

European issues
n°494
27th November 2018

Brexit, lessons in negotiations for the European Union

Eric MAURICE

On 25th November the European Union's 27 heads of State and government approved the [draft agreement for the exit of the UK](#) concluded on 14th November, together with the political declaration, which defines the general framework of the future relation between the UK and the EU.

The formalisation of the agreement by Europe's leaders follows the approval given by the British government on 15th November and confirmed on 22nd November.

To enter into force and to guarantee an orderly Brexit, the agreement now has to be ratified by the European Parliament – which should be just a formality after a debate between political groups – and especially by the British Parliament.

The weak majority of Theresa May's government in the House of Commons, as well as the complexity of the political interests vis-à-vis Brexit – within the Conservative Party and also the Labour Party, and from the Northern Irish Unionists to the Scottish Nationalists – make ratification of the agreement with the Union highly risky.

For the Union however, the conclusion of the withdrawal agreement marks the end of a unique, perilous political phase that started with the referendum of 23rd June 2016, after which it has managed to ["reduce the risks and losses resulting from the United Kingdom's withdrawal from the European Union."](#)^[1]

The 27 Member States have largely achieved the goals they set prior to the launch of talks, particularly regarding the three points they defined as being vital for the conclusion of an agreement: citizens' rights, financial regulation and the border between the Republic of Ireland and Northern Ireland (Ulster).

Give or take a few weeks – at the end of November instead of mid-October – they achieved their goals within the deadline they had set, to allow time to organise parliamentary ratifications and the effective exit of the UK on 29th March 2019.

Apart from the tension over the last few days regarding Gibraltar, the 27 have especially been able to finalise the negotiations and maintain their unity that was made an absolute priority on 24th June 2016 in the face of the existential challenge raised by Brexit.

Whatever the outcome of the ratification process in London, or the way that the Brexit effectively takes place in the spring of 2019 the negotiation over the withdrawal agreement constitutes a particular phase in the Union's history, which can be considered and assessed to determine whether lessons – and which ones – can be drawn for the future development of the Union.

The UK's exit of the EU is based on the article 50 of the Treaty on European Union (TEU) which introduced, via the Lisbon Treaty – the possibility for a Member State to withdraw from the Union.

Beyond the deadline – set at 2 years after notification by the exiting Member State, in order to proceed to the effective withdrawal from the Union, article 50 provides a methodological framework that the institutions and the Member States have been able to use, more so than the UK to be benefit of their goals. With the organisation in place, the sequencing of discussions, as well as the appointment of Michel Barnier, as negotiator-in-chief, this gave the Union in particular a decisive advantage, from the very beginning of the process, over the British government.

To a large degree, via the distribution and tiering of the competences and responsibilities within the institutions and with the Member States, this methodological framework also explains the unity of the 27.

1. Donald Tusk, lettre d'invitation aux membres du Conseil européen, 24 novembre 2018

The European Union has successfully been able to implement its method from a political point of view to ensure unity during the period of negotiation. The political context within the Union, but also in London and at global level, have been decisive in the unity of the other Members, and whilst we stress the exceptional nature of this, it would be hard to repeat.

METHODOLOGY

[Article 50](#) of the TEU stipulates that the "*Union shall negotiate and conclude with that State an agreement setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union.*" It notes that the agreement is negotiated in compliance with [article 218, paragraph 3](#) of the Treaty on the functioning of the European Union (TFEU).

This measure, included in the part of the TFEU regarding the Union's external action, treats de facto Brexit as a matter that "*relates exclusively or principally to the common foreign and security policy*".

It provides that the Commission will appoint "*depending on the subject of the agreement envisaged, nominating the Union negotiator or the head of the Union's negotiating team.*"

It was on this basis that Michel Barnier was appointed as the Union's negotiator-in-chief by the President of the European Commission, Jean-Claude Juncker on 27th July 2016, one month after the British referendum. On 14th September the "article 50 task force" was set up; this was to be the team of negotiators in the Commission.

But very quickly the Union broadened the measure provided by the treaties.

On 25th June 2016, i.e. two days after the referendum, the Council, which represents the Member States, appointed Didier Seeuws, a former deputy permanent representative for Belgium within the Union, as the leader of the "Brexit task force".

Initially seen as an attempt by the Member States to take control of the future negotiations to the detriment of

the Commission, the creation of a working group led by Didier Seeuws led, in the long term, to the fluidification of relations between the two institutions.

The strength of negotiations lay mainly within M. Barnier's team, on a daily basis and when the British negotiators were in Brussels. M. Barnier, his deputies and the members of his team kept the Member States up to date, before, during and after each round of discussions and sometimes in real time.

The Seeuws group in the Council structured and organised the Member States' work, particularly in preparation of the 27 permanent representatives (COREPER) and of the General Affairs Council (GAC) meetings.

The European Parliament was closely involved and consulted, via its president and a Brexit coordinator who was appointed on 8th September 2016 – former Belgian Prime Minister Guy Verhofstadt. Each stage of the Brexit, from the moment when the Union's goals were defined, involved the Parliament, especially to ensure the ratification of the agreement by all of the MEPs at the end of the process.

As it introduced this methodology the Union distributed responsibilities horizontally, including all of the institutions, and vertically, and the teams or officials and diplomats of the European Council.

In line with article 50, the European Council was the guiding body and the final decision maker in terms of the main negotiation stages. But the chain of responsibility that was introduced aimed to protect the heads of State and government and maintain them in the role of the higher authority, a guarantee for general unity.

Unlike the major negotiations over usual Union issues and even the negotiations with former British Prime Minister David Cameron on the position and status of the UK in the EU, undertaken in 2015 and 2016 prior to the referendum, Europe's leaders were never brought into bilateral discussions to settle disagreements or to settle specific issues.

As early as 29th June 2016, the 27 leaders warned that there would be no negotiations before the British notification. In the guidelines of 29th April 2017, the European Council added, "so as not to compromise the Union's position there will be no separate negotiations between one Member State or another and the UK." When Theresa May addressed her 27 counterparts during the European Councils, only its president, Donald Tusk, without entering in-depth discussion, answered her on the Union's behalf.

Any disagreement with the British was therefore settled, not within the usual bodies or via bilateral diplomacy between Member States, but by M. Barnier's team alone, the only correspondent for London, despite the British efforts to circumnavigate this.

Disagreements between the 27 were addressed and settled Seeuws, COREPER and CAG levels – which helped maintain the Union's unity both publicly and in the discussions with the British.

Organised by the work of the institutional mechanism far from the public eye, the unity of the 27 was also strengthened by the opposite of this: transparency thanks to the publication of documents by M. Barnier's team on the Commission's sites and the reports of the progress made during the discussions given to the press.

Whilst the British government was divided between the supporters of a soft and hard Brexit and the reticent "Brexiters" like the Chancellor of the Exchequer, Philip Hammond and to a certain degree, Theresa May, the transparency established by the Union has provided it with an additional advantage. *"In Brussels, openness was seen as a means to corral the EU's 27 Member States, helping the EU forge its mantra on Brexit: unity. By contrast, T. May manages dissent, by limiting information, delaying decisions and shrinking her inner circle."* [2]

A TIMEFRAME

Between the referendum and Theresa May's letter notifying that the UK wanted to leave the Union on

29th March 2017, the European Union had had the time to establish its negotiation mechanism and to prepare guidelines for the European Council, adopted during an [extraordinary summit on 29th April 2017](#).

In its guidelines the European Council recalled in particular: *"an agreement on a future relationship between the Union and the United Kingdom as such can only be finalised and concluded once the United Kingdom has become a third country."*

It said that *"an overall understanding"* regarding future relations would be defined *"in a second phase"* of negotiations, and that discussions on the issue could only start once it had been decided that *"sufficient progress has been made in the first phase"*.

Ahead of the launch of negotiations, the British government insisted on leading two parallel discussions over withdrawal and future relations. In a speech "on the government's negotiating objectives for exiting the EU," delivered on 17th January 2017, [Theresa May maintained](#): *"I want us to have reached an agreement about our future partnership by the time the 2-year Article 50 process has concluded."*[3]

During the very first meeting with Michel Barnier, which officially launched the Brexit negotiations on 19th June 2017, the British Secretary of State responsible for Brexit, David Davis accepted however the time-frame defined by the European Council.

By imposing its time-frame, the EU also imposed the discussion framework, in which the questions surrounding the "divorce", i.e. the law, would prevail over the ambitions for the future, i.e. politics.

In Brussels as in the 27 capitals the prospect of undertaking two negotiations at the same time was seen as a trap, in which the Union might have been led into "bargaining", as in a traditional negotiation, over issues of a different nature.

For the British government however, parallel discussions were to privilege the political – even ideological agenda set by the supporters of Brexit and often dilute technical issues linked to the withdrawal.

2. Meet Britain's real Brexit broker, *Financial Times*, 11th October 2018

3. The so-called Lancaster House speech

For the British government, as Theresa May explained in her speech, then in her notification letter, an “orderly” Brexit meant *“the change from our existing relationship to a new partnership.”*

For the European Union, as stressed by the European Council in its guidelines “orderly” referred above all to *“sett[ing] the disentanglement of the United Kingdom from the Union and from all the rights and obligations the United Kingdom derives from commitments undertaken as Member State.”* since the negotiations over the future could only happen on this condition.

At the start of the negotiations the timeframe therefore privileged the pursue of the Union’s goals and placed the British government in a position so that it had to accept the Union’s conditions to enter into the phase that matched its own goals. Firstly, it had to accept the principle of the payment of its financial obligations and with more serious implications, the principle of the “backstop”, to keep the Irish border open.

In this position the British have also had to resign themselves to a transition period – which they have renamed – “implementation period” in an effort towards positive communication – until 31st December 2020 and possibly until 31st December 2021 if the negotiations over the future relations take more time to complete.

Their haste to start trade talks to the detriment of the withdrawal phase will have cost them a minimum of 21 months, during which time they will have to contribute to the community budget and follow the EU’s rules.

A NEGOTIATOR

The appointment of a “head of the Union’s negotiation team” was provided for in article 50 via article 218, paragraph 3 of TFEU. But by breaking with the custom of choosing a high ranking official or a diplomat to lead the negotiating team, as was usually the case in trade or diplomatic negotiations, and by appointing Michel Barnier, Jean-Claude Juncker accomplished a “game changer”.

A former French Minister and former European Commissioner, Michel Barnier, has a dual profile of being an experienced politician and a connoisseur of European administrative and legal intricacies.

Former candidate for the Presidency of the Commission against Jean-Claude Juncker in 2014, Michel Barnier was also identifiable as a kind of super-commissioner with an authority over the Commission’s departments which were to contribute via the article 50 task force.

According to the general opinion in Brussels, amongst the Member States, and with the European Parliament, which he regularly kept up to date, Michel Barnier stood as a conscientious legal technician, paying particular care to detail and as a politician who lent an ear to the Member States and whom he visited several times to meet political, economic and social representatives.

In addition to this he has had the support of two women, reputed for their expertise and strength in negotiations, which added to his profile and role: German Sabine Weyand, “a Commission problem-solver” [4] who has experience in trade negotiations; and French Stéphanie Riso, who is familiar with discussions regarding the European budget.

Beyond the role defined in article 50 and institutional practice, Michel Barnier donned the role of intermediary between negotiators and the Member States, between the technical and the political. In coordination with Didier Seeuws at the Council and Guy Verhofstadt in Parliament, the sherpas of the heads of State and government, Michel Barnier has been able to be the pivot on which the continued unity of the 27 has formed, thereby managing differences in opinion and adapting the strategy of public expression and decision making ahead of time.

This is the role that the European Council acknowledged by paying notable tribute to Michel Barnier’s “[tireless efforts \(...\)](#)” and to his contribution to maintaining the unity among 27 Member States.” [5]

4. *The Women who shape Brussels, Politico, 9th November 2017*

5. *Extraordinary meeting of the European Council, conclusions 25th November 2018*

THE CARDINAL PRINCIPLES

The decision made by the British electorate to leave the EU was both a political shock and an existential challenge. It broke the taboo of the reversibility of membership and challenged the legitimacy of the European project, which in appearance was being rejected by the first population to whom the choice of remaining or leaving had been given.

The institutions and the 27 Member States responded by promising to provide *"political reflection to give an impulse to further reforms, in line with our Strategic Agenda, and to the development of the EU with 27 Member States."*[6] and by establishing ["cardinal principles"](#) drawn from the treaties and in line with the collective interests, on which their unity was to rest.

In its guidelines of [29th April 2017, the European Council maintained](#): *"Throughout these negotiations the Union will maintain its unity and act as one".* It recalled that the EU could not grant a specific status to the UK: *"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."* It insisted on the fundamental principle of the integrity of the Single Market: *"the four freedoms of the Single Market are indivisible and that there can be no "cherry picking."* It notes that the Union would not adapt its rules to adapt to the UK's departure: *"The Union will preserve its autonomy as regards its decision-making as well as the role of the Court of Justice of the European Union."*

These three basic principles agreed during the preparatory work for the negotiations re-iterated the Union's founding principles, to which all expressed their approval and thereby set the framework of their unity in the face of this danger.

Despite some differences in appreciation, which did occur as negotiations advanced and which were settled "internally", particularly regarding the question of the Irish border and the consequences of this: the backstop, the regulatory alignment of Northern Ireland, the UK's upkeep – at least on a temporary basis – in the customs union, this framework explains the strength of the common front.

ASYMMETRICAL NEGOTIATIONS

The decision to leave the EU, although it was submitted to the British people after a negotiated agreement by the then Prime Minister David Cameron on the position and status of the UK in the Union, took the British authorities by surprise. Neither David Cameron or the supporters of Brexit had a plan on the means and the exact goal of a departure from the EU.

Paradoxically the EU, which was suffering the unexpected departure of a Member State was the best prepared to face this new state of affairs. On the one hand it had article 50 and with this a method that it was able to develop. On the other, it had already experienced – during negotiations with D. Cameron – the establishment of a task force devoted to the UK within the European Commission.

Finally, and especially by imposing its timeframe focused on withdrawal – law above politics – it was able to deploy its institutional machine with the support of its 27 Member States, against one government that still had to draw up its strategy.

The European Union established its goals and principles before discussions began and consequently it was able to adapt its discussions. As for the British, the lack of any clear definition of what Brexit actually meant greatly influenced the government's weakness in the negotiations.

Theresa May unveiled the main outline of her policy for Brexit during the [Conservative Party Conference in October 2016](#), when she announced that she would trigger article 50 in March 2017.

She declared that the ["the most important thing"](#) in the withdrawal phase would be the vote on the "Repeal Act" by the British Parliament to repeal European law in the country after Brexit. *"The authority of EU law in this country ended forever ."*

The speech, written by Theresa May's political advisors without consultation of Britain's diplomats set the foundation for a hard Brexit, but without the Prime Minister realising what this actually meant. *"In the days*

6. Informal meeting, 29th June 2016

afterwards, didn't see her words ruling out Britain's participation in parts of the single market, or frictionless trade with the EU. She did not realise, in other words, that her speech was one of the most fateful policy decisions of the whole Brexit process."[7]

As a result, Theresa May had to relax the red lines defined in autumn 2016, particularly when she had to accept the principle, then the details of a backstop for the Irish border. This aspect of the negotiation almost caused the breakdown in the conclusion of a withdrawal agreement and might still lead to its failure in the House of Commons.

Theresa May did not see that the radical path would weaken her in the face of the European Union when it came to facing legal realities. Challenged within her own government and majority she left the initiative to the Union throughout the entire negotiation. *"Every baby step away from the fundamentalist position the PM took at the October 2016 Party Conference and at Lancaster House gets represented as a betrayal of the [true, unadulterated Brexit](#)."* [8]

The lack of any political coherence on the part of the British was made worse, even before the start of discussions when Theresa May lost her majority in the House of Commons on 8th June 2017 after a snap election organised with the very aim of enhancing her political position.

The alliance she had to make with the Northern Irish Unionists (DUP) and the relative influence of the hard "Brexiters" in the reduced conservative group subjected her to constant pressure and to the very end prevented her from compensating for the structural weaknesses in the British position against the Union.

Britain's disorganisation in addition to the resignations on the part of eminent members like David Davis and Boris Johnson also led to several reshuffles in the very negotiating structure with the Union.

The Department for Exiting the European Union, (the DexEU) was created under the authority of David Davis and his deputy Oliver Robbins. But Robbins, who disagreed with Davis joined 10 Downing Street in September 2017.

Whilst Michel Barnier's official counterpart was David Davis, responsibility for the negotiation increasingly concentrated within the cabinet of Theresa May via Oliver Robbins, who during the discussions remained Sabine Weyand's main counterpart.

David Davis's resignation in July 2018 and the political weakening of Theresa May resulted in part from the hostility that existed between the minister and the diplomat, who embodied two different approaches to Brexit that were hard to reconcile, and which played a major role in the imbalance between London and an organised, united Europe.

Negotiations have therefore been asymmetrical as far as political coherence; the means and the organisation are concerned. For the European Union the uncertainty created by this asymmetry has been compensated for by a lack of preparation by the other side, which spared the unity of the 27.

A PARTICULAR POLITICAL CONTEXT

The "extremely genuine and robust" unity of the 27 "did not fall from heaven" explained Michel Barnier at the end of the negotiations adding that it had come from a true feeling of gravity, therefore responsibility, triggered by the result of the British referendum.[9]

Gravity was further strengthened with the election of Donald Trump in the USA in November 2016 and by his attempts to destabilise the European Union and weaken NATO. This was further heightened by the electoral turn of events that followed in 2017, when the Freedom Party (PVV) in the Netherlands and the Front National

7. *Financial Times*, *op. cit.*

8. *Brexit as revolution*, Ivan Rogers, conference at Trinity College Cambridge, 10th October 2018. Ivan Rogers, former advisor to David Cameron for European Affairs resigned from his role as permanent British representative with the EU in January 2017 in protest against the type of Brexit adopted by Theresa May's government.

9. Press Conference, 14th November 2018

(FN) in France tried to find inspiration in Brexit in order to draw closer to power.

"The instability and insecurity" caused by the terrorist attacks in France and in other Member States, as well as the situation in the Mediterranean and climate change also helped to seal European unity observed Michel Barnier.

"Threats and fear, bitterness and anger felt about the "deserter" also explain the speed with which everyone agreed on the principles that were to govern the divorce negotiations as well as their firm stance with regard to London."[10]

This emerged through the entire negotiation process for the withdrawal agreement, including after the launch of the second phase in March 2018 in the discussions over the framework of future relations.

But tension appeared – or rather erupted in the public space – regarding the finalisation of the political declaration on the future relations in the days that preceded the European Council of 25th November, raising the issue of whether the negotiations, as led by the Union would be a model for the future and whether the unity created on this occasion was a true sign of the Union's revival.

THE LIMITS OF A MODEL

In the atmosphere of crisis that surrounded the result of the British referendum in a "Europe" that is only just recovering from the perils of the financial crisis and which is still marked the tensions of the migratory question, the call for unity might have appeared unrealistic. But it was understood and acted upon. The need for a special effort went together with a method involving all of the institutions.

The Union is built on rules at the service of political goals. This became clear in the implementation of article 50, which separated the issue of British withdrawal from that of future relations, and that

of Brexit from all of the other questions on the European table.

Since article 50 stipulates that *"the member of the European Council or of the Council representing the withdrawing Member State shall not participate in the discussions of the European Council or Council or in decisions concerning it."* the usual work of ministers and leaders was able to continue in their format as 28 without being paralysed or impeded by Brexit.

Unity was easier to maintain since Brexit did not influence other issues. However, it did not extend to other questions.

From the migratory policy to the reform of the euro zone the 27 showed that their unity over Brexit matched a particular requirement to guarantee the long-term survival of the Union, but not of defining a vision for its future.

The cooperation mechanism that resulted from article 50 cannot apply to usual discussions, in which negotiations are prepared and undertaken as 27 rather than 27 against one, and during which national factors and supporters play a much more important role in the definition of individual positions. It is highly likely that this will occur again, in particular during negotiations over the next multi-annual financial framework.

It is also symptomatic in this regard that "political reflection" launched after Brexit – called the Bratislava Agenda or the Road to Sibiu - in reference to the summit planned on 9th May 2019 in the Romanian city – has not yet produced a comprehensive, consensual view of the future of Union.

It is also significant that the only phase in discussions during which the inclusive method was not followed and which led to the only major incident, was that over Gibraltar. To conclude the withdrawal agreement Michel Barnier's team entered into what it called a "tunnel" with the

¹⁰. Luuk van Middelaar, *Quand l'Europe improvise*, Paris, Gallimard, 2018, p. 190

British negotiators, outside of which information was not shared as much with the Member States, to avoid leaks and to be more effective. At the end of the tunnel, Spain deemed that its national interests had not been respected and Spanish Prime Minister Pedro Sanchez threatened to veto the signature of the agreement.

With article 50 the UK was treated as a third country, alone against the 27, which acted via a team of negotiators. And unlike most negotiations undertaken by the Union, particularly in the area of trade and diplomacy, the 27 faced a State that had not anticipated the event.

Brexit was a vote against the government's opinion, not a strategic choice that was desired and well thought out; it was won by political forces that assumed no responsibility for it afterwards. Yet, the *"the populist mandate is weighing heavy in some Member States, very little on Brussels and even less on the negotiation teams. This is a collateral advantage of the often criticised technicity of the Union's institutions."*[11]

It is not very likely that the Union will enjoy these particular circumstances again in a future international negotiation, even if it might arise in the near future, precisely with the UK when negotiations over future relations begin.

The context will however be different and the lessons of the negotiations over Brexit might not apply as easily. On the one hand, because the British government, whatever it might be, will certainly be more pro-active than the government which had to adapt to discussions over the withdrawal, which were mainly technical and legal. However, debate over the extent of compliance with European rules will have to be decided by the political forces in Britain.

On the other hand, the varying national interests of the 27, including national and even regional Parliaments, will be called to ratify the future agreement, and they will probably be more

sensitive when it comes to committing to long term relations.

Last minute discussions over the political declaration, whilst the treaty had already been concluded over issues such as fishing and the danger of unfair trading by the UK, are a sign of what future negotiations might look like.

Conversely it might be argued that the [36-pages political declaration](#), frames future discussions to the extent that the 27 will only have to follow the principles, previously negotiated with such difficulty, to remain united against London.

One of the easiest lessons to apply in the future is that of transparency. Far from revealing differences in opinion between the Member States or between the community's institutions, the transparency adopted from the very start was instructive for public opinion, as well as for political, economic and social players.

Transparency regarding the reality of Brexit helped to stave off the risk of "contagion" to other Member States. This can be seen by the rise in pro-European feeling in public opinion since the British referendum.

It also helped to forge certain support on the part of public opinion and players which strengthened unity during the negotiations. This method of transparency together with close, regular involvement on the part of civil society might usefully be employed again in trade negotiations to reduce the dissensus seen during talks over the TTIP, the free-trade agreement with the USA, and the last-minute stand-off during the signature of the CETA, the free-trade agreement with Canada.

"The United Kingdom's decision to leave the Union creates significant uncertainties that have the potential to cause disruption, in particular in the United Kingdom but also, to a lesser extent, in other Member States,"

11. Organising Brexit, European Issue n°425, Robert Schuman Foundation, 13th March 2017

declared the heads of State and government in April 2017.

A year and a half later the EU concluded a withdrawal agreement with the UK in line with its goals, but the prospect of a disorderly Brexit will remain as long as the British parliament has not ratified it.

Whatever the British legislators' decision and more so if it is negative, the Union will have to continue its work to revive and overcome the uncertainty within its fold and beyond its borders.

It will also have to conclude, in the months or years to come, a unique agreement to stabilise relations with the UK, the fifth biggest economy in the world, the second biggest European army and the third biggest population of Europe.

To do this it will have to learn the lessons of the negotiations over Brexit and take on board the results and limits of this.

Eric Maurice

Head of the Foundation's Brussels Office

Retrouvez l'ensemble de nos publications sur notre site :
www.robert-schuman.eu

Directeur de la publication : Pascale JOANNIN

LA FONDATION ROBERT SCHUMAN, créée en 1991 et reconnue d'utilité publique, est le principal centre de recherches français sur l'Europe. Elle développe des études sur l'Union européenne et ses politiques et en promeut le contenu en France, en Europe et à l'étranger. Elle provoque, enrichit et stimule le débat européen par ses recherches, ses publications et l'organisation de conférences. La Fondation est présidée par M. Jean-Dominique GIULIANI.