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Abstract

On 31 January 2020 the UK left the European Union after 47 years of membership. This paper uses the conceptual distinction between integrative and distributive bargaining to compare the EU's and the UK's approaches in the negotiations that led to the Withdrawal Agreement, setting out the term for the UK's exit, and the Political Declaration on the framework for the future EU-UK relationship. While it would be rational to expect both parties to adopt integrative approaches given the nature of the issues, the long history of cooperation, and the parties' mutual interest in maintaining a close relationship in the future, the comparison demonstrates that it was mainly the EU that leaned towards the integrative end of the negotiating spectrum, with extensive internal consultations, a willingness to engage in open and interest-based discussions aimed at problem-solving, and high levels of transparency, whereas the UK leaned further to the distributive end, reflecting less engagement and consultation with domestic constituents, a focus on pre-determined positions that need defending, and lower levels of transparency.

Introduction

The United Kingdom's (UK) departure from the European Union (EU), or 'Brexit', on 31 January 2020 was a momentous event. It separated the UK from the EU after 47 years of membership, and it was the first time a member state (MS) left the EU. Ever since the UK took the decision to leave the EU through a referendum in 2016, Brexit has received extensive scholarly attention and engendered a 'flood of writing' (Hill, 2019) examining the reasons behind the referendum result and the potential impact on the UK and the EU. However, the actual negotiations that provided the basis for the UK's withdrawal from the EU have received less scholarly attention. Research highlights the institutional complexity and the unprecedented nature of the negotiations (e.g. Durant et al., 2018; Ott and Ghauri, 2019; Patel, 2018), but few systematically analyse the negotiating approaches adopted in the withdrawal negotiations (exceptions include Martill and Staiger's [2018] and Eidenmüller's [2017] analyses of the UK's approach).

This paper uses the conceptual distinction between integrative and distributive bargaining (e.g. Fisher and Ury, 1981; Lax and Sebenius, 1986; Odell, 2000) and offers a comparative assessment of the EU's and the UK's approaches in the negotiations that led to the Withdrawal Agreement (WA) and the Political Declaration setting out the framework for the future relationship between the two parties. While it would be logical to expect both parties to adopt integrative approaches, given the nature of the issues, the long history of cooperation, and both parties' interest in maintaining a close relationship in the future, the paper argues that it was mainly the EU that adopted such an approach, whereas the UK followed a more distributional approach.

The comparison demonstrates how the EU's approach reflected close inter-institutional engagement with domestic constituents, unprecedented unity, a willingness to engage in open and interest-based discussions aimed at problem-solving, and high levels of transparency. In contrast, the UK's approach reflected a lack of consultation with domestic constituents, a political system engulfed by internal splits and resignations, an insistence on sticking to pre-determined positions, and lower levels of transparency. This clash of approaches has led to relational tensions and decreasing levels of trust, which, in turn, is likely to affect the negotiations about the future EU-UK relationship.

Theoretical Framework: Integrative versus Distributive Negotiating Approaches

When analysing negotiation processes, authors differentiate between 'integrative' and 'distributive' behaviour (Walton and McKersie, 1965). Integrative negotiating behaviour, also referred to as 'problem-solving', 'collaborative', 'win-win' or 'principled negotiation' strategies (e.g. Elgström and Jönsson, 2000; Fisher and Ury, 1981; Lax and Sebenius, 1986; Odell 2000) aims to increase the joint gains for all negotiating parties. Distributive negotiating behaviour, referred to as 'conflictual', 'competitive', 'win-lose', and 'positional bargaining' strategies (ibid.) aims to increase a party's own gains in situations of limited resources. These approaches represent two polar ends of the negotiating spectrum, with the integrative end reflecting strategies that aim to make all parties better off and focus on goals that are not in conflict, and the distributive end reflecting strategies that focus on maximising goal attainment for one party when goals are in conflict and there are strong distributional consequences between the parties. While approaches adopted in real negotiations rarely correspond fully to one or the other of these polar ends, most of them can be placed along this

spectrum, leaning either toward the integrative or the distributive end (Odell, 2000, pp. 31-33).

Negotiators who adopt integrative behaviour are open and transparent with each other and aim to find solutions that will reconcile their respective interests. For them, the maintenance of a trusting and long-term relationship has high priority, leading both parties to be cooperative and willing to share information about their true interests with each other, thus increasing the chances of identifying agreements that benefit both parties (Lax and Sebenius, 1986; Walton and McKersie, 1966). They also feel more accountable to their stakeholders, or domestic constituents, and as a result, they engage in extensive internal consultations (Simões 2011).

In contrast, if negotiators adopt a distributive approach, based on positions (rather than interests), secrecy, and attempts at gaining advantages at the other party's expense, there is a greater chance of relational tensions. Even if recognising that full information sharing increase the chances of identifying an agreement, there are worries that the information might be exploited by the other party to gain distributional advantages. These negotiators feel less accountable, and therefore consult less with their domestic constituents (Simões, 2011).

When exploring the negotiating approaches of the EU and the UK during the withdrawal negotiations, one would expect an integrative dynamic to have emerged given the nature of the issues at stake, the long history of cooperation, and both parties' interest in maintaining a close relationship in the future. In terms of the nature of the issues, many would argue that Brexit was unlikely to lead to a win-win situation, and that a lose-lose dynamic better captured the situation facing the negotiators. However, most of the issues under negotiation did not expose win-lose scenarios as per the distributive logic, but rather united both parties in wanting to find solutions that minimise the negative effects that are a natural consequence of

the UK leaving the EU after 47 years of membership. For example, both parties had a shared goal in ensuring that the rights of non-UK EU citizens living in the UK, and UK citizens living in other EU countries, remained as close as possible to the status quo. They also shared a commitment to avoiding a hard border on the island of Ireland, and solutions to how this could be achieved had to be found. Regarding the financial obligations of the UK, there was a slightly different dynamic in that the EU wanted to maximise UK contributions, while the UK wanted to minimise them. Yet, it was predominantly a technical question about how to calculate financial obligations, and a discussion about objective criteria and legal commitments, rather than a positional bargaining approach about the exact amount, would be reasonable to expect.

As for the long history of cooperation, the UK had been a member of the EU since 1973, and in many areas, including trade, development, the single market, environment and climate change, it was seen as a constructive and cooperative member, with interests and preferences close to those of the European Commission and other like-minded countries. Through this engagement, and with both parties interested in a close relationship in future, there should be an incentive to build trust and engage in integrative behaviour. As often highlighted (e.g. Odell 2000), in situations where there is a relational objective in maintaining influence with the other party and where the relationship is on-going, an integrative approach would be rational.

However, despite rational reasons to expect an integrative negotiating dynamic emerging, this did not fully materialise. Even in a negotiating environment conducive to integrative bargaining, such a dynamic will only emerge if *both* parties perceive and approach the negotiations in the same way (Van der Schalk et al., 2010), and as argued in the paper, it was mainly the EU that leaned towards the integrative end of the negotiating spectrum, whereas the UK leaned more towards the distributive end. To make the argument, the paper compares

their respective approaches in the withdrawal negotiations along three inter-related characteristics of integrative versus distributive bargaining: stakeholder engagement; interests versus positions; and levels of transparency (e.g. Fischer and Ury, 1981; Odell, 2000; Simões, 2011; Walton and McKersie, 1965).

Comparison between Negotiating Approaches

Stakeholder Engagement: Inter-Institutional Consultations

International agreements require domestic ratification, which makes it important for negotiators to know the interests and concerns of their domestic stakeholders or constituents. The greater the level of engagement between negotiators and domestic constituents, the greater the understanding between them (Lax and Sebenius, 1986; Walton and McKersie, 1966). Negotiators engaging in integrative behaviour, based on openness and information sharing vis-à-vis their negotiating partner, tend to adopt a similar behaviour with their own constituents (Campbell and Mark, 2006) to which they feel accountable (Simões, 2011). This process of liaising with domestic constituents makes negotiators engage in a process of learning and systematic information processing, which serves to identify and understand true interests, and avoid 'fixed-pie perceptions'. While domestic stakeholder engagement does not *always* lead to integrative behaviour towards the negotiating partner, it is a precondition for it to occur. Negotiators who adopt a distributional approach tend to engage less with stakeholders, feel less accountable, and are likely to attach more importance to 'self-justification' (ibid., p. 355).

This paper limits the comparison of stakeholder engagement to the representative political institutions, i.e. the Council of the EU (from hereon 'the Council') and the European

Parliament (EP) on the EU side, and the UK Parliament and devolved administrations on the British side.

The EU's Approach

Immediately after the official announcement of the UK referendum result, on 25 June 2016, the Council appointed Didier Seeuws, former Chef de Cabinet to European Council President Herman Van Rompuy, as Head of the Special Task Force on the UK within the General Secretariat of the Council. On 27 July 2016, Jean-Claude Juncker, President of the European Commission, appointed Michel Barnier, former European Commissioner and French Foreign Minister, as the EU Chief Negotiator for Brexit negotiations. And on 8 September 2016, the EP's Conference of Presidents of Political Groups appointed Guy Verhofstadt MEP, Chair of the Alliance of Liberals and Democrats for Europe Group, and former Prime Minister (PM) of Belgium, as the EP's Brexit Coordinator.

Under the EU Chief Negotiator, Barnier, a special unit of around 50 people was set up within the Commission, the Article 50 Task Force, to lead negotiations with the UK (Maurice, 2018). Although the Commission had not previously negotiated any withdrawal agreements, it drew upon its extensive expertise and experience of negotiating trade agreements with countries across the world, and accession agreements through its enlargement process. This was clearly seen in the appointment of Sabine Weyand as the Deputy Chief Negotiator. Weyand came from DG Trade and had extensive experience of international negotiations. Since the start of the withdrawal negotiations the EU negotiators, i.e. Barnier, Weyand and the Article 50 Task Force, engaged in close inter-institutional consultations with the Council and the EP, both of which had to ratify the final WA.

Despite having no existing configurations to deal with Brexit, the Council quickly established the Ad hoc Working Party (WP) on Article 50 to support the Permanent Representatives Committee (COREPER) (Art. 50) and the General Affairs Council (Art. 50) on the withdrawal negotiations. As per Article 50, these bodies were limited to the 27 remaining MSs.

Following the start of the withdrawal negotiations on 19 June 2017, the EU negotiators engaged weekly with the WP on Article 50 and COREPER (Art.50), and on a monthly basis with the General Affairs Council (Art. 50) (Interview, WP on Article 50 Official, 10/1/2018). In addition, they kept the Council informed before, during and after each negotiating round with the UK (Maurice 2018). MSs expressed strong support for the approach adopted by the EU negotiators. One official of the WP on Article 50 stressed how '*the people in the task force are very politically savvy as well as being hard working and very good at what they do. It's very well managed. And I don't think you'd get too many MSs who complain about their approach, if any*' (Interview, 10/1/2018). In terms of the inter-institutional consultations, it was highlighted that '*information flows are excellent... people are broadly very happy with the approach they [Article 50 Task Force] are taking. We set the direction of travel and they check in regularly. There is no sense that the Commission will run off and make an offer to the UK that MSs states aren't happy with... they are very consultative*' (ibid.).

The negotiators aimed to understand and protect the interests of all MSs, something apparent in their strong support for Irish concerns about avoiding a hard border between the Republic and Northern Ireland (Usherwood 2019). Barnier visited the MSs regularly to meet with national political, economic and social representatives (Maurice 2018). At the highest political level of MS consultation, the 27 Heads of States or Government met in the European Council (Art. 50) format in the presence of Barnier. The European Council (Art. 50) met as part of most of the regular European Council meetings held following the referendum. In

addition, there were several special European Council (Art. 50) meetings to ensure there were no unnecessary delays on the EU side. MSs consequently dedicated a huge amount of time and resources to Brexit, and they had to significantly increase their administrative capacity both in their Representations in Brussels and the affected national ministries back home (Interview, MS Representation Official, 4/3/2019).

In the EP, a Brexit Steering Group, chaired by Verhofstadt, was set up to prepare and coordinate the parliamentary position on Brexit. The Steering Group worked closely with the Conference of Presidents as well as the affected Committees. The fact that the EP had its own coordinator – something it has not had in any of the EU's previous international negotiations – reflects the importance attached to these negotiations by the EP, and it expressed early on that it expected to be properly involved in the negotiations. Indeed, in its first resolution it made its full involvement a precondition for its consent to the WA (European Parliament, 2017).

The EU negotiators engaged regularly with the EP through the Brexit Steering Group, both to keep MEPs up-to-date on the negotiations with the UK and to listen to their concerns. The close involvement of the EP was seen as crucial to ensure parliamentary ratification, and the general view within the EP was indeed that it had been fully consulted, and that it played an influential role, particularly in the area of citizens' rights (Interview, EP official, 20/11/2018).

This demonstrates how the EU moved swiftly to set up the institutional structures necessary to deal with Brexit, reflecting high levels of expertise and an effective system for inter-institutional consultations. Even if these institutional structures to a great extent mirrored the EU's general processes for conducting international negotiations (Patel 2018), they were distinct structures, not to let Brexit 'interfere with' on-going Union business (European

Council, 2017a). The EU negotiators' engagement with the Council and the EP also went beyond that of any previous negotiation.

This extensive consultation process contributed to unprecedented levels of unity within the EU (Interview, WP on Article 50 Official, 10/1/2018). The negotiators were fully aware of the concerns and interests of the domestic constituents, and ensured these were respected and shared during the negotiations with the UK. As a result, there were never any reasons to expect ratification failures of the WA on the EU-side. Indeed, when the two parties eventually reached agreement on the final WA on 17 October 2019, it was endorsed by the European Council on the same date, and approved by the EP on 29 January 2020 by 621 votes in favour, 49 against and 13 abstentions. This reflects an unusually strong parliamentary majority, going far beyond the simple majority needed for EP consent, and confirms the remarkable unity between the political groups throughout the withdrawal negotiations (Closa, 2019, p. 10). While only a strong qualified majority of the 27 MSs was required, the Council unanimously adopted the decision to conclude the WA on 30 January 2020.

Throughout the negotiations there was also strong discipline in terms of lines of communication. MSs and MEPs were in full agreement that it was Barnier and his team that negotiated on behalf of the EU, and that any attempt by the UK to 'divide-and-rule' should be pre-empted (Nicolaïdis, 2017). At times, individual MSs and the EP engaged directly with the media and the UK, but they never deviated from the EU's united approach. Their interventions followed a supportive rather than competitive logic, and the UK's attempts to bypass the Task Force, and negotiate directly with individual MSs, failed.

The UK's Approach

The UK had no existing institutional set-up on which to base the Brexit process (Rutter and McCrae, 2016), and it had to constitute and staff two completely new departments - the Department for Exiting the EU (DexEU) (around 600 full-time employees), which was set up to handle the withdrawal negotiations specifically – and was consequently wound down after 31 January 2020 – and the Department for International Trade (DIT) (around 1600 full-time employees). Staff numbers in existing departments were also significantly increased as Brexit put huge pressure on all of Whitehall, with departments being overstretched and having difficulties separating Brexit from on-going business (Owen et al., 2018). This rapid increase of new employees, combined with a high staff turnover, led to a lack of policy experience, expertise and institutional memory on the British side (Martill and Staiger, 2018). Sir Ivan Rogers's resignation as UK Ambassador to the EU in early 2017 was a response to the government's reluctance to engage effectively with the UK Representation and its extensive expertise. His resignation e-mail stressed the difference in negotiating experience between the EU and the UK and the challenge this would pose for the UK (The Guardian, 2017). This concern was echoed by an MP reflecting on the Brexit process: '*Hardly a day goes by when the lack of knowledge within Westminster and within the civil service is not being revealed... Brexit is shining a spotlight on a collective lack of basic knowledge about the nature of our membership of the EU*' (Interview, 16/5/2019).

An additional difficulty faced by the civil service in delivering a coherent negotiating approach was the lack of unified political steer. Ever since the negotiations started there were tensions between the PM's office and DexEU, and while formally the Secretary of State for DexEU was the chief negotiator, the actual lead was transferred to the Cabinet Office and PM Theresa May. A clear sign of this was the move of the lead civil servant on Brexit, Olly Robbins, from DexEU to the Cabinet Office in September 2017. The sidelining of DexEU and political differences with the PM led two Secretaries of State for DexEU, David Davies

and Dominic Raab, to resign, making Secretary of State Stephen Barclay the third UK counterpart of Barnier during the withdrawal negotiations (Durrant et al., 2019).

The lack of unity within the executive was also seen among the UK domestic constituents, not least in Parliament, where the divisions between and within parties were striking (Bulmer and Quaglia, 2018, p. 1090). The main division was between those who had supported Leave and those who voted Remain in the referendum. Even in some parliamentary Select Committees, which are normally seen as a consensual part of Parliament, there were significant divisions. This was particularly the case in the Select Committee for Exiting the EU, set up in July 2016, with 21 cross party MPs, under the chairmanship of Labour MP Hilary Benn, where the division between Leavers and Remainers evolved into a sharp divide between those favouring a harder Brexit and those supporting a softer Brexit or Remain (Lynch and Whitaker, 2019). These divisions complicated the Committee's scrutiny work, making it difficult to reach consensus among its members. This in turn, made it easier for the government to dismiss the Committee's reports. Benn, and several other Select Committee Chairs, did indeed criticise the government for failing to engage with their reports (Lynch and Whitaker, 2019).

The government's reluctance to consult with Parliament became evident when the government planned to trigger Article 50 autonomously. However, objections were raised, and in January 2017 the Supreme Court ruled that the Article could not be triggered without parliamentary legislation. As a result, the government introduced a Notification of Withdrawal Bill, which was approved by Parliament. However, the two amendments proposed by the House of Lords about protection for EU citizens in the UK, and Parliament having the final say over any withdrawal agreement, were rejected by the government on the grounds that this would constrain its negotiating position (Fabbrini, 2017).

After Article 50 was triggered in March 2017, May, who hoped to strengthen her hand in the withdrawal negotiations by increasing her parliamentary majority, called a snap election. However, the strategy backfired, and in the general election of June 2017 the Conservative Party lost its small overall majority, forcing the government into a confidence-and-supply arrangement with the Democratic Unionist Party (ibid.). The government thus entered into the withdrawal negotiations with a largely divided Parliament. Yet, instead of consulting with the different parliamentary sections, the government carried out the negotiations without significant parliamentary engagement. This lack of consultation contributed to Parliament's failures to ratify the WA on three occasions (Ruparel, 2019: 6). Even if May insisted she had negotiated the best deal possible with the EU, it was difficult for many MPs to accept this argument as they felt distanced from the negotiations.

With the parliamentary deadlock, May had to ask for two extensions to the two-year time limit set out by Article 50. The first request extended the initial deadline from 29 March to 12 April 2019, and the second one until 31 October 2019. During the second extension, attempts were made to find compromises through cross-party talks with the Labour Party. However, they collapsed as they were seen to happen too late, i.e. after the WA had already been concluded. Given Labour's preference for remaining in a Customs Union with the EU, Labour Leader Jeremy Corbyn met with Barnier numerous times to explore this idea, thus clearly deviating from the official UK position, and sending competing messages to Brussels.

In the end, May's position became unsustainable, and she had to resign. Following a lengthy election process in the Conservative Party, Boris Johnson replaced her as PM in July 2019. However, the change in leadership did not result in further consultations with Parliament. On the contrary, Johnson started his term by advising the Queen to suspend Parliament for over a month. Although the Supreme Court later ruled that this advice was unlawful (Marshall 2019), it was clear that he felt little accountability towards Parliament. This was also

exemplified by his expulsion of 21 Conservative MPs who voted against the government, and in favour of legislation to block a no-deal scenario at the end of the second extension, which led to a number of ministerial resignations, and the Conservative Party's share of MPs decreasing even further.

Johnson embarked on intensive negotiations with the EU to reach agreement on a slightly altered WA and Political Declaration just before the second extension expired. Yet, to allow for proper scrutiny, Parliament, which had not been consulted during the course of these negotiations, voted for an amendment requiring the PM to ask for a third extension. The EU granted the extension until 31 January 2020. Recognising that the WA was unlikely to obtain parliamentary approval with the existing parliamentary arithmetic, the PM called a general election on 12 December 2019, which lead to a significant Conservative majority. Rather than engaging with MPs, the PM thus opted for replacing them, and in this way paved the way for the WA Bill to be passed by Parliament, which voted 330 to 231 in support.

In terms of the devolved administrations, there was a lack of genuine engagement throughout the withdrawal negotiations. There was an attempt at repurposing the Joint Ministerial Committee (JCM) structures, which were initially set up in 1999 to facilitate coordination between the UK and the devolved administrations of Scotland, Wales and Northern Ireland, by constituting the JMC Sub-committee on EU Negotiations (EN). However, its irregular meetings and the fact that the Committee lacked formal decision-making powers frustrated efforts of the devolved administrations to input into the negotiations, and there was a strong feeling that the views of Scotland and Wales were not taken into account (Institute for Government, 2019). The government was criticised for using the Committee to suppress disagreements, rather than engaging with it and trying to find solutions (Parliament 2017).

In Scotland, which voted Remain by 62% to 38% in the referendum, the government argued particularly strongly that Scotland should not be taken out of the EU against its will, and that a lack of consultation with Scotland on Brexit would lead to a second Scottish independence referendum (Gamble, 2018). Consequently, when May ruled out single market membership – a compromise favoured by the Scottish Government, First Minister Nicola Sturgeon and Scottish Parliamentary Representatives started engaging directly with Barnier, exploring possibilities of a closer EU-Scottish relationship (Scottish Parliament, 2017). This engagement, which again illustrates the lack of unity on the UK side and how domestic constituents engaged with the EU according to a competitive logic, increased throughout the withdrawal negotiations. While the government significantly strengthened its majority in the 2019 election, so did the Scottish National Party, which increased its number of MPs from 35 to 48. None of these MPs voted in favour of the WA, and there are now increasing demands for a referendum on Scottish independence from the UK.

Interests versus Positions

Parties adopting integrative approaches signal their willingness to engage in negotiations and understand each other's motivations and priorities (Odell, 2000). The focus is on identifying interests, rather than positions, with interests being defined as underlying desires and concerns that motivate people to come up with creative ideas and alternatives (Fischer and Ury, 1981). While positions, i.e. choices that have been previously decided upon, are likely to highlight differences between the parties, interests are often more compatible, allowing negotiators to find mutually acceptable solutions. When identifying interests, parties engage in an explorative process, before finding solutions that satisfy these interests. Rather than arriving with a fixed brief, the parties approach the negotiations with openness and a joint

problem-solving attitude (Odell, 2000: 34). Integrative strategies include the proposition of agenda items that are seen to benefit both parties (Odell, 2010: 621). In contrast, negotiators following a distributional logic enter negotiations presenting pre-determined positions that are often developed without considerations for what might be possible for the other side. Once these positions have been presented, negotiators become increasingly attached to them, making it difficult to deviate from them (Lax and Sebenius, 1986).

The EU's Approach

While the EU regretted the result of the referendum in the UK, it respected the result, and signalled its readiness to engage in negotiations as soon as the UK would trigger Article 50. There was an awareness that time was tight due to the two-year limit set out by Article 50 (Closa, 2019). The EU negotiators, in consultation with MSs and the EP, started to identify the main interests and problems to be addressed during the withdrawal negotiations to ensure that the European Council (Art. 50) had the necessary basis to formally adopt the negotiating guidelines on 29 April 2017, only a month after the UK triggered Article 50. These guidelines stressed that the aim of the withdrawal agreement was about damage control and mitigating the losses of the UK leaving the EU. The guidelines, which were translated into negotiating directives adopted by the General Affairs Council (Art. 50) on 22 May 2017, instructed the EU negotiators to reach an agreement aiming 'to minimise the uncertainty and disruption caused by Brexit for our citizens, business and MSs' by solving the issues around citizens' rights, the Irish border, and financial commitments (European Council, 2017a). Since the UK had not published any negotiating details, the EU guidelines came to form the basis for the Terms of Reference for the negotiations, agreed by the EU and the UK during the opening of the negotiations on 19 June 2017. If the EU negotiators then were seen to dominate the

negotiations, it was mainly because the discussions were based around *their* guidelines and proposals, given the lack of UK proposals (Grant, 2019).

The EU thus set the agenda for the negotiations. However, this agenda did not reflect pre-determined positions, as per a distributional approach, but rather identified the main problems to be solved. The solutions then had to be found during the negotiations between the two parties. To the EU itself, it was clear that these negotiations, which posed the unprecedented challenge of disentangling a MS, and which were not reflective of traditional 'give and take' negotiations, had to be approached with a problem-solving attitude (de Rynck, 2019) with 'no-one want[ing] to defeat anyone' (European Council, 2018). At the Special European Council (Art.50) meeting of 25 November 2018, Barnier explained how his team 'negotiated *with* the UK, never *against* the UK' and that the deal was 'necessary to build trust between the UK and the EU' (Reuters, 2018).

The issues of citizens' rights and financial commitments were solved relatively quickly, as the EU guidelines focused on legality and methodology. Despite some positioning by the UK at political level, such as stressing the uncertain status of EU nationals as one of the 'main cards' of the UK in the negotiations (Elgot 2016), the dynamic emerging at the negotiating table was mainly integrative.

However, in finding the solution to one of the most difficult issues of the negotiations, i.e. avoiding a hard border on the island of Ireland, the two parties had to work harder to reach agreement. The final solution can can be seen as the result of an interest-based approach by the EU negotiators, in close cooperation with their UK counterparts, within the tight confines created by the UK's red lines on exiting the single market and the customs union, by the EU's own legal obligations and its compliance with international trade rules, and by both parties' commitment to the Good Friday Agreement (Usherwood, 2019). The first proposed solution

came in the form of a backstop that saw Northern Ireland remaining in a single customs territory with the EU to avoid border checks on the island of Ireland after the UK's exit. The backstop would only come into effect unless and until it was superseded by a subsequent agreement. Yet, when it became clear that this proposal, agreed by the EU and the UK negotiators, had little domestic support within the UK - particularly due to the Democratic Unionist Party's refusal to accept any customs border in the Irish Sea, or any constitutional, political or economic differentiation between Northern Ireland and the rest of the UK (Menon and Bevington, 2019) – the negotiators re-engaged in discussions and came up with a new backstop solution that would keep all of the UK within the single customs territory, believing such a solution would facilitate ratification in the UK. This solution was included in the Protocol on Ireland/Northern Ireland of the WA, which was concluded by the EU and the UK in November 2018. During the subsequent ratification failures in the UK, the backstop became the main focus of criticism. The EU first expressed an unwillingness to re-negotiate the WA after having spent one and a half years negotiating it, and as it was unclear how any changes would satisfy those domestic groups within the UK rejecting the backstop. However, with a new leadership in the UK, following the 2019 election, the EU was ready to re-engage in negotiations and listen to new proposals from the UK. Through intense negotiations in September and October 2019 the Protocol on Ireland/Northern Ireland was thus revised, and the backstop was replaced by an arrangement by which all of the UK leaves the EU customs union. However, to avoid a hard border on the Island of Ireland, Northern Ireland will apply EU customs rules and maintain regulatory alignment with the EU, effectively establishing a customs and regulatory border in the Irish Sea (Parliament, 2019). This demonstrates how the EU adopted an open approach and engaged in creative thinking to find a solution that would avoid a hard border on Ireland, while also recognising the domestic sensitivities in the UK and accommodating Johnson's commitment to re-negotiate the WA before the second extension expired on 31 October 2019. Although Johnson was forced to ask for another

extension until 31 January 2020 for ratification purposes, the alterations to the WA allowed him to claim a negotiation victory. His subsequent success in the December general election enabled him to push through the WA without the support of the DUP, which maintained concerns about a border down the Irish Sea (McKay, 2020).

An area where the EU was criticised for adopting a less flexible approach, was the sequencing of the negotiations. Although Article 50 does not prescribe a precise structure for the negotiations, apart from specifying that the EU needs to be 'taking account of the framework for its [in this case the UK's] future relationship with the Union' when negotiating and concluding the withdrawal agreement, the EU insisted on agreeing the withdrawal before discussing the future relationship (Ruparel 2019). This was a strongly expressed position by the European Council, the MSs and the EP, making the EU negotiators unable to accommodate the UK's request of having the two sets of negotiations conducted in parallel, which would allow for trade-offs between the terms of the withdrawal and those of the future relationship (Craig 2017). The EU recognised the integrative nature of the withdrawal issues, and there were worries that if the two negotiations were conducted in parallel, the EU might be led into traditional distributional bargaining over issues of a different nature (Maurice, 2018). In this case the EU can consequently be seen to adopt a less integrative approach. However, this approach had a strong legal and practical rationale. It was clear that detailed discussions on the future relationship would complicate and delay agreement around the more legal, technical and integrative withdrawal issues, which had to be concluded within the two-year time limit set out by Article 50. It was, after all, in both parties' interest to agree a withdrawal agreement within this time limit, and the EU was certain that negotiations of the agreement on the future relationship would take longer. Consequently, even if the two negotiations *had* been conducted in parallel, the UK would still not know whether the future relationship deal would be worth taking, before having to agree to the withdrawal agreement

(Craig 2017). The fact that the EU convinced the UK to accept the sequencing of the negotiations already at the first negotiating round (Green, 2017), hints at the generally accepted logic and pragmatism of this approach by both parties.

Yet, while formal negotiations about the future relationship could not start until after the UK's exit, EU responded to the UK's position on sequencing and expressed its willingness to initiate discussions on the framework for the future relationship, as soon as 'sufficient progress' had been made on the withdrawal issues (Council of the EU, 2017). Once the European Council agreed that sufficient progress had been reached, the EU negotiators immediately outlined different options for this relationship, ranging from free trade area (FTA) to single market membership (European Commission 2017a), and showed a readiness to discuss their respective merits. However, the options were immediately narrowed down by the UK's red lines. The fact that it then took the parties almost two years to agree on just the final *framework* of the future relationship also reflects the unlikeliness of completing both sets of negotiations within Article 50's time limit.

The UK's Approach

Rather than engaging in a problem-solving process, the UK negotiators mainly perceived the negotiations in win-lose, or 'zero-sum terms' (Martill and Staiger, 2018, p. 3), where parties had to defend their positions and push the negotiating partner to make concessions. Once they adopted a position – often without significant justification or consideration for what was actually possible, the negotiators become attached to it, and any deviation was seen as a sign of weakness (ibid.). References to the readiness to 'walk away' from the negotiations, preparations for a 'no-deal scenario', 'they need us more than we need them', and 'we can win' – all characteristic of a distributive approach, were in abundance.

Already before the withdrawal negotiations began, the UK took a positional stance by drawing red lines around free movement of people, independent trade deals, and oversight by the Court of Justice of the EU in the PM's Lancaster House speech (May, 2017). This position was adopted without considering the trade-offs in terms of the future EU-UK relationship. Once the negotiations moved onto the framework of the future relationship, and the EU presented the different options available, the UK was already locked into the FTA option, due to these red lines. Rather than engaging in an explorative and open process of how to remain as close as possible and minimise the adverse economic impact of Brexit, the UK negotiators continuously defended those lines, and there was little room for flexibility (Martill and Staiger, 2018).

Similarly, even though the EU had made the legal and practical reasons for sequencing of the negotiations clear, May's letter triggering Article 50 in March 2017 stressed repeatedly that the two should take place in parallel (PM's Office, 2017), to allow the UK to use its strength in some areas, like security, to obtain concessions in others. While it quickly became clear to the officials around the negotiating table that this was not possible, the British political narrative continued to focus on the need for parallelism long after the start of the negotiations.

A future trade deal between the two parties was seen to be negotiable within the two-year time limit. Yet, this position about parallelism was not anchored in actual preparations of a UK trade policy or considerations about the future relationship with the EU (Green, 2017). Once the European Council agreed that sufficient progress had been reached on the withdrawal issues to start discussing the future in December 2017 (European Council, 2017b), the UK took more than six months to develop its future relationship proposal. This was somewhat puzzling for the EU, given the UK's insistence on parallelism and the feasibility of reaching a trade deal in principle with the EU before March 2019 (Interview, MS Representation Official, 4/3/2019). The proposal that was eventually presented in July 2018,

through the Chequers white paper on the future relationship between the UK and the EU, outlined the creation of a 'free trade area for goods', supported by a 'common rulebook for goods' on 'rules necessary to provide frictionless trade at the border', and the introduction of a 'facilitated customs arrangement' (HM Government 2018). Again, the UK's position did not consider what would be acceptable to the EU, particularly in terms of the EU's commitment to safeguarding the integrity of the EU single market, and respecting the indivisibility of the four freedoms of movement of goods, services, capital and people. The white paper reflected the UK's wish to agree a 'deep and special partnership' with the EU by taking some elements of the customs union and single market, but not others. Nevertheless, the EU 'recognised that there were positive elements in the Chequers proposal' (Parker et al., 2018), and saw it as a basis for discussion. However, the UK presented the paper as a non-negotiable end-point instead of a starting-point for negotiations (Durrant et al., 2019).

The positional approach continued during Johnson's leadership, although it focused more on timing, than content. He insisted on not asking for a third extension to Article 50 in order to 'get Brexit done', thereby prioritising the date, rather than the terms, of the UK's exit. To placate concerns about the impact on trade in the case of a no deal scenario, he argued that an FTA could be negotiated during the transition period (Gardner 2020, p.66). Given that there would be no transition period without the WA, this illustrates the tendency in the UK not to focus on the WA and the agreement on the future relationship as two separate deals, but to merge them in the overall Brexit narrative.

 In addition, Johnson stuck to the position of maintaining the December 31 2020 deadline of the transition period, as per the WA negotiated by his predecessor. During the transition, which is regulating the EU-UK relationship at the time of writing, the UK is no longer part of the EU institutions, but is subject to EU rules and remains a member of the single market and the customs union. The purpose of the transition is to allow time to implement the WA, as

well as negotiating the future EU-UK relationship. Although the final WA entered into force almost a year after the initially envisaged Brexit date of 29 March 2019, and thereby significantly reduced the time available to negotiate the future relationship, Johnson's government was committed to the position of 'getting Brexit done' and not extend the transition deadline (Mason, 2019). This commitment was further strengthened by the legislation ruling out an extension to the existing transition period beyond December 2020.

Levels of Transparency

An integral part of the integrative negotiating approach is the provision of high levels of transparency, not only towards domestic constituents, but also vis-à-vis the negotiating partner. If parties share information openly and consider the perspective of the other, the chances of finding solutions are seen to increase (Odell, 2000). To reach an agreement parties need to have 'good understanding of their own preferences and priorities, to communicate those to their counterpart and to integrate information about each other's preferences and priorities into their own understanding of the problem at hand' (Van der Schalk et al., 2010: 356). When being open and transparent, negotiators are also considered more likely to develop or maintain a close relationship based on trust (Walton and McKerise, 1966; Lax and Sebenius, 1986). In contrast, negotiators adopting a distributional approach tend to be less willing to share information both with their negotiating partner and their domestic constituents. Withholding a certain amount of information is deemed necessary not to reveal your bottom line, and avoid exploitation by the other party, which might try to gain distributional advantages at your expense (ibid). This approach of keeping one's cards close to the chest is clearly less conducive to trust building.

Throughout the negotiations the EU negotiators adopted high levels of transparency, both internally and towards the UK and the wider public. They saw transparency as essential to the success of the negotiations, and the Commission's website stressed how the 'unprecedented nature' of the UK's exit required a 'tailor-made approach to transparency' and that the Commission aimed 'to ensure a maximum level of transparency throughout the negotiations'. A progress report on the negotiations confirmed that they were indeed 'carried out with unprecedented transparency' (European Commission, 2017b). Publicly published documents include negotiating agendas, EU position papers, EU non-papers, EU text proposals, fact sheets, speeches, and the agreements reached.

The EU did not consider this level of transparency to undermine its negotiation approach, or risk the UK gaining distributional advantages. Given the non-distributional nature of the issues at stake, the EU negotiators saw this open approach as effective in identifying the true interests of the two parties – interests that to a great extent overlapped and did not require compromises between two polar opposites. Both parties agreed on the importance of protecting the citizens' rights; ensuring an orderly withdrawal with a smooth phasing-out of existing cooperative procedures; and maintaining an open border on the island of Ireland. None of these issues exposed dynamics where parties were likely to have a bottom line that needed hiding from the other party. As a result, the EU negotiators had nothing to lose through its transparent approach. If anything, the EU gained advantages from it. It helped raise awareness about the Brexit process, not only among the MSs and MEPs, but also among the wider public. It was seen to facilitate and encourage debate and participation, bringing together civil society across the EU (Kendrick and Sangiuolo, 2017, p. 13), and helping national parliaments to engage in 'informed discussions, reply to citizens' questions and engage in public debate' (Barnier, 2017). The Brexit process proved much more difficult and

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complex than some predicted, and initial expectations that it could lead to a domino effect of other MSs leaving the EU have not materialised. Instead, recent polls indicate a growing appreciation for the EU among citizens across the EU (Eurobarometer, 2019). The European Ombudsman (2019) confirmed how the high levels of transparency gave the EU negotiators advantages, as it '*increased their legitimacy in the eyes of the public and it has helped to keep the EU united, as MSs, the European Parliament and citizens were kept informed and included at each step in the process*'. Through their open and transparent approach, the EU negotiators also became the first point-of-call for many media outlets, helping them to control the public narrative around Brexit (Kendrick and Sangiuolo, 2017, p. 15).

The UK's Approach

From the start, the UK negotiators adopted a secretive approach, and stressed that there would not be 'a running commentary of every twist and turn of the negotiations' in Parliament, and they would 'not reveal [their] hand prematurely' (Reuters, 2016). This approach continued, and there was a widespread 'culture of extraordinary secrecy' throughout the negotiations (Owen et al., 2018). An example was the reluctance to share governmental sectoral impact analyses of Brexit, forcing Parliament to use the 'humble address' procedure in November 2017, by which the monarch ordered the release of the analyses for parliamentary scrutiny (Durrant et al., 2019). Another example is the historical motion passed by MPs in December 2018, holding the government in contempt over its failure to release the legal advice carried out by the Cabinet on the WA. Unlike the EP and the Council, Parliament had to ask, and often fight for the information needed.

As for transparency vis-à-vis the media and the general public, May explained early on how 'every stray word and every hyped up media report is going to make it harder for us to get the

right deal for Britain' and that 'the government will not be pressured into saying more than I believe it is in our national interest to say…it is not my job to fill column inches with daily updates' (May 2017). In line with the distributional logic, revealing the UK negotiating position too early was seen to affect its ability to reach a successful deal (Kendrick and Sangiuolo, 2017).

However, this position was difficult to maintain in the face of the EU's extensive provisions of transparency, and there were suspicions that the lack of transparency reflected a lack of planning. As a consequence, the UK started to publish information on its website, including position papers, speeches, statements and white papers (ibid.). Yet, the notion of secrecy continued to prevail in Whitehall. Despite Davis, then Secretary of DexEU, explicitly committing that the government 'would not want either House of Parliament to be disadvantaged with respect to the European Parliament' (House of Lords 2016), many decisions were taken behind closed doors by the PM with a small number of select Ministers and civil servants. This, together with the internal division within Government, led to several alleged leaks to the press, publicly exposing the internal divisions on the UK side, which in turn contributed to the decreasing levels of trust in the government, both by MPs and the general public (Durrant et al., 2019).

In terms of transparency towards the EU, most of the agenda items and discussion documents originated in Brussels, forcing the UK to *respond* to, rather than *initiate* negotiating proposals. And even when responding, the UK was not particularly forthcoming with concrete suggestions for how to solve the issues on the table (Interview, MS Representation Official, 4/3/2019).

Conclusions

The comparison between the EU's and the UK's approaches in the withdrawal negotiations demonstrates how the EU leaned further towards the integrative end of the negotiating spectrum, with extensive internal consultations, a willingness to engage in open and interest-based discussions aimed at problem-solving, and high levels of transparency, while the UK leaned more to the distributive end, reflecting less engagement and consultation with domestic constituents, a focus on pre-determined positions that need defending, and lower levels of transparency.

Even if the rational expectation was that both parties would adopt integrative approaches, this did not materialise. The clash of approaches highlights how the UK underestimated the complexity of the negotiations, and rather than perceiving Brexit as a joint issue that needed to be approached with a problem-solving attitude, it mostly saw Brexit in terms of distributive bargaining, and adapted its approach accordingly. Since a fully integrative dynamic only emerges if both parties perceive the negotiations in the same way, the clash of approaches has led, in line with distributional logic, to relational tensions and decreasing levels of trust. This is likely to have an impact on the approaches adopted in the negotiations about the future EU-UK relationship, which are about to start at the time of writing.

UK is sticking to its positions on not extending to transition period beyond 31 December 2020, and being ready to accept a no-deal scenario 'if it is not possible to negotiate a satisfactory outcome' (HM Government, 2020). Given the government's significant parliamentary majority, there will be less need for extensive inter-institutional consultations. And although the government did publish its approach for the upcoming negotiations (ibd.), its culture of secrecy is unlikely to change overnight.

While the EU is expected to continue to provide high levels of transparency and engage in extensive inter-institutional consultations, as this approach has served it well so far, it is more

likely to engage in positional bargaining. Not only are the issues (such as trade-offs between market access and dynamic alignment, or quotas and access to fishing waters) more distributive in nature, but also, the UK's low priority of maintaining a close relationship based on trust has decreased the EU incentives to adopt an open and interest-based approach. After all, even if support for the EU has increased among EU citizens since the UK referendum, the EU wants to ensure that the UK, as a non-member of the Union, 'cannot have the same rights and enjoy the same benefits as a member' (Council of the EU, 2020), in order not to set a precedent with Brexit.

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