especially the Irish government was aware that the UK preference on the single market and the customs union meant that no future relationship could address the Irish border issue. The EU was also concerned that the UK would use Northern Ireland as leverage on the future relationship and they were unwilling to risk this.

Agreement on the substantive issues for the Union in the first phase of the negotiations was accompanied by a strong commitment to transparency. Intensive horizontal and vertical communication within the Union was a key feature of the Union's approach to the Brexit negotiations. Maximum transparency, favoured by Michel Barnier, was adopted as the operating style by the Union. The Union negotiator was convinced that one had to have 'transparency or leaks' (Interview Commission official in 2019). The commitment of the Union to transparency was included in the negotiating guidelines as a core principle in the following terms: 'Negotiations under Article 50 TEU will be conducted in transparency and as a single package' (European Council, 2017a). The Commission elaborated further on transparency with a commitment to 'ensure a maximum level of transparency during the whole negotiating process' (European Commission, 2017a, 2017b). The Commission pledged that all documents prepared for EU institutions, the member states and the UK would be available to the public, which was an unprecedented level of transparency in a negotiation as sensitive as this one. The EU public had access to the agendas for negotiating rounds, EU position papers, non-papers and EU text proposals. The Commission also shared the presentations from all internal preparatory workshops across all issues. The names of all interest group meetings with the Union negotiator were public. The UK approach was much less transparent with documents released on a case-by-case basis because May was trying to manage a divided cabinet and party. As the negotiations progressed, the EU's transparency became a strength in the negotiations.

5 | NEGOTIATING BREXIT: JUNE 2017–DECEMBER 2017

Less than one year after the referendum, negotiations between the EU and the UK opened on 19 June 2017 in Brussels. The negotiations were a matter of first order governing. Once the UK notified the Union of its intention to leave, the clock was ticking. The negotiators had two years, until 30 March 2019, to agree and ratify a withdrawal deal and the framework of the future relationship, unless both the UK and the EU agreed to extend the negotiations. As outlined above, the EU had inserted an additional pressure point as sufficient progress had to be made in the departure negotiations

before the Union would begin discussing the future relationship. Following the first round of the negotiations, the two parties agreed terms of reference. On the central issue of sequencing, it was evident that the EU approach prevailed. The first step in the negotiations involved the establishment of three working groups, Citizen's Rights, Financial Settlement and other separation issues in addition to a dialogue on the Irish border (European Commission, 2017a). The structure and conduct of the negotiations reflected what the EU wanted from the first phase of the negotiations. There was no working group on the future partnership. In the press conference following the first round, Michel Barnier stuck resolutely to a two-step approach, first the divorce issues and then the scope of a future relationship. The justification offered by the EU for its approach was the need to manage Brexit in an 'orderly manner', a recurrent theme in public pronouncements from Barnier.

The EU wanted to ensure that the Commission did not run ahead of the member states in the negotiations and thus adopted a negotiating rhythm of four weeks; the first was used to prepare for the forthcoming round, the second to negotiate, the third to report back to the member states and the fourth to begin preparations again. Each month the taskforce would transmit position papers to the EU-27 on the key issues for negotiation (12 position papers in this period) before transmitting agreed position papers to the UK. The UK had access to all documents that were available on the taskforce website. The sequencing of negotiations had the desired effect, as it put pressure on the UK to reach agreement on the key issues by December 2017. London had hoped that the October European Council would conclude that sufficient progress had been achieved but it did not, thereby ratcheting up pressure on London. The Council insisted on more progress across the three key issues before phase two could begin (European Council Art.50, Conclusions, October 2017). It was evident from the conclusions and from the joint EU-UK technical reports that substantial progress had been made on citizens and the UK had publicly stated that it would honour its financial obligations, although the EU wanted to translate that commitment into concrete proposals. Less progress had been made on the challenging issue of the Irish border which remained one of the most salient and difficult issues throughout the negotiations.

Aware of the clock ticking and the need to provide some certainty for business, PM May worked hard to ensure that the December 2017 European Council would conclude that sufficient progress had been achieved, that a two-year transition would be agreed and that phase two of the withdrawal negotiations, the scoping of the future relationship, could begin. As late as 29 November, Barnier, the Union's chief negotiator,

said at the Berlin Security Conference that the Union was ‘awaiting sufficient progress’ and that ‘we are not there yet’ (Barnier, 2017). Developments in early December 2017 were a harbinger of just how difficult it would be for Theresa May to deliver Brexit. Both sides were close to an agreement on a joint report on 4 December, which was to be finalised over lunch at the Berlaymont (Brussels), when a statement from the DUP leader Arlene Foster derailed the negotiations. PM May left the lunch and later left Brussels without an agreement. Intensive talks between London and Belfast and the addition of a new paragraph in the joint report, which included a backstop on the Irish border, led to a settlement on a joint report by 8 December, which was subsequently endorsed by the December European Council. The underlying premise of the backstop was that it would come into operation if there was no other way of ensuring that the Irish border remained open and without infrastructure and checks. This was intended to protect the Good Friday Agreement and North-South cooperation on the island of Ireland. It would later prove to be one of the key reasons why Prime Minister May failed to get the Withdrawal Agreement through the House of Commons.

6 | NEGOTIATING BREXIT: GETTING TO A WITHDRAWAL AGREEMENT

The emphasis during 2018 had a dual character, notably steering the negotiations to agreement on the Withdrawal Treaty but also preparing for all eventualities, which was code for No Deal. In addition to the Commission taskforce, the General Affairs Council (Article 50) engaged with Brexit at eight of its meetings that year. On each occasion, the ministers received an update from Barnier. The European Council (Article 50) deliberated on Brexit at six meetings during the course of the year. From an EU perspective, one of the key priorities was to translate the December joint report into legal text. On 28 February, the Commission released a 119-page colour coded draft Withdrawal Agreement to the General Affairs Council (GAC Art50) and the European Parliament Brexit steering group. By 19 March, the UK and EU achieved a partial agreement involving a document consisting of agreed text, which was awaiting finalisation and large areas where there was no agreement.

The challenge for the remainder of 2018 was to translate the colour coded partial agreement into an agreed treaty. Progress in the talks appeared to stall as Theresa May worked to get the support of her divided cabinet to her proposals for the future relationship with the Union. The UK plan, defined as managed divergence, was finally agreed by the May cabinet at Chequers on 6 July. The Chequers plan immediately led to the resignations

of both David Davis and Boris Johnson, demonstrating that political infighting on what Brexit meant was endemic in the UK cabinet. The Salzburg informal EU Summit on 21 September was the first opportunity for May to engage with the other heads on the Chequers proposals but the reception for the plan was lukewarm. In remarks following the summit, Donald Tusk said that there would be no agreement without ‘a solid, operational and legally binding Irish backstop’ (Tusk, 2018) and that although there were positive elements to the proposals, that the framework for economic cooperation implied by Chequers would not work, not least because it risked undermining the single market (Tusk, 2018). With the failure of Chequers, May had to choose between a no-deal Brexit in March 2019 or reach an accord with the Union in autumn 2018. Although she frequently argued that ‘no deal was better than a bad deal’, she worked for a deal and by 25 November after intensive negotiations, a withdrawal agreement including an Irish backstop was achieved. The EU’s determination to deploy all of the governing capacity it could muster across all three governing orders, enabled the EU to act as a collective power in these negotiations. EU collaborative governance performed effectively as the Union reached its negotiating goals in the withdrawal agreement. The procedural pathways contained in Article 50, augmented by additional process elements, drove the negotiations to a successful conclusion. The procedures and processes were embedded in a distinctive institutional ecology that was built on EU capacity and power. The Union had political and procedural control only over the EU’s ratification of the withdrawal agreement, not that of the UK where the problems were likely to be.

The next Brexit phase was focused on the contestation surrounding UK ratification. It was clear from the beginning that May would have great difficulty securing the ratification of the agreement in the House of Commons, with the backstop as the key issue of contention. In December 2018 she postponed the first vote on the agreement as it would have been defeated, and hoped that the December 2018 European Council might offer her further concessions. This failed to materialise as the EU-27 reiterated that the withdrawal agreement was ‘not open for renegotiation’ (European Council Art50, 13 December 2018). The Council did however say that the backstop was an insurance policy and if it ever had to be triggered it would be for a limited period (European Council Art50, 13 December 2018). May lost three votes on the agreement in the House of Commons (15 January, 12 March and 29 March) and had to ask the EU for two extensions to the Article 50 timeframe to avoid a no-deal Brexit.

Throughout 2019, Brexit negotiations shifted from the predictable procedural pathways laid down by the EU to the high politics of ratification. This was characterised by much more high level engagement

between May and the presidents of the Commission and European Council. Furthermore, Brexit became a matter of *Chefsache* and all major political calculations were made by the European Council. The Union attempted to assist May in securing the ratification of the withdrawal agreement. On 14 January, just before the first vote in the House of Commons, there was an exchange of letters between May and presidents Tusk and Juncker. May's six-page letter asks the two European presidents to confirm her interpretation of the protocol on Northern Ireland. The response involved two strands; one dealing with the European Council and one on the Commission's interpretation of the backstop. The letters did not achieve their objective as the withdrawal agreement was defeated in the House of Commons by the largest margin in UK parliamentary history. Following the defeat, May continued to work with the Union to try to get assurances that might shift opposition to the agreement. Intensive negotiations continued through February and as time was running out, there was agreement on two documents on 11 March 2019, approved by the European Council on 21 March. These were:

- an instrument providing clarifications and legal guarantees on the backstop; and
- a joint statement supplementing the political declaration (European Council (Art50) conclusions 21 March, 2019).

The EU would not reopen or renegotiate the withdrawal agreement, but it was prepared to clarify and offer guarantees to assist May in her domestic struggle to ratify the agreement. However, two further failed votes in the Commons ended May's premiership. During this phase, the other issue the Union had to address was the question of extending the Article 50 timeframe which was scheduled to end on 31 March 2019, automatically leading to a no-deal Brexit. With the clock ticking the Union approved two extensions in this phase, naming 31 October as the date of withdrawal.

The Brexit negotiations entered a new phase with the arrival of Boris Johnson in power. As a leader of the Leave campaign, he pledged to 'get Brexit done' and vowed to end the backstop. The European Council had already signalled on 21 June that it was willing to revisit the political declaration but that the withdrawal agreement was not open for renegotiation. In a letter to the EU on 19 August, Johnson was emphatic that the backstop had to go by saying: 'the backstop cannot form any part of a Withdrawal Agreement. That is a fact that we must both acknowledge' (Johnson, 2019). Not only was Johnson seeking to reopen the withdrawal agreement; he was intent on voiding one of its most important elements. The EU reacted to the Johnson letter by reiterating its commitment to the backstop and emphasising what was at

stake, namely the stability of the island of Ireland and the integrity of the single market. With the UK's departure date looming on 31 October and the prospects of a no-deal exit increasing, there was intensive engagement. A breakthrough came during a bilateral meeting between Johnson and Taoiseach Leo Varadkar on 10 October. In a joint statement, the two leaders claimed that there was a pathway to a possible deal. This allowed negotiations in Brussels to proceed. By 17 October there was agreement on a revised protocol that replaced the backstop with a border in the Irish Sea which was in tune with EU preferences. The political declaration was also revised. The new settlement was endorsed by the European Council and, following one more extension, on 31 January 2020, almost four years after the referendum, the UK left the EU with an agreement. There were no celebrations in Brussels on the evening of the 31 January, just a sense of loss as the Union Jack was taken down for the last time in EU institutions.

7 | EXPLAINING THE EU RESPONSE TO BREXIT

How do we explain how the EU responded to Brexit as it did? The EU was confronted by Brexit after a decade of crises, during which many of its key regimes were tested against a backdrop of rising Euroscepticism. Many European governments faced volatility and fragmentation in domestic politics in this period. Brexit was a major blow. For European institutions and the remaining member states, Brexit was an existential threat to the entire European project. It represented a disintegrative moment that could morph into systemic disintegration. Fear of contagion and a potential domino effect from Brexit loomed large. The remaining member states and EU institutions were determined to defend and protect the essence and achievements of their collective endeavour and to reassert the importance of the Union for their shared future. The Union was unwavering in its commitment to protect the Union as a shared polity, on the one hand, and the single market, on the other hand. Neither one nor the other had precedence. Rather, the polity and market were two sides of the same coin.

In order to defend and protect the Union, the EU adopted a commitment to unity from the outset which was sustained throughout lengthy, intense and difficult negotiations. The assertion of unity began as a rhetorical statement of intent but was transformed into a practice norm. This was achieved by creating a form of collaborative governance across all EU institutions to manage Brexit. The European Council was the command centre setting out the guidelines for negotiations, supported by strong institutional nodes within the Council that kept the member states informed and involved. The Article 50 taskforce was key to leveraging the knowledge of the Commission and the necessary homework

before the negotiations began. Michel Barnier, as chief negotiator, maintained high-level contact with EU institutions and the national capitals. Transparency was a marked feature of the EU's approach which built trust and hence unity. During the Article 50 negotiations, the Union stuck with the procedural pathways that it had established for the talks and was unwilling to allow the UK deviate from these pathways.

The Union wanted to underline the significance of membership and ensure that membership continued to matter. It did so by establishing a number of principles to guide the negotiations. A core principle that was reiterated over and over again was the need for a 'balance of rights and obligations'. Put simply, a departing state could not have rights without related obligations. This was to ensure that there was no cherry picking by the UK on a sector-by-sector basis. This principle was linked to the need to maintain the integrity of the single market. The guidelines boldly stated that: 'A non-member of the Union, that does not live up to the same obligations as a member, cannot have the same rights and enjoy the same benefits as a member' (European Council, 2017a). The commitment to the significance of membership was also manifest in the solidarity shown to Ireland throughout the negotiations. The Irish border was elevated to a European issue and the Union worked tirelessly to support one of its member states. Beyond the issue rights and obligations was a commitment to the autonomy of EU decision making and the role of the European Court of Justice, which underlined the commitment to the collective polity.

8 | CONCLUSIONS

The EU responded to the Brexit shock with speed and was determined to achieve an orderly departure while protecting its interests and preferences in the negotiations. The Union deployed all three governance orders in its response to Brexit. Article 50 provided the metagovernance of Brexit by establishing the overarching framework for withdrawal. Second order governance was reflected in institutional arrangements and procedural pathways. Principles, procedures and process were central to the Union's playbook for the negotiations. It deployed its collective capacity to achieve its aims. In the period leading up to the formal negotiations, the Union laid the procedural tracks for the negotiations and created a Brexit institutional ecology that insulated the rest of EU business from Brexit. It used its capacity including the Commission as a knowledge institution to do its homework and to prepare for the negotiations. The Union also structured the negotiations and used time constraints to achieve the outcomes it wanted. First order governance was reflected in the day-to-day management of complex and intensive steering of Brexit over more than three years. Central to

the governance of Brexit was the Union's initial framing of this big political event, which enabled the EU-27 to coalesce around a set of core understandings of what Brexit meant. Crucially, the Union transformed an endogenous shock into an exogenous one.

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