

European issues

n°452

20th November 2017

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Brexit means...? Or the urgency of defining Brexit before the Brexit happens

At the end of the fifth round of negotiations on the conditions of the UK's withdrawal from the European Union, the Council deemed that the progress made was not sufficient to be able to move on to the next two stages of the Brexit – the negotiations of the transition agreement and the definition of the future relationship between the UK and the EU. The respect of the sequencing of discussions is vital for the European negotiating team who hope to secure three major points in the separation (citizens' status, the border between the two Irelands, and the financial settlement) before discussing the future. The timeframe and method have been accepted by the UK.

Since the summer official communication by the British government has highlighted the good state of progress in the negotiations, notably regarding citizens' status and the border between the two Irelands. The English press sometimes criticises the European obstacles caused at times by the negotiation team led by Michel Barnier, and at others by certain member States – France and Germany in particular. At the same time Theresa May tried to show her good will towards the Europeans during her speech in Florence on 22nd September last. She notably accepted the principle of a transition period, which indeed would avoid an excessive feeling of division at the time of withdrawal in March 2019.

Although the UK is implementing a negotiation strategy, it is struggling to deploy one that covers Brexit as a whole:

- Theresa May's compromises in Florence and the aspiration for the rapid negotiation of the three points of the divorce reflect the wish on the British side to move faster on to the negotiation of the transition phase and the final relationship between the UK and the EU;
- However the British government's position with regard to the negotiations does not seem clearly established.

Without any clear definition of the Brexit sought by the UK (the tautology "Brexit means Brexit" says little about what Brexit actually means), it is not worth speeding up negotiations.

1. IN THE QUEST FOR A BREXIT THAT IS BOTH SYMBOLIC AND BENEFICIAL FOR THE UK THE BRITISH NEGOTIATORS ARE PUSHING FOR FASTER NEGOTIATIONS

The timeframe of the Brexit negotiations can be divided into three stages:

- The first stage is devoted to discussion over the UK's exit from the EU, leading to the transformation of the UK into a third country;
- An intermediary stage regarding a transition agreement;
- A second phase of building the future relations between the UK and the EU, notably including an agreement over trade relations.

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1.1. After the fifth round, the first phase of negotiations has still not been sufficiently completed to justify moving onto the next stages

It will be possible to start negotiations phases over the transition period and the future relation between the UK and the EU once the Council deems that significant progress has been made in the first phase of negotiation. In conclusion of the debates on 19th and 20th October the European Council "asked for work to continue to consolidate the convergence already achieved and to continue negotiations to be able to move on to the second stage of negotiations as soon as possible."

Regarding the issue of the Irish border, the European and British negotiators are content with the progress made in the negotiations to date, deeming that it will be not be a stumbling block.

Negotiations over citizens' rights are also moving forward. The goals sought by the UK and the Union are double: a direct effect of the withdrawal agreement and a coherent interpretation between the two parties. After the fifth round, Michel Barnier highlighted three points:

- The need to continue working on precise instruments and mechanisms that help guarantee citizens' rights, with this necessarily involving the EU Court of Justice as the competent court for the interpretation of the rights of European citizens[1];
- Continued differences over the possibility of family reunification and the export of social benefits after the Brexit;
- The UK's intention to introduce a simplified procedure to help European citizens to claim their rights was accepted by the European negotiators.

However, the issue of the financial settlement now seems more complicated. With one sentence in her Florence speech Theresa May committed to a financial settlement: "the UK will honour commitments we have made during the period of our membership." This commitment corresponds to around 20 billion €, i.e. the British contribution as planned until 2021. This

method of calculation is not in line with the European position. The financial settlement will also be increased by the cost of the possible access granted to the Single Market and to the Customs Union during the transition period.

During the fifth round of negotiation the financial settlement was not discussed at all, since the negotiating teams simply focused on technical discussions regarding the methods of calculating the financial commitment. The Europeans are asking for a clear definition of what should be on the British list of commitments.

1.2. The British negotiators have everything to lose in the first phase of negotiations and everything to gain in the second

Strict adherence to the negotiation timeframe is vital for the European negotiators. However, it is politically complex for the British government. Depending on the position in the first or second phase, the balance of power is indeed opposite.

In the first phase of negotiation everything seems to point to how much it is going to cost the UK to exit the European Union[2]. The very existence of a bill to pay to the EU is symbolically strong, whatever the amount. The unprecedented legal vacuum created by Brexit is a threat to people's rights. Finally the transformation of a Member State into a third State brings to light the complexities of Ireland which previously seemed to have been solved. In many ways the negotiation of the terms of the UK's withdrawal from the EU does not really resemble a negotiation, since the balance of power seems to lie so much in favour of the EU. This especially means that the initial damage caused by the transformation of the UK into a third State has to be limited[3].

Conversely the UK has every interest to start the second phase of negotiations as quickly as possible, which will enable more balanced exchange between the two negotiating teams.

Beyond the symbols, Theresa May is seeking a Brexit that is economically beneficial for the UK, or at least one that is as painless as possible. A trade agreement

1. During her Florence speech Theresa May proposed that the British courts take into account the judgments delivered by the European Court of Justice.

2. Cf. the Brexlab paper of 2nd May 2017, "Brexit Disillusionment."

3. On 20th October, Pascal Lamy declared to the Financial Times: "The fundamental difference between the UK vision of what this is about and the Franco-German view is that the British still think this is a negotiation. It is not a negotiation; it is process to be managed to minimize harm. They still seem to believe they can buy something with the money they have to pay."

– whatever its shape or form – would be better than no agreement at all. The second phase of negotiations will lean more in favour of the British negotiators, in that it will focus more directly on an issue that is beneficial to the UK. At this point in the negotiations the British negotiating team will have an opportunity to show that economic exchange can be facilitated with the EU, even after the country has become a third State.

When these issues are placed on the negotiation table, the British and European interests will move overall towards a wider integration of the two markets and the facilitation of trade. This second phase of negotiations will however comprise major risks for the Europeans. On the one hand, it will involve not offering a specific relationship that favours the UK, since this might encourage another Member State to follow the example of the Brexit. On the other hand, the EU will have to defend certain strategic interests, such as the smooth regulation of banking activities.

1.3. The rapid definition of a transition period seems vital to the viability of the Brexit for the UK

Once launched the period of negotiation over the future relationship will necessarily take a great deal of time. A transition phase will therefore be vital. Although the principle of the period of transition was accepted by Theresa May in her Florence speech the definition of the shape and timing of this period has not featured in any official negotiations between the UK and the EU to date.

As time passes the value of this transition period will dwindle. Several banks (for example UBS and the Royal Bank of Scotland) have already said that they are expecting a clear vision – and even a finalised agreement – over the transition period before March 2018. They deem, in effect that they will require a year to move their activities in the EU. Any delay in negotiations and any uncertainty about the direction taken by Brexit will increase the risk for the UK that plans to attenuate risks by the businesses established within its borders will be triggered.

It is now vital for the UK to define the terms and

timeframe of the transition period as quickly as possible to avoid reaching intolerable levels of legal uncertainty for businesses.

2. ABOVE ALL IT IS THE UNCERTAINTY REGARDING THE GOALS PURSUED BY THE UK THAT IS SLOWING NEGOTIATIONS AND WHICH WILL CONSEQUENTLY DELAY THEM

Brexit, as it is being conducted today, is the implementation of the referendum result of 23rd June 2016. This entails an awkward reconciliation between making the UK's will to leave viable and an obligation experienced by British political leaders to respond to populist demands that were interpreted based on the referendum. This paradox, inherent to how Brexit is being undertaken by the UK, is now being exacerbated by debate within the British government over the transition agreement. This will be all the more the case when it comes to defending a cooperation model and trade relations with the EU.

2.1. The British government hopes to negotiate the transition agreement as quickly as possible without even having a shared vision of the issue

Philip Hammond, the Chancellor of the Exchequer indicated on 19th June last that the UK would need a transition agreement after the withdrawal phase, to transform the "cliff" into a "slope", enabling a painless passage in the first break (the transformation into a third State) to the second break (the final definition of Anglo-European relations). To justify these proposals the advocates of a transition period focus on economic arguments. Philip Hammond's proposal was a pragmatic one. Highly criticised, it was finally retained by Theresa May and was officially confirmed as the British position during the Florence speech. This idea does however go against the full application in the shortest time possible of the populist mandate that was interpreted by the majority of the British political class – with Theresa May being the first of these – as of the referendum on 23rd June 2016. It blurs the divorce somewhat. Any transition period would mean the extension of the regulatory, jurisdictional and supervisory framework which is at present in force

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within the Union. The jurisdiction of the EU Court of Justice (ECJ) is part of this; on this issue Theresa May accepted the UK's submission to the ECJ and to any new European standards during this transition period.

A transition agreement should help prevent the effects of the divorce between leaving the Union and the definition of the future relationship between the UK and the continent. To ensure adequate continuity, the UK will have to predefine the public political fields in which it might be useful to maintain links with the Union. Once this work has been done, it will be possible to negotiate the perimeter of the transition agreement. It will not be possible to focus this work just on economic and trade issues. Cooperation regarding issues of internal security or research are examples of areas in which the Union and the UK will continue, in all likelihood, to want to work together. Placing this type of cooperation on hold for some years before re-creating them again would be to no one's advantage.

Hence, in part the transition agreement will define the final agreement. If the transition agreement only includes customs, the final agreement will have to re-create links that will be broken during the negotiations. If public policy is not included in the transition agreement it will be difficult to include this in the final agreement. And yet the final outcome of the Brexit is not totally clear from the point of view of the UK's participation in certain European policies and agencies.

2.2 The UK has not decided on the long term goal in terms of the relationship that it wants with the EU.

The point of departure of the Brexit negotiations is known. Today the UK is a Member State of the EU, committed to a procedure that aims to transform it into a third State. The point of arrival can be thought of in general terms, using the various declarations made by Theresa May since her speech on 17th January 2017 and the White Papers that have been published by the British government. Up to that point it seemed clear that the Brexit wanted by the British comprised an exit from the single market and the four freedoms that this implies. At the very end of the exit process

when relations which prevail between the UK and the continent will have finally been replaced by a new framework, the UK will no longer enjoy free movement of goods, capital, people and services. Brexit will also mean the exit of the Customs Union. To replace this framework it would be difficult to imagine a point of arrival other than a wide free-trade agreement, even if this agreement would not enable a fluid commercial exchange as it exists today in the Single Market.

In her Florence speech Theresa May repeated that the model sought for future relations between the UK and the EU did not resemble either the Canadian or the Norwegian models, deeming the first too ambitious and the second not protective enough of national sovereignty. However, as Michel Barnier said, it will not be possible to seek a relationship that enables both the freedom guaranteed to Canada and the economic advantages enjoyed by Norway.

The British government seems deeply divided over the final nature of the relationship between the UK and the EU, with ministers' positions ranging sometimes from a special, privileged relationship with the EU to a special, privileged relationship with the rest of the world.

Moreover the definition of the future relation between the UK and the EU might take the shape of a free trade agreement. Indeed an association agreement (based on article 217 of the Treaty on the Functioning of the European Union - TFEU) the scope of which would be much wider: environment, foreign, defence and judicial cooperation and police policies etc. seems to have been ruled out. This is the "Norwegian" model, which the British government does not want because there is no participation in the decision making process and there is the freedom of movement of people.

The option of the European Economic Area (EEA) is not politically realistic for the British, even for an interim period of two or three years. The only possibility is a free-trade agreement with the EU based on the model signed with Canada (CETA).

In the last case, and from the standpoint typified by "moderate optimism", the agreement on article 50 would be ratified in time before the official date of

the exit of the Union, (Brexit) 30th March 2019. The aim would be to conclude, if possible before the end of the transition period, a free-trade agreement without including anything significant regarding financial services, but with a wide freedom regarding products and merchandise, on condition that the UK continues to respect the Union's standards and norms.

Under the same terms the UK might be able to continue taking part in the European programmes, notably those involving research and certainly accompanied by a series of agreements on external and internal security (with unavoidable institutional restrictions on both sides) and on the participation in European Programmes, and in certain European Agencies, with the UK accepting the jurisdiction of the European Court of Justice (ECJ) and the corresponding contribution to the European budget[4].

In Florence, Theresa May acknowledged that the UK would seek to maintain its participation in several Union policies, regarding security, science, education and culture. The Labour Party listed in its manifesto for the general election on 8th June last several areas in which it intended to maintain links with the EU, notably Euratom, Eurojust, Europol, and the European Arrest Warrant, Erasmus, and even the European Medicines Agency.

2.3 The disunion of the British government is preventing the definition of a negotiation strategy

Since the summer work has been done to strengthen the credibility of the British position. As of August many papers were published by the British administration that aimed to show its sincerity and preparation of the negotiations by the UK. With her Florence speech on 22nd September last Theresa May sought to create a positive dynamic for the negotiations, pointing to several concessions. Some of these were symbolic, like for example the acceptance of a transition period, with the UK's submission to the decisions of the ECJ and to any new European standards; there was even a proposal to implement the ECJ's interpretations by the British court as far as the rights of European citizens were concerned. And yet – and in spite of the impression that Theresa

May gave in Florence of making major concessions, the European position is still as constant and intransigent on many points. On 12th September last Michel Barnier even maintained, there was no room for "concessions" in the discussions with the UK[5].

The repeated failure of these negotiations is weakening Theresa May further, and she has been extremely isolated since the snap election on 8th June 2017. Within the government her leadership is weak, opposition is visible and criticism between supporters of a symbolic and strong Brexit and the defenders of one that is less sudden and which would provide better guarantees to the UK's economic interests is quite evident. However, no personality in the Conservative Party has yet dared to challenge Theresa May's legitimacy, deeming surely the political risk linked to leading Brexit too high.

Several bids to take control of the negotiations by the British have failed. The strategy aiming to divide the Member States has proved ineffective to date for example. Likewise, the blackmail attempt by Theresa May regarding security cooperation did not last long either; nor did the bid to link the issue of the financial settlement to the future trade negotiation lead to the circumvention of the difficulties of the first stage. Finally, the regular call made by Ms May to take the level of negotiations to the heads of State and government – which would weaken Michel Barnier and highlight divergence between the Member States – has to date remained without effect, since the legitimacy of the Commission's negotiation team has systematically been defended[6].

The same applies to the threat of no final agreement before March 2019, which is now starting to be the focus of attention by the British administration. The recent study of customs issues[7] explicitly analyses the consequences of an exit of the Union without an agreement and makes detailed, operational proposals to limit the risk of the divorce for the British external trade. However, the strategy comprising threats to Europe in the event of no final agreement will not take negotiations forward; it is not credible, since it would be to both sides' disadvantage.

4. See Jean-Claude Piris, <http://ukandeu.ac.uk/the-future-shape-of-uk-eu-relations>

5. "We are not asking the British to make "concessions". The agreement on which we are working will not be built on "concessions". It is not a question of making "concessions" regarding citizens' rights. There is no question of making "concessions" over the peace process in Ireland. And there is no question either of making "concessions" with regard to the financial settlement and the thousands of investment projects and all of the men and women who are backing these projects across all of Europe."

6. Regarding for example the status of European citizens in the UK, the unilateral offer made by Theresa May during the European Council on Thursday 22nd June 2017 was received favourably. On the one hand the heads of State and government clearly showed their respect of the mandate granted to the Commission to complete negotiations avoiding a public response to the position demonstrated by Theresa May during the Council.

7. "Customs White Paper" dated 9th October 2017.

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These strategies can be gauged against Theresa May's weakness, the disunion of her government and the difficulty the British administration has in understanding the position it has to defend. They highlight the risk of a situation in which the UK might neither advance nor reverse, in spite of the imperative of taking decisions and making certain choices.

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During her speech in Florence, Theresa May acknowledged that the Europeans had not wanted

the Brexit negotiations and that it was up to the leaders to complete them efficiently: "I recognise that this is not something that you — our European partners — wanted to do. It is a distraction from what you want to get on with. But we have to get this right. And we both want to get this done as swiftly as possible. So it is up to leaders to set the tone." The last sentence concerns European heads of State and government who will have to complete the difficult work of defining the European position on the future relationship between the UK and the EU. It seems however that this would primarily apply to the British government.

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