

## GENERAL ARTICLES

### THE NEGOTIATIONS: HAMPERED BY THE UK'S WEAK STRATEGY

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*Brexit negotiations were always going to be incredibly tough given the complexity of issues and the deep political divides among UK citizens in the wake of the EU referendum. Theresa May's government compounded these challenges with a poorly executed negotiation strategy: the UK government embarked on negotiations with other EU countries without a clear set of negotiating objectives; it was unable to represent itself as a unified negotiating team; it often found itself on the back foot, responding to EU proposals on both sequencing and content; and UK politicians pursued an ill-judged strategy that did not reflect the nature of the underlying negotiating problem or the UK's relative power position. These weaknesses were the result of ongoing political divides within the UK cabinet, the wider Conservative Party, and UK Parliament. Domestic divisions impeded negotiations with the EU and ultimately led to the rejection of the Withdrawal Agreement by the UK Parliament. The Brexit negotiations are a powerful illustration of how failure by a government to effectively navigate domestic politics can derail international negotiations.*

**Keywords:** Brexit, negotiations, strategy, UK government, EU

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## I. INTRODUCTION

At the outset of Brexit negotiations, UK prime minister Theresa May said she wanted Britain to be a 'great, global trading nation that is respected around the world and strong, confident and united at home'.<sup>1</sup> Yet the Brexit negotiations have damaged the UK government's international reputation and precipitated a political and constitutional crisis at home. Why did this happen?

During the Brexit negotiations, the UK government needed to negotiate effectively on two levels: internationally to secure a deal with the EU, and

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<sup>1</sup> Theresa May, 'The Government's Negotiating Objectives for Exiting the EU: PM Speech' (17 January 2017) <<https://www.gov.uk/government/speeches/the-governments-negotiating-objectives-for-exiting-the-eu-pm-speech>> accessed 15 October 2019.

domestically to ensure that any deal would be ratified by the UK Parliament.<sup>2</sup> Brexit negotiations were always going to be incredibly tough given the complexity of issues and the deep political divides among UK citizens in the wake of the EU referendum. Theresa May's government compounded these challenges with a poorly executed negotiation strategy. I identify specific weaknesses in the UK's strategy towards the EU: the UK government embarked on negotiations with other EU countries without a clear set of negotiating objectives; it was unable to represent itself as a unified negotiating team; it often found itself on the back foot, responding to EU proposals on both sequencing and content; and UK politicians pursued an ill-judged distributive strategy that did not reflect the nature of the underlying negotiating problem or the UK's relative power position.<sup>3</sup>

Weaknesses in the UK strategy stemmed from continuing political divisions at home. The failure of the UK cabinet to agree a common position resulted in the UK negotiating without a clear set of objectives and a lack of political direction generated tensions within the UK negotiating team. In turn, this enabled the EU to seize the initiative in the negotiations and decisively shape the outcome. Despite the role of the UK Parliament as a veto player in ratification of any Brexit deal, the May government marginalised MPs rather than seeking to build alliances across party lines, resulting in the negotiation of an agreement with the EU that was rejected by the UK Parliament.

The Brexit negotiations are a powerful illustration of how failure to effectively navigate domestic politics can lead to 'involuntary defection', where the government is unable to secure domestic ratification of the deal it has negotiated at the international level.<sup>4</sup> Scholars have shown that it is surprisingly common for international negotiations to be derailed by

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<sup>2</sup> On international negotiations as two-level games see Robert D Putnam, 'Diplomacy and Domestic Politics: The Logic of Two-Level Games' (1988) 42 *International Organization* 427.

<sup>3</sup> Negotiation theory commonly distinguishes between distributive approaches which are used to resolve pure conflicts of interest, and integrative approaches where the aim is to find common or complementary interests and solve problems confronting both parties. See Richard E Walton and Robert B McKersie, *A Behavioral Theory of Labor Negotiations: An Analysis of a Social Interaction System* (2nd ed, ILR Press 1991).

<sup>4</sup> Putnam (n 2).

governments misreading their own domestic politics, rather than disagreements with their international counterparts.<sup>5</sup> In the Brexit negotiations, weaknesses in the UK government's strategy did not arise from insufficient information about the nature of domestic politics or opposition from powerful interest groups, but rather from the challenges of forging a cross-party coalition in the context of a majoritarian parliamentary system.

This article is organised chronologically, starting in the aftermath of the EU referendum in June 2016 and ending when Theresa May stepped down as Prime Minister in June 2019. Section 2 provides a brief reminder of the challenging context in which Theresa May's government found itself straight after the EU referendum. Section 3 examines the moves made by the UK and EU<sup>27</sup> as they prepared for formal negotiations. Sections 4 and 5 analyse the first phase and second phase of formal negotiations, while Section 6 examines the politics of domestic ratification in the UK. It concludes with a brief reflection on the UK government's strategy and lessons for future negotiations.

The article draws on a range of publicly available sources including parliamentary reports, government documents, and newspaper articles, and insights from political science and negotiation studies.

## II. STARTING POINT: THE NEGOTIATIONS THAT WEREN'T MEANT TO HAPPEN

Theresa May took the helm of the UK government in July 2016, days after a referendum in which a majority narrowly voted for the UK to leave the European Union.<sup>6</sup> In many ways Theresa May was an unlikely Prime Minister. She was not seen as an obvious leadership candidate within or outside the Conservative Party, was known for being technocratic and had a

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<sup>5</sup> See for instance Peter B Evans, 'Conclusion: Building an Integrative Approach' in Peter B Evans, Harold K Jacobson and Robert D Putnam (eds), *International Bargaining and Domestic Politics: Double-Edged Diplomacy* (University of California Press 1993).

<sup>6</sup> See Federico Fabbrini (ed), *The Law & Politics of Brexit* (Oxford University Press 2017).

low profile.<sup>7</sup> Theresa May's refusal to take sides during the EU referendum campaign propelled her into the leadership position, almost by default. She was the 'last one standing' when it came to electing a new Conservative Party leader.<sup>8</sup>

The referendum outcome was a profound shock to the country's political and economic leadership. Theresa May inherited a civil service completely unprepared to deliver on the 'biggest and most complex task in its peacetime history'.<sup>9</sup> David Cameron, Theresa May's predecessor, had been so confident that the government would win the referendum that he famously told the civil service not to prepare for a 'leave' outcome, a decision that the UK's Foreign Affairs Select Committee later concluded was an 'act of gross negligence'.<sup>10</sup>

Theresa May also faced a bitterly divided Conservative Party. The UK's relationship with the EU has been a perennial challenge for Conservative Party leaders and disputes over UK relations with Europe ultimately cost Margaret Thatcher, John Major, and David Cameron their premierships.<sup>11</sup> Following the EU referendum campaign, rifts ran deep, with rival factions in

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<sup>7</sup> Sam Knight, 'Theresa May's Impossible Choice' *The New Yorker* (30 July 2018) <<https://www.newyorker.com/magazine/2018/07/30/theresa-mays-impossible-choice>> accessed 15 October 2019

<sup>8</sup> Ibid.

<sup>9</sup> Jeremy Heywood, 'How the Civil Service Is Preparing for Brexit' (Civil Service Blog, 11 July 2017) <<https://civilservice.blog.gov.uk/2017/07/11/how-the-civil-service-is-preparing-for-brexit/>> accessed 15 October 2019; see also Joe Owen, Lewis Lloyd and Jill Rutter, 'Preparing Brexit: How Ready Is Whitehall?' (Institute for Government 2018) <<https://www.instituteforgovernment.org.uk/sites/default/files/publications/IFGJ6279-Preparing-Brexit-Whitehall-Report-180607-FINAL-3c.pdf>> accessed 15 October 2019.

<sup>10</sup> Foreign Affairs Committee, 'Equipping the Government for Brexit' (*Parliament*, 20 July 2016) <<https://publications.parliament.uk/pa/cm201617/cmselect/cmfaff/431/43106.htm>> accessed 15 October 2019.

<sup>11</sup> Andrew Grice, 'Europe Killed the Careers of the Last Three Conservative PMs – and Now It's Set to Destroy Theresa May' *The Independent* (12 July 2016) <<https://www.independent.co.uk/voices/europe-killed-the-careers-of-the-last-three-conservative-pms-and-now-its-set-to-destroy-theresa-may-a7132651.html>> accessed 15 October 2019.

the Conservative Party advocating radically different visions of the type of Brexit that the UK should pursue.

As has been exhaustively analysed elsewhere, there were a variety of options for structuring future UK-EU trade relations, ranging from full or partial membership of the single market and customs union (which was quickly dubbed 'soft Brexit' in public discussions), which would entail maintaining very close economic, legal and political relations, to the negotiation of an arms-length free trade agreement or leaving without any agreement at all (forms of 'hard Brexit').<sup>12</sup> The Eurosceptic faction of the Conservative Party sought an arms-length relationship with the EU and advocated for 'hard Brexit' while others in the Conservative Party supported 'soft Brexit'. Emboldened by the surge of support for the UK Independence Party (UKIP) and the victory of the leave campaign in the EU referendum, the Eurosceptic faction gained power within the Conservative Party. Theresa May made sure Eurosceptics were well represented in Cabinet, allocating them the key Brexit portfolios, a decision that proved critical in shaping the course of the negotiations.

The Labour Party, the main opposition party, also faced challenges in the wake of the EU referendum. The vast majority of Labour MPs and grassroots Labour Party members had supported the remain campaign, but after the EU referendum many Labour MPs found themselves representing constituencies in which the majority of voters had voted to leave. This hampered the Labour Party's ability to forge a unified approach to the Brexit negotiations and hold the government to account on its Brexit strategy.

### III. PREPARING TO NEGOTIATE (JULY 2016 - JULY 2017)

Following the UK's EU referendum in June 2016, the UK and the 27 other EU Member States (hereafter 'EU') worked to appoint negotiating teams and decide their negotiating objectives. On 29<sup>th</sup> March 2017 the UK government wrote to Donald Tusk, President of the European Council, to formally notify him of the UK's intention to leave, thereby triggering Article 50 of the Treaty

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<sup>12</sup> See Giorgio Sacerdoti, 'The Prospects: The UK Trade Regime with the EU and the World: Options and Constraints Post-Brexit' in Federico Fabbrini (ed), *The Law & Politics of Brexit* (Oxford University Press 2017).

on European Union (TEU) and starting the clock on the two-year period that the Treaty set out for the parties to agree the terms of withdrawal and nature of the future relationship.<sup>13</sup>

Given the scope of the issues to be negotiated, three agreements needed to be reached. First, agreement on the terms of the UK's withdrawal or 'divorce', covering immediate issues such as: the rights of EU citizens living in the UK and UK citizens living in the EU; financial liabilities, including UK contributions to the EU budget cycle for 2014-2020 and pension contributions; and the relocation of EU institutions based in the UK. Second, a new UK-EU relationship would need to be agreed, including on the access the UK and EU would have to each other's markets; the extent to which the UK would adhere to EU laws and have influence over EU rules and regulations; UK participation in EU research programmes; and the nature of security and defence cooperation.

While Article 50 TEU required the UK and EU27 to reach agreement on the framework for future relations, an agreement on a future relationship between the UK and EU27 could only be finalised and concluded once the UK had become a third country.<sup>14</sup> As a result, a third agreement would also be needed to govern the transition period between the point of the UK's exit (two years after the triggering of Article 50) and the point at which a new UK-EU relationship had been concluded, which was likely to be several years later.

### *1. The UK's Ambiguous Negotiating Objectives*

Initially the UK government appeared to have a coherent set of negotiating objectives focused on delivering a 'hard Brexit' agreement. Within days of assuming office, Theresa May announced her Cabinet, choosing to put three staunch leave-supporting politicians at the helm of the Brexit negotiations: Boris Johnson was appointed Foreign Secretary; David Davis was appointed to the new role of Secretary of State for Exiting the EU; and Liam Fox was

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<sup>13</sup> Theresa May, 'Prime Minister's Letter to European Council President Donald Tusk' (29 March 2017) <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/604079/Prime\\_Ministers\\_Letter\\_to\\_European\\_Council\\_President\\_Donald\\_Tusk.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/604079/Prime_Ministers_Letter_to_European_Council_President_Donald_Tusk.pdf)> accessed 15 October 2019.

<sup>14</sup> See Armstrong in this issue.



appointed to the post of Secretary of State for International Trade. To accompany these posts, the government announced the creation of two new ministries, the Department for Exiting the EU (DexEU) and Department for International Trade (DIT). In appointing a Secretary of Trade and investing considerable resources in a new trade ministry, the government signalled that it was prioritising the autonomy of future UK trade policy, an objective that aligned with the UK's exit from the EU customs union and single market.

Early signs that the UK government would pursue a 'hard Brexit' policy were reinforced by a series of high-profile public speeches in which Theresa May set out the government's negotiating objectives. In her speech at the Conservative Party conference in October 2016, Theresa May emphasised that the 'authority of EU law' in Britain, including the jurisdiction of the European Court of Justice (ECJ), would be 'ended forever', and promised UK control over immigration from the EU.<sup>15</sup> She also promised to trigger Article 50 and embark on formal negotiations no later than the end of March 2017.<sup>16</sup> Meanwhile, Liam Fox, the newly appointed Secretary of State for Trade, set out a vision for negotiating free trade agreements around the world.<sup>17</sup> The stage looked set for the UK negotiating a deal that would result in an arms-length relationship with the rest of the EU, based on a free trade agreement.

Yet, as time went on, the UK's position became more ambiguous. The White Paper in February 2017 explicitly stated that the UK would leave the EU single market and would pursue 'an ambitious and comprehensive free trade agreement', but it also stated that it would pursue a 'new customs agreement' with the EU and that a future agreement might 'take in elements of current single market arrangements in certain areas'.<sup>18</sup> This introduced

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<sup>15</sup> Theresa May, 'Theresa May's Keynote Speech at Conservative Party Conference October 2016' *The Independent* (5 October 2016) <<https://www.independent.co.uk/news/uk/politics/theresa-may-speech-tory-conference-2016-in-full-transcript-a7346171.html>> accessed 15 October 2019.

<sup>16</sup> Ibid.

<sup>17</sup> E.g. Jon Stone, 'TTIP Trade Deal Might Never Happen, Trade Secretary Liam Fox Says' *The Independent* (8 September 2016) <<https://www.independent.co.uk/news/uk/politics/ttip-liam-fox-uk-british-never-happen-stop-international-trade-brexite-a7231786.html>> accessed 15 October 2019.

<sup>18</sup> HM Government White Paper, 'The United Kingdom's Exit from, and New Partnership with, the European Union' paras 8.1–3



contradictions in the heart of the UK's negotiating position, as any customs union agreement that enabled the free circulation of goods would require a harmonised external tariff, which would inevitably curtail the UK's ability to strike free trade agreements with third countries. Meanwhile, incorporating elements of the single market would result in some continued jurisdiction of the ECJ, or an equivalent body, in the UK, breaching one of the red lines Theresa May had set out in her party conference speech.

In retrospect it is remarkable how little attention was paid to the implications of Brexit for peace in Northern Ireland in the EU referendum campaign and first months of Theresa May's government. It was only in a Brexit White Paper (February 2017) and in the letter triggering Article 50 (March 2017) that the UK government started to grapple with the question of how its proposals would affect the border between Northern Ireland and the Republic of Ireland, and its commitments under the Good Friday Agreement. The White Paper recognised the need to 'find a practical solution that keeps the border as seamless and frictionless as possible, recognising the unique economic, social, and political context'.<sup>19</sup> The Article 50 letter stated that the UK wanted to 'avoid a return to a hard border'.<sup>20</sup> Yet this objective was hard to reconcile with the UK's stated ambition of leaving the single market and customs union, both of which implied the introduction of physical checks at the border between Northern Ireland and the Republic of Ireland.<sup>21</sup>

Thus, even before any formal engagement with the EU, contradictions and ambiguities in the UK negotiating position were becoming apparent. The decision to trigger Article 50 and launch formal negotiations before agreeing a coherent negotiating position was a major flaw in the UK strategy. It led the

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<<https://www.gov.uk/government/publications/the-united-kingdoms-exit-from-and-new-partnership-with-the-european-union-white-paper/the-united-kingdoms-exit-from-and-new-partnership-with-the-european-union--2>> accessed 15 October 2019.

<sup>19</sup> Ibid 8.49.

<sup>20</sup> May, 'Prime Minister's Letter to European Council President Donald Tusk (n 14).

<sup>21</sup> On the tensions in the UK position see Emily Jones and Calum Miller, 'The Brexit Impossibility Triangle' [2019] *Project Syndicate* <<https://www.project-syndicate.org/commentary/brexit-impossibility-triangle-by-emily-jones-and-calum-miller-2019-04>> accessed 15 October 2019.

UK to table unrealistic negotiating proposals, including a proposal for the UK to have a customs arrangement with the EU that would ensure frictionless trade and avoid a hard border with Ireland, while also leaving the EU customs union in order to have a fully sovereign trade policy. This proposal was dubbed a 'Schroedinger's Customs Union' by Ivan Rogers, the UK's former Permanent Representative to the EU, as it was hard to conceive how such an arrangement would work in practice.<sup>22</sup>

## *2. The EU's Clear Negotiating Objectives and Agenda-Setting Moves*

While the UK tied itself in knots, the EU developed its own negotiating guidelines<sup>23</sup> and directives.<sup>24</sup> The EU and UK positions shared common elements, including the desire to safeguard the rights of citizens and provide clarity and legal certainty, but there were major differences. The EU insisted that the four 'fundamental freedoms' of the EU single market were indivisible, which meant that agreeing to free movement of goods, services, and capital would necessarily entail accepting freedom of movement of people too, a red line for the UK. The EU explicitly excluded the possibility of a sector-by-sector approach to participation in the single market, in direct opposition to the UK's desire to 'take in elements of the single market'.<sup>25</sup> The EU insisted that any future free trade agreement must 'ensure a level playing field' to safeguard against any moves the UK might make to lower regulatory standards in areas such as tax and social and environmental standards.<sup>26</sup>

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<sup>22</sup> Ivan Rogers, 'Sir Ivan Rogers' Speech on Brexit' (13 December 2018) <<https://news.liverpool.ac.uk/2018/12/13/full-speech-sir-ivan-rogers-on-brexite/>> accessed 15 October 2019.

<sup>23</sup> European Council, 'European Council (Art. 50) Guidelines for Brexit Negotiations' <<https://www.consilium.europa.eu/en/press/press-releases/2017/04/29/euco-brexite-guidelines/>> accessed 15 October 2019.

<sup>24</sup> Council of the European Union, 'Directives for the Negotiation of an Agreement with the United Kingdom of Great Britain and Northern Ireland Setting out the Arrangements for Its Withdrawal from the European Union' <<https://www.consilium.europa.eu/media/21766/directives-for-the-negotiation-xt21016-ado1re02en17.pdf>> accessed 15 October 2019.

<sup>25</sup> European Council, 'European Council (Art. 50) Guidelines for Brexit Negotiations' (n 24) pt 1.1.

<sup>26</sup> European Council, 'European Council (Art. 50) Guidelines for Brexit Negotiations' (n 24) pt 1.1.

The EU also set out a series of stipulations about the negotiating process. The EU Member States would speak with one voice and, to ward off any attempt by the UK to try and capitalise on differences among the EU27, the EU appointed a European Commission Task Force to conduct the negotiations with the UK. It stated that it would engage the UK exclusively through the official negotiating channels and there would be 'no separate negotiations' between the UK and individual Member States. Crucially, the EU also insisted on a two-phase approach to the negotiations,<sup>27</sup> structuring discussions to its advantage by frontloading the issues on which it wanted to secure commitments from the UK, including on citizens' rights, the financial settlement, and the Northern Ireland border, before it would negotiate on the future trading relationship, which was of particular interest to the UK.

The EU's proposals on how the negotiations should be sequenced conflicted with the UK's proposals. In the letter triggering Article 50, the UK proposed that the terms of the future partnership be agreed 'alongside' those of the UK's withdrawal from the EU.<sup>28</sup> Perhaps in a move to push the UK into accepting its preferred structure, the European Commission negotiating mandate only covered those issues it wanted to discuss in phase one. This meant that if the UK wanted to negotiate issues in a different sequence, the European Commission would have had to go back to the Member States to obtain authorisation, delaying the start of the formal negotiations.

### *3. May's Political Miscalculation Further Muddies the Negotiation*

In the run up to formal negotiations with the European Union, Theresa May called a snap general election in a bid to strengthen her negotiating hand. Her government was operating with a wafer-thin majority of only 12 MPs in Parliament and the prime minister was concerned that such a slim majority would enable opposition parties to frustrate the Brexit negotiations. Opinion polls showed the Conservative Party had a twenty-point lead over Jeremy

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<sup>27</sup> Council of the European Union (n 25) pt 3.9.

<sup>28</sup> May, 'Prime Minister's Letter to European Council President Donald Tusk' (n 14)

Corbyn's Labour Party<sup>29</sup> and May saw an opportunity to win a much larger majority and greater control over Parliament.

This move backfired spectacularly as Theresa May lost her parliamentary majority altogether. The prime minister campaigned badly on a manifesto that failed to win public support. She proved herself unable to connect with citizens on the campaign trail, appearing robotic and uneasy. Meanwhile Jeremy Corbyn ran an effective grassroots campaign. The Conservative Party suffered a net loss of 13 seats, producing a hung Parliament. In order to secure a working majority in Parliament, Theresa May entered into an alliance with the 10 MPs from the socially conservative Democratic Unionist Party (DUP) of Northern Ireland, who supported a 'hard' Brexit.

The parliamentary arithmetic that resulted from the ill-judged decision to call a general election left May with a serious political challenge. She needed to deliver a Brexit agreement that worked for the EU and would command the support of a majority of MPs in the UK Parliament, yet she did not command a majority in Parliament and her own party was bitterly divided. There was the option of brokering an agreement with the Labour Party. Had cross-party discussions started in earnest at this early stage it is conceivable that they would have yielded a set of negotiating objectives and ultimately a deal (focused on remaining in a customs union and in the EU single market), which would have been supported by a majority of MPs. But reaching out to the Labour Party ran the risk of alienating Eurosceptic MPs and splitting the Conservative party, a risk Theresa May was not prepared to take. Instead she held fast in her determination to deliver a parliamentary majority through support from Conservative and DUP MPs. This in turn meant that any deal would need to have the support of Conservative MPs who prioritised remaining in the customs union and single market as well as of those who insisted on the UK gaining 'full sovereignty' in external trade policy. This proved to be an impossible task.

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<sup>29</sup> Sebastian Payne, 'UK General Election: Theresa May Seizes the Moment to Bank Poll Lead' *FT.com* (18 April 2017) <<https://www.ft.com/content/7ef72c62-2425-11e7-a34a-538b4cb30025>> accessed 15 October 2019

#### IV. PHASE I OF FORMAL NEGOTIATIONS (JUNE 2017 – MARCH 2018)

Formal negotiations between the UK and EU began in June 2017, eleven days after the snap elections and with Theresa May's government weak and fragmented. The Department for Exiting the EU, which had responsibility for leading the Brexit negotiations, lost two of its four ministers in the wake of the elections and there were major divisions within the Cabinet on how to approach Brexit. Disagreement at the political level made it hard for civil servants to make clear and detailed proposals at the negotiating table.<sup>30</sup> A photograph from the second day of the formal negotiations captured the mood. It was taken at the European Commission's headquarters and showed the EU and UK negotiating teams facing each other across a glass table. The EU's side had a raft of documents, while the UK team had a single, slender notebook among them.<sup>31</sup>

##### 1. *The UK's (Wrong-Footed) Strategy*

The first issue to be negotiated was the sequencing of the negotiations. David Davis, UK Brexit Secretary said, in a widely-quoted media interview, that agreeing on the sequence of negotiations would be the 'row of the summer'.<sup>32</sup> The UK would insist that negotiations on the new trade relationship start immediately, in direct opposition to the EU's proposal for a two-phase schedule that left trade negotiations to the second phase. Yet, despite all the

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<sup>30</sup> Kylie MacLellan and William James, 'Brexit Negotiations Have Not Begun Well for UK, Says Former Top Diplomat' *Reuters* (7 August 2017) <<https://uk.reuters.com/article/uk-britain-eu-negotiations/brexit-negotiations-have-not-begun-well-for-uk-says-former-top-diplomat-idUKKBN1AN12V>> accessed 15 October 2019.

<sup>31</sup> Thierry Charlier, "'No Notes' Davis Riles Anti-Brexit Camp in Negotiations" (*Reuters*, 17 July 2017) <<https://www.reuters.com/article/us-britain-eu-notes/no-notes-davis-riles-anti-brexit-camp-in-negotiations-idUSKBN1A213Z>> accessed 15 October 2019.

<sup>32</sup> Oliver Wright, 'Timetable for Brexit Talks Will Be Row of Summer, Says Davis' *The Times* (15 May 2017) <<https://www.thetimes.co.uk/article/timetable-for-brexit-talks-will-be-row-of-summer-says-davis-zronsmrxr>> accessed 15 October 2019.

bravado, the UK accepted the EU's proposals on the first day of negotiations.<sup>33</sup> The EU had succeeded in structuring the process in its favour.

Although Theresa May appointed several remain supporters into her Cabinet, including Philip Hammond as Chancellor, her decision to put staunch Eurosceptics into pivotal Brexit roles set the UK on course for a hard-line, distributive negotiating strategy. Negotiation theory distinguishes between distributive negotiation strategies that are designed to resolve pure conflicts of interest, and integrative approaches which seek to find common or complementary interests and solve problems confronting both parties.<sup>34</sup> The approach adopted by the politicians in charge of the negotiations suggests that they perceived the UK and EU as having conflicting interests, overlooking the common interests that both parties had in achieving a negotiated settlement and minimising economic disruption.<sup>35</sup> While passing mention was made of shared values and the need to cooperate, the UK's leading politicians showed little interest in understanding the interests of EU Member States and the constraints within which they had to operate, and were not perceived by the EU as trustworthy interlocutors.<sup>36</sup> Instead of seeking to build trust and a spirit of collaboration to address a complex set of challenges faced by both parties, public pronouncements from Theresa May and leading ministers focused on classic distributive tactics including tabling unrealistic demands and making frequent threats to walk away.

The EU was framed by the UK's political leaders as being unreasonable and demanding a 'punitive deal'. Time and again UK leaders declared that 'no deal

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<sup>33</sup> Andrew Sparrow, 'UK Appears to Capitulate on Sequencing on First Day of Brexit Talks - as It Happened' *The Guardian* (19 June 2017) <<https://www.theguardian.com/politics/blog/live/2017/jun/19/boris-johnson-and-gove-both-back-may-as-tory-leadership-speculation-continues-politics-live>> accessed 15 October 2019.

<sup>34</sup> Walton and McKersie (n 3).

<sup>35</sup> A common mistake on the part of untrained negotiators is to assume that parties' interests are directly and completely opposed. See Leigh L Thompson, *The Mind and Heart of the Negotiator* (5th ed, Pearson 2012) 94.

<sup>36</sup> See for instance Angelique Chrisafis, Luke Harding and Arthur Neslen, "'Outrageous" and "a Liar" – Germany and France Lead Criticism of Boris Johnson' (14 July 2016) <<https://www.theguardian.com/politics/2016/jul/14/french-foreign-minister-boris-johnson-is-a-liar-with-his-back-against-the-wall>> accessed 15 October 2019.

was better than a bad deal' and said the UK was prepared to walk away from the negotiating table.<sup>37</sup> Constant references were made to the costs to EU Member States if the UK walked away and frequent pronouncements were made about a Global Britain that would be better off without close ties with the EU as it would be able to enter into an array of trade deals with other countries.<sup>38</sup> As Theresa May said in her speech in October 2016,

Countries including Canada, China, India, Mexico, Singapore and South Korea have already told us they would welcome talks on future free trade agreements. And we have already agreed to start scoping discussions on trade agreements with Australia and New Zealand.<sup>39</sup>

Emphasis was placed on strengthening ties to commonwealth countries, a vision that civil servants reportedly dubbed 'Empire 2.0'.<sup>40</sup>

While a hard-line distributive strategy is useful when negotiating the price of a second-hand car, as one party wins what the other party loses, it is rarely productive in complex public policy negotiations, where parties typically have a mix of complementary and competing interests. Hard-line approaches risk antagonising the other party, damaging future relations, and usually fail to generate deals that maximise value, even for the stronger party.<sup>41</sup> The UK's decision to adopt a distributive strategy in Brexit negotiations was

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<sup>37</sup> See for instance George Parker, 'Theresa May Warns UK Will Walk Away from "Bad Deal"' *Financial Times* (17 January 2017) <<https://www.ft.com/content/c3741ca2-dcc6-11e6-86ac-f253db7791c6>> accessed 15 October 2019.

<sup>38</sup> For instance, in a remark designed to capture media headlines, the UK Foreign Secretary told his Italian counterpart that Italy would agree to the UK's demands as Italy would lose prosecco exports if it didn't. BBC, 'Boris Johnson Attacked over "Prosecco Insult"' *BBC* (16 November 2016) <<https://www.bbc.com/news/uk-37995606>> accessed 15 October 2019.

<sup>39</sup> Theresa May, 'Theresa May- Her Full Brexit Speech at Conservative Conference' *The Independent* (2 October 2016) <<https://www.independent.co.uk/news/uk/politics/theresa-may-conference-speech-article-50-brexit-eu-a7341926.html>> accessed 15 October 2019.

<sup>40</sup> Sam Coates, 'Ministers Aim to Build "empire 2.0" with African Commonwealth' *The Times* (6 March 2017) <<https://www.thetimes.co.uk/article/ministers-aim-to-build-empire-2-0-with-african-commonwealth-after-brexit-v9bs6f6z9>> accessed 15 October 2019

<sup>41</sup> E. g. William I Zartman and Jeffrey Rubin (eds), *Power and Negotiation* (University of Michigan Press 2000).



particularly ironic as the UK was not negotiating from a superior power position. While the costs of a no-deal scenario were substantial for both the UK and EU, impact assessments showed they were much higher for the UK, as the EU Member States were a more important export market for the UK, than the UK was for them: while UK exports to the EU were equivalent to 12.2 per cent of UK GDP, EU exports to the UK were equivalent to only 2.6 per cent of EU GDP.<sup>42</sup> While the threat of walking away with no deal would be costly to some EU Member States, notably Ireland, Germany, the Netherlands, Belgium and France, 19 of the 27 EU Member States had a trade-related exposure to Brexit of less than 2 per cent of GDP. The cost to the UK of walking away was further increased by the immense short-term uncertainties it would create as many of the rules underpinning the UK's economic and regulatory structure would disappear.<sup>43</sup>

The UK's frequently invoked alternative options also lacked credibility. A trade deal with the United States was often held up as an alternative to the EU, but only 18 per cent of UK exports were destined for the US, compared with 43 per cent to the EU.<sup>44</sup> Moreover, the negotiation of a UK-US trade deal would meet strong domestic opposition within the UK. Much touted trade relations with all 51 commonwealth countries, including Canada, Australia, New Zealand and India, only accounted for 9 per cent of UK exports.<sup>45</sup> Meanwhile, UK attempts to initiate trade talks with third countries and invoke these alternative options were rebuffed, as third countries wanted to see the outcome of Brexit talks before engaging in substantive discussions.<sup>46</sup>

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<sup>42</sup> The UK in a Changing Europe, 'Cost of No Deal Revisited' (The UK in a Changing Europe 2018) 18 <<https://ukandeu.ac.uk/research-papers/cost-of-no-deal-revisited/>> accessed 15 October 2019.

<sup>43</sup> The UK in a Changing Europe (n 43).

<sup>44</sup> Office of National Statistics, 'Who Does the UK Trade With?' (3 January 2018) <<https://www.ons.gov.uk/businessindustryandtrade/internationaltrade/articles/w-hodoestheuktradewith/2017-02-21>> accessed 15 October 2019.

<sup>45</sup> 'Trade with the Commonwealth,' (Full Fact, 2 June 2017), <<https://fullfact.org/economy/uk-trade-commonwealth/>> accessed 15 October 2019.

<sup>46</sup> Patrick Wintour, 'May Woos Modi as UK Pursues Free-Trade Deal with India' *The Guardian* (18 April 2018) <<https://www.theguardian.com/world/2018/apr/18/uk->

Rather than shore up the UK's negotiation position, the UK's distributive moves, coupled with its ambiguous negotiating objectives, undermined its credibility as a negotiating partner. The UK was slow to table proposals, giving the EU the opportunity to set the agenda and terms of the discussion. David Davis, Secretary of State for Exiting the EU, defended this approach explaining that

At the end, we may well publish an alternative proposal, but at the moment the proper approach, to get the right outcome in the negotiation, is to challenge what it [the EU] is doing.<sup>47</sup>

The UK's failure to table detailed proposals frustrated progress and enabled the EU to attribute responsibility to the UK for the lack of progress. As Michel Barnier, the EU chief negotiator, stated during the negotiations, 'clarification of the UK's position is indispensable to negotiate and achieve ""sufficient progress"" on the settlement.'<sup>48</sup>

In several instances the UK declared a strong position publicly, only to back down, illustrating the perils of pursuing a distributive strategy when threats to walk away lacked credibility. On the issue of financial commitments for instance, the UK tried to link negotiations to discussions on future trade arrangements, insisting that it would only negotiate its financial commitments if the EU agreed to negotiate the future trade agreement in parallel. EU negotiators swiftly rebutted this move and the UK acquiesced.<sup>49</sup>

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and-india-sign-agreement-laying-ground-for-free-trade-deal-brexite> accessed 15 October 2019; Jon Stone, 'Brexit: India "not in a Rush" to Sign Trade Deal with Britain, Ambassador Says' *The Independent* (6 April 2018) <<https://www.independent.co.uk/news/uk/politics/brexit-india-uk-trade-deal-britain-ambassador-yashvardhan-sinha-a8292091.html>> accessed 15 October 2019.

<sup>47</sup> David Davis, Uncorrected oral evidence: David Davis evidence session, July 11, 2017, 4, <<http://data.Parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/european-union-committee/david-davies-evidence/oral/69275.pdf>> accessed 15 October 2019.

<sup>48</sup> Cited in Arabella Lang, Terry McGuinness, and Vaughne Miller, 'Brexit: The July Negotiations,' Research Briefings Parliament, August 2, 2017, <<https://researchbriefings.Parliament.uk/ResearchBriefing/Summary/CBP-8068#fullreport>> accessed 15 October 2019.

<sup>49</sup> Vaughne Miller, Terry McGuinness, and John Curtis, 'Brexit: The September Negotiations,' Research Briefings Parliament, October 6, 2017,

As negotiations got underway, tensions emerged among the UK politicians and civil servants on the UK negotiating team. Theresa May's public pronouncement in October 2016 that the UK would withdraw from the ECJ reportedly astonished senior officials, as there had not been a detailed internal discussion or assessment of the implications.<sup>50</sup> Similarly, her declaration in the same speech that Article 50 would be triggered by the end of March 2017 reflected the advice of her political advisers, who argued that she needed to be seen by the UK public to be delivering on Brexit, and went against the advice of senior civil servants. Senior civil servants were, rightly, worried that the UK would give the EU an advantage in the negotiations if Article 50 was triggered before the UK government had agreed on what it wanted Brexit to look like.<sup>51</sup>

Tensions were running so high between politicians and civil servants that, even before negotiations began, Ivan Rogers, the UK's permanent representative to the EU, resigned because his relationship with Theresa May and her team had broken down. In his resignation letter he highlighted the risks associated with the UK's lack of clarity in its Brexit negotiating objectives, tensions between the UK's team in Brussels and colleagues in London, and a lack of serious multilateral negotiating expertise in Whitehall. He urged colleagues to 'continue to challenge ill-founded arguments and muddled thinking' coming from London.<sup>52</sup> Meanwhile splits within the cabinet led Theresa May to move Olly Robbins, the UK's chief negotiator, to the Prime Minister's Office so that he would report directly to her. This sidelined David Davis, the ministerial lead for the negotiations, although he remained nominally in charge.<sup>53</sup>

A serious gap was also emerging between the UK government and Parliament, as the government failed to keep Parliament fully briefed on the

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<<https://researchbriefings.Parliament.uk/ResearchBriefing/Summary/CBP-8104>> accessed 15 October 2019.

<sup>50</sup> Knight (n 7).

<sup>51</sup> Ibid.

<sup>52</sup> Ivan Rogers, 'Sir Ivan Rogers' Letter to Staff in Full' (BBC, 4 January 2017) <<https://www.bbc.com/news/uk-politics-38503504>> accessed 15 October 2019.

<sup>53</sup> Ian Dunt, 'David Davis: In the End, There Was Nothing behind the Swagger' (Politics, 9 July 2018) <<https://www.politics.co.uk/blogs/2018/07/09/david-davis-in-the-end-there-was-nothing-behind-the-swagger>> accessed 15 October 2019.

negotiations. This failure to reach out and build trusted relations in Parliament cost the May government dearly when it came to ratification of the Withdrawal Agreement. Despite very delicate Parliamentary arithmetic, the government made no attempt to forge alliances within Westminster. Discussions in Parliament after the first round of negotiations in July 2017 revealed that the Brexit Secretary had not thought about a mechanism for keeping Parliament's EU Select Committee briefed.<sup>54</sup> The government failed to publish impact assessments on the impact of different Brexit scenarios and reports by Parliament's researchers relied on the EU for information about what was happening in the negotiating room.<sup>55</sup>

## *2. The EU Strategy: Clarity and Unity*

Given the manifold weaknesses in the UK strategy, it wasn't hard for the EU's negotiating strategy to look impressive. The EU was clear about its negotiating objectives, which focused on maintaining the integrity of the EU project and supporting Ireland in its determination to ensure there would be no hard border. Throughout the negotiations the EU negotiators appeared to be one step ahead, with the UK largely reacting to EU proposals.

Although the European Commission faced an unenviable task of negotiating Brexit on behalf of 27 Member States, it had decades of experience in leading international trade negotiations on behalf of the EU and using its domestic constraints as a source of leverage.<sup>56</sup> In the Brexit negotiations, the EU managed to preserve unity, showing few of the internal tensions that were so apparent across the Channel. Michel Barnier was a former French Minister who had also served as European Commissioner for Internal Market and Services. He worked hard to keep the leaders of the EU Member States aligned and briefed and quickly earned their trust and respect. Unlike their

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<sup>54</sup> Lang, McGuinness and Miller (n 48) 6.

<sup>55</sup> Sylvia de Mars, 'Brexit: Negotiations Update (March-June 2018),' Research Briefings Parliament, June 20, 2018, <<https://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-8339>> accessed 15 October 2019; Committee of Public Accounts, 'Exiting the European Union Eighteenth Report of Session 2017–19,' Publications Parliament, February 7, 2018, <<https://publications.Parliament.uk/pa/cm201719/cmselect/cmpubacc/467/467.pdf>> accessed 15 October 2019.

<sup>56</sup> Sophie Meunier and Kalypso Nicolaïdis, 'The European Union as a Conflicted Trade Power' (2006) 13 *Journal of European Public Policy* 906.

UK counterparts, Barnier's team was delegated substantial autonomy to negotiate with the UK and his team of negotiators worked effectively together and with their political principals.<sup>57</sup>

Although civil servants on the UK and EU negotiating teams formed a productive working relationship, relations at the political level were tense and became strained, hampering progress. At one stage during the formal negotiations, David Davis and his counterpart Michel Barnier spent only four hours in face-to-face talks during a six-month period.<sup>58</sup>

### 3. *The Joint Report (December 2017)*

After six months of intense negotiations from June to December 2017, the UK and EU reached preliminary agreement on phase one of the negotiations, issuing a Joint Report in December 2017.<sup>59</sup> On citizens' rights, the parties reached a 'common understanding' on how to provide reciprocal protection, while on the financial settlement they agreed on a methodology for calculating the UK's financial obligations.

The most challenging and fraught negotiations were over the UK's border with Ireland. The EU was firm that there would be no hard border on the island of Ireland, and the UK government agreed, but this was hard to square with the UK government's determination to leave the EU custom's union and single market, which implied new border checks. In August 2017 the UK had tabled a proposal for a UK-EU customs partnership arrangement under

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<sup>57</sup> Jennifer Rankin, 'Why the UK's Brexit Negotiation Tactics Drew a Blank' *The Guardian* (31 October 2018) <<https://www.theguardian.com/politics/2018/oct/31/why-the-uks-brex-it-negotiation-tactics-drew-a-blank>> accessed 15 October 2019.

<sup>58</sup> Alex Barker, George Parker and Guy Chazan, 'David Davis Has Spent Just 4 Hours in Talks with Michel Barnier This Year' *FT.com* (29 June 2018) <<https://www.ft.com/content/9e3aacfo-7b9c-11e8-bc55-50daf1b720d>> accessed 15 October 2019.

<sup>59</sup> Negotiators of the EU and the UK Government, 'Joint Report from the Negotiators of the European Union and the United Kingdom Government on Progress during Phase 1 of the Negotiations under Art. 50 TEU on the United Kingdom's Orderly Withdrawal from the European Union' (2017) <[https://ec.europa.eu/commission/sites/beta-political/files/joint\\_report.pdf](https://ec.europa.eu/commission/sites/beta-political/files/joint_report.pdf)> accessed 15 October 2019.

which both parties could have different external tariffs and rules of origin and yet have frictionless trade between them.<sup>60</sup> Under the UK's proposal, the UK would essentially implement two parallel systems at its borders. For goods coming into the UK that were destined for the EU, the UK would act on behalf of the EU, levying EU tariffs and checking products met EU standards. For goods destined for sale in the UK, it would levy UK tariffs and check products met UK standards. The UK government acknowledged this would need a 'robust enforcement mechanism' and the tracking of goods to ensure that they reached their intended destination.<sup>61</sup> The UK negotiators also proposed measures to streamline customs procedures, the use of technology to enable any checks to be carried out virtually, and continued regulatory alignment in agricultural products.<sup>62</sup>

Unsurprisingly, the UK's complex proposals were met with scepticism by the EU and few were persuaded that they were viable. As Ireland's Foreign Minister Simon Coveney stated,

What we do not want to pretend is that we can solve the problems of the border on the island of Ireland through technical solutions like cameras and pre-registration and so on. That is not going to work.<sup>63</sup>

Unable to agree on a detailed solution on the UK-Ireland border, the UK and EU agreed on a set of overarching principles that focused on upholding the Good Friday Agreement and avoiding any physical infrastructure at the border, as well as preserving the integrity of the UK's internal market by ensuring that there would be no customs border between Northern Ireland

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<sup>60</sup> HM Government, 'Future Customs Arrangements' <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/637748/Future\\_customs\\_arrangements\\_-\\_a\\_future\\_partnership\\_paper.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/637748/Future_customs_arrangements_-_a_future_partnership_paper.pdf)> accessed 15 October 2019.

<sup>61</sup> Ibid.

<sup>62</sup> Ibid. See also HM Government, 'Northern Ireland and Ireland Position Paper' (2017) <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/638135/6.3703\\_DEXEU\\_Northern\\_Ireland\\_and\\_Ireland\\_INTERACTIVE.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/638135/6.3703_DEXEU_Northern_Ireland_and_Ireland_INTERACTIVE.pdf)> accessed 15 October 2019.

<sup>63</sup> 'The EU Already Has the Technology to Enforce an Electronic Border' *The Times* (20 August 2017) <<https://www.thetimes.co.uk/article/the-eu-already-has-the-technology-to-enforce-an-electronic-border-h8onkfr22>> accessed 15 October 2019.

and the rest of the UK. The Joint Report committed the parties to upholding these principles 'in all circumstances'.<sup>64</sup> These principles were particularly contentious for the Eurosceptic wing of the Conservative Party as upholding them implied maintaining a very close economic relationship with the EU, which threatened to undermine UK sovereignty in external trade policy.

#### V. PHASE II OF FORMAL NEGOTIATIONS (MARCH 2018 – NOVEMBER 2018)

Following the end of phase one and the publication of the Joint Report, the EU agreed that 'sufficient progress' had been made for the negotiations to move to the second phase, which included negotiating a framework for future trade relations between the UK and EU. Donald Tusk, President of the European Council, warned that agreeing to a deal by the March 2019 deadline would be 'dramatically difficult' and that the Phase II would be 'more demanding, more challenging than the first phase'.<sup>65</sup>

##### *1. The EU Holds the Pen*

Once again, the EU played a decisive role, shaping the trajectory and outcome of the negotiations. The European Commission proposed detailed negotiating guidelines for phase two of the negotiations, which were published by the European Council as negotiating directives in January 2018.<sup>66</sup> These asked the EU team to negotiate a 'standstill' transition period where the UK would be outside the EU and no longer participate in or nominate or elect members of the EU institutions, but would be bound by

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<sup>64</sup> Negotiators of the EU and the UK Government (n 59) 8.

<sup>65</sup> John Ashmore, 'Donald Tusk Warns That Phase Two of Brexit Talks Will Be "More Challenging" than the First' (PoliticsHome, 16 December 2017) <<https://www.politicshome.com/news/uk/foreign-affairs/brexit/news/91514/donald-tusk-warns-phase-two-brexit-talks-will-be-%E2%80%98more>> accessed 15 October 2019.

<sup>66</sup> Council of the European Union, 'ANNEX to the COUNCIL DECISION Supplementing the Council Decision of 22 May 2017 Authorising the Opening of the Negotiations with the United Kingdom of Great Britain and Northern Ireland for an Agreement Setting out the Arrangements for Its Withdrawal from the European Union' <<https://www.consilium.europa.eu/media/32504/xt21004-ado1re02en18.pdf>> accessed 15 October 2019.



the whole of the EU acquis. In line with Article 50, agreement on a future relationship would only be finalised and concluded once the UK had left the EU, although the EU would be ready to engage in preliminary and preparatory discussions with the aim of identifying an overall understanding of the framework for the future relationship. This was in direct opposition to the UK's proposal to enter into substantive negotiations on a future trade agreement during phase two.<sup>67</sup>

The EU negotiating directives were drafted to be very specific and to provide little room for negotiation. In a move to gain the upper hand in the negotiations, the EU codified its detailed negotiating directives, as well as the principles that had been agreed in the Joint Report, and tabled them in the form of a draft legal text.<sup>68</sup> The draft text was circulated by the European Commission for internal discussion by its Member States before being forwarded to the UK.<sup>69</sup> This text was then used as the basis for the negotiations: the EU negotiators were holding the pen.

The UK accepted major aspects of the EU's proposals for the transition period and, in doing so, agreed to provisions that crossed many of the red lines Theresa May had set out in 2016. Although the UK would have technically left the EU, during the 21-month transition period divergence from EU law would not be possible and the ECJ would continue to be a binding source of authority in the UK, the UK would remain in the EU's customs union and

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<sup>67</sup> John Curtis et al, 'Brexit: "Sufficient Progress" to Move to Phase 2' (2017) <<https://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-8183>> accessed 15 October 2019.

<sup>68</sup> 'European Commission Draft Withdrawal Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community' <[https://ec.europa.eu/commission/sites/beta-political/files/draft\\_withdrawal\\_agreement.pdf](https://ec.europa.eu/commission/sites/beta-political/files/draft_withdrawal_agreement.pdf)> accessed 15 October 2019.

<sup>69</sup> European Commission, 'Draft Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community Highlighting the Progress Made (Coloured Version) in the Negotiation Round with the UK of 16-19 March 2018' <[https://ec.europa.eu/commission/sites/beta-political/files/draft\\_agreement\\_coloured.pdf](https://ec.europa.eu/commission/sites/beta-political/files/draft_agreement_coloured.pdf)> accessed 15 October 2019.

adhere to its trade policies, and free movement of people would continue.<sup>70</sup> The UK agreed to stay in the Common Fisheries Policy with no formal voting rights over fishing quotas during the transition period, although it had the right to be consulted.<sup>71</sup> The UK did manage to secure agreement that it could negotiate and sign, although not implement, trade deals with third countries during the transition period.

## 2. *UK Finally Clarifies Its Negotiating Objectives – or Does It?*

Negotiations continued at the technical level in a wide range of areas such as protection of data, police and judicial cooperation, and dispute settlement. But negotiations about how to operationalise the agreed principles with regards to Northern Ireland and on the future of UK-EU relations were painfully slow. The EU proposed a 'backstop' in the draft Withdrawal Agreement of March 2018 that would uphold the Good Friday Agreement by creating a customs and regulatory border down the Irish Sea, something to which Theresa May declared that 'no United Kingdom prime minister could ever agree to' as it would undermine the UK's own internal market and territorial integrity.<sup>72</sup> Subsequent amendments to the UK Customs Bill in

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<sup>70</sup> Sylvia de Mars, 'Brexit: Council Directives for Negotiations on Transition,' March 9, 2018, <<https://researchbriefings.Parliament.uk/ResearchBriefing/Summary/CBP-8234#fullreport>> accessed 15 October 2019 and Vaughne Miller et al, 'Brexit: The Draft Withdrawal Agreement,' March 26, 2018, <<https://researchbriefings.Parliament.uk/ResearchBriefing/Summary/CBP-8269#fullreport>> accessed 15 October 2019.

<sup>71</sup> Kait Bolongaro, 'FAQ: Behind the Brexit Fisheries Transition Deal' (*Politico*, 21 March 2018) <<https://www.politico.eu/article/uk-government-faq-behind-the-brexite-fisheries-transition-deal/>> accessed 15 October 2019 and Department for Exiting the European Union HM Government, 'Draft Text For Discussion: Implementation Period' 7 <<https://www.gov.uk/government/publications/draft-text-for-discussion-implementation-period>> accessed 15 October 2019.

<sup>72</sup> 'Prime Minister's Oral Answers to Questions, 28 February 2018' (2018), <<https://hansard.Parliament.uk/Commons/2018-02-28/debates/E91093BE-192E-4E01-ABCE-3CEB6973074B/PrimeMinister>> accessed 15 October 2019.

July 2018, proposed by Eurosceptic Conservative MPs, ruled out a customs border in the Irish Sea, forcing its renegotiation.<sup>73</sup>

Progress on future UK-EU relations continued to be impeded by on-going divisions within the UK cabinet on the nature of post-Brexit relations. This caused frustration among the EU Member States, with European leaders calling on the UK for 'further clarity' and 'realistic and workable proposals'.<sup>74</sup> Finally, in July 2018, only nine months before the UK was due to leave the EU, Theresa May held a meeting to try and unify her cabinet around a single vision for UK-EU relations. After fraught discussions, the cabinet agreed a position, which was then set out in a White Paper.<sup>75</sup> The White Paper set out a vision of future relations based on a free trade area for goods, with the phased introduction of a Facilitated Customs Arrangement and a 'common rulebook' with the EU for goods. The Facilitated Customs Arrangement was based on the UK's previous proposal (tabled in August 2017 and which the EU had already roundly rejected) where the UK would administer two separate arrangements at its borders. With regard to common rules, the UK proposed a binding treaty commitment to continued harmonisation with EU rules on agri-food (but not services); continued participation in EU regulatory institutions; a common rulebook on state aid; cooperation on competition measures; and a 'non-regression' provision in areas including labour and environment. However, the UK was adamant that freedom of movement would end. The UK position was premised on being able to opt in to some aspects of the EU single market and out of other aspects, a position that was in direct contradiction to the EU's own negotiating mandate.

Although the cabinet collectively signed up to the new position, two days later David Davis resigned, stating that 'the current trend of policy and

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<sup>73</sup> BBC, 'Leo Varadkar: "no Cause for Panic" on UK Backstop Position' (BBC, 17 July 2018) <<https://www.bbc.com/news/uk-northern-ireland-44857742>> accessed 15 October 2019.

<sup>74</sup> European Council, 'European Council (Art. 50) Meeting (29 June 2018) - Conclusions' (2018) Press Release <<https://www.consilium.europa.eu/media/35966/29-euco-art50-conclusions-en.pdf>> accessed 15 October 2019.

<sup>75</sup> HM Government White Paper, 'The Future Relationship between the United Kingdom and the European Union' <<https://www.gov.uk/government/publications/the-future-relationship-between-the-united-kingdom-and-the-european-union>> accessed 15 October 2019.

tactics' was making it look 'less and less likely' that the UK would leave the EU customs union and the single market.<sup>76</sup> His resignation was followed by that of Boris Johnson and eight other ministers and senior officials who supported a 'hard Brexit' agreement. Outside of cabinet, the White Paper was criticised by MPs within the Conservative Party, particularly members of the Eurosceptic European Research Group, for ceding too much sovereignty. It was also criticised by opposition parties. The UK Labour Party argued that it did not resolve the problems of the Northern Ireland border and that the Facilitated Customs Arrangement would be a 'bureaucratic nightmare, unworkable, and costly for business' and reliant on 'technology that does not currently exist'.<sup>77</sup>

### 3. *The Withdrawal Agreement and Political Declaration (November 2018)*

Although the UK's position was unpopular at home, it nonetheless formed the basis of UK proposals to the EU. Theresa May pitched the UK's proposals at an informal meeting of EU leaders in Salzburg in September 2018, but she proved to be a poor diplomat. She insisted that the UK proposals, as set out in the White Paper, were the only viable option for future relations and appeared to be trying to impose them on EU leaders, a move that only served to antagonise. Donald Tusk, European Council President, declared that while there were 'positive elements' in the UK's proposals 'the suggested framework for economic cooperation *will not work*. Not least because it risks undermining the single market [emphasis added]'.<sup>78</sup> The EU's flat rejection of the UK's vision for the future partnership reportedly 'stunned' the UK government, suggesting that the UK had a poor

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<sup>76</sup> David Davis and Theresa May, 'Brexit: David Davis' Resignation Letter and May's Reply in Full' (9 July 2018) <<https://www.bbc.com/news/uk-politics-44761416>> accessed 15 October 2019.

<sup>77</sup> Keir Starmer, 'EU: Future Relationship White Paper' (2018), <<https://hansard.parliament.uk/commons/2018-07-12/debates/5C45D798-0286-4298-BBDE-44C860396ECD/EUFutureRelationshipWhitePaper>> accessed 15 October 2019.

<sup>78</sup> Donald Tusk, 'Remarks by President Donald Tusk after the Salzburg Informal Summit' (20 September 2018) <<https://www.consilium.europa.eu/en/press/press-releases/2018/09/20/remarks-by-president-donald-tusk-after-the-salzburg-informal-summit/>> accessed 15 October 2019.

understanding of their negotiation counterparts. Theresa May accused the European leaders of showing a lack of respect and declared negotiations to be at an 'impasse'.<sup>79</sup>

Eventually, after a series of missed deadlines, the UK and EU reached agreement on 14 November 2018 on a 585-page Withdrawal Agreement that set out the 'divorce terms' and an accompanying 26-page Political Declaration which outlined the future UK-EU relationship.<sup>80</sup> Several areas of the Withdrawal Agreement remained largely unchanged from the March 2018 draft agreement, including on citizens' rights.<sup>81</sup> New features included a review clause that provided for the extension of the transition period if agreement on future relations had not been reached within the initial 21-months. It also provided for the use of independent arbitration to resolve disputes during the transition period, although matters of EU law would be referred to the ECJ.

The Withdrawal Agreement included a lengthy Protocol on Northern Ireland, which came to be known as the 'backstop', designed to prevent the return of a hard border on the island of Ireland. This was ensured through a hybrid of two mechanisms. It had UK-wide elements, providing for the creation of a single customs territory between the EU and UK in the event that the UK and EU failed to reach an agreement on future relations by the

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<sup>79</sup> Arthur Snell, 'Salzburg Brexit Failure Stems from Insular UK Government' (Politico.eu, 23 September 2018) <<https://www.politico.eu/article/brexit-salzburg-theresa-may-failure-stems-from-inward-looking-uk-government/>> accessed 15 October 2019.

<sup>80</sup> European Council, 'Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, as Endorsed by Leaders at a Special Meeting of the European Council on 25 November 2018' <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/759019/25\\_November\\_Agreement\\_on\\_the\\_withdrawal\\_of\\_the\\_United\\_Kingdom\\_of\\_Great\\_Britain\\_and\\_Northern\\_Ireland\\_from\\_the\\_European\\_Union\\_and\\_the\\_European\\_Atomic\\_Energy\\_Community.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/759019/25_November_Agreement_on_the_withdrawal_of_the_United_Kingdom_of_Great_Britain_and_Northern_Ireland_from_the_European_Union_and_the_European_Atomic_Energy_Community.pdf)> accessed 15 October 2019.

<sup>81</sup> House of Commons Exiting the European Union Committee, 'The Progress of the UK's Negotiations on EU Withdrawal- The Withdrawal Agreement and Political Declaration' (House of Commons, December 9, 2018), <<https://publications.parliament.uk/pa/cm201719/cmselect/cmexeu/1778/1778.pdf>> accessed 15 October 2019.

end of the transition period. It also had elements that only pertained to Northern Ireland, committing the region to continued harmonisation with a series of EU technical rules and regulations, while the rest of the UK could diverge from them.<sup>82</sup>

Reflecting continuing disagreement on the nature of future UK-EU relations, the Political Declaration was not the substantive and detailed document that the UK and EU negotiators had promised. While expressing a high level of ambition about the nature and scope of the future relationship, the document only set out a series of options for the UK's future trade with the EU and established a framework for ongoing conversations across a range of areas.<sup>83</sup> In effect, the UK and EU agreed to kick the can down the road, leaving the tough decisions over the nature of future relations for negotiation during the transition period, after the UK had left the EU.

#### VI. THERESA MAY FAILS TO WIN SUPPORT AT HOME (DECEMBER 2018 – JUNE 2019)

With a deal agreed between the UK and EU, it needed to be ratified in their respective parliaments. Prime Minister Theresa May said the deal 'delivered for the British people' and set the UK 'on course for a prosperous future'.<sup>84</sup> Yet the deal she had negotiated met strong opposition in the UK Parliament, and the UK was catapulted into a period of political crisis. As the two-year deadline imposed by Article 50 drew near, there was mounting concern that the UK might 'crash out' of the EU with no deal in place. Fully aware of the

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<sup>82</sup> European Council, 'Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, as Endorsed by Leaders at a Special Meeting of the European Council on 25 November 2018' (n 80) at 301.

<sup>83</sup> 'Political Declaration Setting out the Framework for the Future Relationship between the European Union and the United Kingdom' <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/759021/25\\_November\\_Political\\_Declaration\\_setting\\_out\\_the\\_framework\\_for\\_the\\_future\\_relationship\\_between\\_the\\_European\\_Union\\_and\\_the\\_United\\_Kingdom\\_.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/759021/25_November_Political_Declaration_setting_out_the_framework_for_the_future_relationship_between_the_European_Union_and_the_United_Kingdom_.pdf)> accessed 15 October 2019.

<sup>84</sup> Laurence Peter and Robbie Hawkins, 'Reaction as EU Signs off UK's Withdrawal' (BBC, 25 November 2018) <<https://www.bbc.com/news/live/uk-politics-46329073>> accessed 15 October 2019.

Parliamentary arithmetic in the UK and the possibility that the Withdrawal Deal might be defeated in the UK Parliament, Jean-Claude Juncker, President of the European Commission, cautioned that the Withdrawal Deal was the 'best' and 'only possible' deal.<sup>85</sup> He warned the UK Parliament that the EU was not interested in renegotiating the deal, even if the UK Parliament wanted amendments.

*1. The Deal Is Rebuffed by the UK Parliament (1<sup>st</sup> Attempt)*

The role of the UK Parliament in the Brexit ratification process had been strengthened by an amendment to the EU Withdrawal Act that had passed in 2017, which required any Brexit deal to be enacted by statute rather than implemented by government order.<sup>86</sup> This ensured that the UK Parliament would be given a final 'meaningful' vote on the Withdrawal Agreement.

It rapidly became clear that the Withdrawal Agreement and Political Declaration did not have the backing of a majority of MPs in the UK Parliament. Given the delicate Parliamentary arithmetic, Theresa May needed almost all Conservative and DUP MPs on board. Yet Eurosceptic Conservative MPs strongly opposed the wording of the Northern Ireland backstop, arguing that it could permanently 'trap' the UK into a customs union with the EU. The backstop also crossed a red line for the DUP as it implied regulatory divergence and checks between Northern Ireland and the rest of the UK. At the other end of the political spectrum, pro-European Conservatives disliked the Withdrawal Agreement as it failed to ensure frictionless trade with the EU, while the Labour Party and smaller opposition parties also opposed the Agreement.

Despite the veto power that the UK Parliament had over the negotiations, the government had not invested in cultivating an effective working relationship with MPs. MPs were deeply frustrated at the government's reticence to share information. Only a few days before the meaningful vote was scheduled, MPs found the government to be in contempt of Parliament for the first time in the UK's history. The vote was prompted by the

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<sup>85</sup> Ibid.

<sup>86</sup> European Union (Withdrawal) Act 2018.



government's refusal to publish all of the legal advice that it had received on the Withdrawal Agreement, despite a legally binding Parliamentary vote passed in November 2018 that required it to do so.<sup>87</sup> The DUP voted against the government, exposing the fragility of the government's working majority.

In light of the strong parliamentary opposition, Theresa May withdrew the 'meaningful vote' on the Withdrawal Agreement on 10 December 2018, one day before it was scheduled. She announced that the vote would be held in January 2019 and she would, meanwhile, seek further assurances from the EU about the Northern Ireland backstop.<sup>88</sup> As before, her strategy focused on winning over members of the European Research Group.

Despite EU leaders issuing a formal statement at the UK's request, it fell short of the legal commitment Theresa May had hoped for and failed to reassure Eurosceptic MPs.<sup>89</sup> The first meaningful vote on the Withdrawal Agreement took place in mid-January 2019 and the government suffered the largest defeat of any government in modern Parliamentary history, losing by 230 votes.<sup>90</sup> This prompted the Labour party to table a motion of no confidence, which the government narrowly won.<sup>91</sup>

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<sup>87</sup> Benjamin Kentish, 'Theresa May Government Found in Contempt of Parliament over Failure to Publish Full Brexit Legal Advice' *The Independent* (4 December 2018) <<https://www.independent.co.uk/news/uk/politics/contempt-parliament-vote-theresa-may-brexit-legal-advice-government-geoffrey-cox-a8667086.html>> accessed 15 October 2019.

<sup>88</sup> Theresa May, 'PM's Statement on Exiting the European Union: 10 December 2018' (2018) <<https://www.gov.uk/government/speeches/pms-statement-on-exiting-the-european-union-10-december-2018>> accessed 15 October 2019.

<sup>89</sup> European Council, 'Special Meeting of the European Council (Art. 50) (13 December 2018)- Conclusions' (2018) Press Release <<https://www.consilium.europa.eu/media/37508/13-euco-art-50-conclusions-en.pdf>> accessed 15 October 2019.

<sup>90</sup> Heather Stewart, 'May Suffers Heaviest Parliamentary Defeat of a British PM in the Democratic Era' *The Guardian* (16 January 2019) <<https://www.theguardian.com/politics/2019/jan/15/theresa-may-loses-brexit-deal-vote-by-majority-of-230>> accessed 15 October 2019.

<sup>91</sup> Heather Stewart, Jessica Elgot and Peter Walker, 'Theresa May Survives Vote, but Britain Remains in Brexit Deadlock' *The Guardian* (17 January 2019) <<https://www.theguardian.com/politics/2019/jan/16/mays-government-survives-no-confidence-vote-after-brexit-defeat>> accessed 15 October 2019.

## 2. *The Deal Is Rebuffed by the UK Parliament (2<sup>nd</sup> Attempt)*

Following the government's resounding defeat, Theresa May promised to change approach and be 'more flexible, open and inclusive' in engaging with Parliament and she held her first proper discussions with opposition parties. Looking to win over Labour MPs, she promised to 'embed the strongest possible protections on workers' rights and the environment'.<sup>92</sup> The Labour Party tabled specific changes to the Political Declaration that it wanted to see enshrined in law to secure its support for a deal. These included a permanent and comprehensive UK-wide customs union; close alignment with the EU single market and dynamic alignment on rights and protections so that UK standards keep pace with evolving standards across Europe; clear commitments on participation in EU agencies and funding programmes, including in areas such as the environment, education, and industrial regulation; and unambiguous agreements on the detail of future security arrangements, including access to the European Arrest Warrant and vital shared databases.<sup>93</sup>

The proposals from the Labour Party may well have been amenable to the EU as they did not require the renegotiation of the Withdrawal Agreement, and it is conceivable that a revised Political Declaration would have won a majority in the UK Parliament. Yet accepting the Labour Party's proposals would have alienated Eurosceptic MPs and risked splitting the Conservative Party, a move that Theresa May was still not prepared to make. Instead the prime minister adopted a strategy of 'running the clock down' hoping that, as the March 29 deadline for leaving the EU approached and the risk of leaving without a deal increased, more MPs would support the Withdrawal Agreement.

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<sup>92</sup> Theresa May, 'Statement under Section 13(4) of the European Union (Withdrawal) Act 2018: Written Statement- HCWS1258' <<https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2019-01-21/HCWS1258/>> accessed 15 October 2019.

<sup>93</sup> Jeremy Corbyn, 'Jeremy Corbyn's Letter to Theresa May Spelling out Brexit Demands' (7 February 2019) <<https://www.politicshome.com/news/uk/political-parties/labour-party/news/labour-party/101667/read-full-jeremy-corbyns-letter>> accessed 15 October 2019.

Following more talks in Brussels in early March, Theresa May secured a package of interpretations and clarifications on the Withdrawal Agreement and Political Declaration aimed at placating the Eurosceptic wing of her party.<sup>94</sup> Yet these changes did not go far enough to secure a majority in Parliament, and the UK government lost a second meaningful vote on 12 March 2019 by 149 votes.<sup>95</sup> While a smaller margin than the previous meaningful vote, it was still a historic loss. With only two weeks to go before the UK was due to leave the EU, the government's negotiating strategy was in tatters, and the UK appeared to be without a functioning government. 'This is a circus that is beyond comprehension' said one senior EU diplomat working on Brexit. Another senior Brussels figure involved in talks likened it to 'dealing with a failed state'.<sup>96</sup>

With the UK government failing to show leadership, backbench MPs tried to exert control over the Brexit process, passing a parliamentary motion to reject a 'no deal' scenario.<sup>97</sup> Theresa May sought to bring her deal back for a third time but, in a surprise turn of events, she was blocked by the Speaker of the House of Commons, on the basis of a 400-year old guide to parliamentary procedure, which prevented the government bringing back a motion that was 'fundamentally the same' during the same parliamentary session.<sup>98</sup>

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<sup>94</sup> John Curtis and Sylvia de Mars, 'The "Strasbourg Package"' (House of Commons 2019) Commons Briefing Paper <<https://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-8525#fullreport>> accessed 15 October 2019.

<sup>95</sup> 'Government's Brexit Deal Defeated Again in "Meaningful Vote"' (*www.parliament.uk*, 12 March 2019) <<https://www.parliament.uk/business/news/2019/march/key-brexit-vote-as-meaningful-vote-returns-to-the-commons/>> accessed 15 October 2019.

<sup>96</sup> Alex Barker, 'EU Frustration with UK Rises as Brexit Talks near Final Hours' *Financial Times* (Brussels, 20 March 2019) <<https://www.ft.com/content/80bcdb6a-4b19-11e9-bbc9-6917dce3dc62>> accessed 15 October 2019.

<sup>97</sup> UK Parliament, 'Government's Brexit Deal Defeated Again in "Meaningful Vote"' (*www.parliament.uk*, 12 March 2019) <<https://www.parliament.uk/business/news/2019/march/key-brexit-vote-as-meaningful-vote-returns-to-the-commons/>> accessed 15 October 2019.

<sup>98</sup> Jessica Elgot, 'Brexit: John Bercow Rules out Third Meaningful Vote on Same Deal' *The Guardian* (18 March 2019) <<https://www.theguardian.com/politics/2019/mar/18/brexit-john-bercow-rules-out-third-meaningful-vote-on-same-deal>> accessed 15 October 2019.

### *3. The UK Requests Article 50 Extension*

With the UK facing what was widely described as a constitutional crisis, Theresa May wrote to Donald Tusk, President of the European Council on 20 March 2019, to ask for an extension to Article 50 until 30 June 2019. She argued that this would provide sufficient time for her to attain parliamentary support for the Withdrawal Agreement.<sup>99</sup>

The EU agreed to extend the Article 50 deadline but rejected the UK's proposed extension date. Following intense internal negotiations and reported tensions between President Merkel of Germany and President Macron of France, the EU leaders offered a shorter extension period until 22 May 2019, provided that the Withdrawal Agreement 'is approved by the House of Commons next week'.<sup>100</sup> In the event that the Withdrawal Agreement was not approved, the European Council offered an even shorter extension until 12 April 2019 stating that it 'expects the United Kingdom to indicate a way forward before this date for consideration by the European Council'.<sup>101</sup> The 12 April date was chosen as it was the last point at which the UK, by law, had to state whether it would participate in elections for the European Parliament, scheduled for May 2019.

### *4. The Deal Is Rebuffed by the UK Parliament (3<sup>rd</sup> Attempt) and Theresa May Steps Down*

Having secured a brief respite from the EU, backbench MPs held a series of 'indicative votes' on different Brexit scenarios to try and break the parliamentary deadlock. But, despite two rounds of voting, there was no majority for any of the options tabled.<sup>102</sup> Meanwhile Theresa May, still

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<sup>99</sup> Theresa May, 'Prime Minister's Letter to President of the European Council' (20 March 2019) <<https://www.gov.uk/government/publications/prime-ministers-letter-to-president-tusk-20-march-2019>> accessed 15 October 2019.

<sup>100</sup> European Council, 'European Council (Art. 50) Conclusions, 21 March 2019' (2019) <<https://www.consilium.europa.eu/en/press/press-releases/2019/03/21/european-council-art-50-conclusions-21-march-2019/>> accessed 15 October 2019.

<sup>101</sup> Ibid.

<sup>102</sup> UK Parliament, 'House of Commons Holds Second Round of Indicative Votes' (www.parliament.uk, 1 April 2019) <<https://www.parliament.uk/business/news/2019/april/house-of-commons-holds-second-round-of-indicative-votes/>> accessed 15 October 2019.

determined to get the Withdrawal Agreement passed rather than change her strategy for navigating domestic politics, found a way through parliamentary procedure and held a third meaningful vote on 29 March 2019 on the Withdrawal Agreement (without the Political Declaration). But the government was defeated once again.<sup>103</sup>

With neither the UK government nor backbench MPs able to find a way forward, Theresa May placed the UK's fate in the hands of EU leaders, writing once again to Donald Tusk asking for the Article 50 deadline to be extended to 30 June 2019.<sup>104</sup> EU leaders held an emergency summit on 10 April 2019 to consider their response. After an intense debate they offered the UK an extension until 31 October 2019, providing the UK with six months to try and find a resolution to its fraught domestic politics.<sup>105</sup>

With the date for UK exit postponed, the UK was legally obliged to participate in the EU elections to select new Members of the European Parliament. Nigel Farage, former UKIP leader, created a new political party, the Brexit Party, which committed to 'making sure that the UK leaves the EU'.<sup>106</sup> The election results revealed the depth of political polarisation in UK society. The staunchly Eurosceptic Brexit Party won with just over 30 per cent of the vote share, giving it 29 of the UK's 73 allocated MEPs, while the staunchly pro-European Liberal Democrats came second, winning twenty per cent of the vote share and 16 MEPs. The two main parties performed very poorly, with the Labour Party winning 14 per cent of the vote share and the Conservative Party only nine per cent, placing it in fifth place behind the

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<sup>103</sup> UK Parliament, 'Commons Votes to Reject Government's EU Withdrawal Agreement' (www.parliament.uk, 29 March 2019) <<https://www.parliament.uk/business/news/2019/march/mps-debate-and-vote-on-the-withdrawal-agreement-with-the-european-union/>> accessed 15 October 2019.

<sup>104</sup> Theresa May, 'Prime Minister's Letter to President Tusk: 5 April 2019' (5 April 2019) <<https://www.gov.uk/government/publications/prime-ministers-letter-to-president-tusk-5-april-2019>> accessed 15 October 2019.

<sup>105</sup> European Council, 'Special Meeting of the European Council (Art. 50) (10 April 2019) – Conclusions' <<https://www.consilium.europa.eu/media/39042/10-euco-art50-conclusions-en.pdf>> accessed 15 October 2019.

<sup>106</sup> See <https://www.thebrexitparty.org/>.

Green Party.<sup>107</sup> This was the Conservative Party's worst ever result in a national election since the party was founded in 1834. Theresa May stepped down as party leader in early June 2019.

## **VII. CONCLUSION: FAILURE TO BROKER DOMESTIC COALITIONS**

The UK government's Brexit negotiating strategy was surprisingly weak given its strong civil service and cadre of experienced diplomats. This article has shown how Theresa May's government embarked on negotiations with other EU countries without a clear set of negotiating objectives; was unable to represent itself as a unified negotiating team; often found itself on the back foot, responding to EU proposals on both sequencing and content; and its UK politicians pursued an ill-judged distributive strategy that did not reflect the nature of the underlying negotiating problem or the UK's relative power position.

I have argued that these weaknesses can be attributed to continued divisions within the UK, and the failure of Theresa May to broker agreement within her cabinet and forge a majority coalition in the UK Parliament. The failure of cabinet to agree a common position resulted in the UK negotiating without a clear set of objectives and this lack of political direction generated tensions within the UK negotiating team. In turn, this enabled the EU to seize the initiative in the negotiations and decisively shape the outcome.

At the level of parliamentary politics, it is striking that Theresa May decided not to try and forge a cross-party coalition for the Brexit negotiations from the outset, despite presiding over a minority government and facing deep splits within her own party. Given these constraints, a cross-party approach to the negotiations provided the best prospects for negotiating a deal that could be ratified. The Labour Party's proposals in February 2019 suggest that relatively minor amendments to the Political Declaration, including a credible commitment to the UK remaining in a customs union and aligning with the EU single market, could have yielded a parliamentary majority. Yet

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<sup>107</sup> BBC News, 'European Election 2019: UK Results in Maps and Charts' (BBC News Online, 27 May 2019) <<https://www.bbc.co.uk/news/uk-politics-48403131>> accessed 15 October 2019.

forging a cross-party coalition in Parliament risked splitting the Conservative Party, a move that Theresa May was unwilling to take.

Would a different leader have fared any better? It is tempting to attribute faults in the UK strategy to Theresa May's weaknesses as a politician. Yet even the most astute politician would have faced major challenges in trying to forge a cross-party coalition. The winner-takes-all logic of the UK's electoral system is a formidable barrier to collaboration between the two dominant political parties, even when such collaboration is in the national interest.