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Brexit. Brexit?

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Policy Brief

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On the eve of the invocation of Article 50, this policy brief disentangles the main components of the Brexit imbroglio and lays out the legal framework and political constraints of the negotiations that are about to start. It assesses the reversibility of Brexit, the likely duration and possible outcomes of the negotiations, the legal options for the transition period, and the probable impact of Brexit on the EU27 in general and Central Europe in particular. Because of the UK's size, economic weight and political clout, as well as its peculiar historical background, it concludes that the new EU–UK relationship cannot be based on one of the existing 'models' of external arrangements. The new partnership between the UK and the EU27 will have to go beyond even the most comprehensive free-trade agreement and it should also include finance, energy and external economic policies, as well as covering foreign policy, security and defence. The author emphasises that any weakening of the free movement of persons as a result of the negotiations would be a serious violation of the essential constitutional principles upon which the EU is built, and could damage the foundations of European integration. The brief considers managing internal differentiation without creating permanent divisions among groups of countries as the most important challenge ahead for the EU27. It also argues that, with Brexit, Central Europeans will lose a powerful ally on many economic and constitutional issues, although their economic and geopolitical weight will be on the rise in the new EU27.

Introduction

On the eve of the invocation of Article 50, the question mark in the title of this brief is not meant to question the fact that Brexit will happen. It will. But the answers as to when the new relationship between the UK and the EU will be forged, how it will happen and, first and foremost, what it will constitute are now completely uncertain and unforeseeable. It is this unpredictability that raises not one, but a long list of questions. Neither Theresa May's Lancaster House speech on 17 January 2017 nor the subsequent White Paper published by the British government have entirely clarified all the relevant questions.[1]

Is Brexit reversible?

Brexit is politically irreversible. Regardless of the British Parliament's involvement, Article 50 will be invoked and negotiations will be begun to conclude the agreement setting out the arrangements for the withdrawal, 'taking account of the framework of the new relationship with the Union', as the same Article 50 states. The Treaties shall cease to apply from the date of entry into force of the withdrawal agreement or, failing that, from two years after the notification of the UK's intention to withdraw, unless the European Council, in agreement with the UK, unanimously decides to extend the negotiation period.

The decision of the British voters must be respected and it would be a fatal mistake to believe that this decision could be reversed by any kind of legislation or a second referendum. Any attempt to override the popular will would cause immense and incalculable damage, not only to the UK but also to the EU.

While the result of the referendum must be respected and, accordingly, the withdrawal process is politically irreversible, in a strictly legal sense the process is reversible, even after Article 50 has been activated. The notification of an intention is not a legally binding act; it only triggers the start of a negotiating

[1] UK Government, Department for Exiting the European Union, *The United Kingdom's Exit From, and New Partnership with, the European Union*, Policy Paper, 2 February 2017.

procedure.[2] This procedure, legally and theoretically, can be stopped and the intention can be withdrawn. Up until what point in time? The general principles of international law would suggest that legal reversibility exists until entry into force of the withdrawal agreement. Once this agreement enters into force, the only way of 'reversing' the withdrawal would be to ask to rejoin under Article 49 of the Treaty as is provided for in Paragraph 5 of Article 50.

The withdrawal agreement

The provisions of Article 50 only set out general guidelines for the exit procedure, and a number of issues will be raised in the course of the process. However, even on the basis of these laconic rules, it seems to be clear that a distinction has to be made between the agreement containing the arrangements for the withdrawal ('divorce') and the framework for the future relationship of the departing member state with the Union (which has to be taken into account when negotiating the withdrawal agreement). The former is an agreement negotiated in the light of the guidelines provided by the European Council, and concluded by the Council acting by qualified majority and obtaining the consent of the European Parliament. Even more scant is the language of Article 50 on the 'framework for the future relationship'. If the negotiated agreement does not enter into force two years after the negotiation period, nor is it extended by the unanimous decision of the European Council, the Treaty ceases to apply. No answer is given to the question of what will then happen regarding a large variety of issues, among others the division of assets and liabilities, including the contributions to budget, contingent liabilities and other loan guarantees, outstanding payment promises, staff, pensions, international agreements and so on, relating to the withdrawal itself. The only reasonable outcome, as well as likelihood, is that the two-year period will have to be extended and negotiations will continue until all the withdrawal arrangements are agreed upon.

[2] On irrevocability see J. C. Piris, 'Article 50 Is Not For Ever and the UK Could Change Its Mind', *Financial Times,* 1 September 2016; A. Duff, 'Statement to the Constitutional Affairs Committee of the European Parliament', 8 November 2016, 2. Available at https://polcms.secure.europarl.europa.eu/cmsdata/upload/303548f7-ed4b-4a35-bfb8-efa4c183ff76/AFCO%20Brexit%20Memorandum%2008-11-16%20(Andrew%20Duff).pdf.

The framework for the future relationship

On the other hand, there is no such constraint on the parties regarding the framework for the future relationship. This framework will be an international treaty between the Union and its member states, on the one hand, and the UK (provided it is still united) on the other, formed under the rules of international law, and duly signed and ratified, for the time being, by all of the 38 parliaments. If there is no such treaty, there will be no special framework for the relationship. Thus the general rules and laws, including the international conventions, treaties and agreements that both the Union and the UK are parties to, will apply to trade, investments, security and all other matters.

The withdrawal agreement and the framework for the future relationship should therefore be clearly distinguished from one another regarding timing, procedure and substance alike. At the same time, however, they are politically and economically closely interconnected, as the withdrawal agreements will, no doubt, have to take into account the future framework as it is provided for by Article 50. But how can that framework be taken into account while before serious negotiations have begun and before, at least, even a limited agreement is reached on the substantive elements of that framework? The result is a significant imbalance between the negotiating positions of the parties, essentially to the disfavour of the UK.

Difficult negotiations ahead

The tasks of the negotiators are formidable on both sides, as they have to cope with an extreme complexity of interlocking political, economic and legal issues, many of which conflict with each other. There is the political irreversibility versus the legal reversibility of the exit, as well as the legally distinct and separate negotiating processes on the withdrawal agreement and on the future relationship, which are, however, economically and, in particular, politically interconnected. Moreover, despite the separation of the two legal instruments, there will be some very sensitive borderline issues that could be settled either during the withdrawal or as part of the future agreement. Is the recognition of acquired rights, *inter alia* under existing work permits, a subject that should be dealt with as

part of the withdrawal agreement (probably) or as part of a future treaty? Border controls will have to be re-established between Ireland and Northern Ireland. Is this a withdrawal issue, or should the agreed arrangements be included in the new framework? The complexity is compounded by the extraordinarily high stakes, not only for the two (in fact, 28) parties, but also for the whole world, as the ultimate outcome of the probably drawn-out negotiations will have a major impact upon world trade, the global economy and geopolitics.

Duration of the negotiations

Whatever the final outcome, the negotiations on the future relationship are not expected to be concluded soon. Even if Article 50 is activated before the end of March 2017 and thereby the two-year period begins, it seems unlikely that the withdrawal agreement will enter into force prior to the expiration of that period. Even if informal talks or exploratory conversations are started on the framework for the new relationship while the UK is still a member of the Union—and not yet a third state, with which formal negotiations aimed at the conclusion of an international treaty can be conducted—reaching a final agreement on the vast complexity of all the various issues will take a considerable amount of time.

What can now be safely presumed is that Brexit will not take place prior to the end of this decade, in fact, not before the end of the ongoing multi-annual financial framework in 2020. It is only reasonable to hope that, at least, the de facto application of the treaty on the future framework is assured at the same point in time, in order to avoid a vacuum in the bilateral relations between the UK and the Union. This is, indeed, of fundamental interest to both parties for evident political and economic reasons. Nevertheless, the interest from the two sides is not of equal weight, as represented, primarily but not exclusively, by the share of exports to the other side. The time pressure will therefore be stronger on the UK, but both sides have to understand that the agreement is a common interest and stronger bargaining positions are not to be abused.

At least once Article 50 is triggered the recent *'drôle de guerre'* will come to an end; the recurring battle of rhetoric will, one hopes, fade away and, after months of bafflement, perplexity and unease stemming from the astonishing unpreparedness on all sides, serious negotiations will start. The sooner these negotiations produce tangible results, the more the presently prevailing uncertainty and the economic damage caused by it will decrease.

The future relationship

Much has been said about the question of which model will be adopted for the future relationship, particularly with regard to trade and economic relations. The best answer to this question is none of them: neither the Norwegian, nor the Swiss, nor the Turkish, nor the Canadian, nor any other. The British government's White Paper lays out Britain's negotiating priorities in a way that makes a comprehensive free-trade agreement seem the most likely outcome of the negotiations. Regardless, it is clear that there will be a special *sui generis* regime which will depart from the standard templates. It is now widely recognised that because of the UK's size, economic weight and political clout, as well as its peculiar historical background, the new relationship should not be locked into the existing categories or 'models' of external arrangements.

The European Economic Area

The arguments as to why the UK would not wish to join the European Economic Area (EEA) are well-known and evident. It would be a total reversal of the political decision of 23 June 2016 to accept control of the UK's legislation by the EU, including by the case law of the European Court of Justice, without having any tangible influence upon the EU's decision-making processes in legislation and jurisprudence. In the framework of the EEA 'quasi-supranational' set-up, the EEA countries incorporate more than 300 new EU acts per year,[3] over which the EEA Joint Committee has little, if any, influence in the 'decision-shaping' phase after the Commission has transmitted its proposals to the Council and the European Parliament. This is precisely the limitation of national sovereignty that the British voters hoped to get rid of by allowing Parliament to regain full control over political and economic decisions.

The frustration of being deprived of control over their lives may have been an even stronger factor than the fear of immigration in the motivation of British citizens to vote to leave the EU. Indeed, the migration issue was not even on the table when the exit movement started and, paradoxically, in 2004 it was the UK government, together with Ireland, that opened the door immediately and unconditionally to the free movement of labour from the eight new member states, rather than using the transitional arrangement of a maximum of seven years of restrictions.

[3] S. Gstöhl, *'Brexit' Lessons from Third Countries' Differentiated Integration with the EU's Internal Market,* CEPOB College of Europe Policy Brief, September 2016.

The concerns about intra-EU 'migration' were, and presumably still are, strong, despite the huge benefits the UK has enjoyed thanks to the significant contribution of EU labour to its economic growth. The four freedoms are, of course, the cornerstones of the EEA and it is impossible to envisage EEA membership, or any variation of a 'Norwegian model' without the free movement of labour. It is true that tiny Liechtenstein, with a territory of 160 sq km and with foreigners representing one-third of its population of 35,000, has a special restrictive system, but these criteria certainly cannot be applied to the UK.

Switzerland

The Swiss case is essentially similar to the Norwegian one, although with several differences. While Switzerland has been a member of the European Free Trade Association (EFTA), together with Norway, since its foundation in 1960, the Swiss voted against joining the EEA in a referendum in 1992. In the absence of EEA membership a bilateral approach was taken and a set of sectoral agreements has been concluded,[4] based upon its 1972 free-trade agreement with the European Communities.[5] The agreements also include one on the free movement of persons but, due to the result of the 2014 referendum that required the constitutional introduction of immigration quotas, free movement was not extended to Croatia; consequently the EU rejected the introduction of a safeguard clause that would place national ceilings on EU migration. Negotiations have not yet produced results and the whole complex system of bilateral agreements has been put at risk. Furthermore, the agreements do not cover the area that would be the most relevant for the UK, that is, financial services. The control issue is also somewhat more complex since the establishment of the EFTA Surveillance Authority and the EFTA court, but the end result is that Switzerland has minimal, if any, influence upon the new *acquis* that is to be adopted by EFTA members. The extreme complexity of and uncertainty regarding the resolution of the present difficulties and the risks arising from them regarding the overall system of sectoral arrangements mean that this model would not be attractive to any of the parties, even if there was a remote chance of its applicability.

Turkey

Whether the UK would consider remaining in the Customs Union does not seem to have been raised by either of the two sides in the referendum cam-

[4] Twenty main agreements and more than one hundred 'secondary' agreements.

[5] Gstöhl, *'Brexit' Lessons.*

paign. Turkey has been a member since 1996, as have Monaco, Andorra and San Marino. From Turkey's point of view, membership is certainly not very advantageous, at least from a trade policy perspective. Important areas of trade, primarily agricultural products, are not covered by the bilateral arrangements either, and the provisions agreed in the Additional Protocol of 1970, notably on the free movement of labour, services and capital, have not been implemented.

Turkey has to follow the EU's common commercial policy, but has no influence upon it. The trade agreements made by the EU with third countries open up the EU market to these countries' exports, but deny Turkey the opportunity to export to the same third countries. While this customs union 'model' would resolve the immigration issue from the British government's current viewpoint, it would deprive the UK of what Brexit primarily wants to achieve, namely an independent, sovereign trade policy aimed at the creation of 'Global Britain': a champion of free trade that concludes its own trade agreements and has the ability to dismantle all tariff and non-tariff barriers with the largest possible number of countries.

In the Customs Union, the UK would be bound by *inter alia* the common external tariffs and this would frustrate any effort to put in place an independent commercial policy and conclude free-trade agreements with non-EU countries.

How the UK will become the global champion of free trade and how the undoubtedly attractive objective of creating a free-trading, deregulated and competitive Britain can be reconciled with the idea of seriously restricting the free flow of one of the major production factors remains to be seen. Restrictions on the free movement of labour are, however, not the only element that might come into conflict with the idea of a brave, new, open Britain. At a more general level, a more interventionist economic policy, as proposed in the latest high-level political statements and reflecting an ideological shift from traditional conservative policies, may also conflict with the role it intends to play in promoting free trade and competition at the global level.

The EEA, EFTA Plus and the Customs Union might be termed, with extreme simplification, the 'soft Brexit' options, although it does not really matter what they are called as none of them is politically viable.

The Free-Trade Agreement option

A variation of a free-trade agreement would possibly be a more realistic option. But here again, the reference to existing 'models', Canadian or other-

wise, should be avoided. Free access for British goods to the EU market and vice-versa is certainly an indispensable condition for preventing dramatic damage to both sides' growth and employment, as well as to the global economy. However, the real issues are the scope of the agreement and how to balance the parties' mutual interests, benefits, rights and obligations.

A next-generation free-trade agreement with the widest possible scope, covering all areas of regulation from intellectual property to investments, and from services to the environment and social rights, seems to be the logical direction to take. In reality, however, for both the EU and the UK, it would be a path full of traps, stumbling blocks and pitfalls of economic, political and legal natures. All of these difficulties ultimately boil down to the fundamental dilemma of how and why to grant full access to the single market for British goods and services, including financial services—with special regard to passporting rights—thereby granting the same benefits to the exiting country as those enjoyed by member states, while not granting those member states free access to the British labour market, which is one of the four fundamental freedoms of the single market *acquis.* This would result in significantly better treatment than the exiting country currently has as a member state. If, however, the four freedoms were applied in their entirety, this would go against the verdict of the referendum. Full access to the financial markets of the EU would necessitate some degree of supranational surveillance and control, which would, again, conflict with the outcome of the referendum. Here then, is the contradiction inherent to the choice between a hard Brexit or a soft Brexit. Either it goes against the basic principles of European integration as enshrined in the Treaties, or it does not respect the outcome of the referendum, in particular as it is now interpreted by the 'hard Brexiteers'.

On the other hand, even the most comprehensive free-trade agreement with the widest possible scope could not cover all the fields of cooperation that should be maintained between the UK and continental Europe. The future relationship will, one hopes, be much wider, more diverse and more complex than one that could be squeezed into an economic agreement. History, geography, values, and basic geopolitical and security interests bind the two Unions, whatever developments unfold in the upcoming decades. All this points to the conclusion that the framework for the future relationship cannot be locked in to the structure of existing 'models', and that the agreement or agreements will have to reflect the very special—indeed, unique—nature of the relationship between the exiting country—a permanent member of the UN Security Council and a nuclear power, with a population of 65 million and the fifth largest GDP in the world in nominal terms—and the remaining Union of 27 members.

This new partnership between the UK and the EU27 will have to go beyond even the most comprehensive free-trade agreement and should also include finance, energy, climate and external economic policies, as well as foreign policy, security and defence.

The 'no deal' option

But what if, at the end of the day, no deal is made? For trade and much of the trade-related issues, the multilateral regulatory system of the WTO would apply, that is, the General Agreement on Tariffs and Trade, the General Agreement on Trade in Services and all the other instruments and agreements that currently exist in this institutional and legal framework.

This is easy to say, but harder to implement. Apart from the serious economic consequences for both sides—affecting Britain far more heavily than the EU—the process of reanimating Britain's WTO membership would not be a simple or rapid exercise. The UK was a founding member of the General Agreement on Tariffs and Trade and is still a member of all the subsequent instruments, but since 1973 its rights and obligations have been exercised by the European Commission, within the framework of the common commercial policy. Since most of the entitlements and commitments are attached to the EU, they will now have to be reallocated so that the UK once again becomes the individual beneficiary and obligee of the whole system, for example in terms of quotas, schedules and so on. For the tariff schedules, a possible solution could be to take on—as a matter of fact, to uphold—the EU schedules and apply them vis-à-vis third countries. In the absence of or pending a final bilateral deal, the same tariffs would have to be introduced by both the EU and the UK at the point at which the UK ceases to be a member of the EU. The UK would also be free to apply lower tariffs, either on an *erga omnes* basis or selectively, based upon the free-trade agreements it intends to negotiate and conclude as early as possible with non-EU members. Since the EU tariff schedules contain commitments only for the maximum level, nothing would prevent the UK from lowering or eliminating those tariffs altogether. It is to be underlined that a free-trade agreement between the UK and the EU would not involve, in any way whatsoever, Britain becoming part of the Customs Union and it would not be bound by the common tariff or by other instruments of the common commercial policy, unless explicitly provided for in that agreement.

The legal and procedural challenge would be to divide, reallocate and renew all the obligations to which Britain has been committed through its EU

membership. While the statement of WTO Director General Azevedo, that the UK would have to negotiate everything 'from scratch', seems to be somewhat exaggerated,6 the mere fact that the negotiations will have to be conducted with some 163 members makes it an extremely complex and onerous operation.

As for the trade agreements that the UK intends to negotiate and conclude with the 'rest of the world', it is both politically and technically inevitable that some sequencing is respected. Most of the important candidates for free-trade agreements have already made political statements that negotiations can only be meaningfully advanced when the basic issues surrounding future UK–EU relations have been worked out. Besides, it would be legally and technically impossible to conduct any serious negotiations while the UK remains a member of the Union and some thorny technical issues such as 'country of origin' rules have not been clarified. Nothing prevents Britain from proposing and even conducting exploratory conversations with any third party, but no country can enter into formal negotiations with an EU member without knowing the substantive elements of the relationship between Britain and the EU—by far its largest trading partner—once Britain ceases to be a member.

The WTO option would be the hardest Brexit and would cause very serious damage to all parties and beyond. Everyone wants to avoid it and the reasonable expectation is that it will be prevented by the conclusion of a comprehensive free-trade agreement that would be extended to a number of related areas. The new relationship would also cover—in the same or another international treaty—other vital fields of cooperation.

No bargaining on the four freedoms

How then can the special relationship with the UK; the need to arrive at a fair, equitable and well-balanced solution, which is neither a punishment, nor a reward; and the respect for the basic values, principles and interests of a European construction which will not stop with Brexit, all be reconciled? How can legitimate British interests be recognised at the same time as focusing upon our own future, that of an EU of 27 nations?

6 E. Larry, 'WTO Chief Says Post-Brexit Trade Talks Must Start from Scratch', *The Guardian,* 7 June 2016.

Opinions vary and suggestions differ both in terms of substance and form. Among the diverse propositions, there is one paper that seems to be the best demonstration of how not to approach the above dilemmas and how to frustrate endeavours to achieve fair and well-balanced solutions in line with the basic principles of European integration. The paper, titled Europe *After Brexit: A Proposal for a Continental Partnership,* known as the Bruegel paper[7] and prepared by five distinguished authors in their personal capacities, suggests the establishment of a 'continental partnership'. It is proposed that this partnership is based upon maintaining close economic cooperation which would allow 'continued access to and participation in important parts of the single market', while at the same time would grant control over labour mobility to the UK. The paper submits that 'from a purely economic viewpoint . . . goods, services and capital can be freely exchanged in a deeply integrated market without free movement of workers', and that the four freedoms of the European single market are 'not inalienable for deep economic integration. Free movement of workers can be separated from the rest . . .'. The paper then generously recognises that 'some temporary labour mobility is needed', without specifying the extent to which this mobility would be tolerated and how control would be implemented.

The argument is wrong, even from a strictly economic perspective. Markets are either free or they are subject to control. In the latter case, any differentiation between the various factors of production leads to distortions and frustrates the purpose of the single market. A more serious concern with this argument, however, is that discrimination against the free movement of persons would be a serious violation of the essential constitutional and political principles upon which the whole construction is built, as implicitly acknowledged by the paper itself. It is to be underlined that the unity of the four freedoms is not an issue of national interest to individual member states, but an overarching principle that cannot be subject to narrow-minded bargaining. A departure from the principles, the demolition of one of the pillars, might risk the destruction of the whole building.

The most startling argument of the paper for the acceptance of limits on free movement is that 'under our proposal there is already a political "price" to be paid by the UK as CP [continental partnership] entails significantly less political influence compared to EU membership'. Under this logic, it should be considered and recognised as a 'concession' that a non-member of the EU, having taken a sovereign decision to leave the Union, has less political influence than a member

[7] J. Pisani-Ferry, N. Röttgen, A. Sapir, P. Tucker, G. B. Wolff, Europe after Brexit: A proposal for a continental partnership, 26 August 2016. Available at http://bruegel.org/2016/08/europe-after-brexit-a-proposal-for-a-continental-partnership/.

of the Union. This argument verges on absurdity. How can one imagine that non-members, whoever they are, even if they have the closest possible association with the EU, can have the same political influence on the decision-making of the Union as its members? Is this difference not a natural consequence of the decision made by the country in question and recognised as legitimate by the EU and its members? Do we have to pay the price for this decision by distorting the balance between the four freedoms, and by jeopardising the single market, one of the most significant achievements of the whole integration process?

At the same time, the paper contains a number of interesting ideas and valid propositions. Many of them are self-evident and do not need much argument. The EU needs Britain and Britain needs the EU at least as much, and this in itself makes a close partnership essential. Whether it is to be called a 'continental partnership' is an open question: to give the name to a partnership between continental Europe and the British Isles may be somewhat misleading. The word 'continental' might even be reminiscent of another continental system, the continental blockade, which was not the brightest episode in the history of the relationship between the French—which then dominated the continent—and Great Britain. The best name, at least for the time being, seems to be 'close partnership'.

All these suggestions do not alter the fact that the main thrust of the proposed solution for the eventual deal between the UK and the EU, that is, to give away a fundamental political and economic principle, is entirely unacceptable. It would be a fatal mistake to give up one of the fundamental freedoms created by the European integration process and thereby to put the others at risk as well. It would also be a very negative message to send to all member states and a bad sign for the future development of the Union. At stake are the basic freedoms, principles and values of the EU, which are now being tested by partial and perceived economic interests.

The transition period

As the negotiations on the withdrawal agreement and on the future relationship are legally separate from one another and cannot be conducted in the same time-frame, it is practically impossible to exclude the possibility of a significant time gap between the termination of the UK's EU membership and the entry into force of the new international treaty between the EU, its member states and the UK that has been signed and ratified by all parliaments.

As such, there is a need to design an appropriate legal device to avoid a legal vacuum between the two dates and to mitigate the economic damage and political risk stemming from any gap. Several options could be considered. The membership of the UK could be further extended by unanimous vote, despite the withdrawal agreement having been settled and negotiations concluded. One could simply delay or postpone the application of the withdrawal agreement until such time as the treaty on the new relationship is to enter into force. This would probably entail the extension of UK membership for several years, with all manner of possible and unpredictable developments in the meantime. Another solution could be—despite the fact that the UK would cease to be a member under Article 50—the establishment of a temporary regime with a practically identical result, namely the de facto application of membership rights and obligations until the new treaty regime enters into force. The gap would be bridged in both cases, but the legal situation would not be perfect, and the temporary or transitional period might turn out to be very, very long.

Even in the highly unlikely event of a smooth transition scenario, in which the treaty on the future relationship enters into force at the same time as the UK ceases to be a member, some transitional arrangements will be inevitable. These will involve a certain degree of scheduling regarding the termination of rights and obligations accruing from membership. Some of these entitlements and liabilities will have to survive the membership itself and need to be phased out progressively, subsequent to the date of exit. The dismantling of some instruments may need additional time and, again, transitional arrangements for the application of new ones will be necessary. All these transitional arrangements or instruments forecast the need for some degree of transitional or temporary regime for the complete dismantling of all elements of membership.[8] These arrangements will largely have to be included in the withdrawal agreement itself.

Such transitional or temporary instruments may also be included in the treaty on the future relationship. Careful study will be needed to establish where these transitional provisions should best be placed. Interestingly, the purpose of these transitional instruments is precisely the opposite of the purpose of such arrangements in an association agreement or an accession treaty. In the case of the latter, something is being built up, while with Brexit the purpose is to dismantle the relationship.

[8] Duff, *Statement to the Constitutional Affairs Committee,* 5–6.

Another possibility for eliminating the legal vacuum and bridging the gap between the date of exit and the date of entry into force of the new treaty could be the partial anticipation of the new regime by resorting to the provisional application of at least some parts of the treaty, pending the completion of all the ratification procedures.

At this point in time, the only certainty about the upcoming 'divorce', and especially what comes after, is the uncertainty. This applies to the procedure and the substantive outcome alike. New and unforeseen issues of a legal, economic and political nature will emerge in addition to the many that have been and are fervently being discussed without having a clear answer. The negotiators and decision-makers are facing a daunting task and the challenges for their legal experts are equally formidable.

The EU27 after Brexit: the challenge of internal differentiation

As someone has aptly observed, 'the first important political consequence of Brexit has been the birth of EU 27'. It is the challenge of internal differentiation that the EU member states will have to tackle in the years to come.

Internal differentiation has been on the table for a long time, various ideas have been proposed and discussed, and some important constitutional changes have been accepted and introduced in the Treaties. One of these was the special status of the UK, recognised by a series of permanent opt-outs, starting in Maastricht and expanded with each treaty revision. The last opt-out would have been the result of the agreement with David Cameron at the February 2016 meeting of the European Council, which was eventually frustrated by the referendum.

The UK will go, but the impact of the British exit will remain and will probably increase the demands for further differentiation. What used to be called a 'two-speed Europe'—in fact, wrongly, as the permanent opt-outs went beyond the notion of 'speed'—is now being referred to as a two- or multi-tier Europe with a hard core and an outer circle divided by institutionalised barriers. If these barriers were to become permanent, the result would be the institutional

and legal fragmentation of the structure. This would be the harbinger of the demolition of the overall structure, with all the associated economic and political consequences.

While internal differentiation is a logical and inevitable reflection of the realities, it can only be recognised within some limits and under some clear conditions. First, there must not be 'Chinese walls' between the tiers: communication and circulation must be open and nothing must prevent a member state from the outer circle from stepping across (up) to the inner one. Even more important is that the various tiers should differ in the various fields of integration policies. There should be a variable geometry, with a variety of member states belonging to each tier, according to the policy area. This would, in itself, prevent the creation of permanent institutional structures for the different tiers, notably for the 'hard core'.

Differentiation, eventual fragmentation and a multi-tier structure with variable geometry reflect only one of the interconnected aspects of Brexit's impact upon the future of an EU of 27 member states.

At present, the main approaches regarding the direction to take are diametrically opposed one another. Some suggest that 'the future of Europe will not be secure without big constitutional developments of a federal type' and that Brexit now offers the best opportunity to go firmly along the 'ever closer Union' route. Some suggest going in a similar direction, but first restricting this federal structure to those who are willing and able to join it, leaving aside those who cannot or do not want to follow the same path. Some, on the other hand, suggest a complete overhaul, a fundamental refoundation, by substantially reducing the competences conferred upon the Union to the benefit of the member states, together with a substantial revision and amendment of the Treaties. The recent *White Paper on the Future of Europe* published by the European Commission includes both extremes as two of its five scenarios, and other possibilities in-between.[9]

Some—including myself—contrary to all the above suggestions, propose a pause, a time for reflection, while continuing to work by facing and tackling the growing risks and challenges.[10] It is not wise to act when one's judgement is clouded by fear and panic, particularly when reactions to the series of overlapping crises conflict so fundamentally with each other.

[9] European Commission, *White Paper on the Future of Europe,* March 2016. Available at http://europa.eu/rapid/press-release_IP-17-385_en.htm.

[10] H. Védrine, *Sauver l'Europe,* Éditions Liana Levi (2016), 51–54.

The impact of Brexit on Central Europe

Apart from the institutional consequences, there will be significant changes to the internal economic and geopolitical landscape. It is easy to sum up these changes: a shift eastwards, materialising primarily in growing German interest in and reliance on Central Europe. This means that the economic and geopolitical weight of Central Europe will be on the rise, which will entail a greater political role as well as more responsibility. A geopolitical upgrading of the region had started well before the Brexit referendum anyway, due to the new security risks created by Russia.

This might be good news for the region, but many feel that there is at least as much to be regretted. Central European countries have lost an ally in various fields. Non-euro member countries will not have the strongest voice when it comes to defending the interests and rights of the non-euro area, especially with regard to the initiatives to use the euro-area as the fault-line for an institutional split between the hard core, and those outside it. With the departure of the UK, the strongest and most committed free-trade nation will no longer be present. Central Europe has lost an important ally in its endeavours to develop economic cooperation, trade and investments with the rest of the world, since its countries depend heavily on foreign trade, as is best testified by the very high ratio of exports in their GDPs. While the UK is preparing for the role of Global Britain, a champion of free trade, by eliminating trade barriers with as many countries as possible, in continental Europe an ideologically diverse and strange mixture of movements, represented by unelected but very vocal non-governmental organisations, are successfully working on public opinion to oppose what they perceive as the promotion of globalisation. Free trade and the promotion of growth and employment are apparently the first targets and victims of these movements, and political forces of the most diverse colours are instrumentalising the widespread frustration and anti-capitalist, anti-free market sentiments.

The UK was also a natural ally of Central Europe in defending subsidiarity and national competences against the creeping extension of the common competences of some of the EU institutions. A rebalancing between member states and EU institutions, as well as between the institutions themselves, will have to be achieved in the absence of an influential member state.

That other countries may follow the UK and leave the EU is highly unlikely, albeit not entirely excluded as a possibility. The one group of countries, however, that will never leave the EU is the 'new member states' of Central Europe. Contrary to what many have suggested, the main reason for this is not money. There are, of course, economic, geopolitical and security policy considerations, but they are not the most important factors. The root causes are much deeper, and cultural. Central European nations attach much more importance to their cultural legacy, their values and their way of life, in short to their collective identity. Without Christianity, many of these nations might have disappeared a little more than one thousand years ago. Without their European identity based upon the Judeo-Christian cultural heritage, upon antiquity and its Renaissance, on Roman law and the rule of law that was built upon it, on the Enlightenment and on all the values and principles entailed by it, many of the Central European nations could not have preserved their national identities. While the West experienced internal conflicts and wars, the East had to defend itself against attacks from the outside. Hungary, for instance, lost two-thirds of its population in the thirteenth century because of the Tatar invasion, and fought an ongoing defensive war against the Ottoman Empire for about two hundred years. Had these Eastern Europeans lost these wars and succumbed to the foreign invaders, they would have lost their European identity, and if they had lost their sense of belonging to Europe, they would have lost their national identities as well. This is why being European and maintaining this attachment is an existential issue for most of the nations in this region.

In accordance with this history, central Europeans see Brexit as a call for the EU to react to the new global environment by rediscovering and protecting its cultural heritage, distinct identity and special mission in the world.

To sum up, regardless of the impact of the UK leaving the EU on itself (including Scotland, Northern Ireland, Wales and London), on the EU and its future, and on the economic and political developments of the globalised world, Central Europe will remain in the EU, that is, at the centre of Europe. Its historical, geographical, economic, geopolitical and security situations are fundamentally different from those of the British Isles. We cannot afford to become 'out-riders', and we cannot develop or accept any kind of isolation, wherever, whenever or by whomever such ideas may be raised. This is the legacy of our parents and grandparents. It is about our one thousand years of history; it is about who we are.

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