

# Towards a realistic contingency approach to negotiations

Clingendael Report

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# 1 Introduction

One of the most praised elements of the workings of the European Union (EU) is its ability to reach compromises between its Member States. Yet, evidently, the integration process of the EU is also characterised by protracted decision-making, resulting in poorly-functioning policies in domains that are highly politicised, like migration, enlargement and Eurozone policy. Even when difficult compromises could be stuck, compromising on salient political issues has proven to be problematic in several ways: policies are not functioning as intended because some of their actual consequences were unforeseen; policies are not functioning as well because they were poorly thought through; policy initiatives have suffered from questionable (ideological or overoptimistic) assumptions; policies suffer from poor substantiation; or policies stretch the interpretations of EU treaties (also known as creeping integration), for example in taxation policy. Difficulties related to enlargement, the functioning of the eurozone and border control can be related to the dynamics in the ways in which compromises were substantiated and agreed. One simple solution, often is to streamline EU decision making e.g. by abolishing unanimity voting in sensitive areas such as in economic governance. Before going down that road, this policy brief critically examines whether institutional short-cuts to pre-empt tough and protracted EU decision making should be supported.

The Single European Act and the Maastricht, Amsterdam, Nice and finally Lisbon Treaties attempted to make EU decision-making more efficient. But, should efficiency be the guiding principle in unanimous decision-making concerning areas of core state powers? There is a general impression that negotiations between diplomats lead to the lowest common denominator. The question then is, what strengths and weaknesses do a 'culture of consensus' (Lewis 2003) have?

The ambitions of the new EU Commission makes the question of the alleged problems with protracted decision-making highly relevant at this point in time. Initiatives from the working programme of the von der Leyen Commission on i.e. social policy, enlargement, broadening qualified majority voting in sensitive areas, taxation and industrial policy lead to sensitive questions about costs, consequences and risks, subsidiarity and proportionality. These policy initiatives relate to major core state powers (e.g. taxation policy), potentially major changes in the balance between depoliticised or political decision-making (e.g. competition policy), dangers of unforeseen consequences and political divisions (e.g. climate policy) and could imply further changes in the interinstitutional balance of the EU. No easy decision-making can be expected in these areas.

Over the past decades, increasing harmonisation of national legislative systems has taken place, both in the size of the *acquis* (including regarding taxation where member states enjoy sovereignty), in the increase in details of legislation, and limitation of national leeway due to the shift to increased use of Regulations (Schout and Van Schaik 2019). Some of these developments were the result from “failing forward” (Kelemen et al 2016) or integration by default (Schout 2017): previous EU actions, such as the creation of the eurozone or the Schengen area, are insufficient and require additional EU measures (failing forward) or resulted in major management issues because the member states are too weak for the agreed commitments (integration by default).

Before engaging in new ambitions, the question needs to be posed whether tough negotiations or even blocking minorities to redirecting or to simply oppose integration measures is legitimate. It is also important to take into account that the EU has been able to take major decisions that were, also when the decisions were taken, highly controversial and retrospectively dubious. For example, should all current Eurozone countries have joined and are the latest assessments of the EU Commission on accession of Western Balkan countries based on overly optimistic assumptions, or, put differently, do current situations condone previous resistance? Frans Timmermans once remarked: the time of ever closer union in all areas is over.<sup>1</sup> EU policies can, for different reasons, threaten trust in the Union. How tough can, or should, countries approach EU negotiations?

## Outline

This policy note first discusses (some examples of) the culture of consensus in EU negotiations. Second, reasons for dissent and influence of the negotiations are discussed. It concludes with the discussion of a contingency approach to EU negotiations.

## Methodological note

European negotiations and particularly the subject of compromising or drawing red lines demand *fingerspitzengefühl*. European negotiations and the drawing of red lines are not based on Newtonian science. There is a constantly changing, dynamic and non-linear environment wherein a plethora of stakeholders and issues interact. Therefore, this policy note aims to stimulate the debate on the need for a possibly sharper approach to EU negotiations. For this policy note, we used literature on EU negotiations and consulted 8 (ex-) officials highly involved in EU bargaining.

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1 H. A. Winkler (May 2019), '[No Ever Closer Union](#)', Berlin Policy Journal.

## 2 A culture of consensus

Decision-making in the EU generally adheres to a 'culture of consensus' (Lewis 2003). This culture of consensus originates from the continuous nature of EU bargaining, characterised by building on past rounds of negotiations (path dependency) and the anticipation of the actors of future bargaining situations (shadow of the future such as building up goodwill and credibility for future negotiations). Such institutional mechanisms in the policy negotiation processes as well as the shadow of qualified majority voting (QMV) (but also in areas where unanimity applies), peer pressure and fear of being blamed of blocking decisions, stimulate Member States to compromises and to avoid the blame of failure. This culture of consensus is ingrained in the workings of the EU.

Despite the available institutional options on consensus and voting, Member States prefer the "adoption of a collective decision without a contesting vote" or abstention rather than to vote and coalesce: the so-called "norm of non-public dissent" (Novak 2013). The "shadow of the possibility of a vote" (and sometimes the "shadow of a possible veto") influences negotiations and facilitates consensus by appeasing, but does not necessarily mean compromising with the minority (Beukers 2017, Häge 2013). Experienced diplomats point to the lack of credibility of Danish and British negotiators due to the tendency to place themselves outside of the negotiations, and in the case of stronger Dutch positions, the slogan 'The Dutch are always right, but seldom relevant' is feared. There is a difference between sticking to opposition and being relevant. Or as Jacques Chirac once stated: 'The Dutch missed a great opportunity to keep their mouth shut'.<sup>2</sup>

Diplomatic consensual decision-making culture adheres to rules of diplomatic relations. For example, diplomats understand each other's political intricacies at home in EU negotiations, yet horizontal consistency is valued in policy positions of Member States. Horizontal consistency assumes that Member States, even though government changes occur, will largely attain comparable positions over time in specific policy domains. Consistency in government positions leads to predictability, which ensures that negotiators often are able to anticipate what the positions of their counterparts are. Inconsistency in bargaining is perceived as inconvenient in cooperation and negotiations – for example, one of the interviewed experts cited the capriciousness with which Poland and Hungary act in Brussels. In turn, inconsistency in different official

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2 J. L. Heldring (November 2007), '[Misschien gelijk, zelden relevant](#)', NRC Handelsblad.

and political levels of EU negotiations affects the credibility of government positions of Member States. Often switching up positions in the same negotiations is perceived to lead to incredibility, which possibly leads to an unfavourable environment for bargaining.

Another element of importance is the issue of setting the agenda in negotiations. According to one interviewee, “the key question for any government in deciding whether to draw a ‘red line’ is whether it is prepared to accept that no decision will be taken on the issue in question.” An example of the absence of integration is found in tax harmonization. Successive Dutch governments have refused to agree to proposals for various forms of corporate tax harmonisation even when the European Commission, France and Germany were in favour. Since taxation policy issues require unanimity in the EU, the Netherlands in effect has a veto, even though it is not alone in rejecting the idea. On budgetary issues things are less clear cut: the EU needs to have an annual budget in order to function (this too is a Dutch interest) and there is therefore more of an argument for striking a deal at some point.

The culture of consensus has some undesirable consequences for the effectiveness of EU policy making and in particular for the national implementation of EU legislation. For example, some countries have agreed to the rules of the eurozone, to environment objectives or to the sharing of migrants but show persistent difficulties or reluctance when it comes to implementation and enforcement. Objectives can be too costly, politically undesirable or the required administrative capacities are missing. An accommodating posture can therefore have its drawbacks.

The notions on the rules of diplomatic relations mentioned above facilitate the culture of consensus in EU bargaining, since they further a process of compromising on negotiation outcomes. The culture of consensus is sound in theory, but the continuous practice of bargaining and trade-offs in policy domains that touch on core state powers, advanced administrative capabilities and sustained political will in implementation, often lead to imperfect solutions or effective policy results in practice. Considering tough negotiation positions is therefore legitimised. Moreover, tough positions also required, as underlined in interviews, an occasional ‘no’ to prevent, as underlined by an experienced diplomat, the image – as for example Jean-Claude Juncker apparently claimed about the Netherlands – of being difficult but only for show.<sup>3</sup>

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3 J. Wiersma (10 April 2019), ‘[Junckers gelijk: Nederland betaalt ondanks stoere praat toch wel](#)’, Elsevier Weekblad.

## 3 Red lines

Bargaining in the EU constitutes winners and losers, because compromises have large socio-economic consequences. Member States therefore create obstacles or even draw 'red lines' in negotiations to signal that they have serious difficulties or that they are not willing to accept compromises.

The drawing of red lines occurs mostly in areas where budgetary increases, core state powers and state sovereignty are perceived to be at stake. Member States question whether integration is necessary in these policy areas and whether national tasks have to be referred to the European level. This phenomenon occurs for example in policy areas like taxation, border control and asylum and migration policy.

Member States tend to justify their positions in order to explain themselves and retain their influence in the EU policy processes. Some of the reasons given for dissent can be:

- When Member States feel that their sovereignty is being threatened,
- When the functionality of a proposal is questioned,
- When Member States are not willing to show solidarity,
- When proposals have unwanted budgetary impact,
- Poorly designed policies with potentially major yet unclear consequences,
- Or, when a proposal misaligns with domestic policy. The greater this misalignment, the higher the adaptation costs in implementing EU legislation. Regulatory fit is found to be an important factor in explaining Member States' behaviour (Bailer 2015, Roos 2017).

These types of opposition are understood as signals of discontent – politically or in view of implementation – addressed to a domestic audience or to actors at the EU level. It is not that Member States only use one type of justifications; usually, it is a combination of several justifications.

The form of opposition can also differ. Member States can, in unanimous decision-making scenario's, simply veto policy initiatives deemed to be unacceptable. Usually, the Presidency of the Council probes whether a majority (or in the case of unanimity, *tout court*) can be found in favour of a proposal. The Presidency then either declares that a majority is found and takes the proposal to a vote, or declares that there is no majority to be found and calls off the vote. The 'shadow of a veto' does its work here. Yet, partly resulting from the Luxemburg compromise, it is good practice in the Council that national opposition is accommodated as far as possible and voting is prevented.

Besides using or signalling major difficulties with the use of a veto, Member States can abstain from a vote, which is considered implicit opposition and is regarded a 'no' vote in essence. Member States also tend to issue 'statements' via their Ministries in order to notify others of their positions and possible voting intentions (see for example the statement of four Member States with regards to the EU 2020 budget).<sup>4</sup>

When Member States see fit, government representatives band together with negotiators from other states with similar positions until their coalition is large enough to formally block a decision. Being part of a blocking minority ensures that the Member State's views cannot be ignored despite the limited size of the countries involved (as is the case with Rutte's seven dwarves)<sup>5</sup>. At the same time, joining other states that have negotiation positions close to its own limits the policy concessions the state has to make.

In principle, the formation of a blocking minority could result in a rejection of the proposal. In reality, Commission proposals are hardly ever rejected in their entirety. Empirical data indicate that 90 to 95 per cent of all proposals are eventually adopted. A 'selection effect' seems to operate here, in that the Commission refrains from submitting unpopular proposals in anticipation of their rejection by the Council (Häge 2013). With the adoption of most Commission proposals, the current trend of increasing harmonisation of national legislative systems continues. European policies have become both more encompassing and detailed leading to questions in Member States about the national room for manoeuvre. Given the nature of some proposals and the level of details involved, a political debate is required whether the member states have been too accommodating.

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4 [Statement](#) by Denmark, The Netherlands, Austria and Sweden on the European budget 2020, Ministry of Finance (21 November 2019).

5 N. O'Leary (August 2018), ['Mark Rutte: North's Quiet Rebel'](#) (Politico EU).

## 4 A realistic contingency approach to EU negotiations

The ‘culture of consensus’, where 27 Member States are able to jointly compromise on European integration ranging from economic policy to social policy, is often seen as a prime example of the success of the European integration process. However, research also shows that the bargaining process often leads to compromises constituted by the lowest common denominator (Kelemen et al. 2016) that demand ratcheting up later leading to integration by stealth (Majone 2012). Imperfect policy solutions are then taken for granted, which conceivably bear major consequences for the entire Union.

A tougher negotiation environment, where the diversity and individuality of Member States is respected and imperfect policy solutions are avoided, therefore seems a more desirable negotiation environment. This could lead to more flexibility in EU legislation (Schout and Van Schaik 2019). While the mechanisms of the consensual decision-making environment show that going with the flow is appealing, a closer look at the possible costs and benefits of taking up tough negotiation positions and veto-use seems necessary in times of flexible European integration. Long-term costs can be higher when Member States go along with the flow.

This discussion points to the need to see EU bargaining from a contingency perspective. A more careful analysis is required of political costs, implementation difficulties and possibilities of flexibility to arrive at a national negotiation position. Such a careful assessment is often avoided because the flagging of reservations can easily lead to the impression later of having lost the negotiations when compromises are accepted in the end. This means that Member States should also more carefully set priorities.

Every Member State at the negotiation table understands that their counterparts have critical domestic voices and are willing to give in when proper justifications are given. Member States ought to empathise with and try to understand the positions of other Member States without dismissing their reasoning and justifications. However, this understanding behaviour tends to have its limits as well. According to one interviewee the balancing act needs to be pulled off between a strict but constructive approach to negotiations, with a give and take mindset – since every country is essentially in the same boat of continuous EU negotiations.

## 5 Conclusion

Based on the current state of play of the European integration process, a more rational approach rather than a diplomatic approach to negotiations seems in order depending on the sensitivity of policy on the agenda. Most Member States are strongly in favour of the European project, but tend to hold pragmatic views instead of grand visions. Adhering to a 'culture of consensus' carries the risk of agreeing to European integration even in areas where one or more Member States have serious difficulties. Given the new directions the EU is taking, a political discussion is required on the diplomatic negotiating style and expectations. A more political union will in any case be accompanied by more political, and more visible, negotiations. This can be perceived as unfavourable towards compromises. Yet, the advantages may be broader political support, better policies and more flexibility than is currently allowed in EU policies. Hence, tough negotiations should become more accepted. Sustained veto's will be rare also given the option of flexible integration. Yet, the ultimate consequence of tough negotiations is that a country can on rare occasions legitimately block a compromise.

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