

European issues
n°408
25th October 2016

"Soft or Hard Brexit"?

Pierre Alain Coffinier

On 2nd October during the Conservative Party conference in Birmingham, three months after the referendum, British Prime Minister Theresa May, who is under the pressure of both economic circles and European partners, announced the main outlines of her vision for a UK, that had "won back its sovereignty" after its exit of the European Union¹. The country would control its immigration and legislation once more, whilst guaranteeing businesses the opportunity of "acting and operating with a maximum amount of freedom in the Single European Market." The Prime Minister's insistence on sovereignty and immigration control, its social overtones, intimate that she would privilege a "hard Brexit" outside of the European Economic Area.

This is but an illusion. None of the present models outside of the European Union enable the reconciliation of these demands.

Economic players are nervous. Pressure is growing to retain at least access to the European Single Market.

The Prime Minister announced that she intended to start negotiations before the end of March 2017. She wants to limit the role of parliament. But this particularly difficult process that might last years will not allow this. Westminster will count in terms of the defence of the country's higher interests. To this pressure we might add that of the devolved administrations, namely Scotland and Northern Ireland, which Theresa May intends to hold at bay. Their vote in support of Europe was however quite clear. They will defend continued membership of the European Economic Area, otherwise the spectre of troubles in Ireland or Scottish independence may resurface again – and herald the end of the UK's power as a nuclear deterrent and its world role.

If it does not come to a halt before this, for example in the event of a political U-turn or a change in opinion, the British adventure, which is dividing the country like never before, will lead to a median solution – a "soft Brexit", but from which London's influence in the European Union and the world will emerge extremely diminished.

Is this proof via absurdity of the Union's beneficial aspects?

A IT STANDS RIGHT NOW, THIS GOAL IS A PIPE DREAM.

Three months after the referendum at the Conservative Party conference, Theresa May could not yet postpone announcing the outline of her project for the UK and the date expected by all when Article 50 of the Lisbon Treaty would be triggered. She gave little away, apparently guided more by the democratic mandate provided by the circumstances of her appointment after the referendum – she is the one who has to implement the wish expressed by the people – than by a clear idea of the direction in which she intends to take her country: "Brexit means Brexit", "We are going to make a success of it". For the future "the right agreement for the UK" will include "the free movement of goods and services."

She was more precise about immigration and the rejection of the laws coming from Brussels and Luxembourg, deemed to be intrusive. "The new relationship will include the control of the movement of people from the European Union (...). This means developing our own British model." She intends to give "British companies the maximum freedom to trade with

1. <http://www.ibtimes.co.uk/read-theresa-mays-full-brexit-speech-conservative-conference-birmingham>

"Soft or Hard Brexit"?

and operate in the Single Market". "Our laws will be made not in Brussels but in Westminster" she adds.

Repeated with a certain amount of intransigence, these conditions are dangerous for an economy that benefits generously from its inclusion in the European Union: in 2015 44% of its goods and services exports were directed to the continent whilst 53% of its imports originated there. London is the world's leading financial market and a great deal depends, in many areas (insurance, clearing in euro) on its inclusion in the European Economic Area.

Europe also has a great deal to lose. The UK which is the second or third European economy (depending on the value of the £), accounts for 10% of its continental partners' trade. Its departure would be a real economic, political, strategic, civilizational and cultural amputation.

FREE MOVEMENT OF PEOPLE IS ONE OF THE FUNDAMENTS OF THE EUROPEAN ECONOMIC AREA. AN EXCEPTION MADE TO THIS PRINCIPLE WOULD BE EXTREMELY DIFFICULT TO ACHIEVE.

Surveys² have shown that fear of immigration was one of the main reasons behind the rejection of Europe in the vote on 23rd June. Hence with a net balance of 327,000 people, 180, 000 of whom are European, net immigration in the UK in 2015 was the highest ever recorded.

But the populists have promoted amalgams. In 2015 around 3.3 million citizens from another European country were living in the UK, i.e. 5% of the population. There are around 880,000 Poles, followed by 411,000 Irish, 300,000 Germans and nearly as many French – none of whom are likely to cause problems of integration. The rising number of racist acts since the referendum have targeted "visible minorities" as much as they have Eastern Europeans: 6.9% of the UK's population is of Asian origin, 3% African, 2% are mixed race. By and large the collective benefits of immigration in the UK are higher than the costs. This is particularly true of Europeans whose levels of qualification are higher than average³.

Regarding the means of controlling immigration the British government already has more tools than any other. For the non-Europeans, the country lies outside of the Schengen area, but in a pre-existing "Common Travel Area" with the Republic of Ireland. It already has its own migratory policy. The UK rejected the relocation plan put forward by the European Commission of refugee quotas per country. Ms May supports an aid agenda to the countries of origin. Moreover the Member States retain the power to restrict access to social benefits to migrants without a paid job.

THE CHANCES OF ACHIEVING CONCESSIONS ARE MINIMAL.

Undoubtedly migration is a sensitive issue everywhere in Europe. But this is firstly a response to the influx of economic and political migrants from the Middle East and Sahel. In Germany the political classes barely worry about European citizens working there. In France, the Netherlands and Italy the population is primarily sensitive to Muslim foreigners.

All European leaders say they are against a British derogation to the free movement - of both people and legal entities by the way, which includes services – should the United Kingdom want to stay in the European Single Market. Any restriction to free movement by London once it has left the EU would close its access to the Single Market. This intransigence stems from the fear of europhobic populism. No one in Paris, The Hague, Copenhagen or Rome would happily see a political party invoke a British precedent to demand an exit of the Union. Brexit must have a price. The benefits of Single Market access have a price, which both Norway and Switzerland pay.

On his return from a tour of several European capitals, Charles Grant, the director of the think-tank Centre for European Reform explained recently why Berlin, Paris and notably Warsaw, would be uncompromising regarding immigration⁴. In its quality as un-official leader, Germany has a particular responsibility regarding the European Union and should embody both the interest of all and European orthodoxy. If

2. Cf. : <http://whatukthinks.org/eu/questions/what-is-the-most-important-issue-facing-the-country-at-the-present-time/>

3. <http://www.bloomberg.com/news/articles/2014-11-05/eu-migrants-add-billions-to-u-k-public-finances-report-shows>

4. <http://www.cer.org.uk/insights/why-27-are-taking-hard-line-brexite?>

France adopted a legalistic – and closed – position regarding the demand for a British derogation or arrangement, Berlin would have to follow suit. If the UK wanted selective immigration enabling it to attract the most qualified citizens from Eastern Europe, leaving Germany with the least qualified, Berlin would see it as an unfriendly move. The present firmness was not a position of negotiation. The Visegrad Group (Poland, Hungary, Slovakia and the Czech Republic) which have many citizens in Western Europe would be intransigent. Every country has a right to veto in the approval of any new relationship, ie a new treaty between the UK and the European Union.

The agreement with the UK to withdraw from the EU has to be approved by the European Parliament. Attentive to the interests of European citizens, the latter would reject a text that included an exception to the free movement of people in the country's participation in the Single Market.

Without the progressive integration of the *acquis*, a request for unrestricted access to the world's biggest goods and services market has no greater chances of success. Even if it subscribes to this condition, the opening of the Single Market to a country outside of the EU would bring with it conditions or restrictions that would be unacceptable to the British.

The transposition of the *acquis* into national legislation as it develops, just like the acceptance of a higher form of arbitration, are the only way to guarantee the smooth functioning of the Single Market. Within the EU there are no derogations. Outside of it the most integrated countries are the other members of the European Economic Area – Norway, Iceland and Liechtenstein. They have free access to the European Single Market, but they have to respect the four freedoms of movement (goods, services, capital and people). They do not take part in the Common Agricultural Policy (CAP), or in the Common Fisheries Policy (CFP), or in the Common Foreign and Security and Defence Policy, which they join in on a case to case basis. They are not part of European Customs Union and the borders with the members have to allow the control of the rules of origin. In exchange Norway, for

example, pays access rights that are equal per capita to 83% of the British contribution. The three countries gradually have to accept every European law, without however having any influence over their negotiation. Disputes are settled by the Court of the European Economic Area, which is often more inflexible than the Court in Luxembourg.

If the UK were to adopt a status like this the main change for its economic players would be that London would lose all of its influence over community legislation. This would be humiliating for the second or third European economy, unacceptable to the electorate, which was asking for greater sovereignty and hardly acceptable on the part of the financial sector, which represents 7.5% of the British GDP. A border would also divide Ireland.

In decreasing order of integration and constraints there is the “Swiss Model”. This does not oblige the Confederation progressively to accept the *acquis* although pressure to do so is placed on it. Its relationship with the EU is governed by a series of bilateral agreements (agriculture, free movement of people, trade, taxation etc ...). For the UK the first problem would be that this status does not give Switzerland access to the Single Services Market including financial services. Its banks use branches that are established in London. This relationship allows no control over community migrants. The main capitals of Europe will not want to adopt this model again since it gives rise to many disputes with Bern.

The EU and Canada concluded a free-trade agreement at the end of 2014 after seven years of negotiations; this covers most aspects of the bilateral economic relationship, notably regarding goods and services, investment and government purchases. This agreement does not cover the free movement of people. Ottawa pays no contributions. But the services concerned are of a limited nature. If Canada wanted to enter the Single Market with the “advantages of a European passport” it would have to be established in the Union and respect the rules. A status like this would be less advantageous than the one enjoyed by the City at the moment.

"Soft or Hard Brexit"?

For want of something better EU-UK relations would be governed by the WTO's rules. London would be able to import foodstuffs at better prices than at present – the price of beef and veal are 30% more expensive in the Union than in other world markets – but so are cars, textiles and other goods that are subject to a Common European External Tariff. But this would expose the UK more to globalisation. In a more competitive world, the weakest suffer the most. This could potentially be catastrophic for British industry. In 2015 the UK produced more cars than France. More than 80% were made for export, mostly destined for the EU. 10% Customs duties would be unacceptable, when profit margins lie at around 5%.

Negotiations to reach this agreement would not be simple. Brexit supporters have mentioned the possibility of free-trade agreements with former territories (Canada, Australia, New Zealand) and the major countries (USA, China). Discussions cannot start formally before the UK has effectively left the Union, since economic agreements with external partners are Brussels' exclusive competence. At present there are 53 such agreements. Of course London might already approach the capitals involved on an informal basis. But how can progress be made if regarding the most interesting point, access to the European single market via the UK, no immediate guarantee can be given? Moreover during the G20 in China at the beginning of September, the USA, like Japan, expressed their concern about the path the UK intended to take. In Obama's eyes a bilateral agreement with London would not be a priority for Washington, which is preparing trade agreements with major groups of countries⁵. Japan is concerned about losing access to the European Single Market for the branches of its businesses based in the UK, notably in terms of financial services⁶. Positions like this augur badly for the agreements that might be signed with these two primordial third countries.

The former Director General of the French Council's Legal Department, Jean-Claude Piris has analysed the different options⁷. None are as satisfactory as the present situation. All commit the UK to negotiations that will be as long as they are uncertain. The most

realistic of these seems to be remaining in the European Economic Area. To facilitate acceptance by British public opinion of the constraints that this implies, like maintaining a high level of European integration in which we all have an interest, one study has suggested reassessed rights for members outside of the EU⁸. This kind of solution, which would limit the costs of the Brexit, both for Europe and the UK, would of course be subject to the test of negotiation.

IN THE FACE OF SUCH AN UNCLEAR GOAL AND ECONOMIC UNCERTAINTY, ECONOMIC PLAYERS ARE INCREASINGLY NERVOUS.

Until the announcements made by Theresa May in Birmingham regarding Brexit, the main economic impact of the vote of 23rd June, after the initial shock, which caused the stock market to plummet, was still the 10% depreciation in the value of the pound. This was reflected in the summer in a rise in tourist revenues. Since the British trade balance is in the red, this will lead to inflation that will hit the more modest budgets harder. Consumption remained stable in July, but was morose in August.

The drop in the pound might be of advantage to the competitiveness of British industry, but if an extended period of uncertainty follows, the first signs of a slowing in investments will emerge. British chambers of commerce have divided their GDP growth forecasts by two, down from 2.3% to 1% next year, i.e. the worst economic performance since the financial crisis in 2009. The Bank of England has reduced its interest rates to a record level of 0.25%, which has not had the expected effects either on investments or consumption.

Since fears of a "hard Brexit" are now being confirmed, the UK's position as a global financial hub might be affected. According to PwC⁹, 2 million people are directly or indirectly employed in the British financial services. The sectors in which confidence has declined the most are finance, building and also asset management companies. Their concerns focus on the Brexit's negative impact on the economy in general, the changes regarding European market access, uncertainty regarding subsequent trade agreements

5. <https://www.theguardian.com/world/2016/sep/04/g20-theresa-may-warns-of-tough-times-for-uk-economy-after-brexite>

6. <http://www.mofa.go.jp/files/000185466.pdf>

7. "Brexit or Britin: is it really colder outside?", *European issues* n°355 Bis, 26th October 2015, Jean-Claude PIRIS, <http://www.robert-schuman.eu/en/doc/questions-d-europe/qe-355-bis-en.pdf>

8. "The Future of Europe", *European issues* n°402, 13th September 2016, Thierry Chopin, Jean-François Jamet, <http://www.robert-schuman.eu/en/doc/questions-d-europe/qe-402-en.pdf>

9. <https://www.theguardian.com/business/2016/sep/26/brexit-anxiety-financial-services-sector-cbi>

and the perspective of low yields. Some 5,500 financial companies, notably American, Japanese and Swiss based in the UK, would be affected and many are said to be planning relocation. According to the Financial Times¹⁰, one fifth of the City’s revenues i.e. £9 billion, are threatened due to restricted access to the single financial services market, in other words the loss of “European passport” rights. The director of the London Exchange maintains that 100,000 jobs might leave the UK if the City loses its ability to undertake transactions in euros.

Carlos Ghosn, CEO of Renault-Nissan, which owns the country’s biggest car factory in Sunderland (north-east England, producing half a million vehicles per year) announced that he was freezing investments until the UK’s future relations with the EU had been clarified, notably in terms of customs duties. Jaguar Land Rover is also concerned. The British group that belongs to Tata has calculated that if the UK returned to the WTO’s rules, with customs duties of 10% on its exports to Europe, its annual profits would be cut by £1 billion.

In the hope that it will find a solution that will satisfy their interests, “anonymous clients” (strongly suspected of belonging to the business world) mobilised at the end of June to demand guarantees regarding the “respect of the UK’s constitution and of parliament’s sovereignty when article 50 of the EU’s treaty is invoked”¹¹. No fewer than 6 initiatives were taken in this direction. Since Theresa May’s speech in Birmingham four major industry heads, including that of the powerful Confederation of British Industries (CBI) have signed a letter demanding the upkeep of the UK in the Single European Market, “since a departure from the European Union without any preferential trade agreement, derogating from the standard rules of the WTO, would cause serious long term damage to the British economy. The British voted to leave the EU, not for a reduction in their living standards. We are asking for a Brexit that will protect everyone’s prosperity in the UK.”

The new economic advisor at the ministry responsible for the Brexit, Raoul Ruparel estimates that in the long term the UK’s departure from the European Customs

Union (which does not include Norway and Iceland) would cost between 1 and 1.2% of the GDP, i.e. £25 billion per year¹².

It goes without saying that the economic situation will influence the parliamentary process and the policy of the UK’s exit from the European Union. However this will be particularly long and difficult.

And even if we did accept Theresa May’s goal, for example, as a negotiating position likely to develop into a “soft” Brexit, the path to achieve this is unexplored territory. It opens up a number of constitutional and legal issues in London, and also within the governments of Northern Ireland and Scotland, which make the Prime Minister’s terms impossible to achieve.

The referendum on 23rd June has so divided the UK that on the announcement of the results, debate irrupted over what to do next. Anecdotally the purists in favour of remaining rail against the very organisation of a vote, which went against the sacrosanct principle in British parliamentary democracy of parliament’s supreme sovereignty, in which referendums have no place.

But this vote has created a political fact that is impossible to ignore. Therefore article 50 of the TEU, which provides that “*any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements. A Member State which decides to withdraw shall notify the European Council of its intention. (...) the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union.*” “*The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.*”

But because there is no British Constitution the first question raised, is whether it is up to the government or parliament to invoke this article, then negotiate the withdrawal agreement and define the “framework of future relations.”

10. Cf. Fifth of City revenues could be hit by ‘hard Brexit’ - Financial Times

11. <http://uk.reuters.com/article/uk-britain-eu-law-idUKKCN0ZK0HZ>

12. <https://www.theguardian.com/politics/2016/oct/11/government-adviser-leaving-eu-customs-union-uk-25bn>

WHAT ROLE IS THERE FOR PARLIAMENT?

Due to its central position in British democracy the issue of Parliament's role is raised in the initial phase of the exit process triggered by article 50.

As far as the government is concerned the referendum had already been assessed by the MPs who gave their opinion on the question that was to be asked in the spring. It is its responsibility alone now to notify the European Council of the decision to leave. Beyond that, since withdrawal would affect the UK's relationship with foreign countries the text would be "a royal prerogative." In virtue of this it is also the government's responsibility to negotiate the exit agreement and the ensuing process. This position was repeated by Ms May on 2nd October: Whitehall (the government) would not have to give account to anyone during the process. The political motive behind this position is clear: on the eve of the referendum more than three quarters of the members of the House of Commons, ie 479, including 185 Conservative MPs out of 330, said they would vote to remain in the European Union. The majority supporting Europe was even clearer in the House of Lords. Another review in Parliament would seriously reduce the government's room to manoeuvre: MPs would demand red lines, a roadmap, terms of reference.

Strictly speaking, the government's position can be defended. However, the scope of "royal prerogatives" was reduced in 2010, and without exception, international treaties must now be presented to parliament 21 days before their ratification. The House of Commons can hold a debate and its opinion has to be followed. Potentially it has the right to veto, although it has never exercised this right.

But lawyers and parliamentarians deem that the 2010 reform of the scope of "royal prerogatives" does not go far enough, since it does not allow them to monitor the substance of the text during negotiations. One of the most eminent specialists

of British constitutional and public law Derrick Wyatt, Professor emeritus at Oxford University, made it clear to the House of Lords European Committee on 6th September that the extent of the turmoil created by the Brexit would justify constitutional reform¹³. The rights of nearly 4 million people would be affected – ranging from the European citizens living in the UK, to the British citizens living in the rest of the EU – along with the economic and political interests of the entire population and the mode of government of the devolved administrations. Future trade relations with Europe will also be inseparable from domestic policy issues. Indeed free-trade agreements focus more on non-tariff barriers such as the harmonisation of standards and rules, rather than on customs rights. One of the goals of parliamentary follow-up might be to gather together multiparty support on British negotiation positions, otherwise these might be undermined before the agreement has even been concluded. But support like this would be easier to achieve during negotiations than if faced with a take-it-or-leave-it text at the end of the process. At the same time parliament might ensure that the views of all of those concerned are taken into consideration during the process. It should abstain however from nitpicking and ensure the country's higher interests.

Since Theresa May's speech, which suggested that the government wants to take the country towards a "hard Brexit", pressure has increased: an unprecedented coalition of Conservative, Labour, Liberal Democrat, Scottish National Party and Green MPs have demanded a vote in the House of Commons on the government's position before the official notification of the decision to leave the Union. The government position suffered its first setback at the beginning of October. The Court asked it to justify the assertion whereby it maintains that the Brexit belongs to the realm of "royal prerogatives" reserved for international treaties. Ms May has just given way to pressure. On 12th October she agreed to parliamentary debate on the path that the UK intended to take.

13. <http://www.publications.parliament.uk/pa/ld201617/ldselect/lddeucom/50/50.pdf>

WHICH AGREEMENTS? WHICH RULES?

Britain's departure might be a drawn-out, progressive process lasting many years. No fewer than five agreements might be necessary. Article 50 provides for a withdrawal agreement and a framework agreement on the future relations of the UK and its 27 former partners. Beyond that a specific treaty with the EU and free-trade treaties would, in all likelihood, be necessary with the country's external partners. To these four agreements – a series of agreements – some say there would also have to be an interim agreement that would prevent a sudden break from the present situation in the Union and the subsequent situation. Each has its own pitfalls.

Departure agreement

The agreement to leave would, like any divorce, focusing on goods and money, be hard and bitter. Firstly, it would involve separating the assets, distributing debts, the budget, the rights acquired, pensions, property and institutions. The new location of the institutions, whose HQ is in England, would have to be defined, like for example the European Medicines Agency, and the European Banking Authority. This might be settled before the next elections in the European Parliament in 2019. It would be a paradox to have to elect new MEPs again to the Parliament in Strasbourg.

But the difficulty in meeting the first condition of article 50 would be to draft the terms “taking account of the framework for its future relationship with the Union”. Since this has never been done before, no one knows what the “framework” should cover; they know even less about its legal status in the event of litigation. A minima a vision of what these future relations might be would be required. The control of immigration might feature in this vision.

Treaty on subsequent relations between the UK and Europe

Theresa May at first announced the Great Repeal Act, which, in order to minimise the split, would start by transposing European self-executing law (without

integration into local legislation) into British law. This first task is easy: the starting point of future relations would only be the present relations. It would allow parliament to then assess which share of this legislation it should keep, amend or repeal. This automatic transposition immediately spares the British a colossal amount of work: sifting through and arbitrating over the future of 13, 000 texts covering 80,000 pages of “acquis”.

Beyond that future relations would undoubtedly seek to maintain close cooperation with Europe in a series of areas in which interests converge: in terms of security –terrorism, drug trafficking, cross-border police cooperation, European arrest warrant. The same applies to the external policy, including sanctions, international security, development and emergency aid. London will want to keep European research aid, although the disproportionate share that it draws from this has attracted some jealousy. We might also forecast similar views in terms of the environment, climate change, energy policy, the interconnection of energy networks. Coordination would also undoubtedly have to be established regarding international economic policy in the Bretton Woods institutions and the agencies of the UN. Member States will also be extremely interested in the British State aid, competition, consumer protection and right of establishment (the freedom of movement applying to both physical and moral persons), healthcare policies and labour law. According to the experts it might be possible to negotiate all of this in two years.

The commercial chapter of the future relationship might take much longer. The simplest solution would be for the UK to remain in the European Economic Area. If, finally, positions were to relax, this might be possible. Firstly the UK would have to negotiate – after its exit from the EU – its membership of the European Free Trade Association (EFTA –Iceland, Liechtenstein, Norway and Switzerland). Once admitted it would have to apply to join the European Economic Area (the previous countries without Switzerland). However to integrate the latter it must have the approval of the three present members, and Norway does not seem to be in a hurry to see a country with 12 times its population enter the association.

"Soft or Hard Brexit"?

If an ad hoc agreement outside of the European Economic Area is necessary the specialists questioned at the House of Lords (cf. réf 13) doubt that this can be successfully negotiated within two years. Basically London would certainly like an ambitious agreement covering many areas. It would be difficult to give details of the framework agreement quoted in article 50. To extend the two year period provided for in article 50, the approval of the 27 would be required. The unanimity of the partners is also required for a trade treaty for the UK to follow the Lisbon Treaty.

Interim agreement:

Ms May is ruling out an interim agreement between the present situation and final relations. Professor Landowski¹⁴ of the Centre for European Policy Studies (CEPS) maintains that if the agreement on subsequent relations were to be negotiated after the exit agreement, a great deal of litigation would remain pending, thereby justifying a complex interim agreement: if the UK maintained its links with some parts of European legislation, which parts would that be? How would new community legislation affect the old laws still linking it? How would the European Court of Justice's jurisdiction still apply to the UK?

SCOTLAND AND IRELAND CAN ADD THEIR SHARE OF CONSTITUTIONAL AND POLITICAL COMPLICATIONS.

The archipelago's new map is no longer that of a united kingdom. Set in the economy of the Republic of Ireland whose economic success has been linked to its entry into the European Union, Ulster mostly voted to remain (56%). And the Scots supported remain massively (62%).

Scotland took Theresa May's speech badly. Not only does it want to remain in Europe, but, with an ageing population it needs a qualified labour force. It has not experienced the rise in xenophobia of certain English towns. Leaving the European Economic Area would endanger its powerful financial sector, which works in tandem with London. Its agriculture, based on small farms is extremely dependent on the CAP. Its universities

and research centres, of international standing, draw major amounts of aid from the 2020 agenda. In 2014, the British government promised Scotland that "no" to independence was the only way for it to remain in the Union. The equation is now the other way round. It then promised to increase Edinburgh's prerogatives. In particular, Westminster conferred "a statutory base" to its promise "not to legislate normally over a devolved issue without the consent of the competent authority" (according to the "Sewell Convention"). And yet, Theresa May clearly stated that the devolved bodies and the "divisive nationalists" would not be able to oppose the will expressed by the British people.

The Scottish First Minister Nicola Sturgeon deems that this overthrows the terms of Scottish acceptance of the result of the 2014 vote against independence. She has just announced that in the event of "hard Brexit" she would call another referendum. Whilst two years' ago 45% of the Scots voted for secession, in June 62% voted in support of the European Union. With a "hard Brexit" out of the European Economic Area Theresa May would alienate the Scottish economic sectors which helped win the "no" to independence in 2014.

In the event of Scottish independence, the downgrading of the UK as a world power looms up large. Scotland would not want to retain the Coulport and Faslane facilities which host Britain's nuclear deterrent. Public opinion supports this firmly. Even if though it would remain a NATO member it would not be obliged – at least on a permanent basis – to accept this force, which England would have to repatriate. But a removal such as this would be expensive. It would be problematic from a political point of view since the English population, which is much denser and extremely sensitive to environmental issues would not accept it. Its strategic justification is dividing the political classes. It would be impossible to maintain vital, yet already weakened political consensus over the required, estimated period of twenty years. Apart from losing one third of its territory and all of its influence in Europe, the UK would lose its international status.

If under pressure from Westminster and the City business circles, the British government finally decided

¹⁴. <https://www.ceps.eu/publications/procedural-steps-towards-brexit>

to remain within the European Economic Area, other complications of a legal and constitutional nature would emerge with the devolved entities. A complex task would have to be undertaken together with the withdrawal agreement. The European Convention of Human Rights (ECHR), just like European legislation is directly integrated into the devolution statutes of Scotland, Wales and Northern Ireland. The 1998 Scotland Act which is the foundation of Scottish devolution, provides that any legislative act passed by the Scottish Parliament that is incompatible with European legislation or with the rights contained within the European Convention on Human Rights, “is illegal”. Similar clauses also apply to Wales and Northern Ireland. As a result when the UK repeals its ECHR (1998) or European Economic Community membership (1972), it will also have to have previously amended legislation governing devolution.

In addition to this the community competences repatriated by the Great Repeal Act, which were devolved to Scotland, Northern Ireland and Wales, will then have to be re-attributed to Edinburgh, Belfast and Cardiff. This is notably the case with the CAP, the common fisheries policy (CFP), social policy, research aid, directives in terms of energy, environment and sustainable development – all policies which, with the notable exception of the CFP, of which Scotland would willingly rid itself, are extremely important to the Edinburgh government. Already the indistinct lines of division between “reserved” and “devolved” issues allow room prior to Brexit, for interminable legal nitpicking ...

None of this will be simple, particularly in a damaged “bilateral” political context. Any move by Westminster that affects a devolved issue requires the consent of the provincial parliament involved.

In other words even a soft Brexit in which the UK remained in the European Economic Area might take the country, during the entire negotiation period, to the verge of constitutional crisis.

The Irish situation is no less sensitive. 55% of Northern Ireland voted to remain in the European

Union. The Northern Irish are the biggest beneficiaries of the European Structural Funds in the UK. Their economy is totally integrated into that of the Republic of Ireland whose economic success is linked to its membership of the European Union. The integration of Ulster with the south plays a stabilising role. Finally, the Good Friday Agreements (Belfast Agreement), a reference in terms of conflict settlement, which led to the end of the troubles in Ulster are intimately linked to the European Union. The obligations that go with it are the responsibility of the UK, the Republic of Ireland and Northern Ireland. Both parts of the island use the European Arrest Warrant a great deal, which has notably simplified procedures. It would be difficult to go back on bilateral extradition agreements that might lead to long disputes. Whilst the Catholic community approved massively to remain in the EU and the Protestants voted to leave, a painful exit process, which would complicate relations with the Republic of Ireland, would re-introduce a border and affect respective interests differently. It might also destabilise the fragile community status quo.

A “SOFT BREXIT”?

Theresa May, a vicar’s daughter, who is distancing herself from her predecessor and his followers, who come from the wealthiest social class, cannot be criticised for firstly paying attention to the under privileged classes who expressed their frustration with this vote. The referendum on 23rd June, which is atypical in terms of a British population that acknowledges the economic benefits that the European Union has had long term – is a sign of the discontent of a two-tier society, in which social disparities are the greatest of all Western Europe.

But she has placed herself on a collision course with parliament, the business world, and a good share of her own party, Scotland and Northern Ireland, not to mention all of her economic partners, whether they are European or from elsewhere. Rising prices, the suspension of investments are starting to take their toll across the board.

"Soft or Hard Brexit"?

As summarised by former Chancellor of the Exchequer, George Osborne, "*Brexit won a majority, hard Brexit did not*" out of the European Single Market. Parliament, business circles, the devolved nations (Scotland and Northern Ireland) have the means to impose concessions to protect the economy. A survey at the end of September indicated that since the vote Britons' hopes to reduce immigration have diminished.

It remains that a Norwegian solution would be humiliating for the UK. Should it leave just to rejoin in a few years time – the status of the countries of the European Economic Area was designed in view of membership – it would lose at least some of its opt-outs. If it changes its mind after triggering article 50 and notifying its intention to leave, there is also a strong possibility that it would not return in the same conditions. So, finally, what is the point of leaving?

The only way for the government to persuade the Brexiteers to admit such a U-turn and to recreate a

consensus in a divided country would be to provide first all the evidence you tried to find a path that would satisfy their demands. This would be a dangerous domestic exercise which might also end in a loss of influence for London.

The damage limitation exercise, which falls to London, might also turn into a demonstration that any way out of the EU is still worse than being inside. To which it would certainly help should Brussels address the most pressing issues to all its citizens, both British and continental – like immigration, growth, terrorism and the fight to counter global warming.

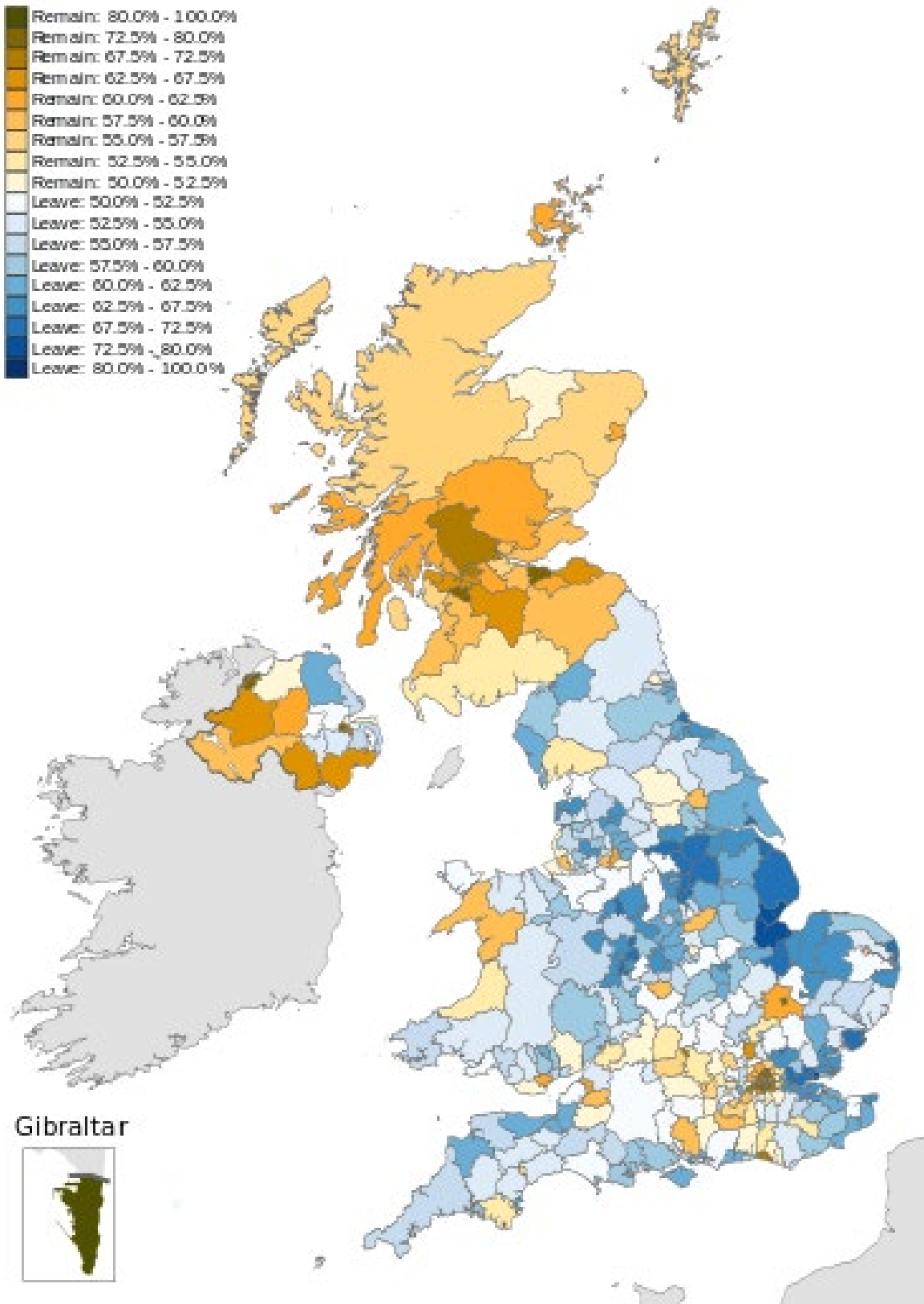
Pierre-Alain COFFINIER,
Diplomatic Advisor for the INHESJ

You can read all of our publications on our site :
www.robert-schuman.eu

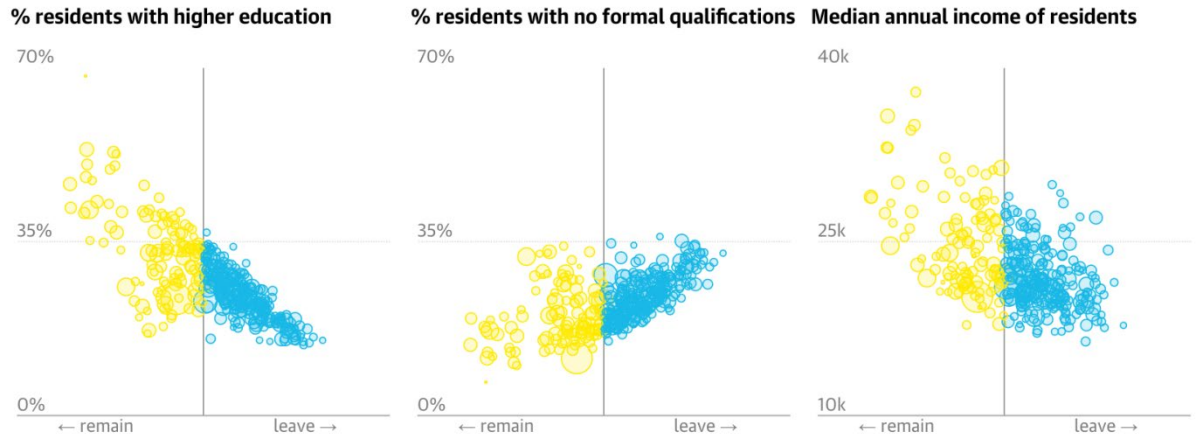
Publishing Director : Pascale JOANNIN

THE FONDATION ROBERT SCHUMAN, created in 1991 and acknowledged by State decree in 1992, is the main French research centre on Europe. It develops research on the European Union and its policies and promotes the content of these in France, Europe and abroad. It encourages, enriches and stimulates European debate thanks to its research, publications and the organisation of conferences. The Foundation is presided over by Mr. Jean-Dominique Giuliani.

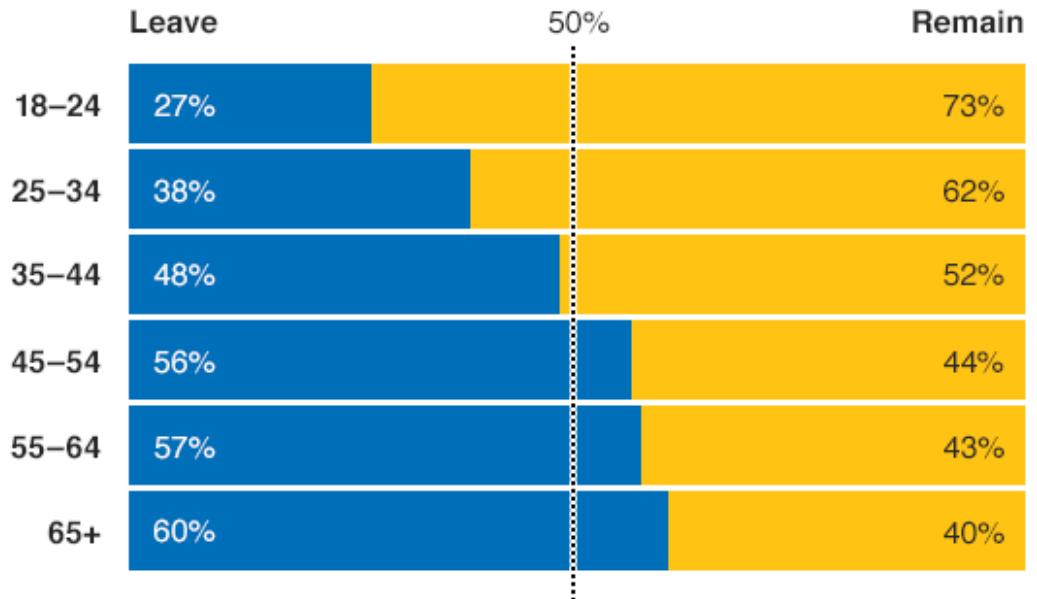
ANNEXES



"Soft or Hard Brexit"?



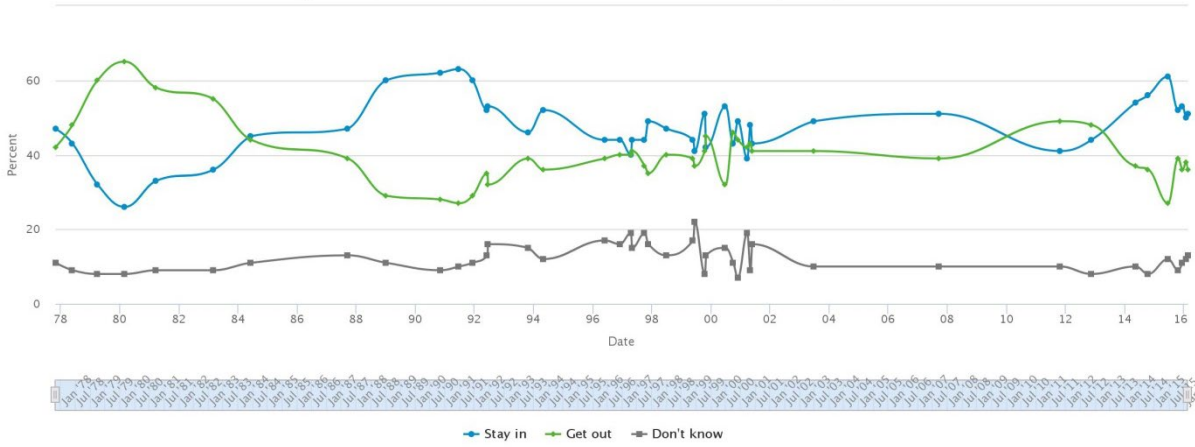
How different age groups voted



Source: Lord Ashcroft Polls



How would you vote in a referendum now on whether Britain should stay in or get out of the EU ?



Source data at www.whatukthink.org Eu run by NatCen Social Research

Referendum Vote Intention Poll of Polls



Source data at www.whatukthink.org Eu run by NatCen Social Research