

European issues

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## Organising Brexit

The Robert Schuman Foundation is launching the **BrexLab**, an analysis laboratory that will focus on the negotiations in view of the UK's exit of the European Union.

As soon as the British express their wish, in line with article 50 of the Treaty on European Union, long discussions will begin between the two sides.

Complicated and technical, but important and even vital for many economic sectors, the latter will come under the scrutiny of public opinion and these negotiations will sometimes be difficult to interpret.

The **BrexLab** will bring together a panel of leading experts on European issues who will endeavour to analyse the course of the discussions and developments so as to provide those involved with a vital interpretation of events. The results of its work will be addressed confidentially to entities and institutions who would like to receive them. A brief analysis - the first one written by Jerome Gazzano and Andi Mustafaj linked with the members of the **BrexLab**'s working group is included- will be published regularly for a wider audience.

The **BrexLab** is an initiative put forward by the Robert Schuman Foundation and two committees at the French Senate: the Committee for European Affairs and the Committee for Foreign Affairs, Defence and the Armed Forces.

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#### Or the difficult task of rationalising populism

On 17th January last, Theresa May delivered her twelve point plan for the upcoming negotiations over Brexit. On 2nd February the final version of her speech was published in the shape of a whitepaper. This document is a heterogeneous mix of issues of varying importance, addressed both to citizens and MPs, English, Welsh, Irish and Scottish alike, as well as to public opinion and European negotiators.

According to Theresa May's speech and the ensuing whitepaper a triple goal emerges: Brexit must be painless for the British; it must be symbolic; it must also be used as a domestic policy tool.

#### 1. Theresa May is subject to an imperatively populist mandate which will force her to seek a symbolic Brexit

In Theresa May's speech, as well as in the whitepaper, judicial independence and a stricter migration policy are presented as non-negotiable elements in the British position. These two points, No2 and No5 in the whitepaper ("*taking control of our own laws*" and "*controlling immigration*"), simply reflect the mandate defined by the British electorate during the referendum: an assertion of identity in the face of Brussels' technocracy. The particular conditions of Theresa May's accession to the post of Prime Minister – precisely to implement the referendum result – force her to provide the vote of 23rd June 2016, which was originally consultative, with its full value, likewise its interpretation in regard to the main points

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of the campaign. On these two points her mandate is imperative, it is also, like the pro-Brexit political speeches prior to the referendum, largely populist in nature.

The UK's independence vis-à-vis the European Union's Court of Justice (ECJ) was a strong point in the campaign on the part of those defending Brexit and as a result, in the second point of her speech, Theresa May clearly targets the re-establishment of the UK's legal sovereignty. Hence exiting the EU, under article 50 of the treaty on European Union, necessarily implies that European law ceases to apply in the UK. Just as European law will disappear from the British normative corpus the day of its exit from the Union, the ECJ's decisions will no longer have any effect, at least regarding situations after the country's exit. Hence this is not a negotiation goal in fact; it is clearly just an inevitable consequence of Brexit.

In response to the populist mandate after the referendum of 23rd June 2016 the whitepaper then maintains that the UK will be able to control its immigration once it has left the EU. To do this Theresa May indicates that the movement of European citizens will be subject strictly to British law. This point is often presented as the illustration of the hardness of Brexit chosen by Theresa May and as a future hurdle for European negotiators, since the interest of the Member States is heterogeneous on this count, notably due to the over representation of Polish citizens amongst Europeans working in the UK. However, it appears that this point will be especially handicapping to the British negotiators: Theresa May will be forced to achieve a symbolic result (like a wall) marking the closure of the UK's borders to European citizens and workers, whilst maintaining an acceptable, minimal protection of British citizens living on the continent. This second condition implies, via reciprocity, the protection of European citizens living in the UK. The European Union will for its part only be concerned by the status of European citizens living within British territory and it does not have the same symbolic constraint (closing its border with the UK is not a stake). Contradictory goals on this point will only affect the British.

Although Theresa May's speech, just like the whitepaper (point 6, "*securing rights for EU nationals in the UK, and UK nationals in the EU*"), fails to provide a clear perspective on the future treatment of European citizens living, working or studying in Britain, objectively there is nothing to prevent a balanced negotiation and a symmetrical agreement on this point, since the UK is no less concerned by the fate of its citizens in the EU than the EU is with its citizens living in the UK.

### **2. The British position is handicapped by the costs associated to the domestic acceptability of the agreement**

Brexit represents a major rift for the UK from the economic, political and institutional points of view. To make it acceptable to public opinion and the political parties, in her programme Theresa May presents new advantages that British citizens will draw from this future situation. For example:

- point 7 of the whitepaper, "*protecting workers' rights*", indicates that the British government will ensure that the EU's *acquis* are protected regarding labour rights and that it will work towards improving these; yet there is nothing in Europe to prevent the UK from developing more protective legislation for its workers;
- point 10, "*ensuring the United Kingdom remains the best place for science and innovation*", offers the same discourse regarding research and innovation: apart from the issue of the continuity of European funds that is provided presently to the UK's universities and research centres, the British government has been extremely free, to date, regarding its domestic policy in this area;
- point 8, "*ensuring free trade with European markets*", reserves similar treatment to issues in terms of protecting the environment.

These proposals have no clear link to Brexit. They are details in a strictly domestic political programme, for which the exit of the EU will change nothing. Only the positive budgetary effect of the Brexit for the UK might be highlighted (the end of the UK's contribution to the

Union's budget). This argument that was largely used in debate prior to the referendum is only mentioned very briefly in the whitepaper and is immediately nuanced by the desire to continue contributions to specific European programmes.

In terms of the British institutions, the competences taken back from the EU represent an opportunity for Theresa May, notably regarding Scotland. Her speech and whitepaper clearly maintain that the disappearance of the European level of sovereignty should enable the redistribution of certain competences between the various parts of the UK (point 3, "*strengthening the Union*"). By insisting on British Union and the government's will to guarantee the freedom of citizens and businesses between the different components of the UK, Theresa May will replace the European Union by an enhanced British Union. She is counting on sharing out the cake represented by the European competences to make the Brexit more palatable in the eyes of those who did not want it. This is a dangerous wager: it is likely that London will try to take back Brussels' former, extremely strategic competences.

Theresa May will therefore have to make Brexit acceptable to all sides, i.e. the UK's political parties, its public opinion and the institutions. These discussions will be all the more of a handicap for the British negotiators, which do not concern or are not supposed to affect the European negotiators directly.

### **3. In contradiction with her populist mandate Theresa May will try to make Brexit as painless as possible for the UK**

From a normative and economic point of view the quest for a viable Brexit for the UK will force British negotiators to manoeuvre in a reduced area and within a tight time span, left by the imperative, populist mandate that resulted after the vote on 23rd June 2016.

Securing the judicial situation and the simplicity of the post-Brexit transition are deemed to be a major goal in the upcoming negotiations and are the focus of the first point developed in the whitepaper ("*providing certainty*

*and clarity*") and of point 12 ("*delivering a smooth, orderly exit from the EU*"). A simple rule is expressed: without exception the norms in force prior to Brexit will continue to apply after Brexit. In real terms the whitepaper commits firstly to the total integration of the European *acquis* into British domestic law – then each ministry will decide what it will keep and what it will do away with – including interpretations of the law made by the ECJ. This decision will help prevent a major legal vacuum when the UK exits the Union and maintain legal continuity, thereby smoothing out the possible negative effects of the Brexit. This position, necessary for the viability of Brexit, will attenuate its symbolic scope. It might seem contradictory with the imperative mandate regarding the legal and political independence of the UK, and political debate will undoubtedly emerge in terms of the opportunity to abandon certain European texts. The Member States, whilst having an interest in the widest dissemination as possible of European norms in the world, will not be concerned by this negotiation point that is internal to the UK. Potentially the Member States will be confronted with the British approach comprising a reproduction outside of the Union of the advantages granted to them when they were within it, with the "opt-in/opt-out" game. The review of competences will comprise a strong base for this approach. The danger for the European Union will be for it to have to make successive concessions in virtue of a pragmatic, realistic approach. And this to the detriment of a global approach that should lead to the establishment of a status outside of the European Union that is necessarily not as good as actually being a member of it.

From a trade point of view the absence of any agreement at the time of exiting the union would be extremely damaging. Brexit without a signed agreement is being formally considered by Theresa May: "*the Government is clear that no deal for the UK is better than a bad deal for the UK*". For almost all British exports (which go to the EU), the lack of any agreement would imply the application of customs duties going from the present "zero duties" to the basic WTO rules regarding customs barriers. British negotiators now have to play off the populist project that they have been given against a strategic, realistic analysis of the issues at stake:

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- in application of Theresa May's imperative mandate the UK will no longer be a part of the EU's Single Market, since this market includes the free movement of people, goods, services and capital; the Swiss and Norwegian are then to be ruled out a priori, since they include the free movement of people;

- at the same time the free movement of goods, services and capital between the UK and the EU will be sought, in order to limit the impact of the potentially sudden establishment of customs barriers in such an important outlet for the British economy.

The terms of negotiation are clear (this involves a traditional trade negotiation) and not in the UK's favour for two main reasons:

- 48 % of British goods exports go to the EU, in comparison with 6% of European exports which go toward the UK;
- these negotiations offer the euro area with an opportunity to rectify the incongruity represented by the offshore domination of the London financial market over the single currency.

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In view of these three challenges for the UK, resulting from the speech delivered on 17th January and the whitepaper on 2nd February it appears that:

- Theresa May will adhere to her commitments over a symbolic, populist Brexit ; this will be the most costly to the UK;

- Theresa May will try to make the Brexit palatable ; this will be the greatest domestic political risk for her;

- Theresa May will fail to make the Brexit painless for the UK, except if she succeeds in dividing the European States. This is a great unknown.

Brexit is very different for the European Union. The populist mandate is weighing heavy in some Member States, very little on Brussels and even less on the negotiation teams. This is a collateral advantage of the often criticised technicity of the Union's institutions. The symbolic imperative of the Brexit still exists however for the EU, in that spreading the temptation of article 50 has to be prevented. Everything will depend on the capacity to shape and defend a united Union whose interests are shared (and not fragmented per Member State) in the face of a united British Union.

The strength and unity of the EU in these negotiations should not aim to punish. Interests remain and will remain mainly joint, even though nothing would justify the Europeans having to pay for the "wall" that the citizens of Britain have decided to build around themselves.

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[www.robert-schuman.eu](http://www.robert-schuman.eu)

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