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Editorial

The Editorial Board of ELTE Law Journal decided to devote a special issue to Brexit – considering it is probably the most fateful event of the decade in Europe. The articles map the historical roots and the present political context of this unprecedented move, along with its impact on the free movement of persons, on the area of freedom, security and justice, on common agricultural policy and on the future role of English as the lingua franca of the Union. The foreseeable triggering of Article 50 TEU poses unprecedented political, legal and procedural questions to be answered. Central Europe, including Hungary, has to reconsider its position in a rapidly changing European Union. Of course it is impossible to grasp all the legal consequences of this historical change; the major elements of the farewell deal still have to be hammered out by the negotiating parties, but we have to face the fact that something has dramatically changed: The Anglo-Saxon world represented by Great Britain is prepared to cut its former ties with the European Union. The United Kingdom strives for an independent and global role instead of being a member of the 'European concert'. An important epoch of the continent has been irrevocably completed.

The majority of the authors are members of our Faculty, representing the remarkable intellectual power of our 350 year old institution. We are especially honoured that Tibor Navracsics, member of the European Commission and János Martonyi, former minister for foreign affairs of Hungary, contributed to this issue and three ambassadors of the Hungarian diplomatic service offered their analysis and notes on the sweeping changes as well. In this way, readers may learn not only the views formulated in the 'ivory tower' of the university but the opinions of those, who have confronted the multiplicity of tasks while 'in the commanding bridge'.

Budapest, December 2016

Miklós Király *Réka Somssich*

Symposium

Tibor Navracsics*

Beyond Policies: a Crisis of Identity

There is no doubt: 2016 marks a symbolic turning point in the history of European integration. Just over first six months into the year, a new crisis, a crisis of identity, could be seen to emerge as a political consequence of the Brexit referendum in the United Kingdom. This new crisis is, however, not really a new one. It existed at European level even before the recent developments started in the UK and it has been going on for as long as the debate on the integration process. It has now nevertheless gained a particular importance, because it has added a new dimension to the already existing questions on Europe's future.

Some say that Brexit will cause enormous damage to economic cooperation, to the functioning of the European Single Market. Others emphasise the political dimension of Britain's impending departure. They say Brexit will rupture the process of successful policy-making and enlargement in Europe, and bring an end to the ambitious goals of ever closer union, as defined in the Treaty. For them, this is a turning point – to be followed by decline and the challenge of disintegration.

For me, the result of the UK referendum is a striking example of an identity crisis at European level. All the components of this crisis have been with us for many years. The referendum has only brought to light and shown the political and economic implications of a missing or weakened identity. In this sense, the outcome of the referendum has not triggered a new crisis, but deepened an existing one and made the problem more visible. However, it has also contributed to a widening of two eminent policy crises which threaten solidarity and institutionalised cooperation between Member States and the European institutions: the Euro crisis and the migration crisis.

This is because all well-functioning cooperation on policies– based either on a Community or intergovernmental approach – needs a firm foundation of solidarity and mutual interest, underpinned by a sense of common identity. If this feeling does not exist, even in the loosest sense of the word, European integration will be doomed to fail. The question is therefore what conclusions should be drawn from the debates on European identity, policy crises and Brexit, respectively. Obviously, these lessons are important not only in themselves. They can also show us how to develop a concept of European identity that is acceptable to citizens and more successful.

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In this paper I will argue that, while the developments in British politics which led to Brexit happened simultaneously with the Euro and the migration crises, this is not just another policy crisis. It is more than that. It goes beyond policies, to the very heart of European integration: a European identity embodied by a willingness to cooperate closely with others. That is why the Brexit referendum is not just another referendum. Brexit indicates a political crisis – a crisis of identity – at policy level. This is the point where we can go beyond theoretical debates on European identity and develop a new European identity by using the policy instruments we have in our hands.

A new concept of European identity is, therefore, needed. We have to find a new concept which – unlike the traditional federalist vision – is not based on a top-down, but on a bottom-up approach. A European identity that does not exclude or supersede, but complements other loyalties and makes them richer. There are very successful policy instruments for this purpose at European level. We have to make the most of them in developing a new community of communities in Europe.

I A Turbulent Decade: Policy Crises at European Level

The history of European integration has never been short of policy crises. Right from the beginning, emergency situations and quick solutions – improvisations even – have always characterised the process. However, unexpected situations often served as moments of truth and gave a push to European integration.

Member States' funding difficulties in agriculture and rural development led to the creation of the Common Agricultural Policy, while, as a result of the coal crisis resulting from overproduction, a common regional policy was established in the early 1960s; just to mention two examples that illustrate the enormous – and eventually beneficial – effect various crises have had on policy and institutional development at European level.

Similarly, recession and stagnation in the past eight years have raised fundamental questions about the European economic model. They revealed the vulnerability of the Euro and made a case for a more disciplined and coordinated – even united, perhaps – budgetary policy in the Eurozone. Before the financial and economic crisis that erupted in 2008, some might have regarded the lack of a fiscal union as a convenient safeguard of Member States' power. However, as the crisis demonstrated, the incomplete institutional and policy setup of the single currency no longer simply point to a desire to preserve national sovereignty. It has been revealed to be a severe risk to the stability of one of the world's leading currencies.

Nevertheless, despite all the problems and the conflicting views on what solidarity actually means in practice, the feeling of belonging has never been seriously questioned. That is why the economic problems and challenges to the stability of the Euro have not led to a systemic crisis. Problems and debates on how to address these challenges remained at policy level and sought policy solutions. No matter how much the single European currency served as tangible proof of a European identity, its problems did not trigger an identity crisis.

Nevertheless, while the Euro crisis did not create a need for redefining the elements of identity on which European integration was based from the beginning, it was the worsening of the migration situation that led to this debate in the European Union. 'United in diversity', one of the fundamental principles and the slogan of the EU, has come under pressure. A sudden surge in the number of refugees and migrants coming to the EU posed a new challenge to Member States in 2015.

Undoubtedly, the issue was not new. Greece, Italy, Malta and Spain had accumulated an enormous amount of policy expertise to address the sometimes very difficult situations that can arise from uncontrolled migration. The novelty of the most recent case was twofold. First, the sheer number of migrants put unbearable pressure on the existing institutional and legal framework. Second, due to the opening of a new route for migration, the group of countries affected became larger. While the countries along the traditional routes across the Mediterranean were already relatively experienced in tackling the issue, Western Balkan and Central European states were shocked by large numbers of refugees and migrants arriving.

Not only did Dublin III collapse during the crisis, but also deepening disagreements between Member States led to a policy vacuum. Some see the solution in 'more Europe', seeking to establish a unified European migration policy with a fully-fledged institutional setup and decision-making powers at European level. For others, a renationalisation of European migration policy is the best way to address the challenge. They argue that efficient national migration policies are the safeguards of Europe's security and the only means to control a massive influx of people.

Moreover, the migration crisis led to bitter arguments between Member States over the way decisions are taken in the Council. The European Commission's proposals on relocation quotas and a unified European asylum system sparked controversies at national level. The use of qualified majority rules was challenged by Hungary and Slovakia in the Justice and Home Affairs Council. The two Member States turned to the European Court of Justice, arguing that the proper forum for making decisions on migration quotas would have been the European Council, and that there should have been a requirement to achieve a unanimous vote, rather than a qualified majority, because of the sensitivity of the issue.

These two recent examples of policy crises evolved almost perfectly simultaneously. They represent the institutional and policy challenges the Union is facing. Neither of them is unique in the history of European cooperation. The Euro crisis was preceded by the collapse of the European Exchange Rate Mechanism in the 1990s, and controlling mass migration has been on the agenda of ministers of Interior Ministers before, too. However, the depths of the problems in both cases caused more bitter controversies than in the past.

During these two crises, conflicts have emerged that have a new dimension compared to traditional policy debates. It is no longer only about discussing competing ideas and proposals for addressing policy challenges. Now, one of the fundamental principles of European cooperation is being questioned. Challenging the principle of solidarity among the Member States forming the Union is a new development in both crises. This new dimension takes us beyond conventional policy frameworks and leads to the fundamental issue of European identity.

While solidarity has been one of the catchwords during the crises, it cannot be interpreted only in a policy context. Solidarity is strongly linked to community. There is no community without identity. As a result, the debate of policy proposals formulated in the name of solidarity has opened up a new discussion of European identity. The question of values and principles made its way back onto the agenda, and politicians again faced the once buried challenges of identity and community at European level. Diverging interpretations and definitions of what solidarity means and what its limits are did not only reveal a lack of consensus. They also, for the first time in the history of European integration, raised the possibility of excluding a Member State – Greece – from the Euro zone.

All taboos regarding integration were subsequently broken. If the exclusion of a country can be openly debated then a voluntary departure is also possible. If the ideas underpinning European integration are to be reformulated then the institutional setup based on these ideas can be redefined as well. In this context, the longstanding political conflict in the United Kingdom relating to the country's European Union membership became a debate on identity, too.

II Brexit: from Policy to Identity

The potential departure of a Member State from the European Union has been on the agenda before. The history of post-war European cooperation had seen serious intentions to leave even before the UK referendum. A French threat of withdrawal from the Treaty was intended to strengthen the country's position during the 'empty chair' period in 1965-66, which marked the first constitutional crisis in the European Community. The British referendum on membership of 1975 and all the following referenda on ratifications of new Treaties brought up constitutional issues and future institutional scenarios of the European Union.

Not one of them, however, explicitly raised the question of identity. Institutional settings or the distribution of powers were extensively debated, but feelings of solidarity and the sense of community remained untouched. The main principle underpinning European integration was never questioned in any Member State, the sense of belonging never undermined during the respective campaigns.

This is what makes this year's referendum in the United Kingdom fundamentally different. The starting point was a policy debate on how to control the influx of Central and Eastern European employees that have been coming to the UK for years. Of course citizens of these countries – the so-called new Member States – were only exercising their right to free movement within the EU to find work available in labour markets recently opened to them.

Germany and some other Member States had been more reluctant to open their markets to employees and entrepreneurs from Central and East European countries. Other Member States, like the United Kingdom, took their Treaty obligations seriously: they offered the citizens of these countries opportunities to take up jobs and start businesses right after their accession in 2004.

As a result, a new workforce appeared on the British labour market – hundreds of thousands of inexpensive but highly qualified employees. They sometimes filled vacancies and

posts for which they were overqualified. Nevertheless, fears and political tensions arose, boosted by some tabloids and politicians.

The British government at first tried to respond using employment and migration policy. Initial policy measures included attempts at restricting access to jobs and social benefits available to every European Union citizen.

Drafting these policy measures, the government faced a double challenge. Externally, any restriction of the free movement of workers contradicts one of the fundamental – and universally respected – principles of the European Single Market. That is why the government was confronted with strong and legitimate resistance at European level. Domestically, however, these policy responses proved insufficient to quell the debate. As the country approached the 2015 parliamentary elections, Eurosceptic politicians – both in opposition and in the government – turned what had originally been policy issues into a highly political one.

According to them, the 'invasion' of the British labour market by Eastern Europeans was a result of the fact that the country had lost control over immigration. They argued that it was time to reassert its right to determine how many people could come to Britain, and from which countries. They raised the debate about immigration to a higher level and linked the issue at its core to another, more traditional dilemma of British politics, its geopolitical affiliation with the European Union. The EU, as many in the UK see it, is a superstate where Member States are reduced to submission by Brussels, losing their sovereignty and independence. The solution, argued the Eurosceptics, lies either in returning to a loose form of economic integration or the UK leaving the European Union as a political project.

Faced with such a potentially explosive political issue in the run-up to the 2015 campaign, the government – and the Europhiles in the Conservative Party – tried to avoid making it an electoral issue. It was clear to them that if the elections turned into a vote on EU membership, the issue would split and paralyse the Conservative Party, leading to defeat.

That is why David Cameron decided that he needed to eliminate the problem from the campaign. He chose to try to gain time and postpone confrontation – thereby raising the stakes. By declaring that a separate referendum would be held after the parliamentary elections he neutralised the migration problem during the campaign. But at the same time he turned it into a high-profile political issue for the very near future. The British Prime Minister put what had originally been a mostly policy-based domestic political debate into a European context.

For him, pushing for new rules on migration was just part of a wider plan to reform the European Union. Cameron and his supporters in the Conservative Party tried to win the battle over Europe by emphasising the need for a fundamental reform, superseding policy-based objections of his opponents.

The manoeuvre succeeded only partially. Cameron did manage to exclude migration and the issue of Britain's place in the EU from the campaign and secured a convincing victory for the Conservatives. But afterwards, the postponed debate became a battle of conflicting views not only on migration, but on relations to and in the European Union as such.

Thus, Pandora's Box had been opened and one year after the parliamentary elections the United Kingdom found itself in a campaign again. This time, however, it was not a parliamentary majority at stake, but British membership of the EU. Migration and other EU-related policy

issues were overwhelmed by high politics. Both sides of the campaign benefited from the new situation.

Pro-EU groups – the 'remain camp' – supported a new deal for Britain in the EU. Led by the Prime Minister, they drew up a list of proposals. Policy measures, including restriction of social benefits for EU citizens, were drafted, and David Cameron visited European capitals to drum up support from other Member States. Eventually, at the European Council meeting in February 2016, the British Prime Minister secured the critical backing of both the other Member States and the European Commission.

As such, the Remain campaign seemed to have secured an important victory. Cameron's aim was to present himself as a competent, highly respected European statesman who could successfully represent and protect British national interests. His proposals went on to form the core of the Remain camp's arguments in the run-up to the referendum. Based on exact calculations and tangible proposals, supporters of EU membership campaigned at policy level. They put policy-messages at the heart of the campaign. The United Kingdom is better off inside the EU than outside of it – this was their main message. Economic and financial arguments designed to appeal to voters' heads seemed to be invincible.

Had it still been a policy debate, the Remain camp would surely have won. However, something happened which the Prime Minister and his supporters failed to notice: while they were preparing for a policy debate using rational arguments, the real battle took place at a different level.

Delaying the debate had given the leave-camp the opportunity to turn the issue into a genuine political one, into a question of membership and identity. Exploiting the potential of this controversial question, they put independence and British identity at the heart of their campaign. Independence and integration, membership and national identity were presented as antagonistic terms. Instead of mirroring the Remain camp's route of investing energy in drawing up policy alternatives, they chose a different path and launched a campaign centred on identity. They put the emphasis on emotional factors and mobilised voters by appealing to feelings of national identity and a sense of belonging. For them, the European Union was a supranational project hostile to nation states and national identity. That is why, in their logic, it had to be rejected by citizens.

The Leave camp changed the narrative of the referendum campaign. The possibility of the United Kingdom's departure became increasingly real. This unexpected development unsettled supporters of the Remain camp. European integration is unpopular when it comes to identity issues. The demand of taking back control, on the other hand, was at the same time popular and motivating for many voters – just because it could be closely linked to national identity.

That is where the Remain camp lost the battle. While they were pursuing a policy-oriented campaign, focusing on common sense, the Leave campaigners stirred voters' emotions. They set their national identity against a European identity and claimed that the two were antagonistic, incompatible. They were able to do this because at least one influential interpretation of European identity underpins this narrative. And they succeeded because this sort of artificial European identity has always been unpopular with European citizens.

The Remain camp lost the referendum because the battle was not fought where they expected it to be fought. They were prepared for a policy campaign – and faced with an identity issue. What happened to them happens invariably when national identities are set against European identity: the latter loses.

The significance and the consequences of the referendum teach us important lessons on European identity. The referendum painfully demonstrates the damage to European cooperation caused by the absence of a viable and loveable concept of a European identity. The new definition of European identity is not rocket science. It is right under our nose. It has been evolving for decades, fed by policy measures and based on common sense. We just have to make it more visible. Then it can be the foundation of a new narrative on European identity.

III Identity or Identities?

Does an individual have an identity or identities? The question has always been a subject of debate. The easy answer, of course, can be misleading. On the one hand we can talk about a person's identity, in the singular, as a coherent set of feelings and parts of a personality. On the other hand every individual is made up of multiple identities; these make up his or her identity. Often the outcome of these debates depends on where people put the emphasis.

National identity is traditionally perceived as a homogeneous structure that supersedes every other loyalty. The era of nationalism – the 19th and 20th centuries – led to the creation of political structures, above all nation-states, based on a strong and exclusive sense of nationhood. There was no place in this concept for other loyalties unless they had been subordinated to the national identity.

Hence, following the patterns of European traditions, there has been a tendency to envisage that a European identity would develop in the same way as national identities. From the beginning, supporters of European integration were keen on building a new, supranational, structurally homogenous European identity, which absorbs national identities into a larger unit of loyalty.

This exclusive approach was doomed to failure. While a few ardent Eurofederalists saw it as an indispensable prerequisite for successful European integration, the majority of European citizens have always been averse to supranationalism. All the more so since major building blocks of a viable identity have been missing.

The process of European integration as an intrinsically technocratic one has always lacked emotional attachment. This did not cause problems until the push for stronger political integration in the 1990s, when the new ambitions of the European Union immediately raised questions about the foundations of the yet-to-be-born political project. These questions revolved around primordial components of a political community, such as legitimacy, demos and identity.

That is how the fate of European cooperation and the success of European identity became inextricably linked. At the stage of integration we have reached now, the prospects of the European project are determined by the level of public support for European solutions. All

previous and recent examples show that the European Union loses when confronted directly with national loyalties. These cases also demonstrate that the European identity, even in its embryonic form, falls away when citizens face this kind of binary choice.

The Brexit referendum is the most striking recent illustration of what happens when national and European identities are set against each other. The Leave camp very consciously portrayed traditional supranational notions of European identity as being antagonistic to other loyalties. The European super-state's mission – they said – was to undermine organic communities and loyalties and to subjugate nation-states to an illegitimate bureaucracy based in Brussels. This bureaucracy was bent on eliminating all identities other than a supranational European one and eventually taking all means of control away from organic communities.

That was the line of argument during the campaign which left the Remain camp defenceless. They were well-prepared for policy debates, had a myriad of facts on their side on issues of economy and finance, but lost the battle on identity questions. They simply could not generate emotional support for their campaign. Enthusiasm won it for the leave-camp.

At this point we confront a question that is posed and reinforced by referenda in the European Union time and time again. To be viable, an institutional arrangement needs a certain level of emotional attachment. Without this attachment, institutions collapse. Referenda show that clashes of identities are lethal for European integration because citizens prefer arguments based on national identity to those based on a European one.

Does this mean that the project of building a European identity is doomed to fail? If the answer is yes then European cooperation will return to national solutions, at least in politics. This would not necessarily result in the failure of the European project as a whole. It would just indicate that we are about to enter a new intergovernmental period. Looser forms of cooperation, as well as a stronger emphasis on the national level, can be feasible as well, but it must be clear that policy cooperation and competitiveness would suffer as a result.

Previous examples demonstrate that supranationalism leads nowhere. Failed attempts to create a supranational European identity were punished by the UK referendum. However, the failure of supranationalism does not mean that all other forms of a European solution must be excluded.

IV What does the Brexit-Referendum Teach Us on Identity?

One could argue that, had the referendum campaign remained focused on policy issues, supporters of British membership of the EU would have prevailed. They were better prepared, more concrete in their rhetoric, and common sense was on their side. The result nevertheless demonstrated a major deficiency of European integration. Policy results may be convincing, and rational voters may accept them. However, when it comes to politics, policy results fail to touch the feelings needed to get voters to support the project.

Polls and analyses suggest this happened with the Brexit referendum. There is a strong correlation between citizens' age and social status and their inclination to support the European project. Young, urban, educated people are generally in favour of Britain being a member of

the European Union. Less educated, aging, rural populations have been the stronghold of the Leave campaign. This means that young, educated people are more willing to include the European dimension in their self-definition; that is to embrace European identity.

Having arrived at this point, a definition of European identity is inevitable. Undoubtedly, there are broad variations of the term. One can define it as a geographical identity; for others it is linked to European culture. Without questioning the relevance of these approaches, in this paper a narrower interpretation is used. In this context, European identity is a sort of political identity, linked to the project of European integration. As Leo Tindemans puts it in his report in 1975: 'The fact that our countries have a common destiny is not enough. This fact must also be seen.' For me, the belief in this common destiny is the cornerstone of a European identity. It does not exclude or contradict any other loyalty. Moreover, it is built upon multiple, overlapping local, regional, ethnic, national or religious identities.

Only with this interpretation of European identity can we avoid the trap of supranationalism. The European Union's only chance of survival is not to be a superstate but a community of communities. Similarly, the only viable option for having a European identity is the one based on the complementarity of various overlapping identities. Recent political developments suggest that a European identity can only be successful if it is not set against national or other loyalties. And as national identities show, overlapping identities can live together harmoniously in a personality. One can be proud of their hometown or region as much as of their motherland. To recreate this complementarity is the secret to success for a European identity.

Strikingly, there is a prototype of this model that functions very well at European level. Next year, in 2017, the Erasmus programme will celebrate its 30th anniversary. Erasmus is the most successful – and certainly the most popular – project of European integration: more than two million young European students have been given the opportunity to study in another country, while staff, apprentices, volunteers, youth workers and other young people have also been offered the chance to go abroad. They have experienced Europe and developed a sort of European identity. For them, attachment to European cooperation is not a subject for ideological debates, but an everyday feeling.

Since its beginning, the Erasmus programme has shaped generations of young Europeans. They can be found everywhere in economic, cultural and also political elites, both at national and European level. Their support for the European project has been best demonstrated exactly by the results of the British referendum. Analyses show that while the majority of the politically active population voted to leave, of the about 64% of registered voters between 18 and 24 years old who are estimated to have gone to the polls, 73 percent are thought to have supported British EU membership.

That means that the complementary model of building a European identity works. It can be developed and reinforced by policy measures just like Erasmus. Based on policies, the identity-building process can avoid the traps of the past and ideological debates. By bringing up new generations of committed Europeans, the major public benefit is to make the European Union stronger.

János Martonyi*

Brexit. Brexit?

The title is somewhat misleading, as is the case when the purpose of the title is not necessarily to reflect the content, but rather to attract attention. To dispel any misunderstandings, the question mark does not refer to the fact that Brexit will happen. It will. But when, how and, first and foremost, what will be the new relationship between the UK and EU is now completely uncertain and unforeseeable. It is this unpredictability that raises not one, but a long list of questions.

Both the reasons for what happened, notably the outcome of the referendum, and likely future developments can only be explored and analysed in the widest possible scope, indeed, in a global context. Brexit is a part and a reflection of a series of interrelated global developments that have been witnessed and amply analysed for some years.

The complex economic, geopolitical and cultural developments and the deep changes brought about by them have created the feeling of uncertainty, unpredictability and anxiety that can best be expressed by a single German word, Angst. This is partly rational, partly irrational. According to most objective; economic, sociological, health and educational criteria – despite the growing inequality within societies (and not between societies, i.e. between developed and developing countries) – the world is now a better place than it was 10 or 20 years ago.[1] At the same time, our mood is getting worse; it is characterised by fear, anxiety, foreboding and, for many, by anger. There must be a reason for this gap between reality and perception. In fact there are many and most of them are real. On the one hand, there are alarming global economic and geopolitical developments that might easily get out of control. Because of the interconnectedness of the present world where the flows of causality accelerate ('butterfly defect')[2] even minor events may beget major disruptions. World economic data could be much better, but the indicators are not as bad as we anticipate it could become. From the Italian banks to Chinese indebtedness, numerous reasons can be found for the fear of the return of a 2008 type financial and economic crisis. Geopolitical instability and risks generate even more anxiety and are no longer limited to areas outside Europe. While the longstanding tectonic movements are being

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1 The Atlantic: The Best Year in History for the Average Human Being, theatlantic.com/international/archive/2015/12/good-news-in-2015/421200/(downloaded: 2016. április 7.).

2 Goldin, I. and Mariathasan, M., *The Butterfly Defect, How Globalization Creates Systemic Risks and What to do about it* (Princeton University Press 2016).

exacerbated by the sharpening conflict around the South China Sea, where the more assertive Chinese have genuine difficulty in understanding the application of international law in an area carrying their empire's name, there are new security threats in Europe connected to a more aggressive Russian attitude, not only towards its neighbours as has been demonstrated by the occupation of Crimea and part of Eastern Ukraine, but also in the Middle East.

The new security situation, the spectacular 'return of history' greatly contributes to the sense of instability and the fear of the unknown resulting therefrom. Political instability is also growing within many countries in and outside Europe.[3] Established political structures are trembling, leading middle of the road political parties and their coalitions are rapidly losing weight; new, more radical political forces emerge on both sides. Many speak about the crisis of democracy, which is not a brand new subject; nevertheless, it cannot be easily dismissed given the cumulation of signals conveyed by the political and institutional failures and gridlocks in many well-established democracies.[4] The dysfunctionality of both national and international institutions is perhaps the most evident symptom of growing mistrust, not only of them but also of the existing economic, social and political system. This again enhances fear and anger and the sense of loss of control over developments and over our individual and collective future.

Uncertainty and instability create fear, fear creates distrust and distrust enhances divisions and anger. The most salient development of the overall political and social atmosphere is the deepening divide along the major dividing lines that are themselves the subject of controversy. For many the main division is between the elite (whatever it means), the establishment and the anti-establishment, or more generally between those who support the system and those who want to dismantle or even destroy it. In the absence of a coherent doctrine, i.e. an all-pervading ideology (an up-to-date version of 19th century 'scientific socialism') the destruction of the existing system fortunately does not seem to be imminent.

For some, the main divide is between those who want to live in an open world and those who prefer a closed one. The former are called internationalists, the latter nationalists, who are identified as populists, these being the most convenient and widespread negative classification sufficiently hazy to cover one's all political opponents.[5]

Gone are the days when the main political families opposing one another could be termed right and left. Hence, the traditional dividing line of the political landscape has become irrelevant and useless, both in theory and in practice. Middle right and middle left both endeavour to expropriate the other side's political programmes and slogans. Extreme right and extreme left have become closer to one another than any time before, and distinguishing the two has become almost impossible.

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[3] Non-economic factors, such as geopolitical uncertainties, are among the key factors representing downside risks for the world economy. See IMF World Economic Outlook, October 2016.

[4] Hall, T., Held, D. and Young, K., Gridlock, *Why Global Cooperation is Failing when we Need it Most* (Polity Press 2013, Cambridge).

[5] Várady, Tibor, 'Abuses Of „Populism"' Hungarian Review, 2016, November.

We differ on the changing dividing lines, but all realise that the gaps separating us are getting deeper and the negative emotions on both sides of those lines are on the rise. The language is increasingly excessive and it is the culture of hatred that tends to dominate public discourse. The new technology is only the means of spreading the culture of hate; the intention to revile and harm others originates in us human beings.

Angst and divisions reinforce the perception of a chaotic world where people are losing control of their lives and future, where unknown and secretive global forces, unelected and faceless bureaucrats (sometimes they have a face, which makes it even worse) and their institutions use and abuse their excessive and growing powers.

What does all this has to do with Brexit?

First, all or almost all the above factors have their special impact upon Europe and play a particular role in the context of European integration. The general sentiment of loss of control over economic and political decisions, the growing mistrust in institutions, the widening distance between decision making and 'ordinary citizens' and all the frustration and anti-establishment anger resulting therefrom did make an important contribution to the final outcome of the British referendum.

Global challenges that seemed to be remote and abstract materialized most concretely with the explosion of the refugee crisis and made the migration challenge the number one issue – rationally or irrationally – in British public opinion. The impotence of the European institutions and their inability to take control of the crisis increased the mistrust in the same institutions and their remote bureaucracies. Paradoxically, for the UK the migration crisis did not have much to do with the EU decision making, as it, not being a member of Schengen, was free to take any necessary measure in its own national competences regarding both refuges and migrants coming from non-EU countries. What could not be prevented under EU membership was the free movement of persons/labour in the single market; that is the presence in the UK of Polish, Hungarian etc. workers who are, in proper terms, not 'migrants', but persons benefiting from one of the basic freedoms of the European Union. Brexit is needed to get rid of these EU citizens and not to resolve the influx of people coming from outside the EU.

Notwithstanding all the above, the EU, its institutions and its member states had and still have their own failures, deficiencies and weaknesses that contributed significantly to the outcome of the British referendum. The overstretching of the scope of the competences deferred to the Union by its member states, the relentless efforts made by the European Commission to extend those competences ('creeping extension'), the frailing respect for the Treaties by these institutions themselves, the disruption of the balance among the institutions by shifting political decision-making to the Commission from the Council and the European Council, the growing self-assertiveness on the part of some institutions, combined with political bias, the recurring disregard of the principle of the equal treatment, the reluctance to duly recognise the national and constitutional identity[6] of member states as enshrined in the Treaty are all among the

[6] S. inter alia Bogdanffy, Armin von and Schill, Stephan, 'Overcoming Absoluter Primacy: Respect for National Identity under the Lisbon Treaty' (2011) 48 Common Market Law Review, p. 1–38.

negative developments that played a role, not only in the Brexit vote, but also in the challenges with which the EU is now confronted.

At the same time it would be a mistake not to see the special British dimension of the outcome of the referendum. Inside or outside, the British 'splendid isolation' as well as the very special cultural, mental and, indeed, political legacy of a world empire has always been present in the UK's relationship with the 'rest of the world', including continental Europe.

The sentiment of the British people has always been mixed and ambiguous vis-à-vis European integration. Winston Churchill, while anticipating a United Europe, never thought that Britain should be part of it. A respectable senior British citizen, when asked couple of days after the leave vote about his view on the outcome, simply said: 'You know very well that I was for Brexit even before the United Kingdom joined the European Community.' This succinct judgement reflects not only the English sense of humour – that, among other things, will be missed in the future European Union –, but also the feeling of a significant part of British society, including among the political elite.

It took more than half a century to recognise that General De Gaulle's refusal to support the membership of the UK in the Community was not without some justification. His premonition turned out to be essentially right after all: the British will be different, as they always have been. They will never be fully committed in their heart and mind to the European integration project. The permanent opt-outs of key projects such as the Euro, important areas of justice and home affairs, Schengen and others only reflected this deep-rooted, historical British 'exceptionalism'. The tentative agreement made with Prime Minister Cameron at the February European Council would have further enhanced the special status of the UK, if it had materialized. It did not and now a new relationship will have to be hammered out after a long, difficult and tremendously complex negotiating process.

What will be that new relationship? The shortest answer to this question is that no one knows at this point of time. However, in the light of the huge economic and political impact of that relationship upon the UK, on the EU and all of its member states, as well as upon global economic and geopolitical developments, some forecasts should be tentatively made, at least with some degree of probability.

First, Brexit is politically irreversible. With or without the British parliament,[7] Article 50 will be invoked and negotiations will be started to conclude the agreement setting out the

[7] *R (Miller) v Secretary of State for Exiting the European Union.* Judgement in the High Court of the Justice, case No: CO/3809/2016 and CO/3281/2016. At the time this paper has been closed the High Court judgment of 3 November 2016 is under appeal and will be finally and definitely decided by the Supreme Court in December 2016. The judgment of the High Court established very clearly and convincingly that in the UK's constitution the Parliament is sovereign, it can make and unmake any law it chooses. The exercise of the Crown's (Government's) prerogative powers in making and unmaking international treaties has no effect on domestic law laid down by Parliament as legislation. There is nothing in the language of the European Communities Act, 1972 to support the Government's contention that it retained its prerogative power to effect a withdrawal from the Community (EU) Treaties. In the absence of such entitlement it goes against the fundamental constitutional principles to change domestic legislation – and thereby affect rights of citizens – by the exercise of prerogative powers. The conclusion is that the Secretary of State does not have power to give notice pursuant to Article 50 of the TEU for the United Kingdom to withdraw from the European Union.

arrangements for the withdrawal, 'taking account of the framework of the new relationship with the Union'. The Treaties shall cease to apply from the date of entry into force of the withdrawal agreement or failing that, 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 period.

The decision of the British voters must be respected and it would be a fatal mistake to believe that this decision can 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 for 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 however reversible, even after Article 50 has been activated. Notifying an intention is not a legally binding act; it only triggers the start of a negotiating procedure.[8] This procedure, legally and theoretically, can be stopped and the intention can be withdrawn. Until what point of time? General principles of international law would suggest that legal reversibility would exist until the 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 it is provided for in para 5 of Article 50.

The provisions of Article 50 set only the 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 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, 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 happen then to a large variety of issues, such as the division of assets

[8] The question of whether the invocation of Article 50 can be revoked or not has been a relevant issue in the above High Court judgement. The irrevocability of the notice pursuant to Article 50 was recognized by both parties. 'It is common ground that withdrawal from the European Union will have profound consequences in terms of changing domestic law in each of the jurisdictions of the United Kingdom'. The Government (or its counsels) made a serious mistake by accepting before the Court that Article 50 is irrevocable and therefore, in the absence of an agreement, UK membership in EU automatically ceases to exist without the Parliament's involvement. As a result the rights written into the European Communities Act, 1972 based upon EU membership would be extinguished and primary legislation adopted by the Parliament would be displaced. On irrevocability s. Piris, Jean Claude, 'Article 50 is not for ever and the UK could change its mind' Financial Times, 1 September, 2016. and Duff, Andrew, 'Statement to the Constitutional Affairs Committee of the European Parliament' 8 November 2016, p. 2.

and liabilities,[9] such as the contributions to budget, contingent liabilities and other loan guarantees, outstanding payment promises *(reste à liquider),* staff, pensions, international agreements etc., relating to the withdrawal itself. The only reasonable outcome, as well as the likelihood, is that the two-year period will have to be extended and negotiations will continue until all the withdrawal arrangements are agreed upon.

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 United Kingdom (provided it is still united), on the other, under the rules of international law, duly signed and ratified, for the time being, by the altogether 38 (!) parliaments. If there is no such treaty, there will be no special framework for that relationship and it is the general rules and laws, including all the international conventions, treaties, agreements both the Union and the UK are parties to, that will apply to trade, investments, security and everything else.

The two legal instruments are therefore clearly to be distinguished from one another regarding timing, procedure and substance alike. At the same time 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 by Article 50. But how can that framework be taken into account as long as no serious negotiations are being conducted and before, at least, a limited agreement is reached on the substantive elements of that framework? The result is a significant imbalance between the negotiating positons of the parties, essentially to the disfavour of the UK.

In any case, 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 – as we have seen – are in conflict with each other. There is political irreversibility versus legal reversibility of the exit and legally distinct and separated negotiating processes on the withdrawal agreement and on the future relationship that are economically and, in particular, politically interconnected. Moreover, despite the separation of the two legal instruments, there will be some very sensitive borderline issues that may be settled either during the withdrawal or in the future agreement. Is the recognition of acquired rights, inter alia under existing work permits, a subject-matter that is to be dealt with in the withdrawal agreement (probably yes) or in a future treaty? Border controls will have to be re-established between Ireland and Northern Ireland. Is it a withdrawal issue, or are the agreed arrangements to 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 likely drawn-out negotiations will have a major impact upon world trade, the global economy and geopolitics.

[9] Negotiations on the UK exit bill will raise a number of controversial financial and legal issues. According to a Financial Times analysis 'the battle over Britain's exit bill from the EU is shaping up to be one of the most fraught and contentious issues in the forthcoming divorce talks'. Size of exit bill – estimated to be around 60 billion euro – will be one of the most fractious issues, Financial Times, 13 October, 2016.

Whatever the final outcome will be, 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 years period starts to run, it seems to be unlikely that the withdrawal agreement will enter into force prior to the expiration of that period. Even if the 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 aiming at the conclusion of an international treaty can be conducted – the final agreement on the vast complexity of all the various issues will take a considerable amount of time.

What now can be safely presumed is that Brexit will not take place prior to the end of this decade; in fact, until the end of the ongoing multi-annual financial framework. It is only reasonable to wish 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, the fundamental interest of both parties for evident political and economic reasons. Nevertheless, the interests on the two sides are 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.

Once Article 50 is triggered, at least, the present *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.

Much has been said and the discussion is still going on about the question of which model will be adopted for the future relationship, with particular regard to trade and economic relations. The best answer to this question is none; neither the Norwegian, nor Swiss, nor Turkish, nor Canadian, nor any other. There will be a special sui generis regime ('bespoke agreement') which should depart from the standard templates. It is now widely recognised that the UK is different (as it always has been inside the EU as well) and because of all the disparities in size, economic weight and political clout, as well as in view of the different historical background and point of departure, the new relationship should not be locked in the existing categories or 'models' of external arrangements.

The arguments why the UK would not wish to join the European Economic Area are well-known and evident. It would be a total reversal of the political decision of June 23 to accept control over 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 decision-making process in legislation and in jurisprudence. In the framework of the EEA 'quasi-supranational' set-up, the EEA countries incorporate more 300 new EU acts per year[10] upon which the EEA Joint Committee has little, if any, influence in the so called 'decision-shaping' phase after the

[10] Gstöhl, Sieglinde, 'Brexit lessons from third countries'differentiated integration with the EU's internal market' CEPOB College of Europe Policy Brief, September 2016.

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 life may have been even a stronger factor than the fear of immigration. 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 free movement of labour from the eight new member states, not using the option of a transitional arrangement of a maximum seven years of restrictions. (Demanded, insisted upon and implemented by Germany… Times change, *tempora mutantur,* even if we do not all change accordingly with them.) The concerns about intra-EU 'migration' were and presumably still are, however, strong despite the huge benefits the UK 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 apply to the UK.

The Swiss case is essentially similar to the Norwegian one, though with several differences. While being a member state of EFTA, together with Norway, since its foundation in 1960, Switzerland refused to join the EEA as a result of a referendum in 1992. In the absence of EEA membership a bilateral approach was taken and a set of sectoral agreements has been concluded (20 main and more than 100 so-called secondary agreements) based upon its 1972 free trade agreement with the European Communities.[11] The agreements also include one on the free movement of persons but, due to the result of the referendum in 2014 requiring the constitutional introduction of immigration quotas, free movement was not extended to Croatia and the EU rejected a safeguard clause with national ceilings on EU migration. Negotiations have not yet produced result and the whole complex system of bilateral agreements is put at risk. The agreements do not cover the area that would otherwise be the most relevant for the UK, i.e. financial services. The control issue is also somewhat more complex with 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 adoption of the new acquis to be accepted by EFTA members. Extreme complexity, uncertainty regarding the solution of the present difficulties (that have not been made easier by Brexit) and risks resulting from them, regarding the overall system of sectoral arrangements, would not make this 'model' attractive to any parties, even if there was a remote chance of its applicability.

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 campaign. Turkey has been a member since 1996, as have Monaco, Andorra and San Marino. Turkey's position is certainly not very fortunate, at least from a trade policy perspective. Important areas of trade, primarily

11 Gstöhl (n 10).

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 common commercial policy, but has no influence upon it. The trade agreements made by the EU with third countries open the EU market for these countries' exports, but deny this preference for Turkish exports to the same third countries. (This is now a major concern for Turkey regarding the TTIP negotiations.) 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 aiming at the creation of 'Global Britain', champion of free trade and concluding its own trade agreements and dismantling possibly 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 in itself 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. In any case, it is a reasonable presumption that Britain will not be tempted to introduce a kind of 'reversed community preference' by excluding the free movement of labour from the future framework of its relationship with the EU and granting more access to non-EU countries to its labour market in its new agreements to be negotiated. (Only after coming to terms on the major elements of the future relationship with the EU.) Restrictions on the free movement of labour are, however, not the only element that might come in conflict with the idea of a brave, new, open Britain. Suggestions have been made to intervene in an 'orderly and structured' manner regarding sensitive foreign investments in the UK.[12] 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.

EEA, EFTA plus, and customs union might be termed, with extreme simplification, as the 'soft Brexit' options, although it does not really matter how they are called as none of them is, indeed, politically viable.

A variation of free trade agreement would possibly be a more realistic option. But here again, the reference to existing 'models', Canadian or others, should be avoided. Free access for British goods to the EU market and vice-versa is certainly an indispensable condition of 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 balancing their mutual interests, benefits, rights and obligations.

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[12] UK set for US-style investment regime as May clamps down on foreign deals, Financial Times, 10 October, 2016.

A last generation free trade agreement (or an association agreement with deep and comprehensive free trade) with the widest possible scope covering all the areas of regulation, from intellectual property to investments, from services to the environment and social rights seems to be a logical direction to go in. In reality, for both the EU and UK, it would be a terrain full of traps, stumbling-blocks and pitfalls of an economic, political and legal nature. All these difficulties ultimately boil down to the fundamental dilemma, of how and why to grant full access for British goods and services, including financial services (with special regard to passporting rights), and thereby assure the same benefits for the exiting country as those enjoyed by member states, while not having free access to the British labour market, this being now one of the fundamental four freedoms of the single market acquis. This would result in significantly better treatment than the one the exiting country now 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 market of the EU would otherwise necessitate some degree of supranational surveillance and control, which would, again, come in conflict with the outcome of the referendum. Here is the inherent contradiction of a hard or soft Brexit. Either it goes against the basic principles of the 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 former 'soft Remainers' now turned '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 can be squeezed into an economic agreement. History, geography, values, basic geopolitical and security interests bind together the two Unions, whatever developments will unfold in the upcoming decades. All this points to the conclusion that the framework for future relationship cannot be locked in the structure of presently existing models, and the agreement or agreements will have to reflect the very special – indeed, unique – nature of the relationship between an exiting country, a permanent member of the UN Security Council, a nuclear power, with a population of 65 million and having the 5th largest GDP in the world in nominal terms, and the remaining Union of 27 members.

Notwithstanding all the above arguments for the sui generis nature of the future relationship, one should not forget that, all through the last 60 years, the EU developed a highly sophisticated, essentially coherent and well-structured system of external differentiation of relationships and legal instruments with third counties across the world. This system is based on economic, geopolitical and security considerations and interests, as well as on values and principles which, after all, constitute the backbone of the whole venture, internally and externally alike. Any new agreement negotiated in the future cannot depart from these basic principles reflecting both the values and the interests. The new agreement will also be part of the external acquis and as such, will have an influence upon the further development of the structure of the differentiated external relations of the Union. Any innovative and new solution will, or may have, political and economic consequences, as is always the case with precedents, even if they are not formally recognized as such.

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 then can legitimate British interests be recognised at the same time as focusing upon our own future, that of the European Union of 27 nations?

Opinions vary and suggestions differ both for substance and form. Sharpening the rhetoric is not helpful but understandable, given the high degree of uncertainty and bafflement on all sides.

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[13] and prepared by five distinguished authors in their personal capacity, suggests the establishment of a 'continental partnership'. This partnership is proposed to be based upon maintaining close economic cooperation which would allow 'continued access to and participation in important parts of the single market' and 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 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. More serious is, however, that the discrimination against free movement of persons would be a serious violation of the essential constitutional and political principles upon which the whole construction is built (as is implicitly acknowledged, even 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. (After all, who are the ultimate winners and losers in the game of workers' movement in the Union would be a never-ending argument.) 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

[13] *Europe after Brexit: A proposal for a continental partnership* by Jean Pisani-Ferry, Norbert Röttgen, André Sapir, Paul Tucker, Guntram B. Wolff, 26 August 2016.

a non-member of the EU, having taken a sovereign decision to leave the Union, has less political influence than a member 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 in the decision-making of the Union as its members? Isn't this difference a natural consequence of a decision by the country in question and recognised as legitimate by the EU and its members? Do we have to pay a price 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 the 'close partnership1.

This partnership will, indeed, have to go beyond even the most comprehensive free trade agreement and it should also include finance, energy, external economic policies and climate as well as foreign policy, security and defence. The idea that this partnership could then serve as a possible model for other non-EU members and become the building block for a future outer circle of European cooperation is premature and doubtful in view of the significant differences in the situation of has-been and – at least for the time being – would-be members.

All these suggestions do not alter the fact that the main line of the proposed solution for the eventual deal between the UK and the EU, i.e. 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 signal for the future development of the Union. At stake are the basic freedoms, principles and values that are now tested by partial and perceived economic interests.

The framework of the future relationship should not only step out from the shackles of the existing 'models' (while respecting, as underlined, values and principles both of the external and the internal structure), but also from the alternatives of 'hard' or 'soft' Brexit. These options or alternatives are now at the centre of the ongoing political debate and are largely considered as mutually exclusive paths to follow. This does not mean that decisions on some issues and on the main direction to follow are not needed. However, any premature, a priori categorisation enhances rather than alleviates political and psychological impediments. We only have to look at the history of European integration to realise that the hardest negotiations on the most important issues have always been settled by compromises. (Some say this is one of the root causes of the challenges.) After the deal is done, there will be ample time to categorise, classify, qualify and analyse. What can now be foreseen with some degree of likelihood is that the final

deal will be harder than it would be according to reason and it will be softer that the present rhetoric would lead one to believe.

But what if, at the end of the day, no deal is made? For trade and much of the trade-related issues, the multilateral (in fact, universal) regulatory system of the WTO would apply, that is GATT, GATS and all the other instruments and agreements now existing in this institutional and legal framework.

Easy to say, harder to be implemented. Apart from the serious economic consequences for both sides, (affecting Britain far more heavily that the EU), the process of reanimating Britain's WTO membership would not be a simple and rapid exercise. The UK was a founding member of GATT and is still a member in all the subsequent instruments, but since 1973 its rights and obligations have been exercised by the EC, within the framework of the common commercial policy. Since most of the entitlements and commitments are attached to the EU, they now have to be re-allocated so that the UK again becomes the individual beneficiary and obligee of the whole system e.g. quotas, schedules etc. For the tariff schedules, the possible solution could be to take over – 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 EU and the UK at the time the UK ceases to be a member of EU. The UK would also be free to apply lower tariffs, either on an *erga omnes* basis (suggestions have been made to follow the Macao or Hong Kong model), or selectively, based upon the free trade agreements it intends to negotiate and conclude as early as possible with any non-EU members. Since the EU tariff schedules contain commitments only as 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 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 is not that Britain is prevented from free trading with the whole world, but to divide, re-allocate and renew all the obligations to which Britain has been committed through its EU membership. While the statement of WTO Director General Azevêdo, that the UK has to negotiate everything 'from scratch', seems to be somewhat exaggerated,[14] the mere fact that negotiations will have to be conducted with some 163 members makes it an extremely complex and burdensome operation.

As for the trade agreements 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. Besides the fact that most of the important candidates for free trade agreements have already made political statements that negotiations can only be meaningfully advanced when basic issues around future UK-EU relations have been worked out, it would be legally and technically

[14] Larry, Elliot, WTO chief says post-Brexit trade talks must start from scratch, Roberto Azevêdo says leave vote would present complex and unusual situation with UK unable to 'cut and paste' its former EU-negotiated trade deals, The Guardian, 7 June 2016.

impossible to conduct any serious negotiations as long as the UK is a member of the Union and some thorny technical issues such as 'country of origin' rules are not 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.

A further trade issue that will have to be tackled both in a WTO context and in the EU-UK bilateral relationship is to what extent and through what legal mechanism the free trade agreements now in force (or entering into force before the UK actually leaves) will be extended to or upheld by Britain. Hence comes the suggestion of making flanking agreements[15] that are intended to tailor the contents of the given agreement to Britain and then include those separate international provisions in some way connected to the 'basic' agreement. Whatever the legal solutions will be, these new international trade agreements also necessitate substantive negotiations, given that the third parties would be keen on keeping their benefits under the agreement without granting additional concessions to the exiting country.

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 in another international treaty – other vital fields of cooperation, as referred to above.

But what happens if the parties cannot come to an agreement, neither within the two years, nor in the extended 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 a significant time gap between the termination of UK membership (whether or not the two years period from the notification is extended) and the entry into force of the new international treaty between the EU, its member states and the United Kingdom after it has been signed and ratified by all parliaments.

As such, there is a need to design the appropriate legal device to avoid the legal vacuum between the two dates and at least to mitigate the economic damage and political risk stemming from it. Several options may be considered. The membership of the UK could be further extended by unanimous vote, despite the fact that the withdrawal agreement has been agreed upon and negotiations have been concluded. One could simply delay or postpone the application of the withdrawal agreement until the time the treaty/ies on the new relationship enters into force. This would likely entail the extension of UK membership for several years, with all manner of possible and unpredictable developments in the meantime. No one knows what would be the political reaction to those, perhaps fundamental, changes of circumstances in the various parliaments or beyond. (It is not only Wallonia or Scotland; it could very well be London

[15] S. in more detail on EU-only and on mixed agreements Guillaume Van der Loo and Steven Blockmans, 'The Impact of Brexit on EU's International Agreements' 15 July 2016 CEPS Commentary.

or Brussels/Strasbourg.) Another solution could be – despite the fact that UK ceases to be a member under Article 50 – the establishment of a temporary regime with a practically identical result, namely the de facto application of the membership's 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 (not for the first time in the EU's history) and the temporary or transitional might turn out to be very, very long *(ce n'est que le provisoire, qui dure).*

Even in the event of a highly unlikely smooth scenario, where 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 some degree of transitional or temporary regime for the complete dismantling of all elements of membership.[16] These arrangements will primarily have to be included in the withdrawal arrangement itself.

Such transitional or temporary instruments may also be included in the treaty on the future relationship. It needs careful study as to where these transitional provisions are to be placed. Interestingly, the purpose of these transitional instruments is precisely the opposite of the purpose of such arrangements in an association agreement or in an accession treaty. In the case of the latter, something is being built up (construction), while with Brexit the purpose is to dismantle the construction (deconstruction). Indeed, this is a 'reversed transition', which inversely mirrors the scheduling instruments of association agreements or accession treaties.

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 applying provisionally 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 discussed, without having a clear answer to them. Negotiators and the decision-makers are facing a daunting task and the challenges for their legal experts are equally formidable.

What can be, in a situation characterised by conflicting political objectives, economic interests and divergent legal approaches and, on top of this, fraught with high-running emotions, the role of legal scholarship?

The same as usual. Identifying the issues, difficulties and pitfalls; clarifying possible consequences, analysing all relevant present and future factors (in other words, trying to predict the unpredictable) and making all possible efforts to find new inventive solutions, both for the

[16] Duff (n 8) pp. 5–6.

foreseeable and for unforeseeable situations. And, first and foremost, calming down the excited minds, cutting through the negative emotional spiral and taking an objective, reasonable and well-balanced approach in order to find the most appropriate technical devices serving, after all, the fundamental common interests of all parties concerned. That is, establishing a fair and successful partnership, one that is as close as possible.

However, even if the closest ever partnership in the history of the European Communities'/Union's external relations can be successfully brought into being, the UK will be a partner and not a member. This sounds as flat as the 'Brexit is Brexit' statement, but the message is important: 'the first important political consequence of Brexit has been the birth of EU 27'.[17] In other words, all the above discussion ultimately belongs to the external relations of the Union. How these relations will have to be shaped and differentiated in the future is a question of paramount importance, but it is an external issue.

From the point of view of the future of the 27 however, it is not the external, but the internal issues that are even more important. It is the challenge of internal differentiation that has to be tackled 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 specifically was the special status of the UK, recognised by a series of permanent opt-outs, starting in Maastricht, and then expanded in each treaty revision. As referred to above, the last opt-out would have been the result of the agreement with David Cameron at the February meeting of the European Council, which was eventually frustrated by the referendum.)

The UK will go, but the impact of the British exit remains and will likely enhance 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 referred to a two or multitier Europe with a hard core and an outer circle divided by institutionalised barriers. If these barriers became 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 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 over (up) to the inner one. Even more important is that the various tiers should differ in the various fields of integration policies. It 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'.

[17] Peter Ludlow, 'The European Union without Britain' European Council Briefing Note 2016/4-5, Eurocomment, June and September 2016, p. 1.

Differentiation, eventual fragmentation and a multitier structure with variable geometry reflect only one of the otherwise closely interconnected aspects of Brexit's impact upon the future of a European Union of 27 member states.

At present, the main lines of the views and propositions regarding the direction to take diametrically oppose one another. Some suggest that 'the future of Europe will not be secure without big constitutional developments of a federal type1[18], and Brexit offers now the best opportunity – after getting rid of the British 'outriders' and 'drag anchors' – to go firmly along the 'even closer Union' concept. Some suggest going in a similar direction, but first to restrict 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 of these were hastily accepted to become members without due preparation, anyway…)[19] Some, on the other side, 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 of and amendments to the treaties. (Interestingly, both the federalist and the sovereigntists refer to the original founding principles of European integration; rightly so, as both opposing ideas have been present right from the beginning and all through the 70-year history of European integration.)

Some– like this author as well – contrary to all the other above suggestions, propose a pause, a time for reflection, while at the same time continuing to work by facing and tackling the growing risks and challenges.[20] It is not wise to act when clouded by fear and panic, in particular when reactions to the series of overlapping crises conflict so fundamentally with each other. Compromises will be, again, inevitable but, during the pause for reflection, some basic principles could be roughly agreed upon, such as more flexibility, more selectivity (as to the direction to be taken regarding various common policies), genuine subsidiarity, respect for the treaties, restoring a fair balance between the institutions themselves, respect for national identities, full respect for equal treatment, less institutional assertiveness and less political bias, just to mention a few of those suggested principles.

The overall impact of Brexit on the European integration process, both internally and externally, goes far beyond the subject of this paper. Apart from the structural – institutional consequences, there will be significant changes in the internal economic and geopolitical landscape. It is simple to sum up these changes; a shift eastwards, materializing primarily in a 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 started well before the referendum, due to the new security risks created by Russia.)

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18 Duff (n 8) p. 9.

19 The view that the main reason of most of the hardships afflicting the European Union is the hasty and unprepared Eastern enlargement has been a recurrent argument for quite a while. S. Laurent Wauquiez, *Europe: il faut tout changer* (Odile Jacob 2014, Paris) and also Wolfgang Münchau, 'Two big mistakes that ruined Europe' Financial Times, 2 November 2015. Opposing view: János Martonyi, 'Enlargement has helped strengthen resilience' Financial Times, 4 November 2015.

20 Hubert Védrine, *Sauver l'Europe* (Éditions Liana Levi 2016) pp. 51–54.

This might be good news for the region, but many feel that there is at least as much to be regretted. Central European countries 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, with special 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 there. Again, Central Europe loses an important ally in its endeavours to develop economic cooperation, trade and investments with the whole world, since its countries depend heavily on foreign trade, as is best testified by the very high ratio of exports in their GDP. While the existing UK is preparing for the role of Global Britain, champion of free trade, 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 NGOs are successfully working on public opinion to oppose to 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 instrumentalizing 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 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, albeit sometimes excessively self-propelled member state.

The impact of Brexit upon the external relations of the EU would, of course, need a special study, with particular regard not only to the economic aspects, but also all the others, such as foreign policy, security and defence; in short, the global role of the EU. Much depends upon the development of the transatlantic relationship, the future of trade; i.e. the nature, the substance and the form of a possible instrument that may eventually take shape as the final outcome of the ongoing negotiations on what is now called the Transatlantic Trade and Investment Partnership or its substitution by a less ambitious agreement. Much depends also on the place and role of NATO in the complex geopolitical equation, where there are a number of unknown factors. Also relevant, moreover, will be how the EU reacts to the entirely changing global environment, how it can renew, at least mentally and culturally, and refound itself by rediscovering and protecting its cultural heritage, distinct identity, special mission and the responsibilities falling upon Europe.

Brexit is Brexit, in the sense that it will certainly happen. When, how, under what conditions and circumstances, with what consequences and what impact it will have upon all of us are all uncertain. Uncertainty is bad for business, but it may generate innovative thinking and creativity. Whether this will offset the negative impact of Brexit remains to be seen.

Will others follow? Highly unlikely, but not entirely excluded. There is one group of countries, however, where leaving is, indeed, out of the question. These are precisely the 'new member states', the Central Europeans (widely called 'Eastern Europeans' which is still much better than calling them 'ex-communist countries'). They are the countries which now seem to have a stronger attachment to Europe than most other member states of the Union. Despite

some voices coming both from the inside and from the outside, countries such as Poland or Hungary will never leave the European Union. Contrary to what many try to suggest, the main reason is not money. There are, of course, economic, geopolitical and security policy considerations, but they are still not the most important factors. The root causes are much deeper: 'it is culture that matters'. In other words, Central European nations attach much more importance to their cultural legacy, their values and way of life; in short to their collective identity. Without Christianity, many of these nations might have disappeared a little more than 1,000 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 identity. One of the differences between 'Eastern' and 'Western' Europe is that while the West had internal conflicts and wars, once for 100 years and once for only 30, the East had to defend itself against attacks from the outside. Hungary, for instance, lost two-thirds of its population in the 13th century because of the Tatar invasion, and had a constant war of defence against the Ottoman Empire for about 200 years. Had these Eastern Europeans definitely lost these wars, and had they had to succumb to the foreign invaders, they would have lost their European identity, and if they had lost their belonging to Europe, they would have lost their national identity as well. This is why being European and keeping this attachment has been an existential question for most of the nations of the region that we persistently try to call Central Europe – not without reasons that go beyond geography.

To sum it up, whatever will be the impact of the UK's leaving the European Union on the United Kingdom (including Scotland, Northern Ireland, Wales and London), on the European Union and its future, on economic and political developments of the global world, Central Europe shall remain in the European Union, that is in the Centre of Europe. Its historic, geographic, economic, geopolitical and security situation is fundamentally different from that of the British Isles. We cannot afford becoming 'out-riders', and we cannot develop or accept any kind of isolation wherever, whenever and by whoever such ideas may be raised. It is the legacy of our grandparents and parents. It is about our 1000 years of history, it is about who we are.

Miklós Király*

Brexit in Context

Some Historical Remarks on the Relationships between the United Kingdom and Continental Europe

I

The opinion of British people expressed at the referendum on 23 June 2016 deciding to leave the European Union came as a shock for many supporters of the country's EU membership. However, if we look back at history, we have to realise, that this reserved or sometimes even hostile attitude towards strong continental ties is not unprecedented in the history of England.

We may refer Henry's VIII's 1533 Act in Restraint of Appeals to Rome, which forbade all appeals to the Pope in Rome on religious and other matters and claimed 'this realm of England is an empire'. Although this Act reflected a very concrete private matter[1] of the King, it became the legal foundation of English reformation and resulted in the separation of England from the leading spiritual power in Europe. One year later, another Act was passed, the Act of Supremacy which declared that the King as a 'sovereign lord' was 'the only supreme head in earth of the Church of England called Anglicana Ecclesia'. Even the teaching of Canon Law was supressed at the universities, replaced by secular Roman Law.

The next centuries experienced the rise of the British Empire. By the mid-19th century, the United Kingdom had become the strongest colonial power – governing the crown jewel of India, amongst others – and the first industrial state in the world. During this period of time the main goal of British foreign policy was to keep the classical balance of power in the European continent. It effectively prevented the continental hegemony of Spain, France and later Germany.[2]

The words of Lord Palmerston perfectly described this approach, which dominated British foreign policy for centuries: 'I hold with respect to alliances, that England is a Power sufficiently strong, sufficiently powerful, to steer her own course, and not to tie herself as an unnecessary appendage to the policy of any other Government. (…) We have no eternal allies, and we have no perpetual enemies. Our interests are eternal and perpetual, and those interests it is our duty to follow. (…)'[3] Besides this, the United Kingdom, as an imperial power, quite logically developed

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1 Henry VIII sought to annul his marriage to Catherine of Aragon.

2 George, Stephen, *An Awkward Partner, Britain in the European Community* (3rd edn, Oxford University Press 1998) p. 12.

3 Speech to the House of Commons on 1 March 1848.

a kind of global approach towards foreign policy and matters of international commerce. In this very large field of manoeuvring, Europe was only one, and not necessarily the most important scene of events.

II

Against this background, it is not surprising that the idea of European integration emerged only in theoretical thinking in Britain for a long time. It is still worthwhile to mention William Penn, who published 'An essay towards the present and future peace in Europe' in 1693. In this study, he suggested the introduction of a European Parliament – an assembly, where the number of MPs representing a country was proportional to the population, territory, and economy of the participating countries. He suggested a kind of 'weighted voting' in its decision-making, too. Of course there was no practical chance of implementing his ideas in Europe; later he sailed to North America and there established Pennsylvania, organised according to democratic principles.

At the end of the 19th century, when it became clear for some leading politicians that the price of preserving the balance of power in Europe could be very high, the idea of European integration started to infiltrate into the political thoughts of English politicians as well. We may recall the statement of Lord Salisbury, Conservative prime minister, written in 1897: 'The federated action of Europe, if we can maintain it, is our sole hope of escaping from the constant terror and calamity of war, the constant pressure of the burdens of armed peace, which weigh down the spirits and darken the prospects of every nation in this part of the world. The Federation of Europe is the only hope we have.'[4]

Naturally, we have to mention Winston Churchill too, and not only his famous Zurich speech delivered in 1946, suggesting a United States of Europe. As early as 1930, he devoted an article to the *'United States of Europe'* in the Saturday Evening Post, responding positively to Aristide Briand's proposal for a European Union.[5] During the Second World War, in 1942, he wrote the following note to Anthony Eden: 'I must admit that my thoughts rest primarily in Europe – the revival of the glory of Europe, the parent continent of the modern nations and civilisation It would be a measureless disaster if Russian barbarism overlaid the culture and independence of the ancient states of Europe. Hard it is to say now, I trust that the European family must act unitedly as one under a Council of Europe… I look forward to a United States of Europe in which the barriers between the nations will be greatly minimised and unrestricted travel will be possible. I hope to see the economy of Europe studied as a whole.'[6]

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[4] Critchley, Julian, 'The Great Betrayal – Tory policy towards Europe from 1945 to 1955' p. 85. In Bond, Martyn, Smith, Julie and Wallace, William (eds.), *Eminent Europeans* (The Greycoat Press 1996, London, 321 p.) pp. 85–96.

[5] Pinder, John, 'Prewar Ideas of European Union – The British Prophets' p. 8. In Bond, Martyn, Smith, Julie and Wallace, William (n 4) pp. 1–21.

[6] Critchley (n 4) p. 85.

Or we can cite the rather prophetic words of Harold Macmillan from 1939: 'Many people are asking what kind of Europe one could hope to emerge out of the chaos of today. The picture could only be painted in the broadest colours. But if Western civilisation is to survive, we must look forward to an organisation, economic, cultural and perhaps even political, comprising all the countries of Western Europe'.[7]

Despite all their eloquence, these words did not necessarily represent the focus of actions of the cited eminent politicians and they were often far from the mainstream of British politics. Lord Salisbury served as prime minister during the peak of British imperial power, so India, Africa and the development of the navy dominated his foreign policy. Churchill was an ardent supporter of European integration – but without the participation of the United Kingdom. The ties with the still existing colonies and the connections with the 'English-speaking peoples'[8] lay deep in his political thoughts. Macmillan submitted the first request for UK membership of the European Communities but, parallel with it, he strengthened the relationship and military cooperation with the USA which – among other factors – led to the veto of de Gaulle to British accession in 1963.[9]

III

Even a more detailed analysis does not alter fundamentally the above documented Janus-faced attitude of British political thinking and politics towards European integration, although the picture is more nuanced. We have to differentiate between the voices of intellectuals, business people and the opinion of the Foreign Office. Amongst academics, the federalist idea became increasingly popular from the end of the 19th century, in opposition to the liberal free trade approach. This was partly a reaction to the looming menace of a great war with the rising European power of Germany and partly an attempt to counterbalance the vast market of the United States and the unprecedented pace of economic development there. This economic argument was echoed by business and the Treasury in the government, too. However, the supporters of federalism pursued different goals. Some of them advocated an Imperial Federation as an answer to the American experience, having the aim of transforming the British colonial system into a federation and an economic bloc. The Imperial Federation League was founded in 1884; the political leader of the movement was Joseph Chamberlain.[10] The idea survived the First World War and was strongly supported by several representatives of the British industry.[11] Another group of British federalists supported deeper transatlantic ties,

7 Critchley (n 4) p. 88.

8 See the major monograph of Winston S. Churchill, *A History of the English-speaking Peoples* 1956, 1957, 1958.

9 *The Blackwell Biographical Dictionary of British Political Life in the Twentieth Century* (Basil Blackwell Ltd 1990, Cambridge, 449 p.) pp. 289–290.

10 Pinder (n 5) p. 7.

11 Boyce, Robert, 'British Capitalism and the Idea of European Unity Between the Wars' in Stirk, M.R., *European Unity in Context* (Pinter Publishers 1989, London, New York, 225 p.) pp. 65–83.

envisaging an Atlantic Federation with the United States of America. The idea of creating more European integration was a third concept flourished under the umbrella of federalist movement. Already in 1871 Sir John Seely, professor of modern history at Cambridge, published an article entitled United States of Europe,[12] as did W.T. Stead, the editor of the Pall Mall Gazette and Review of Reviews.[13] The concept of a European federation was strongly supported by several professors during the interwar period especially by some members of the London School of Economics, such as Harold Laski and Ivor Jennings, who devoted a book to the subject under the title 'A Federation of Western Europe'.[14]

However, the British governments followed a strategy to restore the former strategic equilibrium of major powers even after the First World War, until the time of the great depression.[15] The attitude of the Foreign Office was much reserved regarding a European Federation. It was therefore unprepared for the initiative of Aristide Briand on a future European federation in 1929. There was an 'inadequacy of intelligence on the European movement'.[16] The words of Sir William Tyrell, permanent under-secretary, were quite symptomatic, as he evaluated the work and efforts of Count Richard Coudenhove-Kalergi, founder of the Pan-European Society thus: 'I know Coudenhove: he is a thoroughly impractical theorist'[17]. Later, however as ambassador to France, he changed his sceptical view. A decade later, there was a unique moment in history, which could have radically changed the tide of events. In June 1940, during the worst days of German invasion in France, Churchill, supported by his Cabinet, accepted the proposal of an 'indissoluble union', with shared citizenship between the United Kingdom and France. The Franco-British Union could have had joint organs not only for defence but for foreign, financial and economic policies. Reynaud, the French prime minister at that time, was ready to accept the initiative; however, his government replaced him by Marshal Pétain and capitulated.[18] This was a very serious blow to the federalist idea in the United Kingdom.

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12 Seely, John, 'United States of Europe' Macmillan Magazine, Vol. 23, March, pp. 436-448, see Pinder (n 5) p. 4 and p. 21.

13 Stead, W.T. 'The United States of Europe on the Eve of Parliament of Peace' The Review of Reviews Office, London, 1899. See Pinder (n 5) p. 21.

14 Jennings, W. Ivor, *A Federation for Western Europe.* (Cambridge University Press 1940), see Pinder (n 5) p. 11 and p. 20.

15 Boyce (n 11) p. 69.

16 Boyce (n 11) p. 67.

17 Cited by Boyce (n 11) p. 66.

18 Pinder (n 5) p. 18, and Lukács, John, *A párviadal (The Duel)* (Európa Könyvkiadó 1995, Budapest, 369 p.) pp. 200–201.

IV

Although the federalist idea was not unknown to British political culture (or even popular, bearing in mind the looming menace of Second World War on the horizon), after the Second World War it lost its momentum. A Labour government was formed after the elections in 1945. The new Prime Minister, Clement Atlee, earlier seemed to be a supporter of European federation, and he delivered a speech in 1939 using the slogan 'Europe must federate or perish'[19], but after the war his main concern was to build the National Health Service and to nationalise the key industries. The Labour party was very reluctant to join to a *'capitalist club,'* as they called the plans for European integration.[20] After the Hague Conference, devoted to support European unity, in April 1948, 'Labour observers noted that the attendance was overwhelmingly representative of Conservative and capitalist groups'[21]. So, when in May 1950 the French minister of foreign affairs, Robert Schuman, made his historic proposal to pool the French and West German coal and steel industries, the British Government rejected participation in the project. The decisive factors behind this refusal – besides the above mentioned suspicion – were probably economic. Roughly 40 percent of British exports and imports were related to the Commonwealth. The Board of Trade opposed British participation in European integration.[22] In addition, the Labour Government was not ready to pass control over the freshly nationalized steel industry to a supranational authority. Most probably the rank and file of the Labour Party would have rejected such a shift, too. Even the French invitation to participate was somewhat half-hearted. The British Government did not get a forewarning of the Schuman Plan, although even the US Secretary of State was informed before the announcement.[23] As a consequence, the European Coal and Steel Community was established without the participation of the United Kingdom.

However, the real great disillusionment for federalists came in 1951. The Tories and Churchill were returned to power, but Great Britain no longer championed the cause of European integration. There were several reasons behind this approach. One of them was the 'ambivalence, if not a division within the ranks of the Conservatives over Europe', as it was described by Harold Macmillan. (It is quite characteristic that the pro-Europe Macmillan was made Minister of Housing, effectively removing him from the European scene.) The foreign secretary became Martin Eden, a Eurosceptic[24] who focused on the problem of Suez instead of Europe. The

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19 Pinder (n 5) p. 15.

20 Critchley (n 4) p. 90.

21 Morgan, Kenneth, O., *Labour in Power, 1945-1951* (Oxford University Press, Oxford, p. 392) cited by George (n 2) p. 19.

22 George (n 2) p. 15.

23 George (n 2) p. 20. Similarly, Middlemas, Keith, *Orchestrating Europe, The Informal Politics of European Union 1973-1995* (Fontana Press 1995, London, 206 p.) p. 21.

24 It is worth to recall his speech at Columbia University in January 1952: 'If you drive a nation to adopt procedures which run counter to its instincts, you weaken and may destroy the motive force of its action… You will realize that I am speaking of the frequent suggestions that the United Kingdom should join a federation on the continent of Europe. This is something which we know in our bones, we cannot do… Britain's story and her interest lie far beyond

attention of Churchill was absorbed by the Cold War and by the efforts to build a 'special relationship' with the United States.[25] The transatlantic and Commonwealth axes were clearly more important for him than the British position in Europe.[26]

The scepticism towards European integration seemed to be justified for some years, due to the manifest failure of the efforts to create a European Defence Community in 1953-1954. The mainstream British view was therefore quite convinced that even the Messina negotiations started in 1955, preparing for the European Atomic Energy Community and the general common market of the European Economic Community, would not bring any result. As Macmillan wrote in his memoirs 'The official view seemed to be a confident expectation that nothing would come out of Messina.'[27] The British administration failed to grasp the importance of this development, the establishment of integration based on the free movement of goods, persons, services and capital in all sectors. Of course, the traditional fears of the exclusion of Commonwealth trade and the related reluctance to accept common external tariffs[28] applied by the participating European states strengthened this reserved attitude. These considerations overruled the fact that even the United States supported the new project. As a result, the United Kingdom was represented only at a low level at the Messina Conference and – having no prepared position[29] –, did not take part actively in shaping the structures of the new cooperation. Instead of the negotiated scheme, the British government initiated a loose free-trade zone, excluding agricultural products. However this was not acceptable to France, a major exporter of such products.[30] Again, the two new Communities were established without the participation of the country.

V

In less than a decade came the U-turn in British foreign policy, in 1961 Harold Macmillan, by then prime minister, applied for membership of the European Communities. This move can be explained by several factors, first that European economic integration turned out to be a success. A spectacular development in trade and economic growth was experienced in the six founding states, much more robust in nature than that in the UK. The support of the USA remained firm regarding the EEC, rejecting alternative ways of transatlantic economic co-operation. There

the continent of Europe. Our thoughts move across the seas to the many communities in which our people play their part, in every corner of the world. These are our family ties. That is our life: without it we should be no more than some millions of people living on an island off the coast of Europe, in which nobody wants to take any particular interest.' cited by Bogdanor, Vernon, 'Britain and Europe' (2016) 2 (14) Zeitschrift für Staats und Europawissenschaften/Journal for Comparative Government and European Policy, pp. 157–165, p. 158.

25 Critchley (n 4) p. 90.

26 George (n 2) p. 23.

27 Macmillan, Harold, *Riding the Storm* p. 26, cited by George (n 2) p. 26.

28 George (n 2) p. 27.

29 Middlemas (n 23) p. 33.

30 George (n 2) p. 27.

were fears that the successful European Communities might also develop strong military cooperation without the United Kingdom. Plus, in a short period of time, it became obvious that the Commonwealth did not necessarily follow the British position on foreign or economic policy; the leading role of Britain was not unquestionable there. This changed reality was mirrored by the press, the Financial Times, The Guardian, The Observer and The Times started to argue in favour of membership.[31]

However, the golden momentum for becoming a founding Member of the integration had already passed. During the sixties the position of the European Community was dominated by the French president De Gaulle, who was more than sceptical about the UK's membership, considering the country the US *'Trojan Horse'* in Europe, and he vetoed her accession twice, in 1963 and in 1967. One may say that this was an ungrateful move since Britain had saved France twice in the World Wars; however, we have to admit retrospectively that there was some merit is his argument: 'England in fact is insular, maritime, bound by her trade, her markets, her supplies, to countries that are very diverse and often very far away… How can England, as she lives, as she produces, as she trades, be incorporated in the Common Market?'[32] So Britain had to wait until the resignation of De Gaulle in 1969 and finally became a member of the European Communities only in 1973. The century-old dilemma regarding the relationships with Europe was settled – at least at first sight. The negotiations on the terms of accession were not easy. Britain, as a late-comer, had to accept the structures and models hammered out earlier by the six founding Member States. Some issues, such as the impact of the Common Agricultural Policy on the United Kingdom and the Commonwealth, or the contribution to the Community budget, haunted British politicians for several more years or even decades.

In January 1972, Edward Heath, Conservative prime minister, delivered a fine speech, celebrating the closure of 'arduous negotiations over more than ten years' leading to the accession of the United Kingdom. In his contribution, he struck a good balance between national interests and European commitment: 'Clear thinking will be needed to recognise that each of us within the Community will remain proudly attached to our national identity and to the achievements of our national history and tradition. But at the same time, as the enlargement of the Community makes clear beyond doubt, we have all come to recognize our common European heritage, our mutual interests and our European destiny'[33].

With hindsight, we may risk saying that Edward Heath was probably the only British prime minister who felt a genuine enthusiasm towards the cause of European integration.[34] However, the dissenting opinions emerged soon as well. In fact, already during the accession negotiations there was a legal attempt before the courts to prevent the British government to accede to the

[31] George (n 2) p. 34.
[32] Quoted in George (n 2) p. 34.
[33] Speech by Edward Heath, Brussels, 22 January 1972. Bulletin of the European Communities, February 1972, No 2, pp. 25–27.
[34] Middlemas (n 23) p. 74.

European Communities.[35] In *Blackburn v Attorney General,*[36] proceedings were started to get a ruling that it would be unlawful for the Government to sign the Accession Treaty, surrendering part of the sovereignty of the Crown and the Parliament. However the claim was dismissed, as was the appeal against the dismissal. It is worth recalling the opinion of the outstanding British judge of that time, Lord Denning, who clearly realised the transfer of competences to the EC but maintained that the courts did not have the power to decide upon such issues, and emphasised the dualist approach between international law and domestic law:

'Much of what Mr. Blackburn says is quite correct. It does appear that if this country should go into the Common Market and sign the Treaty of Rome, it means that we will have taken a step which is irreversible. The sovereignty of these islands will thenceforward be limited. It will not be ours alone but will be shared with others.

(…) Even if a treaty is signed, it is elementary that these courts take no notice of treaties as such. We take no notice of treaties until they are embodied in laws enacted by Parliament, and then only to the extent that Parliament tells us. That was settled in a case about a treaty between the Queen of England and the Emperor of China.'[37]

Finally, the European Communities Bill was passed by both Houses of the Parliament after tough debates but without a single amendment and entered into force on 1 January 1973.[38]

VI

This was still not the end of the stormy history of British accession. After two elections in February and October 1974 a Labour Government replaced the Conservative cabinet of Edward Heath with a promise to renegotiate the terms and conditions of British accession and asking the opinion of the people on British membership. The underlying reasons behind this promise were mainly domestic. The Labour Party won only by a thin majority at the second election in 1974. A campaign against Brussels might have been considered as a good cause for uniting the divided nation, since it was an issue which penetrated across party lines. Moreover, the crusade against EC membership was wholeheartedly supported by the left wing of the Labour Party, which had very strong ties with the trade unions. The demand for renegotiation of the conditions of accession was mainly a tactical device in the hands of the prime minister, who pragmatically accepted British membership of the EC, but not according to the terms negotiated by the former Conservative Government.[39] During the renegotiations the most sensitive issues were revisited, such as the access of Commonwealth products to the EC, reform of the CAP and

35 Turpin, Colin, *British Government and the Constitution, Text, Cases, Materials* (3rd edn, Butterworths 1995, London, Dublin, Edinburgh) p. 295.
36 *Blackburn v Attorney-General* (1971) 1 WLR 1037 (CA).
37 Turpin (n 35) p. 295.
38 Turpin (n 35) p. 296.
39 George (n 2) p. 77.

the size of British contributions to the budget of the European Communities.[40] Finally a reasonable compromise was reached, although the tough negotiations had a negative impact on the perception among other Member States regarding the British attitude towards Europe. The role of UK being an *'awkward partner'*[41] in the European integration goes back to this period of time. The renegotiation and its results were presented as a great victory in the domestic context. Based on this, the prime minister and the majority of his Cabinet members supported the renegotiated terms of accession. In Parliament, the majority of Labour MPs voted against the new terms; however the vote went in favour of acceptance, thanks to the support of the Conservative Party headed by Margaret Thatcher. She gave three principal reasons explaining her position: peace and security, a guaranteed food supply and a future role for Britain on the world stage.[42] Even so, she left the greater part of the Conservative referendum campaign in 1975 to the former Tory prime minister, Edward Heath.[43]

The referendum on membership was considered by many Conservative politicians as alien to British constitutional traditions. A good amount of populism was injected into the campaign, and a strange alliance was formed against EC membership, including the extreme right National Front and the extreme left of the political spectrum: the left wing of the Labour Party plus the marginal Maoist and Trotskyist groups. Despite the negative campaign, the referendum confirmed British membership with an unexpected two-third majority in favour (67.2 per cent) based on a high turnout of voters (64. 6 per cent). The UK's membership of the EC at that time seemed to be finally settled.[44]

However, forty years later, it became obvious that the heart of the British lion did not change and remained tortured by the disputes, prejudices, doubts and fears of the past century. The great political battle continued; moreover, the very same arms were deployed in the struggle, the renegotiation of conditions of EU membership followed by a popular vote and cases before the courts. So, we have to accept the opinion: 'No one familiar with British history should be surprised at the verdict of the referendum. For Britain's relationship with the Continent has always been uneasy'.[45]

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40 George (n 2) p. 81.

41 See the title of the well-known book written by George, Stephen, *An Awkward Partner. Britain in the European Community.*

42 George (n 2) p. 92.

43 Gamble, Andrew, *The Free Economy and the Strong State, The Politics of Thatcherism* (2nd edn, Macmillan 1994, Houndmills, London) p. 98.

44 George (n 2) pp. 94–95.

45 Bogdanor (n 24) p. 157.

Krisztina Arató*

Pros and Cons in the Brexit Campaign

What do They Tell Us About the European Union?

On January 23rd 2013, David Cameron, Prime Minister of the UK, gave a speech at the London headquarters of Bloomberg.[1] In this speech – which recalls Margaret Thatcher's Bruges speech of 1988[2] in its tone, structure and also content – he promised a referendum for the British electorate on remaining in or leaving the European Union. To the great surprise of both British and European citizens, on 16 June 2016 the majority (51.9%) of British voters decided to leave the European Union.

Since one big and influential member state leaving the European Union is an unprecedented and major development in economic, political and also institutional terms, a vast number of analyses has and will come out about its various aspects. It is worth looking at the procedural questions of exiting the EU (Art. 50) and how it is being implemented for the first time; the economic consequences for both the UK and the EU; and political aspects such as electoral participation, the party-system, populism and political communication. In this paper I concentrate on the arguments of the 'leave' and the 'remain' campaign – I am interested in what kind of stories and narratives hide behind the arguments and what they tell us about the perception of the European Union by both sides.

My analysis belongs to the interpretive school of political science. Interpretive aproaches in political science argue that human behaviour, as well as political action, is based beliefs and preferences. When people make a certain (political) choice, they do so because they share the values of the selected party, or they think that their choice will add to their well-being or the well-being of their community. However, these preferences, and, more importantly, the beliefs behind these preferences can hardly be identified on the basis of sociological data (income status, education, nationality etc.) The interpretive school of political science argues that we can reconstruct ways of thinking that (of course not as an only factor) influence political action on the basis of what people say – the narratives, the discourse.[3] My analysis remotely

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1 David Cameron, EU speech at Bloomberg. 23 January 2013 https://www.gov.uk/government/speeches/eu-speech-at-bloomberg.

2 Margaret Thatcher, *Speech to the College of Europe ('The Bruges Speech')* 20 September 1988. http://www.margaretthatcher.org/document/107332.

3 David Marsh, Gerry Stoker, *Theory and Methods in Political Science* (Palgrave, 2010) 131–134.

relates the to the emerging sub-discipline of campaign studies[4] – as I am interested in exploring the image of the European Union on both sides, which has been expressed in the Brexit campaign in a concentrated manner.

In order to analyse the 'Leave' and the 'Remain' arguments in the Brexit campaign and what they say about the European Union, within the interpretive framework of the approach of political science, I use the concept of myths. In the first part of my article I collect the main features of political myths as a theoretical framework for my argument. In the second section I explore the current myths and their challenges in the contemporary European Union. In the third part I identify the major 'Leave' and 'Remain' arguments in the Brexit campaign and explore how they fit into the myth-countermyth framework within the EU. At the end, I draw some preliminary conclusions.

I Myths and Countermyths – Summary of the Theoretical Framework

Myths have been the subject of theory-building in various fields in social sciences and humanities: anthropology, theology, linguistics, psychology and art-history, as well as literature, history and political science.[5] Here – without the intention of giving a full picture on myth-theory – I concentrate on related key findings in political science, being fully aware that most times it is difficult to establish the borders between myth-theories in general and the ones on political myths.

As Christopher Flood suggests, 'a myth is a narrative, a story which presents a sequence of connected events'.[6] He argues that it is worth distinguishing between two types: sacred myths and political myths. Sacred myths refer to ideas and narratives usually built around the issues of the creation of gods (theogonic myths), the creation of the world (cosmogonic myths) or the creation of man (anthropogonic myths). While closely connected to sacred myths in functions, dissemination and other aspects, political myths help to explain – and understand – a current political system. There are several definitions available for the concept of political myth other than Flood's; the basic disagreement among writers seems to be whether political myths necessarily have a 'true' basis (if we dissect the word 'mythology' into two originally Greek words, *mythos* refers to belief and *logos* to reason and knowledge). A group of analysts argue that the major dividing line between sacred myths and political myths is the element of truth, empirical facts, events or widely observable phenomena, which is only characteristic of the

[4] See e.g. Margaret Scammell, 'Political Marketing: Lessons for Political Science' (1999) 47 Political Studies, 718–739, or Rüdiger Schmitt-Beck, David M. Farrell, 'Studying Political Campaigns and Their Effects' in Farrell, David M., Rüdiger Schmitt-Beck (eds), *Do Political Campaigns Matter? Campaign Effects in Elections and Referendums* (Routledge 2004, London) 1–21.

[5] Julie Barbara Jane Reid, *A Theoretical Explanation of the Construction of Counter Myth: a Case Study of Post Apartheid South African Film* (PhD Dissertation, University of South Africa, 2011.) http://uir.unisa.ac.za/bitstream/handle/10500/5961/dissertation_reid_j.pdf?sequence=1.

[6] Christopher Flood, *Political Myths. A Theoretical Introduction* (Routledge 2002, London and New York) 27.

latter.[7] This assertion can also be found in Christopher Flood's the definition; he states, when elaborating his previously quoted definition, that political myths are narratives of past, present or predicted political events which their teller wants to make understandable for their communities.[8] In this system of thought, political myths do not need to be sacred (i.e. unchallengeable) in modern societies, but they need to be accepted as fundamentally true by the group or society in which they appear. Since in everyday usage the word 'myth' may refer to stories that are provably untrue or invented,[9] it is necessary that the explanations that political myths provide should be accepted as true by their communities. On the other hand, other authors say that the much underlined truth element is not a central characteristic of even political myths. George Schöpflin argues that myths provide a group with a story that help a group identify where they have come from and what makes them different from others. These beliefs *(mythos)* do not necessarily have to do with facts or rationality *(logos).* 'Myth is about perceptions rather than historically validated truths (in so far they exist at all), about the ways in which communities regard certain propositions as normal and natural and others as perverse and alien.'[10] Botticci and Challand define political myths as 'the work on a common narrative, which provides significance to the political conditions of a social group'. For them, the major elements of political myths are that they coagulate and reproduce significance, that they are shared by a certain group and that they address the specifically political conditions of a given group.[11]

Political myths are not static by nature: they evolve over time and change according to different influences – political campaigns, elections, scandals, economic processes, international influences; the list is endless. It is more useful to understand myths as a process of continuous work on a pattern that may be subject to change according to the change of circumstances.[12] Thus, when analysing current myths of the European Union, accordingly, we can only take a snapshot of a certain point in time.

Myths can appear in a number of forms. Politicians may refer to them in speeches and interviews; artists express them in very different works of art; in the mediatised world of politics, they can be expressed in innumerable forms of photos, clips, logos and other visual images (also on the borderline of fiction); they can be seen in different rituals, such as memorial days,

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7 See e.g. David Archard, 'Myths, Lies and Historical Truth: A defence of Nationalism' Political Studies (1995) 43, 472–481, and Vincent della Sala, 'Political Myth, Mythology and the European Union' (2010) 48 (1) Journal of Common Market Studies, 1–19.

8 Flood (n 6) 29.

9 This statement is especially true in the case of the European Union – the European Commission runs a blog called 'Euromyths' where distorted or untruthful stories about the EU are presented and corrected. Since most of that information appears in the British media, the blog is run on the EC/UK website. http://blogs.ec.europa.eu/ECintheUK/.

10 George Schöpflin, 'The Functions of Myth and a Taxonomy of Myths' in Geoffrey Hosking, George Shcöpflin (eds), *The Myths of Nationhood* (Hurst & Company 1997, London) 19–35.

11 Chiara Botticci, Benoit Challand, 'Rethinking Political Myth. The Clash of Civilizations as a Self-Fulfilling Prophecy' (2006) 9 (3) European Journal of Social Theory, 315–336.

12 Hans Blumenberg, *Work on Myth. Studies in Contemporary German Social Thought* (MIT 1988, Massachusetts).

celebrations, marches and awards; in social practices such as participation in celebrations (or indeed, elections), support of different decisions etc.[13] Bennett even argues that myths are practically everywhere to such a degree that they can slip into our unconscious, that they not only influence the way we perceive the world around us but they can be understood as lenses through which we see it.[14] This understanding of political myths also includes the notion that myths are not only rational constructions: emotions are also part of them. As Botticci and Challand put it, 'political myths are mapping devices through which we look at the world, feel about it and therefore also act within it as a social group'.[15]

As well as being diffuse in appearance, myths also coagulate or crystallize into a few images, icons or stories. Myths can be discussed at length when writers or scholars elaborate on them; however, most can be expressed very briefly, clearly, and, most importantly, understandably to the public. As Bell argues, 'Myth serves to flatten the complexity, the nuance, the performative contradictions of human history'.[16] The power of myth lies in the ability to tell a simple story that makes the evolution of a society and its polity intelligible to people.[17] This is why it is possible to use them very expressively using visual communication tools in modern media politics.[18] This 'iconic nature' of myths makes them highly visible to the public and also those actors who 'use' them (we will come back to actors of myths later) but also makes their analysis – especially scientific research – rather difficult. Behind one image, action or political speech, the appearance of a particular myth can be observed but it is hard to prove it was conscious and deliberate.[19]

There are several types of political myths. There are foundational or primary myths that concern the origins of a community, telling when and how a community started to belong together, including references to who belongs to the group (us) and who doesn't (them). 'Golden Age' myths recall successful periods in history, great days to remember that serve to maintain hope in times of crisis. 'Suffering myths' refer to hard days back in time, also giving hope for the future, since the community was able to survive. All communities also have 'exceptionalism' myths, showing they are unique and serving as a source of pride for its members.[20]

Myths survive because there are actors in a community who keep them alive.[21] The 'storytellers' can be different actors in the society. Most visible of these actors are politicians who publicly talk about and to their communities on occasions such as memorial days, electoral campaigns, even in ordinary interviews. But myths are also told by several other actors: journalists, commentators, bloggers when writing about current events, academics when

13 Flood (n 6) 161.
14 Lane W. Bennett, 'Myth, Ritual ans Political Control' (1980) 30 Journal of Communication, 166–179.
15 Botticci–Challand (n 11) 321.
16 Duncan Bell, 'Mythscapes: Memory, Mythology and National Identity' (2003) 54 (1) British Journal of Sociology, 63–81.
17 Della Sala (n 7) 4.
18 Flood (n 6) 166.
19 Botticci–Challand (n 11).
20 Della Sala (n 7) 7.
21 Bell (n 16).

analysing social processes, civil society organisations when bringing members together or organising projects, teachers at school, parents in their families, friends in pubs. Myth interweaves society. 'Myths need social actors to bring them to life and to ensure that they continue to tell a story that resonates. But if civil society chooses to craft and promote its own myths, then the legitimacy of the political rule is likely to be put into question.'[22] The elite and the public should thus share the political myths they tell: this is an important factor that we should keep in mind when analysing myths and countermyths in the European Union.

Myths have their own evolution and go through three stages of development: diffusion, ritual and sacredness.[23] In the first period, the narrative is told by several actors within society. With regard to nation-building, analysts of collective identity formation offer a wide range of theories about how this diffusion happens and who tells the stories.[24] Ethno-symbolists argue that symbols and narratives are there in the collective memory as building blocks,[25] whereas constructivists say that all of us are members of 'imagined communities' where elites created the stories of belonging.[26] In the second period, rituals start to be attached to the narratives in the form of memorial days (9 May in the case of the European Union), prizes (e.g. Karlspreis established by the city of Aachen in 1950) or other community acts. In the third phase the myth becomes sacred, not in the religious meaning of the word but suggesting that the existence of the political community it belongs to is in itself unquestionable.

Political myths, as stated above, are not static by nature. This notion implies that that one particular myth is, on the one hand, subject to change within the framework of a particular narrative, or, on the other hand, it is also possible, that within the same group, an alternative explanation may potentially emerge, offering a different view for the community. Thus, it may be more precise to call myths accepted by the majority of community as 'dominant' myths – since the pluralistic nature of societies necessarily brings about alternatives. Reid argues that emerging alternative explanations of the basic issues in a community – countermyths – have been either ignored or under-researched and under-theorised in the myth literature.[27]

Roland Barthes, the French literary theorist and philosopher, was first to mention the idea on countermyths in his volume 'Mythologies'.[28] The concept was quoted and partially discussed further by John Fiske in his Introduction to Communication Studies, where he argued that subcultures in a society offer alternative explanations to those of mainstream (dominant)

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22 Della Sala (n 7) 8.

23 Della Sala (n 7) 9.

24 Koller Boglárka, 'The Fading Civic Identity of EU Nationals – With a Special Focus on the East-Central Euopeans Attachments' in Ágh Attila, Vass László (eds), *In European Futures: The Perspectives of the New Member States in the new Europe* (BCCB 2012, Budapest).

25 E.g. Anthony D. Smith, *The Ethnic Origins of Nations* (Blackwell 1986, Oxford).

26 Benedict Anderson, *Imagined Communities. Reflections on the Origin and Spread of Nationalism* (Revised Edition, Verso 1991).

27 Reid (n 5) 26.

28 Roland Barthes, *Mythologies. Selected and translated from the French by Annette Lavers* (The Noonday Press 1972, New York).

myths.[29] Mary Sheridan-Rabideau described counter-myths as partly a social action of criticism against competing, mainly dominant, myths and also as the attempt to establish new myths.[30] When identifying the social functions of counter-myths, Reid builds on the functions of myths in general, adding the particularities of counter-myths. With regard to the function of self-definition (defining 'us' and 'them' for a community), counter-myths perform a double task: first they reject the definition offered by dominant myths and, second, the communities concerned 'accept the counter myth which encodes the identity of a certain group in a way which distinguishes it from the dominant myth discourse'.[31] Counter myths, just like dominant myths, are there to simplify reality. Counter myths are also there to make the alternative explanations understandable, but here they also have a double task: they use the simplified encoding of the dominant myth and their own simplified view of the community as well.[32] Myths in general as usually used for explaining why and how a particular community arrived at a certain position.[33] They account for what happened in the past and how and also, reflect on the present and the future. The same is true for countermyths, with the distinction that they offer and alternative explanation for the community.[34]

Countermyths undoubtedly challenge dominant myths. They express the need for change; they are able to inspire the tellers of the dominant myths to review their version of why the community belongs together. Countermyths may induce processes where the revision of dominant myths leads to create a more accepted version, or that countermyths can actually 'win' and become a dominant narrative in a community. I argue that currently in the European Union we experience a struggle between dominant myths (those of the EU supporting elite, EU officials, pro-EU academics, and other tellers of the traditional Monnet-Schuman discourse) and countermyths offered by parties and politicians who are usually identified by the increasingly complex 'Eurosceptic' attribute.

II Myths and Countermyths in the European Union

The statement that the European Union/European Communities have had their political myths when they were established is a subject of debate among scholars. Obradovic argues that the legitimacy crisis of the European project is rooted in the missing myth of origin, that it lacks an essentially organic, mythical foundation.[35] Most scholars who wrote on the subject of myths and

[29] John Fiske, *Introduction to Communication Studies* (Routledge 1982, London) 90.
[30] Mary P. Sheridan-Rabideau, 'The Stuff that Myths Are Made of: Myth Building as Social Action' in Written Communication. October 2001, 18. 440–469.
[31] Reid (n 5) 60.
[32] Reid (n 5) 61.
[33] See Schöpflin (n 10) 210 and also Tudor, Henry, *Political Myth* (Pall Mall 1972, London)
[34] Reid (n 5) 63.
[35] Daniela Obradovic, 'Policy Legitimacy and the European Union' (1996) 2 (34) Journal of Common Market Studies, 191–221.

the EU – and they were not numerous, although recently growing in number – argue quite the contrary. Hansen and Willams state that the European project has had its special mythology, although it was intentionally a rather non-political one – the functional, technocratic picture that the EC drew of itself was really a mythical explanation of the birth and nature of the new political community.[36] Vincent della Sala argues that the European Union has a strong foundational myth built on humanist values, such as peace, tolerance, diversity, solidarity and progress, going back centuries and with rituals already built around them.[37] Eric Jones collected illustrations of the existence of the economic mythology of European integration. [38]

In this section I not only support the latter authors in proving, by showing examples, that the European Union and its predecessors have successfully built myths around an emerging polity but I also argue that a different narrative is offered as countermyths of the European project. Countermyths are identified on the basis of statements, opinions and arguments usually connected to Euroscepticism. Although it is rather problematic to define Euroscepticism, which contains notions from explicit opposition to the entire existence of the EU or EU membership to expressing hostility or deep reluctance towards present EU structures and the modus operandi of the EU (legitimacy, pooling of sovereignty, delegation of powers to EU institutions, introduction of new policies etc.)[39], I argue that on the basis of their discourse, the core countermyths defined theoretically in the previous chapter can be identified even if I accept the argument of Cecile Leconte that Euroscepticism shows variations from member state to member state.[40]

The following list is based on research carried out on the history of the European Union (Arató–Koller 2013, Arató–Koller 2015). On the other hand, the examples I bring for supporting my argument can, of course be taken as random samples. They are mostly quotations from the founding fathers, member state and EU politicians and key documents from the history of the EU. I am fully aware that images, symbols, cartoons, documentaries, and other actions could be brought here in order to fully support my view – with the careful distinction that myths and countermyths can vary from one member state to another – if that is at all possible. As quoted from Botticci and Challand above, the research findings about myths can quite easily be observed but hardly proven.[41] Thus, the following part should be taken as hypotheses for further research, with the qualification that research tools and methods have yet to be identified and selected carefully.

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36 Hansen, Lene, Williams, Michael C., 'The Myths of Europe: Legitimacy, Community and the 'Crisis' of the EU' (1999) 37 (2) Journal of Common Market Studies, 233–249.

37 Della Sala (n 7) 11.

38 Eric Jones, 'The Economic Mythology of European Integration' (2010) 48 (1) Journal of Common Market Studies, 89–109.

39 Cecile Leconte, *Understanding Euroscepticism* (Palgrave Macmillan 2010, Basingstoke) 8.

40 Leconte (n 39) 4.

41 Botticci–Challand (n 11) 321.

1 Myth No. 1: Peace

'World peace cannot be safeguarded without the making of creative efforts proportionate to the dangers which threaten it. (…) With this aim in view, the French Government proposes that action be taken immediately on one limited but decisive point. It proposes that Franco-German production of coal and steel as a whole be placed under a common High Authority, within the framework of an organization open to the participation of the other countries of Europe. The pooling of coal and steel production should immediately provide for the setting up of common foundations for economic development as a first step in the federation of Europe, and will change the destinies of those regions which have long been devoted to the manufacture of munitions of war, of which they have been the most constant victims.'[42]

The quoted Schuman declaration is considered as the first and key proof of the intention of the Founding Fathers of the European project, which still serves as a basis as the strongest sign of the existence of a foundational myth of the European Union. It says that Europe – especially France and Germany – has learned the lessons of history, the lessons from numerous wars between the two nations and across the whole Continent over the previous centuries. Weaver argues that in European identity politics, where not only 'us' but also those who are 'the others', 'them' (i.e. those who are different from us) have to be defined: in the case of Europe, 'Europe's past of wars and divisions is held up as the other to be negated, and on this basis it is argued that 'Europe' can only be if we avoid renewed fragmentation.'[43]

The foundational myth of peace is supported by publications on the historical roots of European integration going back beyond 1945. There are collections published on the idea of Europe dating back to the 14th century. Pierre Dubois, Dante Alighieri, Hugo Grotius, Immanuel Kant, Victor Hugo, Friedrich Naumann and other philosophers, political advisers and writers were already forerunners of the modern integration process built pre-eminently on establishing peace in Europe. This approach, called 'idealistic' by Neill Nugent,[44] is confirmed by European institutions – surprisingly also by the 'nonmajoritarian', regulatory[45] institution, the European Central Bank (ECB). European institutions, as part of their PR activities, present information for the public, also in the form of short films for educational purposes. Even the short video on the history of the ECB starts with WWII confirming the foundational myth of the EU.[46]

The EU's anti-war foundational myth has not been actively used for a long time; we can also say it was taken for granted by the story-tellers of the EU and the public as well. However, it has

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[42] The Schuman Declaration 9 May 1950 http://europa.eu/about-eu/basic-information/symbols/europe-day/schuman-declaration/.

[43] Ole Weaver, 'European Security Identities' (1996) 34 (1) Journal of Common Market Studies, 103–132.

[44] Neill Nugent, *The Government and Politics of the European Union* (Palgrave Macmillan 2010, Houndmills, Basingstoke) 9.

[45] Giandomenico Majone, 'Integration and Democracy: the Big Trade-Off' in Majone, Giandomenico (ed), *Dilemmas of European Integration. The Ambiguities and Pitfalls of Integration by Stealth* (Oxford University Press 2005, Oxford) 23–41.

[46] The History of the European Central Bank. https://www.youtube.com/watch?v=Aijn_4TFF_8.

been reinforced in the midst of the economic and financial crisis that has threatened the Eurozone since 2008. German Chancellor Angela Merkel said in the Bundestag in October 2011 – when asking support for the German position:

'Nobody should take another 50 years of peace and prosperity in Europe for granted. They are not for granted. That's why I say, if the euro fails, Europe fails. (…) We have a historical obligation: to protect Europe's unification process begun by our forefathers after centuries of hatred and bloodshed by all means. None of us can foresee what the consequences would be if we were to fail.'[47]

A clear reference to the widespread foundational myth of the European project is recited in the recent declaration called New Narrative for Europe:

The European integration project was born like a phoenix out of the ashes of World War I and World War II. 100 years ago, Europe lost its soul on the battlefields and in the trenches. Later, it damned itself within the concentration camps and the totalitarian systems associated with extreme nationalism, anti-Semitism, the abolition of democracy and rule of law, the sacrifice of individual freedom and the suppression of civil society. But, since the end of World War II, the ideal of a Europe united by the principle of mutual respect and the values of freedom and democracy has brought redemption. Europe's soul was restored. Today the European integration process stands against all forms of war.[48]

2 Myth No. 2: Rationality

While the Schuman declaration also made reference to the establishment of a European federation, reality showed that this aim was not going to be on the agenda for long. Instead of the *finalité politique,* actors and theorists concentrated on the process of integration in the 1950s and 60s – that is, actually also present in the founding text. The reference on sectoral integration, starting with coal and steel and the establishment of the High Authority, refers to the neofunctionalist school of thought. Ernst Haas, one of the first theoreticians of neofunctionalism has a telling sentence on the nature and the spirit of the new institutional setup:

'Converging economic goals embedded in the bureaucratic, pluralistic and industrial life of modern Europe provided the crucial impetus. The economic technician, the planner, the innovating industrialist, and trade unionist advanced the movement, not the politician, the scholar, the poet, the writer.'[49]

Accordingly, the system to be created lacked any of the open romantic references to values, political motivations and alike usual in high politics. This is why Obradovic argued that until

[47] Merkel addresses Bundestag on euro rescue plans. Oct. 26. 2011. https://www.youtube.com/watch?v=4mJoi8mlmYA.

[48] European Commission, *A New Narrative for Europe 2014* http://ec.europa.eu/debate-future-europe/new-narrative/pdf/declaration_en.pdf.

[49] Ernst B. Haas, *The Uniting of Europe: Political, Social and Economic Forces 1950–1957* (2nd edn, Stanford University Press 1968, Stanford CA) xix.

1992 the European project lacked any mythical foundation.[50] Whereas Hansen and Williams demonstrated that neo-functionalist anti-political sentiments also create their own myth, the myth of rationality.[51] The elements of this myth are low politics, the community method (or the Monnet-method), where institutions independent of national governments would make rational policy (and not political) decisions, and the idea of efficiency.

The myth of rationality still prevails: whereas an abundance of books and analyses are published on the political system of the European Union, all suggesting that the EU is already a *(sui generis)* political system with all its political implications,[52] the European Commission still maintains a picture of itself as a predominantly technocratic and bureaucratic institution concentrating mainly on efficient implementation of EU legal instruments and not as a political player.

3 Myth No. 3: Economic Co-operation and Success

Neill Nugent, in his introductory book on the European Union, on the different editions of which generations of European studies students grew up, states that if we have to discover the historical roots of the European project, instead of political and philosophical texts from the Middle Ages and after, we should concentrate on the field of economic history. He quotes Pollard on the 19th century European economy:

'Europe's industrialisation proceeded relatively smoothly, among other reasons, precisely because it took place within what was in many essentials a single economy, with fair amount of movement of labour, a greater amount of freedom for the movement of goods, and the greatest freedom of all for the movement of technology, know-how and capital.'[53]

The idea of post-WWII integration was explicitly economic as well as political. Robert Schuman, acknowledging that a European federation being the long-term objective, stated that the immediate goal was to ensure 'the modernisation of production and the improvement of its quality; the supply of coal and steel on equal terms to the French and German markets… (and) to those of the (other) member countries; and the equalisation as well as the improvement in the living standards and working conditions in those industries'.[54] Jean Monnet, in the very first issue of the Journal of Common Market Studies, also stressed the need for economic cooperation 'The need was political as well as economic. (…) We thought that both these objectives could in time be reached if conditions were created enabling these countries to increase their resources by merging them in a large and dynamic common market; and if these

50 Obradovic (n 35) 198.

51 Hansen–Williams (n 36) 237.

52 E.g. Nugent (n 44) or Simon Hix, Hoyland, *The Political System of the European Union* (3rd edn, Palgrave Macmillan 2011, Basingstoke).

53 Sidney Pollard, *The Integration of the European Economy since 1815* (George Allen & Unwin 1981, London) Quoted by Nugent (n 44) 10.

54 The thought of Robert Schuman is quoted by Peter Stirk and David Weigall (eds), *The Origins and Development of European Integration: A Reader and Commentary* (Pinter 1999, London and New York) 87–88.

same countries could be made to consider that their problems were no longer solely of national concern, but were mutual European responsibilities.'[55]

The economic myth of European integration contains the notion that the steps made by European institutions could only happen the way they did and they inevitably lead to a political union. As the White Paper on the Completion of the Single Market states: 'Just as the customs union had to precede economic integration, so economic integration has to precede European unity.'[56]

Not only economic co-operation but also economic success and prosperity have been connected to the European project. The EU website, its part providing very general information for the public contains the following statements:

'The EU is a unique economic and political partnership between 28 European countries that together cover much of the continent. The EU was created in the aftermath of the Second World War. The first steps were to foster economic cooperation: the idea being that countries which trade with one another become economically interdependent and so more likely to avoid conflict. (…) The EU has delivered half a century of peace, stability and prosperity, helped raise living standards, and launched a single European currency, the euro. (…)'[57]

Major EU documents also echo the perception of connecting economic co-operation with growth, prosperity and success. The declaration Berlin Declaration on the occasion of the 50th anniversary of the signature of the Treaties of Rome states:

'We are facing major challenges which do not stop at national borders. The European Union is our response to these challenges. Only together can we continue to preserve our ideal of European society in future for the good of all European Union citizens. This European model combines economic success and social responsibility. The common market and the euro make us strong.'[58]

The crisis dating from 2008 that started with the collapse of Lehman Brothers brought to surface the systemic inconsistencies of the Eurozone and negatively affected economic growth and employment. It reinforced the EU's institutional and legitimacy problems, clearly mirrored in the declining general trust levels towards the Euro and the EU in general. Since economic cooperation – connected to success – is one of the leading myths of the European Union, that had to be very clearly questioned, the economic crisis contributed to the growing distrust of the EU and its institutions, although we have to admit that trust levels towards the EU change in parallel to those towards national governments.[59]

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55 Jean Monnet, 'A Ferment of Change' (1962) 1 (1) Journal of Common Market Studies, 203–211.

56 European Commission (1985) Completing the Internal Market: White Paper from the Commission to the European Council (Milan, 28-29 June 1985) COM(85) 310.

57 How the EU works. http://europa.eu/about-eu/index_en.htm

58 *Berlin Declaration on the occasion of the 50th anniversary of the signature of the Treaties of Rome.* http://europa.eu/50/docs/berlin_declaration_en.pdf

59 Eurobarometer 83.

4 Countermyth 1: Lack of Democracy

Although the democracy deficit, a widely discussed feature of the European institutional setup, was born in the 1980s, the criticism of the Communities from the democracy point of view is as old as the Schuman Declaration itself. The British, being suspicious towards anything other than traditional intergovernmental cooperation, had long debates in the House of Commons in the months after 9 May 1950. During this debate, John Strachey, the Secretary of State for War in the Attlee Government, argued against joining the formulating ECSC with the following statement:

'(…) The Schuman Plan would put real power over Europe's basic industries into the hands of an irresponsible body free from all democratic control. (…) For my part, a plan for international unity was unacceptable so long as it contained this provision as one of its essential features, and I stand by that statement. Such a plan appears to me to erect a barrier to democratic popular control over our two basic industries; and, let us never forget it, it is upon these basic industries that the very livelihoods of our people depend. The people of this country, and, to a lesser extent, the people of Western Europe, have just achieved a measure of democratic control over these industries. I could not and cannot accept a plan which puts them outside democratic control.'[60]

The academic debate on the problematic nature of democratic features of the EU heated up after the Treaty of Maastricht in 1992. Although this-ever growing literature can hardly be named Eurosceptic, or even be accused of a wish to provide arguments for building a countermyth for the European project, the issues they name do come back in political debates and reasoning. The widely known arguments refer to the increased executive power and at the same time decreased national parliamentary control in EU decision-making;[61] the general weakness of the European Parliament (however strong development there has been in its participation in EU decision-making[62]); the lack of real European level elections;[63] the distance between the EU and European citizens;[64] and the problem that, as a result of the above factors, the EU adopts policies that are not supported by the majority of citizens.[65]

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[60] Secretary of State for War, John Stratchey (Attlee Government) in the House of Commons, 11 July 1950. Hansard 1803-2005. http://hansard.millbanksystems.com/commons/1950/jul/11/schuman-plan-ministers-speech#S5CV0477P0_19500711_HOC_349.

[61] Tapio Raiuno, 'Always One Step Behind? National Legislatures and the European Union' (1999) 34 (2) Government and Opposition, 180–202.

[62] E.g. Shirley Williams 'Sovereignty and Accountability' in Keohane, Robert. o., Hoffmann, Stanley (eds) *The New European Community* (Westview Press 1991, Boulder, CO.).

[63] Simon Hix, 'Dimensions and Alignments in European Union Politics: Cognitive Constraints and Partisan Responses' (1999) 35 European Journal of Political Research, 69–106, Gary Marks et al., 'National Political Parties and European Integration' (2002) 46 (3) American Journal of Political Science, 585–594.

[64] William Wallace, Smith, Julie, 'Democracy or Technocracy? European Integration and the Problem of Popular Consent' (1995) 18 (3) West European Politics, 137–157.

[65] Fritz Scharpf, *Governing in Europe: Effective and Democratic?* (Oxford University Press 1999, Oxford), Wolfgang Streeck, Philippe Schmitter, 'From National Corporatism to Transnational Pluralism: Organised Interests in the Single European Market' (1991) 19 (2) Politics and Society, 133–164.

These arguments have been recently used in the European political arena, especially by clearly Eurosceptic parties and their representatives. The best known of them is Nigel Farage MEP, leader of the UK Independence Party, who co-chaired the *Europe of Freedom and Democracy* group in the European Parliament 2009-2014. In a speech in the European Parliament, on 24 February 2010, Farage questioned the legitimacy of Van Rompuy's appointment, asking 'Who are you? I'd never heard of you, nobody in Europe had ever heard of you'. He also stated that Van Rompuy's 'intention [is] to be the quiet assassin of European democracy and of the European nation states.'[66]

This opinion, though clearly exaggerated and its style proved to be unacceptable (MEP Farage was fined 10 days' MEP allowances for his speech)[67] seems to reflect European public opinion. According to the Eurobarometer surveys, in three and a half years between autumn 2009 and spring 2013, positive opinions on how democracy works in the EU fell 12 percentage points while in the same period adverse opinions increased by 14 percentage points and they have not changed since.[68]

5 Countermyth 2: Threat to National Sovereignty

According to Robert O. Keohane, it is rather troubling that the key concepts of international relations are constantly redefined and reinterpreted as the situation in the international arena change. [69] The concept of sovereignty clearly belongs to that category. Without the intention of giving a full analysis on the history and diverging interpretations of the term in this article, it is important to note that sovereignty includes at least two notions: internal sovereignty, meaning supremacy within a given territory over all other authorities (including the idea of popular sovereignty connected to the problem government legitimacy), and external sovereignty, referring to the independence of a state, being free from other external authorities.[70] The European integration process, with its supranational principles on pooling sovereignty, has most clearly moved away from the classic understanding of external sovereignty that does not allow governments to enter into processes where they do not have the right to veto. Although treaty amendments require full consent by member states, the supremacy and direct effect of EU law, the expansion of QMV in the Council, has limited (or changed) the traditional European concept of sovereignty. Thus, in the case of the European Union, 'under conditions of extensive and intensive interdependence, formal sovereignty becomes less a territorially defined barrier than a bargaining resource'.[71] As Sir Geoffrey Howe, the British Foreign Secretary under

66 Nigel Farage harangues EU President Herman van Rompuy. *EUX.TV*. YouTube. 24 February 2010.
67 Nigel Farage fined for verbal attack on EU president. theguardian.com 2 March 2010 http://www.theguardian.com/politics/2010/mar/02/nigel-farage-fined-mep-rompuy.
68 Eurobarometer 83:139.
69 Robert O. Keohane, 'Ironies of Sovereignty: The European Union and the United States' (2002) 40 (4) Journal of Common Market Studies, 743–765.
70 Jürgen Habermas, *Zur Verfassung Europas. Ein Essay* (Suhrkamp Verlag 2002, Berlin) 54.
71 Keohane (n 69).

Margaret Thatcher, expressed it more bluntly: 'Sovereignty is not like virginity, which you either have or you don't … . It is a resource to be used, rather than a constraint that limits our capacity for action.' [72]

However, within the countermyth on sovereignty takeover, politicians expressing their concerns about this issue seem to think within the frame of the traditional understanding of the concept. The history of this 'conceptual debate' goes back as early as the 1960s. President de Gaulle was the first leading European politician to go back to the idea of traditional external sovereignty, both in words and in practice. In his words:

'The fundamental divergence between the way the Brussels Commission conceived its role and my own government's insistence, while looking to the Commission for expert advice, that important measures should be subordinated to the decisions of the individual states, nurtured an atmosphere of latent discord. But since the Treaty specified that, during the inaugural period, no decision was valid unless unanimous, it was enough to enforce its application to ensure that there was no infringement of French sovereignty.'[73]

Just as de Gaulle intended to preserve sovereignty in its traditional meaning, not only with words but with actions like the empty chair crisis resulting in the Luxembourg Compromise in 1966 that altered the entire dynamism of Community decision-making,[74] the United Kingdom followed that line of argumentation in terms of external sovereignty. Margaret Thatcher, in her famous 'Bruges speech', which provided a basis for British Euroscepticism[75] as well as for the rebirth of integovernmentalism, summarises her views on national sovereignty as follows:

'My first guiding principle is this: willing and active cooperation between independent sovereign states is the best way to build a successful European Community. To try to suppress nationhood and concentrate power at the centre of a European conglomerate would be highly damaging and would jeopardise the objectives we seek to achieve. Europe will be stronger precisely because it has France as France, Spain as Spain, Britain as Britain, each with its own customs, traditions and identity. It would be folly to try to fit them into some sort of identikit European personality.'[76]

We still have to carry out thorough analyses on the effect of sovereignty in connection with the economic and financial crisis that started back in 2008 but we can make some preliminary statements. Clearly, not only theoretical and political but practical problems arose in Greece, when the Eurozone countries gave conditional financial aid for the country on the verge of bankruptcy for years. Jean Claude Juncker stated that 'the sovereignty of Greece will be massively limited'.[77] Other countries did not ask for a life-saving bailout, and still used the issue

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72 Geoffrey Howe, 'Britain's Place in the World' (1990) 66 (4) International Affairs, 675–695. Cited in Keohane (n 69).

73 Charles de Gaulle, *Memoirs of Hope* (Simon and Schuster 1971), reprinted in Brent F Nelsen, Alexander Stubb (eds), *The European Union. Readings on the Theory and Practice of European Integration*. (Palgrave Macmillan 2003, Basingstoke) 27–45.

74 Arató Krisztina, Koller Boglárka, *Képzelt Európa* (Balassi Kiadó 2013, Budapest) 114–118.

75 Leconte (n 39) 3.

76 Thatcher (n 2).

77 Greece faces 'massive' loss of sovereignty. EUobserver, 07.11.2011. http://euobserver.com/news/32582.

of keeping national sovereignty as a kind of counter argument against the European Union. David Cameron, Prime Minister of the United Kingdom between 2010 and 2016, launched a verbal and political fight both against the EU tackling the crisis and also against 'sovereignty takeover', rather reversely, he argues for authority being located at national rather than European level, and therefore supranational trends should be resisted. (Cameron 2013)

Viktor Orbán, elected Prime Minister of Hungary in 2010, has used a special rhetorical strategy, built his politics on the basis of a 'freedom fight' and one of his opponents in this symbolic war is the European Union. This strategy includes regaining and keeping national sovereignty. As he stated in an interview given to the Daily Telegraph in the UK (quote from the article):

'As I get older [he is still only 50], I tend to be more sceptical. Values are more important than money. National sovereignty is more and more important in my mind. The question "Who is governing us?" is the key question.' So he supports David Cameron's efforts to change the European rules: 'We shall need a new basic treaty eventually.' He wants to join Britain in resisting 'the creeping movement of Brussels to eat up national sovereignty'.[78]

6 Countermyth 3: Inability to Act

The decision-making system of the European Union, based on the so-called Monnet-method that balances community interests and national interest, has been traditionally slow. Already from the 1990s, experts in European law and politics raised the question of the efficiency of European decision-making. They argued that the continuously growing workload of the institutional system degraded the efficiency of decision-making[79] while others pointed to the dilution of the substantive content of EU legislation[80]. Fritz Scharpf had already argued, back in 1988, that the EU is 'trapped' – according to his analysis, the Single European Act was unable to reduce the inefficiency and inflexibility of European decision-making because of the need for compromise between member governments.[81] While being aware that the speed of the decision-making process is not the only determinant of efficiency, most of the analyses measured the timeframe of decisions from the Commission proposal to the decision of the Council. Heiner Schulz and Thomas König carried out empirical research in this subject – they found that while the majority-decision in the Council speeded up the process, the participation of the European

[78] Charles Moore, 'Viktor Orban Interview: Patriotism is a Good Thing' The Telegraph, 15 October 2013. http://www.telegraph.co.uk/news/worldnews/europe/hungary/10373959/Viktor-Orban-interview-Patriotism-is-a-good-thing.html (downloaded 10 May 2013).

[79] Reanud Dehousse, 'Constitutional Reform in the European Community: Are there Alternatives to the Majoritarian Avenue?' (1995) 18 West European Politics, 118–136.

[80] Van den Bos, J., 'The European Community' in B. Bueno de Mesquita, F. Stokman (ed), *European Community Decision Making* (Yale University Press 1994, New Haven).

[81] Fritz Scharpf, 'The Joint-Decision Trap: Lessons from German Federalism and European Integration' (1988) 66 Public Administration, 239–278.

Parliament (with the intention to decrease the democracy deficit) increased the timeframe of decision-making.[82]

Apart from social science research, the slowness and inefficiency of EU decision-making has been part of the public discourse as well. One of its prime examples was the more than 30 year deadlock on the directive on the Statute of the European Company,[83] where the requirement of unanimity in the Council halted the proposal many times before it was finally accepted.[84] However, when the multiple crisis of the European Union (economic, monetary, political, later migration) broke out after 2008, the inefficiency discourse intensified. Politicians and economic experts criticised the EU for being ineffective when it tried to tackle the problem of the crisis of the Eurozone. George Soros elaborated his criticisms in several articles and interviews regarding its treatment of both the Eurozone crisis and the refugee crisis – very telling that lately he has been talking more about Angela Merkel's leadership in connection with the problems of the European Union, than the Council.[85] Several right and extreme right politicians expressed their concerns with the weakness of EU leadership, including Nigel Farage and Viktor Orbán. The latter said, after the autumn 2015 terrorist attacks in Paris, 'What we see in the European Union is floating, being weak, uncertain and paralysed. There are endless negotiations and conferences but there are no solutions. We are trapped in ideologies instead of acting on the basis of common sense and our own cultural traditions.'[86]

The picture would be very neatly explicable if we could say that myths express views of pro-EU politicians and countermyths arguments appear on the Eurosceptic side. Let us now demonstrate the contrary – and see what Gey Verhofstadt, former Belgian prime minister and president of ALDE faction of the European Parliament said: 'The European Union's list of crises keeps growing. But, beyond the United Kingdom's "Brexit" vote to leave the bloc, Poland's constitutional court imbroglio, Russian expansionism, migrants and refugees, and resurgent nationalism, the greatest threat to the EU comes from within: a crisis of political leadership is paralysing its institutions.

As if to prove the point, EU member states' leaders (with the exception of UK Prime Minister Theresa May) met recently in Bratislava, Slovakia, in an attempt to demonstrate solidarity, and to kick-start the post-Brexit reform process. The attendees made some progress toward creating a European Defence Union, which should be welcomed, and toward admitting

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82 Heiner Schulz, Thomas König, 'Institutional Reform and Decision-Making – Efficiency in the European Union' (2000) 4 (44) American Journal of Political Science, October 2000. PD. 653–666.

83 Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE) Official Journal L 294 , 10/11/2001 P. 0001–0021.

84 The history of the legislation at http://www.worker-participation.eu/ European-Company-SE/History

85 See e.g. George Soros, Gregor Peter Schmitz: The EU Is on the Verge of Collapse – An Interview' The New York Review of Books, 11 February 2016. http://www.nybooks.com/articles/2016/02/11/europe-verge-collapse-interview/

86 Viktor Orbán, 'Speech in the Hungarian Parliament 16 November 2016' Own translation. http://www.kormany.hu/hu/a-miniszterelnok/beszedek-publikaciok-interjuk/orban-viktor-napirend-elotti-felszolalasa20151116.

that the EU's current organisational framework is unsustainable; but there was scant talk of meaningful institutional or economic reform.

Meanwhile, Italian Prime Minister Matteo Renzi's refusal, at the close of the summit, to appear onstage with French President François Hollande and German Chancellor Angela Merkel all but confirmed fears that rudderless leadership is fuelling institutional dysfunction. A summit that was supposed to be a display of unity revealed only further division.'[87]

After identifying the current myths (peace, rationality, economic co-operation and success) and countermyths (lack of democracy, threat to national sovereignty and inability to act) of the European Union, it is time to turn to our main subject – how those narratives came up in the referendum campaign on Brexit in the UK.

III Arguments and Counter-Arguments in the Brexit Campaign

As stated in the introduction, this article is remotely related to the emerging sub-discipline of political science that is called campaign studies. What I am interested in is the arguments, the narratives that were expressed in the campaign in the United Kingdom during the Brexit campaign, about the European Union. Since only a few months passed since the referendum, no exhaustive textual analysis has been published so far, I therefore decided to collect the arguments on the basis of summaries of arguments that were compiled to inform votes especially in the final stages of the campaign. (Table 1)

[87] Guy Verhofstadt: *Europe's Leadership Crisis. September 12 2016. Project Syndicate.* https://www.project-syndicate.org/commentary/european-union-leadership-crisis-by-guy-verhofstadt-2016-09.

1. Table: Leave and remain arguments in the Brexit campaign[88]

Issue	LEAVE	REMAIN
Sovereignty	'Britain is a great nation with a proud history that has been forced into subservience to the unelected bureaucrats of Brussels. Outside the EU, Britain could resume its place as a powerful independent power. It is the world's 5th biggest economy and 5th most potent military force with its own nuclear deterrent. It is a permanent member of the U.N. Security Council. Freed from restraints in Europe, Britain could rebuild ties with natural English-speaking allies in the Commonwealth and strengthen the Special Relationship with the United States.'[89]	'Being in the EU gives Britain a more powerful role in the world and a say in major global decisions. We would still need to comply with many EU laws and regulations and in the future have no influence on new ones.'[90] 'EU membership involves some loss of sovereignty but it is a worthwhile trade for the influence it brings. In return for agreeing to abide by EU rules the UK has a seat around the table at which they are set and its voice is amplified on the world stage as a result.'[91]
Democracy	'Britain is the birthplace of modern parliamentary democracy. It is time to free it from the murky decision-making of the EU where the un-elected Commission initiates legislation, national veto rights have been steadily undermined and lack of voter interest has eroded any claims to legitimacy by the European Parliament.'[92]	'The EU has a better level of democratic scrutiny than any other international: the UN, NATO, WTO, IMF, World Bank etc.'[93]

[88] Table compiled as a result of extensive keyword search of campaign information available on the Internet. I thank Alan Emery for his kind contribution.

[89] http://www.debatingeurope.eu/focus/arguments-britain-leaving-eu/#.V-vPZ1Ka0dU

[90] http://www.strongerin.co.uk/get_the_facts#uVaMzl8HQGzFbcAr.99

[91] http://www.theweek.co.uk/brexit-0

[92] http://www.debatingeurope.eu/focus/arguments-britain-leaving-eu/#.V-vPZ1Ka0dU

[93] http://ukandeu.ac.uk/wp-content/uploads/2016/04/Leave-remain-the-facts-behind-the-claims.pdf p.4

Issue	LEAVE	REMAIN
Economy	'Over-regulation by the EU has cost the British economy over £125 billion. Freed from Brussels red tape, the UK economy would thrive like Norway or Switzerland – two of the most successful states in Europe. Britain could negotiate its own trade deals with the likes of China, the United States and Russia on terms tailor-made to suit the national interest. Trade with the EU countries would continue – it will be in their interests to maintain Britain's access to the European free market. Taxpayers would get an immediate saving of over £20 million a day from Britain not having to pump money into the EU budget. British farmers, fishermen and small businesses would all be free from ruinous Brussels policies.'[94]	'Over half Britain's trade goes to the EU, bringing the country around £400 billion a year. That dwarfs any savings from not contributing to the EU budget. Over one-in-ten British jobs are directly linked to EU membership and studies show Brexit could wipe up to 10 percent from UK GDP. International companies invest in Britain because it's a gateway to the EU's 500 million consumers. Even if a post-Brexit UK persuaded former partners to grant it Norway-style access to the EU market, it would have to accept EU rules without any say in shaping them.'[95] 'Being in Europe boosts our economy which is why 9 out of 10 economic experts predict economic damage if we left. • The Governor of the Bank of England says Brexit would lead to an economic shock – or recession – which would mean dramatic public spending cuts, job losses and years of financial insecurity for your family. • 9 out of 10 economic experts say our economy would be damaged. The value of the pound would fall, meaning the cost of your shopping and mortgage rates would rise, and the value of your home and pension would fall. • Overall we get more out than we pay in. Britain pays £5.7 billion a year to be a member of the EU Single Market, the world's largest free trade zone (Source: The Institute for Fiscal Studies) but the benefit of being in the EU is worth £91 billion to our economy.[96] • The UK economy benefits from investment worth £66 million from EU countries – every day (Source: Office of National Statistics).'[97]

94 http://www.debatingeurope.eu/focus/arguments-britain-leaving-eu/#.V-vPZ1Ka0dU
95 http://www.debatingeurope.eu/focus/arguments-britain-leaving-eu/#.V-vPZ1Ka0dU
96 Source: Confederation of British Industry.
97 www.strongerin.co.uk/get_the_facts#uVaMzl8HQGzFbcAr.99

Issue	LEAVE	REMAIN
Free movement of persons /immigration	'Since Poland and the other eastern European nations joined the EU in 2004, migrants have used the Union's free labour movement rules to flood the UK. Poles are now the biggest immigrant group in Britain. Immigrants arriving in Britain from the EU outnumbered Brits heading the other way by a record 180,000 last year, placing unacceptable strains on housing, welfare and education. Lax border controls in other EU countries already make it easier for illegal migrants and terrorists to get into Britain, despite the UK staying outside Schengen. Now the EU wants Britain to take more refugees. Leaving the EU would allow Britain to regain control of its borders."[98]	'Leaving the European Union would allow us to choose our own immigration policy; that is true; but it is not going to stop immigration. Asked by the BBC if the Leave campaign's "chosen immigration" policy would actually guarantee to cut the number of immigrants, Boris Johnson carefully avoided answering the question.' Then on 19th June, he said; 'I am pro-immigration, my friends. I am the proud descendent of Turkish immigrants. And let me stun you, perhaps, by saying I would go further. I am not only pro-immigration, I'm pro-immigrants.' And these words from the leader of the "Leave" campaign that has suggesting that it would drastically reduce immigration to the UK. The fact is that if the British economy is to prosper, it cannot do so without recruiting large numbers of skilled and unskilled workers from other countries. If they don't come from our own continent, Europe, they will have to come from other continents. In no way will leaving the EU stop immigration to the UK. EU immigration is a great asset to the UK economy, and people from EU countries pay a lot more in taxes than they receive as benefits. Immigration is always an emotive issue that appeals to people's sense of nationalism. It is easy, and sometimes satisfying, to blame others for our perceived ills. Of course, in the event of a Brexit, the economic downturn that will follow will make Britain a far less attractive country compared to other parts of Europe, we'll all be poorer, and immigration from the EU will fall of its own accord. But that would really be an own goal.[99]

[98] http://www.debatingeurope.eu/focus/arguments-britain-leaving-eu/#.V-vPZ1Ka0dU

[99] http://about-britain.com/institutions/compare-brexit-arguments.htm

Issue	LEAVE	REMAIN
Membership fee	'Leaving the EU would result in an immediate cost saving, as the country would no longer contribute to the EU budget, argue Brexiters. The leave campaign claimed that the UK was paying £20bn a year or £350m a week to Brussels and this could be saved and spent on the NHS. This was one of the key messages in the campaign. Some on the leave side acknowledged this was incorrect at the time and most subsequently have distanced themselves from the claim.'[100] 'Last year, Britain paid in £13bn, but it also received £4.5bn worth of spending, says Full Fact, 'so the UK's net contribution was £8.5bn'. That's about 7 per cent of what the Government spends on the NHS each year.'[101]	'The claim that the UK sends £350 million per week to the EU is wrong. This is what we would send if it wasn't for the UK's budget rebate. The rebate is effectively an instant discount on what we would otherwise be liable for – the 'gross contribution'. In 2014, the gross figure was £18.8 billion. Since it was negotiated in 1984, the rebate on the UK contribution has meant that the UK actually pays less than this hypothetical amount. The rebate can't be changed in future without the UK's agreement. The Treasury and the European Commission have both confirmed to us that the actual payment is the gross contribution minus the rebate. The actual payment is different from year to year, but last year's was £250 million a week The size of the payment varies from year to year. It was as high as £14.5 billion (£278 million per week) in 2013, and as low as £8.7 billion (£168 million per week) in 2009, according to the official EU Finances report published by HM Treasury. The figure for 2014 was marginally lower than in 2013, at £14.4 billion, while the projection for 2015 is that it will be £12.9 billion. This is £248 million per week, or £35 million per day, not £55 million a day as is sometimes claimed. The UK gets money from the EU budget as well, so the savings from leaving would be lower The UK receives money back from Brussels in the form of grants and payments. These mainly go to farmers and poorer areas of the country such as Wales and Cornwall.'[102]
Law	'Too many of Britain's laws are made overseas by dictates passed down from Brussels and rulings upheld by the European Court of Justice. UK courts must become sovereign again.'[103]	'The exit campaign has over-exaggerated how many laws are determined by the European Commission. It is better to shape EU-wide laws from the inside rather than walking away.'[104]

100 http://www.bbc.co.uk/news/uk-politics-eu-referendum-36641390
101 http://www.theweek.co.uk/brexit-0
102 http://ukandeu.ac.uk/wp-content/uploads/2016/04/Leave-remain-the-facts-behind-the-claims.pdf p.9
103 http://www.telegraph.co.uk/news/2016/06/16/leave-or-remain-in-the-eu-the-arguments-for-and-against-brexit/)
104 http://www.telegraph.co.uk/news/2016/06/16/leave-or-remain-in-the-eu-the-arguments-for-and-against-brexit/)

Issue	LEAVE	REMAIN
Defence / Peace	'Britain could soon be asked to contribute to an EU Army, with reports suggesting Angela Merkel may demand the Prime Minister's approval in return for other concessions. That would erode the UK's independent military force and should be opposed.'[105]	'European countries together are facing the threats from Isis and a resurgent Russia. Working together to combat these challenges is best – an effort that would be undermined if Britain turns its back on the EU.'[106] 'It's an uncertain world out there.' 'Western democracies are under threat from a resurgent Russia, unrest around the Middle East, terrorism, nuclear rogue states. Is this really the right time to cut ties with your closest allies and create a new focus of international uncertainty? Britannia no longer rules the waves, and Britain is stronger working with France, Germany and the others within the EU on diplomacy, development and building democracy around the world. Washington wants Britain to stay in the EU and strengthen the European pillar of NATO. Outside the EU, Britain would lose global clout.'[107]

When analysing the above arguments, it is worth looking at them in the framework of the myths and countermyths described in section 2. Obviously, the strongest element of the debate was the issue of sovereignty (countermyth 1.). It appeared alone, as an independent argument, against the Brussels bureaucracy and the UK being better off representing herself in the United Nations and other international organizations and negotiations. On the other hand, it is not hard to notice that sovereignty is a cross-cutting argument of the Leave side in other issues as well. There is sovereignty in the 'law'-argument, saying that too many UK laws are connected to Brussels and that should be changed; in the 'defence' argument, saying that an emerging European army would erode the UK military force, and also the 'immigration' issue, saying that after leaving the EU the UK can gain back control over her own borders. The countermyth of lack of democracy (no. 2) was also an issue during the campaign. The narrative of the EU being an organization where the decision-making system is unclear, where the un-elected Commission initiates legislation, where national veto has been undermined and few people bother to go to elect MEPs (see Table 1.) reflect exactly the usual countermyth that was already being traditionally recited years before the Brexit campaign by one of the leaders of the Leave camp, Nigel Farage (UKIP).[108] Interestingly, the argument about the EU's weak leadership, the countermyth to the inability to act (countermyth no. 3) was not expressed explicitly. In issues where this argument could have been used (the slow reaction to the economic and migration crises), the narrative of sovereignty was applied (the UK being better off regaining independence and excluding the EU from the management of the economy and of borders).

105 http://www.telegraph.co.uk/news/2016/06/16/leave-or-remain-in-the-eu-the-arguments-for-and-against-brexit/
106 http://www.telegraph.co.uk/news/2016/06/16/leave-or-remain-in-the-eu-the-arguments-for-and-against-brexit/)
107 http://www.debatingeurope.eu/focus/arguments-britain-leaving-eu/#.V-vPZ1Ka0dU
108 See section 2, countermyth 2.

Original EU myths seem to have appeared in the debate as answers to the arguments of the 'Leave' camp by the Remainers. The traditional argument behind European integration – securing peace (myth no. 1) – did not appear as an independent statement. It came up as a counter argument – if the UK leaves the EU then, in an age of multiple global threats and challenges, the UK should not loosen ties with the European continent. However, the original mission of the EU, as a tool to secure peace in Europe, remained invisible. The EU as a key to economic success (myth no. 3) became one of the central issues of the Brexit debate. While the 'Leave' camp argued that British economic interests could be represented much better outside the EU, especially in international trade negotiations, the 'Remain' arguments concentrated on the close ties of the UK economy with the Continent, the market of 500 million consumers and the threats of Brexit (inability to influence EU law, losing out in the financial markets etc.) Economic arguments also covered employment and immigration, the 'Leave' camp stressing the burden of intra-EU labour mobility and threats to the UK social system, the Remain camp arguing towards the needs of the UK labour market for foreign labour and drawing attention to the prospect that the UK alone will not be able to reduce immigration from outside Europe. Economy-related arguments also concentrated on the issue of the membership fee: while the 'Leave' camp argued that £350m a week to Brussels could be saved and spent on the NHS, the 'Remain' camp dissected this argument and called it at the very least misleading. Myth no. 2 on rationality, the EU being a technocratic cooperative did not appear in the debate.

IV Conclusions

I stressed in this article that political myths are key in the understanding of a political system. Since the EU is also a *sui generis* political system, I argued that it is possible to identify the myths that explain the existence and the nature of the EU. However, I also argued that this traditional understanding is challenged by countermyths that developed in the previous decades.

I pointed out that the unprecedented event in the European integration process, the referendum on the UK leaving the European Union can be fitted into this mythpoetical process. I identified the myths and countermyths in the arguments of the 'Leave' and the 'Remain' camp and found that the 'Leave' campaign stressed the countermyths (especially the ones on sovereignty takeover and lack of democracy) and argued against (economic co-operation and success) or ignored (peace and technocracy) original myths. Further research is needed to support the impression that the 'Remain' arguments were mostly responsive to the narratives of the other side.

Obviously, my approach is one of the many possible approaches to understand what happened in the UK on June 23 2016. Numerous other aspects are worth exploring with regard to Brexit: differences in turnout in various strata of the society, the historical roots of Brexit in British EU politics, the UK party system and Brexit, the campaign itself, EU institutional aspects, and the legal, economic and political consequences of Brexit for both the UK and the European Union, etc. My research, revealing the discourses and interpretations of the political debate in the UK on Brexit, may be continued in the direction of political culture. In this area, a special

phenomenon has been recently identified –post-truth or postfactual politics[109] that means that political debate is disconnected from details of policy, that certain political arguments are widely expressed and repeated even if they are found untrue. These theoretical developments may contribute to the understanding of political myths (where it is debated whether they have or have not an element of truth). We have to also add here that these recent developments do not only characterize Brexit – many commentators use the idea of post-factual politics to analyse the 2016 electoral campaign in the United States.[110] As such, the interpretive framework of political myths I applied to the Brexit campaign discourse can be used to understand the changing nature of politics also outside the UK.

[109] Keyes, Ralph, *The Post-Truth Era: Dishonesty and Deception in Contemporary Life*. (St. Martin's 2004, New York).

[110] E.g. Jonathan Freedland (13 May 2016) 'Post-truth politicians such as Donald Trump and Boris Johnson are no joke' The Guardian; or Daniel W. Drezner, 'Why the post-truth political era might be around for a while' The Washington Post, 16 June 2016.

Tamás Kende* – János Katona**

In the Crystal Ball: Outside the EU and What the UK will Find There

On June 23 2016 the people of the United Kingdom voted – in a legally non-binding but politically imperative referendum – for the UK to discontinue membership of the European Union.

David Cameron, the British Prime Minister, had promised in 2013 a referendum on the United Kingdom's EU membership before the end of 2017. In 2016, his government negotiated a series of EU reforms with the other member-states with special provisions for the UK. The result of the referendum of June 23 2016 was in favour of the withdrawal of the UK from the European Union, notwithstanding the outcome of those negotiations.

While the reasons for the decision of the British electorate are not entirely clear and probably cannot be narrowed down to a single factor, it appears likely that the majority specifically rejected the free movement of workers, a key component of the single market. Based on statistics from 2014, there were only 2.9 million EU nationals in Britain. That is no more than 5% of the UK's population yet the Leave campaign succeeded in convincing a sizeable part of the electorate about the tenability of immigration.

Writing the day after the result was announced, the leader column of *The Irish Times* stated that the electorate had fallen for an 'easily sold, demagogic delusion.'[1] All elections are thus to some degree. But promises made in a general election generally have to be delivered on, or the promisor gets punished at the subsequent elections. In the case of a referendum, it is more complicated to come back for those who made those promises. Yet, the fact is that news is leaking about Brexit being a bad deal for the UK: the UK's office for budget responsibility predicted Brexit would blow a €70 billion hole in the nation's finances and the Institute for Fiscal Studies said Brexit would see real wages lower in 2021 than they had been in 2008.

Following the referendum, Prime Minister David Cameron resigned and a new Prime Minister, Theresa May was named and the entire cabinet reshuffled. Prime Minister May has not yet submitted to the EU the UK's decision to withdraw from the EU. In October 2016,

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[1] Irish Times view: Brexit a bewildering act of self-harm http://www.irishtimes.com/ opinion/editorial/irish-times-view-brexit-a-bewildering-act-of-self-harm-1.2698212.

however, she indicated that such a decision would be submitted in March 2017. She also launched the slogan 'Brexit means Brexit', which is likely to mean that the UK will exit the EU regardless of the results of the negotiations with the other 27 member states and regardless of the potential economic consequences.[2] As such, the slogan seems to indicate that she will not submit the results of the negotiations for approval to by the Houses Parliament or by referendum. Although up until recently, the PM declined 'to give parliament a formal vote on the decision to trigger the Brexit process or any deal she achieves, saying it is the government's prerogative',[3] the situation may possibly be altered by the recent ruling of the High Court (if it will be sustained by the Supreme Court.). The High Court held in its decision dated November 3th 2016 that the Government does not have the authority (stemming from the Royal Prerogative) for a notification sent under Article 50 of the TFEU relating to the withdrawal from membership (see below). The question shall be decided soon on appeal and its outcome may have an effect of the internal constitutional and, consequently, political setup if it requires the Parliament to formally decide on the notification.

In this paper, in the first part we shall briefly review the withdrawal of the UK from the perspective of the EU Treaties, then move on to present the objectives the UK may seek to achieve by the withdrawal from the EU as it has been expressed during the Brexit campaign or since then. We then examine several possible options available for the UK and the EU to regulate their cooperation. Finally, we shall finish with a quick analysis of these options mainly from the aspect of their feasibility and political expedience.

I Brexit: The Unprecedented Withdrawal from the EU from the Perspective of the Treaties

Withdrawal from the EU is unprecedented, as no member state has until now withdrawn from the integration process. Some bulwarks of the neo-functionalist academic literature claimed that member states were locked in the integration process and so turning back was not a feasible option, politically or economically.[4] Before the Lisbon Treaty there was no formal procedure for a withdrawal and, therefore, the Vienna Convention of the law of Treaties would have applied. However, since the entry into force of Lisbon, Article 50 of the TFEU regulates the withdrawal procedure.

When the UK submits its decision to withdraw from the EU, it needs to refer to and its declaration needs to be based on Article 50. This Article provides a legal basis and the procedure to be followed in the event of withdrawal. The relevant parts of the Article state:

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2 https://www.theguardian.com/politics/2016/oct/14/us-banks-planning-exodus-from-brexit-britain-michel-sapin-french-minister

3 https://www.theguardian.com/politics/2016/oct/12/theresa-may-accepts-need-for-brexit-debate-in-parliament

4 Historical Institutionalist Perspective by Paul Pierson' Harvard University and Russell Sage Foundation Program for the Study of Germany and Europe Working Paper No. 5.2 (October 25, 1994).

> 1. Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.
> 2. A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, 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. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.
> 3. 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.
> 4. For the purposes of paragraphs 2 and 3, the member of the European Council or of the Council representing the withdrawing Member State shall not participate in the discussions of the European Council or Council or in decisions concerning it.
> 5. ….[5]

Paragraph 2 provides for a procedure which allows the negotiation of a withdrawal treaty (WT).

The notice for withdrawal is a trigger event that inevitably leads to either the conclusion of a withdrawal treaty followed by the withdrawal or to the withdrawal without a treaty.[6]

During the negotiations on 'Brexit', the UK would remain a member-state and continue to participate in EU activities with the exception provided for in Article 50(4).[7] This exception logically provides that the UK's representative in the European Council and the Council – as well as the bodies preparing for the meetings of these bodies, such as the Permanent Representatives Committee (COREPER) – will not participate on the EU side in negotiations with the UK on Brexit.

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[5] *Consolidated Versions Of The Treaty On European Union And The Treaty On The Functioning Of The European Union,* OJ, July 6, 2016 C-202 p. 43.

[6] 'The Lord Chief Justice asked whether once Article 50 had been invoked it could be stopped and whether some form of 'conditional notice' could be given. Pannick said there was no possibility of the UK either giving conditional notification or stopping it once it had been started. But the question of the 'reversibility' of article 50 surfaced again in the afternoon, and the lord chief justice asked for further clarification of the procedure. Helen Mountfield QC, who represents the crowd-funded People's Challenge, said: 'There's no authority [for reversing a decision to leave the EU] because it's never been attempted before. Reversibility is a question of interpretation of EU law.' None of the parties in the case are so far suggesting that departure is anything other than a one-way street.' https://www.theguardian.com/politics/2016/oct/13/government-cannot-trigger-brexit-without-mps-backing-court-told-article-50?CMP=share_btn_fb.

[7] See the UK Parliament's own debate on this: https://hansard.parliament.uk/commons/2016-11-07/debates/C59A3B55-6FB3-455D-B704-F8B1BF5A5AF5/Article50.

Interestingly, although the EU has been created by an international treaty between its prospective member states, a withdrawal will not be concluded with all other member-states and, therefore, it would not require ratification by all. It will be concluded by the UK and the EU's institutions. The Council would approve it on behalf of the Union, 'acting by a qualified majority, after obtaining the consent of the European Parliament.'

On the other hand, the withdrawal will require a revision of the EU treaties, to be based on article 48 TEU, requiring the agreement of all the remaining member states.

Given the complexities of such a withdrawal and the many alternatives which need to be taken into account, it is very likely that the two years allowed for negotiating withdrawal will not be sufficient. In such a case, Article 50(3) allows for an extension of that period, subject to the agreement of the UK and to a unanimous decision of the European Council. If negotiations between the UK and the EU on Brexit are not concluded before the two year deadline, the UK would exit the EU without a treaty and thereafter it would be forced to negotiate and conclude an agreement like any other third party. The conclusion of this agreement negotiated after the two year period would be subject to unanimity in the Council [Article 218(8) of the TFEU].

This is why the UK has not yet – at the time of writing this paper – notified the European Council of its intention to withdraw from the EU, although the new Prime Minister May has clearly indicated that the decision of the referendum will be followed ('Brexit is Brexit'). The UK is apparently trying to extend the two year deadline by not notifying its intention to withdraw until the UK administration has in its own opinion fully prepared for the withdrawal. This – as is suggested in the press – is not likely to be before the first half of 2017 so Brexit is likely to take place at some point in 2019.

The agenda and the precise subject of the Brexit negotiations are further blurred by the fact that no public agenda exists as to the strategy of the UK Government relating to the negotiations. The UK government – partly led by Brexiteer politicians – seems to underestimate the difficulty of the negotiations lying ahead and the economic risks associated with it, and is playing up the potential economic benefits of the UK being on its own. Prime Minister May has recently suggested that the UK would be open to conclude a transitional arrangement with the EU in order to avoid the uncertainties that could occur before the complex task of establishing the post-Brexit relations with EU and third countries are finalized.[8] However, unintentional revelations from the UK Ministry preparing the Brexit seems to suggest that the UK is not keen on a transitional arrangement.[9]

[8] 'May hints she may be open to transitional agreement with EU'. Reuters, November 21, 2016. http://uk.reuters.com/article/uk-britain-eu-industry-brexit-idUKKBN13G10H.

[9] The notes revealed on 28.11.2016 said: 'Transitional – loath to do it. Whitehall will hold onto it. We need to bring an end to negotiations.' UK unlikely to stay in single market, Tory document suggests: https://www.theguardian.com/politics/2016/nov/28/uk-unlikely-to-stay-in-single-market-tory-document-suggests.

II What does the UK Wish to Achieve with the Withdrawal from the EU?

The obvious UK priority is to obtain as much access as possible to the EU's internal market (actually, for the most part, the EEA's market). In other areas of EU policy, some transitional measures would be appropriate. This is because the economies of the UK and the rest of the EU, after more than 40 years of membership, have become closely intertwined and interdependent. This is also because, as EU citizens, about two million British people live, work or are retired in other EU member-states, while some two and a half million other EU citizens live in the UK. All this makes it clear that the UK would have no interest in waiting to negotiate an agreement until after it had formally withdrawn from the EU. It would have a strong interest in negotiating speedily while still a member, and thus being able to benefit from Article 50 TEU special procedure.

While the 'Leave' campaign had a fairly coherent set of campaign slogans as to why the UK would need to leave the EU, the UK government has not, until the time of writing this paper, penned a coherent policy document on the aims of the UK with its withdrawal. If the UK government was to internalise in full the campaign arguments and promises of the 'Leave' campaign then of its commitments to a fully sovereign UK, with no unconditional immigration from the EU, with the rights of UK banks preserved, with more flexibility in trade negotiations and with substantially less payment by the UK into the EU budget emerge.

For these promises to materialise, it seems the UK would look for a withdrawal treaty with the EU in which the free movement of persons would be curtailed but the freedom of movement of goods, capital and services would not. Goods would move freely while there would not be a common external trade policy. In this set of promises, the UK's legislation would remain fully coherent with the EU rules in order for the remaining three freedoms to work seamlessly, although the UK parliament would be free to pass any legislation it, as a sovereign decision maker, wishes to pass. Fulfilling these promises would mean that the UK government has been able to calm the electorate and minimize the negative economic impact of Brexit on the UK economy by keeping the UK and within it the City of London – on its terms – in the single market as far as goods, services and capital are concerned. This solution is a form of 'soft Brexit' as the term was coined – a solution which allows the UK to exit the EU but leaves its economy firmly anchored in its single market – but not the only form of 'soft Brexit' imaginable.

In order to achieve this maximalist set of contradictory aims (access to the single market, no free movement, no contribution to the EU budget, no oversight by the Luxembourg Court), the UK would need to undertake a Herculean negotiating task, as some of these aims mutually exclude each other or, with regard to some of these aims, the EU's current leaders exclude making these concessions.

Probably this recognition and pressure from inside the government from British business circles lead Prime Minister May to stress in October 2016 that Britain would prioritise the control of immigration over anything else and therefore it is ready to withdraw from the EU without an agreement and fall back on the terms which the WTO agreement proposes, a withdrawal that is called 'hard Brexit' by the newspapers A hard Brexit is any form of

withdrawal from the EU by the UK in which the UK leaves the single market and, therefore, its economy and primarily its services sectors is open to losses. Donald Tusk is of the opinion that a soft Brexit does not exist and a soft-hard dichotomy is a fallacy. He tweeted, following a conference by the European Policy Centre on October 13 2016,[10] that '…the only real alternative to a "hard Brexit" is "no Brexit". Even if today hardly anyone believes in such a possibility.'[11]

Anyway, it is too early to say whether some or all of the campaign promises or the promises made by the Prime Minister in the autumn of 2016 will make it into the policy brief that will determine the negotiating position of the UK. It is not by chance that the UK itself is likely to want to leave – as we now know – by the end of March 2017 to give it time to devise its negotiating positions and submit its withdrawal.

III Options for a Withdrawal

As outlined above, a withdrawal could take several forms of the options covered in this paper. These options can be positioned next to one another on an imaginary 'soft Brexit-hard Brexit' axis, mainly by taking into account the EU policies in which that the UK probably wishes to continue to participate, and the institutional consequences of such participation. As discussed widely in public by the academic community and in the press, the available options include solutions such as the 'Norwegian model', the 'Swiss model', the 'Turkish model', a free trade agreement (FTA) or trade governed by WTO rules or an *á la carte* relationship with the EU.

The implementation of these options – except for 'relationship á la carte' – are either based on existing international instruments or on examples that are already present in the external economic relations of the EU (as their names show). The 'Norwegian model' requires EFTA and EEA, while other solutions may be based on the existing free trade agreements of the EU and its Member States, or the ones that are currently being negotiated. A Turkish model is an 'association' type agreement, creating a customs union and, finally, the so-called 'á la carte relationship' is based on a relatively new set of standards of cooperation between the EU and a third state.

Another aspect is that, apart from the conclusion of a WT, most of the options require that the UK enters into further international arrangements, either with the EU only and/or its member states and/or with certain other states, such as the EFTA and the EAA states. It is only the 'hardest' Brexit that is based on the provisions of the existing multilateral framework of international trade, i.e. the WTO, even though it is unclear whether the 're-accession' of the UK to the WTO would be a simple technical issue or a result of complex negotiations.[12]

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[10] http://www.consilium.europa.eu/en/press/press-releases/2016/10/13-tusk-speech-epc/

[11] 'Hard Brexit' or no Brexit, Donald Tusk warns UK: https://www.ft.com/content/df4885fa-9160-11e6-8df8-d3778b55a923.

[12] Peter Ungphakorn, *Nothing simple about UK regaining WTO status post-Brexit.* http://www.ictsd.org/opinion/nothing-simple-about-uk-regaining-wto-status-post-brexit. Last accessed, November 22, 2016. Alan Beattie, 'Brexit

In this section, we shall review the various options the UK faces concerning the next steps following its withdrawal from the EU.

1 The Norwegian Model

The Norwegian model is the 'softest' Brexit of all the existing options – provided that the 'no Brexit at all' case is left out from the available possibilities and – consequently – the one that keeps the deepest level of economic integration between the EU and the UK.

The implementation of the Norwegian model would require the accession of the UK to the EAA. This necessitates the approval of the parties to the EAA, namely the EU, its member states and other parties to the EAA, Liechtenstein, Iceland and Norway. The current setup of the EAA also presupposes that the 're-accession' of the UK to the EFTA, which it left upon its accession to the EC back in 1973, would require, in addition, the approval of Switzerland.

An EAA-based integration would bring together the EU Member States, the three EEA States and the UK in a single market, ensuring all the four freedoms of the EU, that is the free movement of goods, persons, capital and the freedom of establishment. It would not include, however, the common trade, agricultural and fishery policy, does not create a customs union and shall not extend to monetary union. Naturally, it covers neither the CFSP nor justice and home affairs.

From an institutional point of view, as a Member of the EAA, the UK would be subject to the EAA institutions, including the EAA Court, when implementing (or failing to implement) the relevant EU-originated legislation. That is comparable to the control exercised by the Court of Justice over the acts of the UK as an EU member state. More importantly, in the areas covered by the EAA single market rules, the UK (with other EFTA members) would be more or less left out of the law-making process, which is a situation much less disadvantageous than that of an EU member state.

A further discouraging factor is that, even though the EAA has functioned for more than 20 years since 1994, neither the EU nor the EFTA parties seem entirely satisfied with it. The Council has recently expressed its discontent with implementation of the relevant EU legislation within the EAA and called for actively working towards a sustainable and streamlined incorporation and application of EEA-relevant legislation.[13] The EFTA parties, in turn, complain that the EU does not sufficiently take their interests and their constitutional problems into account.[14] This is adequately illustrated by various quotes from Norwegian politicians such as

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and the WTO option: Key questions about a looming challenge' Financial Times, 12 July, 2016. https://www.ft.com/content/5741129a-4510-11e6-b22f-79eb4891c97d. Last accessed, November 22, 2016.

[13] Council conclusions on a homogeneous extended single market and EU relations with Non-EU Western European countries. p. 4. https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/er/146315.pdf. Last accessed: November 24, 2016.

[14] Jean-Claude Piris: If the UK votes to leave: the seven alternatives to EU membership. Citing: *Norwegian Ministry of Foreign Affairs, 'The EEA Agreement and Norway's other agreements with the EU,' 2012-13.* See also Jacques Pelkmans, 'The EEA Review and Liechtenstein's Integration Strategy' Centre for European Policy Studies, Brussels, March 2013. https://www.cer.org.uk/publications/archive/policy-brief/2016/if-uk-votes-leave-seven-alternatives-eu-membership. Last accessed: November 24, 2016.

the EU spokesman for the Norwegian Conservative Party, Nikolai Astrup: 'If you want to run the EU, stay in the EU. If you want to be run by the EU, feel free to join us in the EEA'[15]. For the sake of completeness, it worth adding that these ideas are not shared unanimously: some commentators highlight that EFTA parties do have effective ways to influence EAA relevant legislation and they are able to achieve meaningful exemptions from EU legislation applicable in the EAA territory.[16]

Be that as it may, the above characteristics of the Norwegian model hardly fit into the political requirements relating to the future status of the UK as expressed by the majority of Brexiteers. First and foremost, a strict limitation and control of migration of EU workers, which was part of the main focus of the Brexit campaign, is not compatible with the EAA. Similarly, the 'outside' legal control exercised by the EEA Surveillance Authority and the EAA Court over the UK in the EAA context seems not to correspond to the 'restoration' of UK sovereignty sought by the supporters of Brexit either. Also, based on the example of Norway, EAA parties are bound to contribute to the EU via the EAA funds that could represent a burden at least comparable to the current contribution of the UK to the EU.[17]

The Norwegian option is not necessarily capable of ensuring the economic advantages that its protagonists expect. For example, the lack of a customs union and the corresponding reestablishment of the customs borders could significantly hinder the operation of the free movement of goods (by increasing the costs of the enterprises) when compared to the current situation. Another structural problem with the EAA is that the current advantages enjoyed by the UK in the EU single market are only replicated in the EAA if they are duly introduced by all EAA members. Taking into account the important backlog of implementation that exists today, EAA-based market access for UK producers could be significantly limited when compared to the current situation.[18]

Although the relatively 'deep' continued integration of the UK into the EU, seemingly implied by the Norwegian model, might seem appealing to those willing to mitigate the effects of the Brexit and/or to maintain close integration, it does not correspond to the political cornerstones placed by the Brexit campaign and may also be disappointing from the perspective of preserving the economic advantages of integration.

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15 See for example: What would 'out' look like? https://www.google.hu/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&cad=rja&uact=8&ved=0ahUKEwjMu8qr577QAhVMuhQKHcFdDnIQFggkMAE&url=http%3A%2F%2Fwww.policy-network.net%2Fpublications_download.aspx%3FID%3D9287&usg=AFQjCNHzPLpVi1t1c51D_OzKJ3e7lwIjYA&sig2=fvKTS-mwCNCkBYRc1wmVPA p.5 n.13 citing: http://www.cbi.org.uk/media/2133649/doing_things_by_halves_-_lessons_from_switzerland_and_norway_cbi_report_july_2013.pdf.

16 Safe harbour: why the Norway option could take the risk out of Brexit. http://www.telegraph.co.uk/business/2016/06/18/safe-harbour-why-the-norway-option-could-take-the-risk-out-of-br/.

17 See (n 14) p. 12.

18 Ibid p. 12.

2 The Swiss Model

The UK could structure a withdrawal treaty in order to implement a solution similar to the Swiss model of relations with the EU.

The relationship between Switzerland and the EU may have seemed promising to Brexiteers because it is largely based on classic international law; the framework is constituted by over a hundred sectoral international agreements (which will clearly not be the case between the EU and the UK.). EU-Swiss relations are somewhat looser than those the EU has with EEA members, in the sense that Switzerland is also not legally bound by judgments of the European Court of Justice and there is no court overseeing EU-Swiss relations while the EEA EFTA disputes are decided by an EFTA Court.

Yet, in reality Switzerland has to catch up with EU regulations and directives and has to incorporate those into its domestic legal order and de facto has to follow their interpretation by the ECJ in order to access the EU single market of goods. Moreover, the Swiss sectoral agreements with the EU do not cover services in general and financial services in particular. There is only an odd agreement on life insurance applicable in this sector. In that sense, the Swiss model cannot serve as an example for the UK as a substantial part of British trade is in services and Switzerland also has to contribute financially to the EU budget.

Moreover, it will be difficult to pursue the Swiss model as a model for the UK because the EU is dissatisfied with the state of its relationship with Switzerland and wants to reform it. In December 2010, the EU's Council of Ministers described these relations as 'not ensuring the necessary homogeneity', and causing 'legal uncertainty'. It added that this system 'has become complex and unwieldy to manage and has clearly reached its limits'.[19] In December 2012, the Council reaffirmed that 'further steps are necessary in order to ensure the homogeneous interpretation and application of the Internal Market rules', and that it would seek a 'legally binding mechanism' to make Switzerland sign up to revised laws, as well as 'international mechanisms for surveillance and judicial control'.[20]

Then, in February 2014, the Swiss people, based on a legally-binding initiative, decided in a referendum that some form of quotas be placed on immigration from the EU.[21] Switzerland has until February 2017 to implement the results of the 2014 referendum. Based on the results of the referendum, the Swiss government announced that it would not allow free movement of persons with Croatia. Introducing such curbs as required by the referendum and the Swiss government's own initiative would contravene the EU's principle of free movement of people, to which Switzerland must adhere.

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[19] Council conclusions on EU relations with EFTA countries, 3060th GENERAL AFFAIRS Council meeting Brussels, 14 December 2010 http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/foraff/118458.pdf.

[20] Council conclusions on EU relations with EFTA countries Brussels, 20 December 2012 http://eeas.europa.eu/archives/docs/norway/docs/2012_final_conclusions_en.pdf, p. 6.

[21] 'Swiss immigration: 50.3% back quotas, final results show'. http://www.bbc.com/news/world-europe-26108597.

The EU rejected that move. It also rejected a subsequent proposal that Switzerland should be able to impose quantitative limits on a surge of immigrants from EU countries.[22]

The dispute over the free movement of persons led the EU to review the entire legal framework of bilateral agreements with Switzerland, and the Council of Ministers decided, in May 2014, to mandate the Commission to launch negotiations with Switzerland on 'an international agreement on an institutional framework governing bilateral relations with the Swiss Confederation'.[23]

If concluded, such a new agreement would impose much stricter legal obligations related to the internal market on Switzerland than those of the EEA EFTA members. If the Council mandate is implemented, then

– the European Commission would monitor Switzerland's application of the bilateral agreements,
– the Commission would be given 'investigatory and decision-making powers' similar to those over member-states when policing the single market,
– there would be a maximum time limit for Switzerland to implement EU laws, when they are updated,
– the ECJ should have jurisdiction, and either the EU or Switzerland should be able to take cases to the court 'without the other party's prior consent'.

While these negotiations are continuing[24] and it is not clear what sort of agreement will be hammered out, it seems evident that the Swiss-model is not promising for the UK, in the sense that the agreement as it is now may be past its prime and it is highly unlikely that the EU would be amenable to conclude a Swiss-model agreement with the UK whilst it is in the process of fundamentally reforming that agreement with Switzerland and wishes to take out all those elements which may have seemed attractive for the Brexiteers when they brought up the Swiss model in the first place.

To sum up, the Swiss model is likely to be unsuitable for the British government as a template for negotiations as

– it would provide a partially hard Brexit, as it does not cover services in general and financial services in particular,
– the Swiss model involves the free movement of EU citizens without a limit,
– following the Swiss model would involve contributions by the UK to the EU budget,
– the EU is unlikely to accept a new adherent to the Swiss model while it is in the process of fundamentally renegotiating the archetype of this model.

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22 See (n 12) p. 7. point 47. Last accessed: November 24, 2016.

23 Press release 3310th Council meeting Economic and Financial Affairs Brussels, 6 May 2014 http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ecofin/142513.pdf, p 18. Last accessed: November 24, 2016.

24 https://www.admin.ch/gov/fr/accueil/documentation/communiques.msg-id-63829.html

3 The Turkish Model

Some Brexiteers during the referendum campaign mentioned the EU-Turkey association agreement[25] that includes a customs union as a desirable fall-back for Britain.

If the UK entered into a Turkish type customs union with the EU, it would not be free to adopt its own tariffs, because it would have to follow decisions on tariffs made by the EU. If the UK and the EU were to agree jointly on the common external tariffs, this would no longer be the Turkish-model.

Besides, the Turkish model does not give Turkey full access to the EU's internal market, as it covers neither services nor the free movement of individuals, just the free movement of goods and even this at a price. Under the EU-Turkey association agreement, Turkey accepts the EU's *acquis communautaire,* including regarding competition policy.

In our view, under this model, the UK would not benefit from the free trade agreements (FTA) the EU concluded or concludes. It was mentioned by several Turkish commentators that, following the conclusion of the EU FTA with the Republic of Korea, Turkish exporters have not gained access to the Korean market, while Korean exporters have access to the Turkish market. Also, if the EU-US trade deal is agreed and the UK settled on the Turkish model, American companies would have access to the UK market while the UK would not have access to US markets.

To sum up, the Turkish model is also likely to be unsuitable for the British government as a template for negotiations, as it does not cover services in general and financial services in particular, would curtail UK sovereignty on trade policy and requires a partial acceptance of EU jurisdiction. Nevertheless, it could be an attractive solution in the sense that it does not involve the free movement of people and does not require a contribution to the EU budget.

4 Free Trade Agreement with the EU

Another option available is an FTA with the EU and, in the likely scenario that this would result in a mixed agreement, its member states. This option is sufficiently flexible, as the treaty practice of the EU in this field is changing. This flexibility however, means that it is difficult to identify the main elements of a model contained in an FTA.

The existing agreement include various forms of agreement named, among others, as association, stabilisation, free trade or partnership and cooperation agreements with countries all over the world including in particular Europe, the Mediterranean but also other African and South American states. Association and free trade agreements provide at least for the reduction or abolition of custom tariffs and quotas in certain or most sectors of the economy, while some cooperation agreements leave these barriers to trade unchanged. The cooperation under some these agreements may serve as a means for strengthening economic integration while collaboration remains limited with other countries.

[25] http://ec.europa.eu/enlargement/pdf/turkey/association_agreement_1964_en.pdf

Some recent free trade agreements however – that have not yet entered into force, some of them not even signed, – intend to create the framework for a free trade area with only a limited number of reserved sectors. These agreements also extend to areas going beyond free trade and contain important provisions relating to market access, harmonisation of economic regulations etc. The CETA with Canada or the dubious TTIP, and to lesser extent, the free trade agreement with Singapore (EUSTA) and Vietnam are the examples of the evolution of the EU´s free trade agreements.

It is undoubted that the weight of the UK in the world economy and its relationship with the EU would call for a free trade or partnership agreement like the CETA or the TTIP. Technically, the parties to an FTA are allowed to agree flexibly on what they deem important. Under such an agreement, it would be possible to ensure a free trade area in the trade of goods and even to various sectors of services, and it would be possible to achieve harmonisation of market regulation (which as a starting point, exists in the EU-UK relationship). On the other hand, an important obstacle to overcome is the complexity of such negotiations. Both the CETA and the TTIP in particular illustrate these difficulties. It is therefore unlikely that a meaningful FTA could be achieved within a reasonable deadline.

5 The UK Falls Back on WTO Rules

It was recently floated that if the UK cannot agree with the EU on some other form of ongoing trade cooperation, it could simply fall back on WTO rules, which set limits on the maximum tariffs that countries can apply to trade in goods. This solution was even mentioned as desirable from the Brexiteers' point of view. The apparent advantage of this solution would be that it would not involve contributions by the UK to the EU budget and would allow the UK to completely free itself from the jurisdiction of the Luxembourg court.

It seems though that it is here that any advantages stop. This would be one of the hardest forms of Brexit, as it would not provide for the free movement of goods, services, capital or people. The EU and its member-states would become third countries for the UK and vice-versa. The UK would have to re-establish customs controls at borders with EU member-states, including the border with the Republic of Ireland. A firm border between the Republic and Northern Ireland could unravel the Good Friday Agreement, according to some sources.[26]

There was quite a bit of discussion as to how long it would take for the UK to sort out details of its membership within the WTO, as it would still have to agree with the EU on its share of tariff concessions made to the EU by third parties. Even so, after the UK becomes an operational independent member of the WTO, it would find itself in a relatively difficult position. While up to 40% of its exports are targeted to the single market, it would find itself on a par with China and the Russia as far as ease of access to the single market is concerned.

[26] Northern Ireland could veto Brexit, Belfast high court told: https://www.theguardian.com/world/2016/oct/04/ireland-to-seek-special-status-to-keep-open-border-with-uk-amid-hard-brexit-fears; Ireland confirms talks under way over post-Brexit border controls: https://www.theguardian.com/politics/2016/oct/10/ireland-confirms-talks-under-way-over-post-brexit-border-controls.

A lot of the British industries, such as car assembly plants and the car parts industry, would be seriously hurt by tariffs. These supply chains would be disrupted if the UK fell back under WTO rules and firms might decide to scale back or stop production in the UK if they could not optimally reach the single market from their current factories. In addition to tariffs, non-tariff barriers to trade, such as long waits at the border, could cause further disruption as the WTO has had extremely modest results in reducing non-tariff barriers to trade in manufacturing or trade in services.

Moreover, it is far from evident that the re-accession of the UK to the WTO that will be formally required is going to be a simple, technical exercise, as some argue. Although the UK is a WTO member, this membership is bundled with that of the EU and the purpose of the negotiations with other WTO members would be to reinstate the 'single' and independent UK membership. This exercise may lead to intense negotiations with several countries or group of countries and may have an impact in the UK too, if important social groups find themselves in a less favourable situation than before Brexit.[27]

A rather peculiar situation would arise as regards to those 60 or so free trade agreements (FTAs) that cover about 35 per cent of world trade concluded by the EU that are 'mixed agreements'. These so-called 'mixed agreements' were concluded both by the EU and the UK, because their content affects the EU's exclusive competence and also some UK competences. Because of its exclusive power on trade, the EU made commitments on trade in these agreements. If the UK were no longer a member of the EU, the part on trade – services, such as financial services – would no longer apply between the UK and the non-EU country that had signed the agreement. The UK, therefore, would – based on the Vienna Convention of the Law of Treaties – either end up with a large number of FTAs which no longer have an active part on trade or no FTAs at all. It would have to start negotiating FTAs with third countries and try to achieve, on its own, terms similar to the existing ones. That is unlikely, though. The UK alone would have less clout than the EU as its imports and exports constitute roughly 20% of those of the EU; no more. As such, it is likely to be forced to content itself with worse terms of market access than those achieved by the EU or unequal market access, as with the China-Switzerland FTA, concluded in 2013, where Switzerland has given China more access to its markets than vice versa.[28]

Thus, for several years after Brexit, to say the least, British external trade would be negatively affected.

A long period of uncertainty would be weighing on Britain's trade and inward foreign investment, and this would affect economic growth. In the long run, one hopes, when bilateral trade agreements between the UK and all its main partners, including of course the EU, come into force, the situation will improve.

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27 See (n 11).

28 *Free Trade Agreement between the People's Republic of China and the Swiss Confederation* http://fta.mofcom.gov.cn/topic/enswiss.shtml.

6 A Customised Solution

Many have come up with customised solutions for the UK. This would entail a solution that is not based on pre-existing models and would be a UK-only model, which, therefore, would take longer to negotiate as it could not be based on existing subsets of models. In trying to have a customised solution, the UK is also running a risk. The EU has always been trying to have certain objective models in place for external relations. If the UK is no trying to introduce a UK-model, this could subvert existing models, especially the Swiss and the Turkish one and would, therefore, create an even more complex set of negotiations.

Moreover, as has often been stated publicly in the almost half year since the referendum, EU leaders are of the opinion that the UK must not benefit too much from its withdrawal[29] from the EU because this would create a dangerous precedent and sort of a disintegrating force for other member states.[30]

In a rather influential paper, Bruegel[31] the think tank proposed a customized solution in August 2016. The authors argued that none of the existing models of partnership with the EU would be suitable for the UK. They proposed a new form of collaboration, a continental partnership, which would considerably less deep than EU membership but somewhat closer than a simple free-trade agreement. The proposed continental partnership would consist of the UK participating in goods, services and capital mobility and to some extent in labour mobility. The UK would participate in a new system of inter-governmental decision-making and enforcement of common rules to protect the homogeneity of the deeply integrated market. The UK would have a say on EU policies but ultimate formal authority would remain with the EU. According to and as a consequence of the proposal, there would a Europe with an inner circle, the EU, and an outer circle with less integration for the UK and potentially for Turkey, Ukraine and other countries. It appears that the paper was not warmly received and is not now considered as a pattern for the solution of the UK's dilemma.

In our view, the agreement ironed out in February 2016 between Donald Tusk and David Cameron[32] could partially be a basis for a blueprint for a custom-made solution. This solution has already been considered acceptable by the other member states, so this could be a point of departure for negotiations, even if in its earlier form it was voted down in the referendum. That agreement provided for an 'emergency brake' on in-work benefits for up to four years if there is pressure on a particular member state. This agreement would have indexed child benefit to

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29 Brexit: Francois Hollande demands UK pay heavy price for deciding to leave EU http://www.independent.co.uk/news/uk/politics/brexit-hollande-france-uk-must-pay-price-eu-withdrawal-crisis-a7349756.html.

30 David Davis warns EU leaders not to go ahead with 'punishment plan' for Britain: http://www.telegraph.co.uk/news/2016/10/10/theresa-may-brexit-talks-denmark-netherlands-live/.

31 Jean Pisai-Ferry, Norbert Röttgen, André Sapir, Paul Tucker And Guntram B. Wolff: *Europe after Brexit: A proposal for a continental partnership,* http://bruegel.org/2016/08/europe-after-brexit-a-proposal-for-a-continental-partnership/.

32 Decision of the Heads of State or Government meeting within the European Council concerning a new settlement for the United Kingdom within the European Union: https://www.documentcloud.org/documents/2716240-Brexit-Deal.html.

the level of the member state where the child resides. According to the agreement, member states could take further action against sham marriages and fraudulent immigration claims.

Another idea recently touted is the 'Canada-plus' option,[33] suggesting Britain could look to replicate the free trade deal (CETA) hammered out over seven years by the EU and the North American country. The plus would be the addition of services, especially of financial services. If the UK was proposing taking the 'Canada-plus' option, at least a part of the negotiations could be spared. David Davis, the new minister for Brexit, has called it the *'perfect starting point for our discussions with the Commission.'* Earlier this year, Boris Johnson stated on Brexit that 'we can be like Canada.'[34]

The Canadians government officials seem a little sceptical as to how the UK could use CETA as a model: 'How they think CETA is the panacea, I'm confused,' said one senior Canadian government official who was deeply involved with the negotiations. "We still don't get complete access to the EU market[35] the way the Brits currently have as a member state. So I don't understand this looking towards CETA as the answer to Brexit when they will be taking a 43-year step backwards in terms of the current access they have to the European Union.' [36]

Canadians also think that the agreement cannot be replicated as the UK and Canada are two different countries: 'I honestly don't know how it can be exactly replicated,' said Sylvain Charlebois, a professor at Dalhousie University in Halifax. 'Gains are going to be different, stakes are going to be different. And therefore the deal has to be different.' [37]

7 An Evaluation of the Options

It seems from the above that none of the existing models offers a solution which meets either the Brexiteers' campaign promises or the declared aims of the UK government. It appears that none of the existing models may serve even as a good point of departure for starting negotiations.

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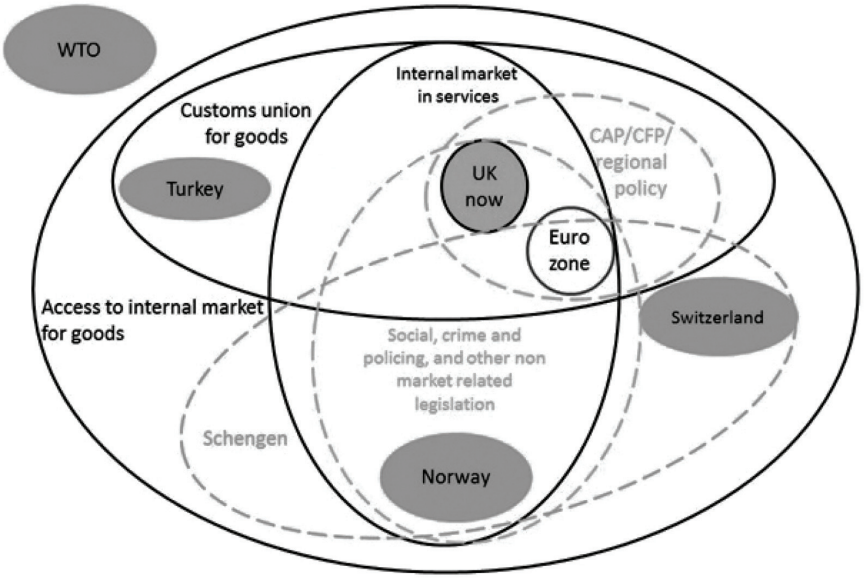
[33] UK unlikely to stay in single market, Tory document suggests: https://www.theguardian.com/politics/2016/nov/28/uk-unlikely-to-stay-in-single-market-tory-document-suggests.

[34] Canada's trade deal with EU a model for Brexit? Not quite, insiders say https://www.theguardian.com/world/2016/aug/15/brexit-canada-trade-deal-eu-model-next-steps; Britain must earn from the EU-Canada Ceta trade deal saga https://www.theguardian.com/business/2016/oct/29/britain-must-learn-from-the-eu-canada-ceta-trade-deal-saga.

[35] The agreement promises that around 98.6% of goods traded between Canada and the EU will be free of duty and empowers regulatory bodies to accept the standards and tests carried out in each other's jurisdictions. While the trade deal aims to liberalize services, hundreds of exceptions are listed. Under CETA, Canada will have no hand in setting EU regulations or formulating product standards and no access to the banking passport system that would have allowed its banks and financial services to trade freely. The freedom of movement clauses are primarily focused on businesspeople.

[36] Canada's trade deal with EU a model for Brexit? Not quite, insiders say, https://www.theguardian.com/world/2016/aug/15/brexit-canada-trade-deal-eu-model-next-steps;

[37] Canada's trade deal with EU a model for Brexit? Not quite, insiders say https://www.theguardian.com/world/2016/aug/15/brexit-canada-trade-deal-eu-model-next-steps;



Drawing 1. Alternatives for Britain

Table 1. Models and Brexit campaign promises

Model	**Free movement of persons**	**Free movement of goods**	**Free movement of services**	**Jurisdiction of the Luxembourg Court**	**Contribution to the EU budget**	**Meets the Brexiteers' campaign promises (reasons highlighted in grey)**
Norwegian model	yes	yes	yes	yes	yes	no
Swiss model	yes	yes	no	no	yes	no
Turkish model	no	yes	no	no	no	no
WTO solution	no	no	no	no	no	no
Customized solution	no	yes	yes	no	no	yes

We suspect that the UK government probably has already drawn the conclusion that the difference between the goals and reality are irreconcilable, and remaining in the single market may prove unrealistic. This seems to be confirmed by a document photographed in the hands of a senior Conservative official on Downing Street. The handwritten note, carried by an aide

to the Tory vice-chair Mark Field after a meeting at the Department for Exiting the European Union, could be seen to say: 'what's the model? Have your cake and eat it.'[38] The Times[39] characterised the handwritten note as giving away the UK government's duplicity in negotiations and the facts that 'ministers may be reluctant to compromise with EU'. The handwritten notes also appear to rule out single market membership (the Norwegian option): 'Why no Norway — two elements — no ECJ intervention — we're a rule-taker beyond our trade with Europe. Unlikely to do internal market.'

As such at present, it appears that the UK may opt for a customised solution, which would best reflect the UK's policy goals (no free movement, no ECJ jurisdiction, and no contribution to the EU budget) but which is outside the single market. In this case, the CETA agreement may indeed serve as a point of departure, and access to the market in services would need to be added on top of it. It is unclear what the UK plans to offer in order to seal the deal and gain access to the EU market in services. It may be that the reference included in the above handwritten note 'Europe gets a good deal on security' [40] wishes to suggest that the UK would somehow top up the CETA deal on its side by UK concessions on security in exchange for UK access to the services market. It is hard to assess how realistic this idea is.

IV Looking in Our Crystal Ball

Uncertainty is bad for business and the economy, and anything related to Brexit at the time of writing is uncertain.

(1) It is uncertain (but more likely than not) whether Brexit will happen at all.
(2) It is not certain how it will happen, namely whether the Houses of Parliament will be involved in the process and whether there will be a parliamentary decision or referendum concerning the terms negotiated. It is also uncertain whether the UK will strive to conclude a transitional arrangement before concluding a final agreement on exiting the EU.
(3) It is not certain when it will happen, namely whether the notice on withdrawal will be served on the EU in March 2017 and whether the negotiating period will be a two year period or it will be prolonged by a transitional agreement.
(4) It is also uncertain whether the UK government will negotiate to customise for itself one of the existing models or will try to negotiate a solution tailor-made for the UK or if it will exit the EU by default.

[38] UK unlikely to stay in single market, Tory document suggests: https://www.theguardian.com/politics/2016/nov/28/uk-unlikely-to-stay-in-single-market-tory-document-suggests.
[39] 'Have cake and eat it' – aide reveals Brexit tactic Ministers may be reluctant to compromise with EU http://www.thetimes.co.uk/edition/news/have-cake-and-eat-it-aide-reveals-brexit-tactic-wrj58bjbn.
[40] Ibid.

ad 1) Ms. May and her government very clearly are of the opinion that Brexit must take place, as the referendum has decided on the exit of the UK ('Brexit means Brexit') from the EU and the question is merely how and when. Ms. May seems to be of the opinion that Brexit must take place whatever the consequences may be. On the other hand, according to former Prime Minister John Major, there is a 'perfectly credible1 case for a second referendum on leaving the European Union.[41] Former Prime Minister Tony Blair said in an interview that he was not predicting Brexit would not happen, only that there was a possibility it would not. 'It can be stopped if the British people decide that, having seen what it means, the pain-gain, cost-benefit analysis doesn't stack up. And that can happen in one of two ways. I'm not saying it will [be stopped], by the way, but it could. I'm just saying: until you see what it means, how do you know?'[42]

I am currently of the opinion that if an Article 50 notice on withdrawal is made then withdrawal will take place, whether through an agreement of through the passage of time. In that sense, the question is whether the notice on withdrawal will be served or not.

ad 2) Given the decision of the High Court[43] on the need to involve Parliament in the withdrawal of the UK from the EU and the expected decision on appeal by the Supreme Court, the Houses of Parliament will likely be involved in and have a decisive say in the UK's decision on withdrawal and probably also in the negotiations with the EU. If Parliament is involved in the political process of the withdrawal under Article 50 of the TEU and with the preparation of the exit strategy then the UK may not file its withdrawal notice in March 2017 or may not file it at all. This may lead at some point to snap elections in the UK, as the UK cannot leave the EU in limbo for ever even if the unfortunate wording of Article 50 of the TEU makes the EU a hostage of the departing member state. If the snap elections would result in a Parliament with a very different composition and in a clear mandate for exit or remain, this may lead to the UK deciding on filing a notice on withdrawal under Article 50 of the TEU or not filing it at all.

Even if the EU leaders now are of the opinion that there can be no negotiations before the withdrawal notice is submitted[44] and the UK government was also of this opinion before the referendum,[45] it may be that Angela Merkel – who emerges somehow as the only European authority on Brexit – would somehow give a sign to the UK that the EU is ready for transitional arrangements[46] as the two year withdrawal period is insufficient for creating a satisfactory new regime for UK-EU relations.

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41 John Major: case for second Brexit referendum is credible, https://www.theguardian.com/politics/2016/nov/25/brexit-sir-john-major-says-perfectly-credible-case-for-second-referendum.

42 http://www.newstatesman.com/politics/uk/2016/11/tony-blair-s-unfinished-business

43 The Queen on the application of (1) *Gina Miller &* (2) *Deir Tozetti Dos Santos vThe Secretary of State for Exiting the European Union,* (1) *Grahame Pigney & Others,* (2) *AB, KK, PR and Children – Interested Parties Mr George Birnie & Others – Interveners* [2016] EWHC 2768 (Admin) Case No. CO/3809/2016 and CO/3281/2016 3 November 2016 https://www.judiciary.gov.uk/judgments/r-miller-v-secretary-of-state-for-exiting-the-european-union/.

44 Brexit: Germany rules out informal negotiations see: www.bbc.com/news/world-europe-36637232.

45 See: The process for withdrawing from the European Union see: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/504216/The_process_for_withdrawing_from_the_EU_print_ready.pdf.

46 May hints at transition deal on Brexit to avoid 'cliff edge' for business https://www.theguardian.com/business/2016/nov/21/government-working-hard-avoid-brexit-cliff-edge-business-theresa-may-cbi.

ad 3) Given the uncertainty as to the role of Parliament and the flexibility of the EU, it is not clear when the negotiations would start, how long those negotiations would last and when they would end.

ad 4) Most important of all, it is unclear what the negotiating aims and strategy of the UK are. The stated aim of the UK government is to get maximum access to the single market with a minimum or no freedom of movement, no payment to the EU and no acceptance of the jurisdiction of the EU Court of Justice. According to former Prime Minister Blair, attempting to secure access to the single market will be the defining negotiation. "Either you get maximum access to the single market – in which case you'll end up accepting a significant number of the rules on immigration, on payment into the budget, on the European Court's jurisdiction. People may then say, 'Well, hang on, why are we leaving then?' Or alternatively, you'll be out of the single market and the economic pain may be very great, because beyond doubt if you do that you'll have years, maybe a decade, of economic restructuring."[47]

So it seems from the above and the analysis under Section 3 above that none of the existing models offer anything similar to what the UK seems to want.[48] The UK will therefore either have a tailor-made solution or no solution at all and. if the UK submits its notice for withdrawal under Article 50 of the TEU, at the end of the two year term it would likely exit by default and without an agreement and it would simply fall back in international trade in goods and services according to the WTO rules. With this potential outcome and the uncertainties attached, the UK government has been forced to offer compensatory state aid for an industry and may be forced to offer the same for others.[49]

Yet the outcome does not bode well for the UK or the EU as it seems that the UK government is split and intellectually ill prepared[50] and probably dishonest including the foreign secretary, Boris Johnson who are '…saying things that are intellectually impossible, politically unavailable, so … [are] … not offering the British people a fair view of what is available and what can be achieved in these negotiations'.[51]

As to the next steps as they are visible at the time of writing, a lot may depend on the decision of the Supreme Court in the case Miller & Tozetti Dos Santos -v- The Secretary of State for Exiting the European Union[52] as to whether the Houses of Parliament will be implicated in the decision on the withdrawal or not.

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47 http://www.newstatesman.com/politics/uk/2016/11/tony-blair-s-unfinished-business.

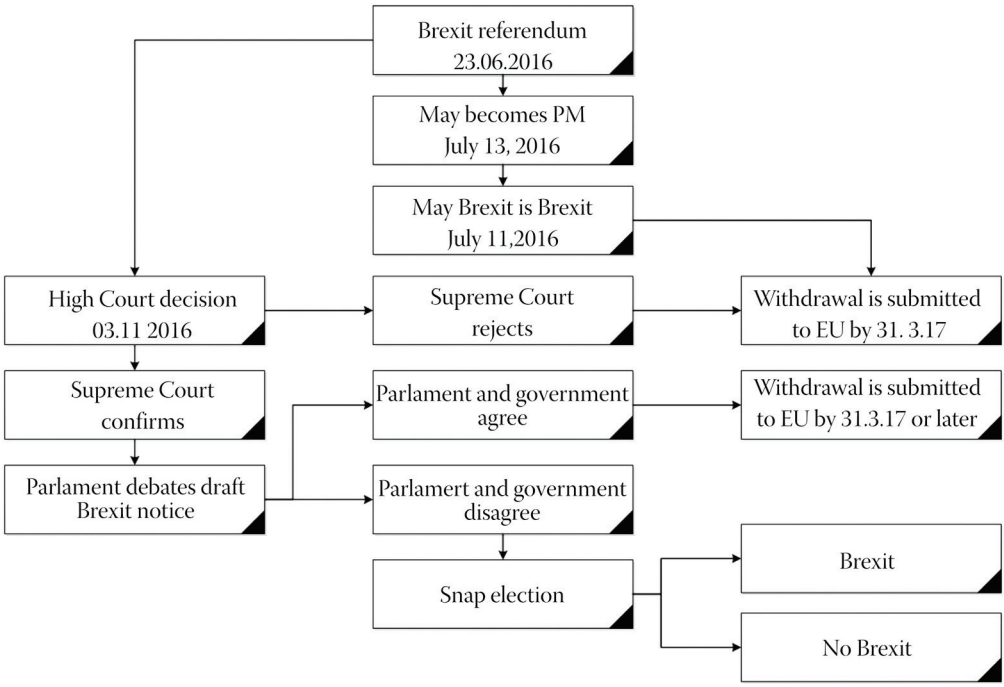
48 Brexit and beyond: how the United Kingdom might leave the European Union http://ukandeu.ac.uk/research-papers/.

49 UK seeking tariff-free EU deal for carmakers, Nissan told https://www.theguardian.com/business/2016/oct/30/nissan-eu-tariff-free-brexit-sunderland.

50 According to a memo by Deloitte leaked to the press on November 6, 2017 'Despite extended debate among permanent secretaries, no common strategy has emerged,' http://www.thetimes.co.uk/edition/news/cabinet-split-threatens-to-derail-may-s-brexit-talks-hxfwmv2td.

51 European ministers ridicule Boris Johnson after prosecco claim, https://www.theguardian.com/politics/2016/nov/16/european-ministers-boris-johnson-prosecco-claim-brexit.

52 See above (n 42).



Drawing 2. Likely timeline on Brexit

If the Houses of Parliament will participate in the decision-making, it may be difficult to maintain Ms. May's timetable and submit the withdrawal notice when she planned. More importantly, the Parliament may also somehow prevent the government from submitting the withdrawal notice to the EU at all, in which case snap elections are likely to be called. Based on the snap elections, a new parliament with a different political make-up could be elected and this could mean a new government, potentially with a different set of goals.

Our crystal ball has not yielded a clear prediction of what exactly will happen in the coming twelve months. What is clear, it is as if the UK has stepped Through the Looking Glass[53] and from June 24 Brexiteers, Remainers and the entire EU and its population now found itself on the other side, in a strange parallel, unsafe and mysterious world where clocks work backwards.

[53] Lewis Carroll: *Through the Looking-Glass* (Dover Thrift Editions, Paperback. Mineola May 14, 1999, New York).

Ágnes Kertész*

Brexit's Legal Framework

When, at the time of drafting the Lisbon Treaty (and before that the EU Constitution), a provision on the eventual withdrawal of a Member State was inserted, no one really thought that this provision would ever be applied and even less that it would be so soon. Since the Brexit referendum, Article 50 of the Treaty on European Union (TEU) became the most debated and controversial Treaty provision, the interpretation of which gave rise to a lot of legal discussions. This paper intends to give an overview of the legal framework of Brexit by underlining the uncertainties and open questions on the eve of triggering the withdrawal procedure.

I Provisions of the Treaty on European Union Providing Member States with the Possibility of Withdrawal (Article 50)

Although Article 50 TEU regulates the framework for the withdrawal of a Member State from the Union, its interpretation raises a multitude of questions. The first thing to question could be the exclusiveness of Article 50 to regulate the withdrawal. Article 5 of the Vienna Convention on the Law of Treaties makes it clear that the Convention also applies to any treaty that is the constituent instrument of an international organisation, without prejudice, however, to any relevant rules of the organization.[1] As such – despite the exit option from an international treaty set out in Article 54 of the Vienna Convention – Article 50 TEU shall apply exclusively.

This is going to be the first time of applying Article 50 – once the intention to exit is officially notified – therefore the process which is about to start can be considered as the test of Article 50. On the other hand, it's not only because of this test that we face a number of issues, but rather because of the framework nature of Article 50: it sets out numerous elements of the exit, but more detailed rules and practical questions remain open with regard to the procedure. In addition to the political significance of the forthcoming procedure, caution is also justified due to the precedent nature of it. How will the official notification of the intention to withdraw take

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[1] Article 5 of the *Vienna Convention on the law of treaties concluded at Vienna on 23 May 1969*: The present Convention applies to any treaty which is the constituent instrument of an international organization and to any treaty adopted within an international organization without prejudice to any relevant rules of the organization.

place? Would an oral announcement addressed either to the President of the European Council or to the Members of the European Council during their meeting be sufficient? Should the intention to withdraw be written? How should an *exit treaty* be drafted? Could the treaty of accession serve as an example for it? Who negotiates with whom? Who is the EU's negotiator? Who gives the mandate to the negotiator? Could a Member State change their mind following the announcement of the intention to withdraw? All these questions and many others would require precise responses also with regard to the political significance of the exit procedure. The answers hereinafter – although they are not the only ones – offer options with the aim of taking account of the practical steps in the forthcoming process and of exploring the possible ways of interpretation – along the lines of Article 50.

1 Decision on Withdrawal in Accordance with National Constitutional Requirements

By virtue of Article 50 of the TEU, any Member State may decide to withdraw from the Union exclusively *in accordance with its own constitutional requirements*.[2] In the UK, the Government can initiate a referendum by law. Under the law adopted in 2000,[3] the result of the referendum is not binding on the Government or on the legislator. The question put to a referendum requires a simple majority and there is no participation threshold. The provisions of the Act defining the legal framework of the EU referendum[4] were drafted accordingly, saying that the referendum has an *advisory* character. The British Government is therefore legally not bound by the result of the referendum, however it was confirmed on several occasions that the Government regards it as politically binding.[5]

Although the results of the consultative referendum may be regarded by the Government as politically binding, the role of the British Parliament in the process is however far from clear. In my view, Parliament can't be bypassed and can't be omitted from the UK's national decision-making process on EU membership. This opinion is not only supported by the fact that, in recent years the British delegation – due to the need for a parliamentary mandate in EU-related issues – in almost every EU negotiation entered parliamentary reservation and kept that reservation until the end of the negotiations. The Government argues that the exit from the EU formally means the termination of the EU accession treaty and – as such – it is deemed to fall under the royal prerogative, therefore it requires the adoption of measures within the competence of the executive power. Parliament's decision is therefore not necessary at this stage. According to those who dispute the Government's legal arguments, the Act of Accession to the European Communities (1972) should not to be overlooked. Without the amendment of that

[2] Paragraph 1 Article 50 TEU: Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.
[3] Political Parties, Elections and Referendums Act 2000.
[4] European Union Referendum Act 2015.
[5] E.g. David Cameron's speech of 27th June 2016 in the House of Commons.

Act, withdrawal is legally impossible. At the same time, its amendment requires a parliamentary majority. In the national judicial procedure initiated on this particular issue, the High Court, in its ruling of 3rd November 2016, upheld the action. It stated that the Government can't announce the withdrawal officially without the authorisation of Parliament.

However, the ruling gives no instruction regarding how Parliament should be provided with the right to decide on authorisation. As a result several possibilities have already been given for obtaining parliamentary authorisation for the official notification of the intention to withdraw: 1) starting a legislative procedure; 2) adoption of a parliamentary resolution; 3) the Government imposes on itself the obligation to provide information continuously and to engage in permanent dialogue with Parliament. The latter appears to be far from sufficient though, taking the resolution of 3rd November into account.[6] If a draft law is to be submitted and a legislative procedure for the adoption of a parliamentary act is started accordingly in order to obtain the parliamentary mandate for the notification, the procedure can be significantly prolonged and, in addition, the opportunity is provided for submitting motions for amendment. The submission of a parliamentary draft resolution results in a much shorter procedure, but in this case the role of Parliament is limited to the approval or rejection of the Government's submission. The Government has not yet taken a position on the matter of obtaining parliamentary authorisation.

At the same time, the review of the possible ways of obtaining parliamentary authorisation should wait until the end of the appeal procedure. Following the Government's appeal, the Supreme Court – having declared the appeal admissible – held hearings lasting four days from 5th December 2016. The Supreme Court – for the first time in its history – is trying the case with 11 judges. The judgement is expected by the end of January 2017.

The accountability of the Government to Parliament was not in dispute so far: the Government is obliged to inform Parliament continually on negotiations in relation to the withdrawal agreement. International treaties (both on the exit and on the future relationship) agreed at the end of the negotiations are subject to vote in the House of Lords and in the House of Commons, but only the House of Commons can block their ratification (the deputies can't modify the agreed text, though). Parliament will also have an important role to play in the amendment of the laws related to the EU membership of the United Kingdom.

It's obvious that even the way leading to a national decision required for the announcement of the intention to withdraw – which is a condition to the exit procedure – has posed questions to the United Kingdom. Those questions are unavoidable from a constitutional and institutional point of view. To answer them is time-consuming and, of course, is not without adopting political positions in relation to the issue of staying/exiting. However, the European Union made it clear that no negotiations in any format – neither on withdrawal nor on conditions setting up the framework of future relations – can be started with the United Kingdom prior to the official announcement of withdrawal.

[6] https://www.theguardian.com/politics/2016/nov/03/high-court-brexit-ruling-what-does-it-all-mean

2 Official Notification of the Member State's Intention to Withdraw

In accordance with the constitutional requirements, the decision taken by a Member State on the intention to withdraw is officially announced (notified) to the European Council.[7] The procedure according to Article 50 can only be launched after this official announcement (notification). On the occasion of the European Council's meeting of 28-29th June 2016, the Member States clearly agreed not to enter into negotiations with the United Kingdom in any way prior to the official announcement. No formalities have been established with regard to the official announcement so it can take place at any meeting of the European Council as well. The question is: When? There aren't any provisions at all in the Treaty on the timing of the official announcement of the intention to withdraw, nor are there any time limitations in this regard. The reason is that the process within the Union will be launched by the notification itself. Prior to this notification there is *no case*, no procedure in the eyes of the EU. Even if there is no procedure – legally speaking – until the official announcement of the intention to withdraw, in any event there is already a political situation. This can be clearly seen in the current situation: the question concerning the date of the notification arises every day since the results of the referendum became known. There was an opinion, immediately after the referendum, that the notification could have taken place even in the European Council during its meeting on 28-29th June 2016, as Prime Minister Cameron had made it clear that he acknowledged the binding force on his Government of the outcome of the referendum. After the internal political crisis that followed the results of the referendum and the nomination of the new Prime Minister, Theresa May – having taken her office – has repeatedly said that negotiations on exit would not start in 2016. Then March 2017 came up, currently being the date given by the UK[8].

More has been said about the interests linked to the timing of the notification by the UK than about the EU's institutional aspects. They aren't less significant, though. How long can the current situation, where there is a valid national referendum on the intention to withdraw but there is no official announcement in this regard to the European Council, be maintained? What happens if, due to a national – judicial or parliamentary – deliberation, the notification foreseen for March 2017 cannot be possible? How long can the official announcement of the intention to withdraw be delayed and what can the EU institutions do during this period? Legal options 'to enforce' a notification are not included in the Treaty and daily news of the European shock following the referendum has abated by now. However, the fact remained here with us. Since the European Council returned to 'business as usual'[9] – which means continuous crisis management – the United Kingdom is taking part in the negotiations, but neither the EU institutions nor the Member States are negotiating on setting up post-Brexit conditions with her.

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[7] Paragraph 2 of Article 50 of TEU: A Member State which decides to withdraw shall notify the European Council of its intention.

[8] http://www.bbc.com/news/uk-politics-37532364

[9] http://europedecides.eu/2016/10/octobers-brussels-summit-shows-the-eu-getting-back-to-business-by-ignoring-brexit/

TEU, however, imposes on Member States and EU institutions the obligation of sincere cooperation.[10] Due to this, Member States and EU institutions must assist each other in the implementation of their tasks. Accordingly, in order to implement Article 50, the Member State concerned and the EU institutions do not lose sight of their obligation of sincere cooperation. Consequently, following the successful referendum on the exit the Government can be expected to communicate its intentions in due course to the EU. Obviously 'due course' does not mean years, especially not in the situation where the UK would have held the Presidency of the Council of the EU in 2017 according to the decision fixing the order of rotation of the Presidency of the Council.

Opinions are divided regarding the reversibility of the procedure following the notification of the intention to withdraw at least as much as they are regarding obtaining parliamentary authorisation for the notification. The Government – during the judicial procedure scrutinising the necessity of the parliamentary notification – made it clear that the process is irreversible. Despite the British Government's current determination aiming at going through with the exit, I believe that one should not overlook the fact that the submission of the notification opens the negotiations in order to prepare the agreement on withdrawal, and in this phase of negotiations there can't be legal obstacles to prevent the Member State who submitted the notification from stepping back. Consequently, until the entry into force of the agreement on withdrawal, it is legally possible to stop the exit procedure. Similar opinion has been expressed by the author of Article 50, Lord Kerr, secretary-general of the European convention, which drafted the Treaties. He said that notification under Article 50 should not be irrevocable, as it would be politically unthinkable that anyone or any institution of the EU would encourage a Member State to leave the EU if this Member State finally decided not to leave.[11]

3 Adopting a Negotiating Mandate before Starting Exit Negotiations; the Guidelines of the European Council

Under Article 50 (2) TEU, negotiations are started in accordance with the guidelines of the European Council. Since the notification of withdrawal is an essential condition for the official commencement of the exit procedure, the adoption of guidelines setting up the framework for the negotiations would be possible only after this notification. In a political sense, however, this preparation has certainly begun: in order to prepare political discussions on the way forward, leaders have already held several talks with the 27 Member States.[12]

The content of the guidelines referred to in Article 50 serves as a negotiating mandate and as such sets the framework for negotiations. Article 50 (2) clarifies this by referring back to Article 218. (3) TFEU.[13]

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[10] Paragraph 3 of Article 4 of TEU: Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.

[11] http://www.bbc.com/news/uk-scotland-scotland-politics-37852628

[12] http://www.consilium.europa.eu/en/press/press-releases/2016/09/16-bratislava-declaration-and-roadmap/

[13] Paragraph 2 of Article 50 TEU: A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude

With regard to the international agreements concluded by the EU, the Council sets out negotiating directives to the negotiator. These directives are found in the form of a Council decision. The negotiator can't deviate from them, unless the Council amends its negotiating policy.[14]

Therefore, before the exit negotiations, detailed and precise guidelines adopted by the European Council can facilitate the commencement of negotiations, a further essential condition of which is the adoption of a Council decision providing a mandate to open negotiations. The negotiating directives – which serve as a mandate for the negotiator – are established in accordance with the framework set out in the guidelines. The Council decision on the negotiating directives is adopted by a qualified majority.[15] Prior to the Council's negotiations, the Commission shall submit recommendations and the Council will act in accordance with them.

II Leaders of the Talks, Parties to the Negotiations

Under Article 50 (2), the Union negotiates with the Member State preparing for exit. The Council concludes the agreement on behalf of the Union, acting by a qualified majority, after obtaining the consent of the European Parliament. According to Article 218 (3) referred to by Article 50, the Council will adopt a decision authorising the opening of negotiations and nominating the Union negotiator or the head of the Union's negotiating team. The nomination of the negotiator is therefore contained in the Council decision; however, Article 50 does not specify which institution delegates the negotiator or upon which institutional arrangement the delegation is based. Such a decision can't be adopted prior to the formal notification of the intention to withdraw. The institutions however began naming people in charge of the negotiations just a few days after the results of the referendum were presented.[16] First, the President of the European Council announced that he had entrusted the leadership of the negotiations to director Didier Seeuws, head of the Brexit Working Group of the General Secretariat.[17] Then, a few weeks later,

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an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.

14 Paragraph 3 of Article 218 TFEU: The Commission, or the High Representative of the Union for Foreign Affairs and Security Policy where the agreement envisaged relates exclusively or principally to the common foreign and security policy, shall submit recommendations to the Council, which shall adopt a decision authorising the opening of negotiations and, depending on the subject of the agreement envisaged, nominating the Union negotiator or the head of the Union's negotiating team.

15 Point *b)* of Paragraph 3 of Article 238 TFEU: where the Council does not act on a proposal from the Commission or from the High Representative of the Union for Foreign Affairs and Security Policy, the qualified majority shall be defined as at least 72 % of the members of the Council representing the participating Member States, comprising at least 65 % of the population of these States.

16 https://www.theguardian.com/politics/2016/jun/26/belgian-diplomat-to-head-eus-brexit-taskforce

17 See uws used to be the head of cabinet of the former President of the European Council, Herman van Rompuy.

the European Commission named its leader of the talks as Michel Barnier, former Internal Market Commissioner.[18] So for the time being, both the European Council and the European Commission have their main persons responsible for the negotiations, which is necessary, since the preparation of the agreement on exit presupposes inter-institutional cooperation. We have seen above, however, that the Council decision will give a mandate to begin negotiations preparing the withdrawal agreement and this formal decision of the Council will provide the name of the Union's negotiator or the head of the negotiating team.

III Content, Conclusion and Entry into Force of the Withdrawal Agreement

All that Article 50 provides on the content of the withdrawal agreement is that the Union shall negotiate and conclude an agreement with the Member State concerned, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union.[19]

There is less certainty as far as the content of the withdrawal agreement is concerned compared to, for example, its provisions on its entry into force. Which elements can fit into the exit agreement, and which elements should be part of an agreement that is separate from the withdrawal agreement have already been the topic of debates for months without an answer. The subject-matter to be regulated by the withdrawal agreement is not only important in terms of content and negotiation technicalities and tactics, but it is also important in terms of selection of the procedure to be applied for the adoption. Reading Article 50 and Article 218 (3) together makes it clear to me that the settlement of future relations should be subject to a separate agreement, not to the withdrawal agreement. Consequently, it is necessary to conclude at least two agreements, one on the withdrawal and another on future relations. It is likely, however, that further agreements would be needed – as the European Commission has suggested on several occasions – to clarify transitional arrangements.

The withdrawal agreement is concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament. Consequently, it is clear that the conclusion, or the entry into force of this agreement, doesn't require any further procedural steps (e.g. ratification) from the Member States; the agreement is concluded on behalf of the Union by the Council. There are no obstacles to starting negotiations simultaneously on the withdrawal and on the elements of the agreement on the future relationship between the Member State and the EU. However, this is not the subject of the withdrawal agreement, as a separate agreement should be concluded to that effect. If a solution

[18] http://www.politico.eu/article/michel-barnier-named-as-junckers-brexit-chief-europe-negotiations-consquences-future/

[19] 2nd sentence of 2 Paragraph of Article 50 TEU: In the light of the guidelines provided by the European Council, 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.

is adopted where the withdrawal agreement itself contains matters related to the arrangements of future relations, the withdrawal agreement could become a mixed international treaty, and as such, it could require ratification by the national parliaments as far as it concerns regulatory areas which do not fall under the exclusive competence of the Union. In order to keep the withdrawal agreement under the rules of Article 50 and in accordance with the conditions set out for the agreements concluded by the Council, it is necessary to prevent the agreement from regulating more than the withdrawal.

The agreement on the future relationship should be negotiated and adopted under Article 218, on the conclusion of international agreements, instead of under Article 50. This determines the decision-making procedure as well and, accordingly, instead of qualified majority voting, unanimity is required in areas where unanimity is required for the adoption of EU legal acts; moreover, approval by the national parliaments will be needed in respect of areas of mixed competence.

It is also worth comparing the accession treaties of the Member States to the withdrawal agreement to be worded for the first time now. The accession treaties are an organic part of EU primary law; they are concluded by the Member States with the country that intends to access the EU and unanimity is required for these treaties. In contrast, in accordance with Article 50, the withdrawal agreement is concluded with the exiting country by the Union itself instead of the Member States and a qualified majority in the Council is sufficient for that.

Where the withdrawal agreement is not part of EU primary law but an international agreement under Article 218, the Court of Justice of the European Union could even prevent its entry into force with a given content[20], if, for example, it was in conflict with any fundamental provisions of the Treaties. Therefore, also in this case, scrutiny could take place to explore which matters can be drawn in the regulatory area of a withdrawal agreement concluded in accordance with Article 50 (2). May it regulate on issues that would otherwise fall under the areas of mixed competence or would these require national ratification (e. g. provisions on the EU's own resources)? Or does it already endanger the fulfillment of the requirement laid down in Article 50m according to which the withdrawal agreement is concluded by the Council acting on behalf of the Union?

As far as the entry into force is concerned, it can be stated that the date of termination of rights and obligations under the Treaties is necessarily included in the withdrawal agreement. If the agreement is not concluded two years after the notification of the intention to withdraw then the rights and obligations under EU Treaties for the exiting State will terminate on that date,[21] unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.

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[20] Paragraph 11 Article 218 TFEU: A Member State, the European Parliament, the Council or the Commission may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the Treaties. Where the opinion of the Court is adverse, the agreement envisaged may not enter into force unless it is amended or the Treaties are revised.

[21] Paragraph 3 of Article 50 TEU: 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.

It is worth having also a look at the ordinary review and revision of the Treaties which can take place according to the procedure set out in Article 48 (2)-(5) of the TEU:[22]

- The Government of any Member State, the European Parliament or the Commission may submit to the Council proposals for the amendment of the Treaties. These proposals shall be submitted to the European Council by the Council and the national Parliaments shall be notified.
- If the European Council, after consulting the European Parliament and the Commission, adopts by a simple majority a decision in favour of examining the proposed amendments, the President of the European Council shall convene a Convention composed of representatives of the national Parliaments, of the Heads of State or Government of the Member States, of the European Parliament and of the Commission.
- The European Council may decide by a simple majority, after obtaining the consent of the European Parliament, not to convene a Convention should this not be justified by the extent of the proposed amendments. In the latter case, the European Council shall define the terms of reference for a conference of representatives of the Governments of the Member States.
- If the European Council approves the amendments proposed by the Convention or decides not to convene the Convention, the conference of representatives of the Governments of the Member States convened by the President of the Council adopts by common accord (by unanimity) the proposed amendments. Once this common accord is reached the proposal should be ratified by all the Member States in accordance with their respective constitutional requirements.

[22] Paragraph 2-5 Article 48 TEU: Ordinary revision procedure:
2. The Government of any Member State, the European Parliament or the Commission may submit to the Council proposals for the amendment of the Treaties. These proposals may, inter alia, serve either to increase or to reduce the competences conferred on the Union in the Treaties. These proposals shall be submitted to the European Council by the Council and the national Parliaments shall be notified.
3. If the European Council, after consulting the European Parliament and the Commission, adopts by a simple majority a decision in favour of examining the proposed amendments, the President of the European Council shall convene a Convention composed of representatives of the national Parliaments, of the Heads of State or Government of the Member States, of the European Parliament and of the Commission. The European Central Bank shall also be consulted in the case of institutional changes in the monetary area. The Convention shall examine the proposals for amendments and shall adopt by consensus a recommendation to a conference of representatives of the Governments of the Member States as provided for in paragraph 4. The European Council may decide by a simple majority, after obtaining the consent of the European Parliament, not to convene a Convention should this not be justified by the extent of the proposed amendments. In the latter case, the European Council shall define the terms of reference for a conference of representatives of the Governments of the Member States.
4. A conference of representatives of the Governments of the Member States shall be convened by the President of the Council for the purpose of determining by common accord the amendments to be made to the Treaties. The amendments shall enter into force after being ratified by all the Member States in accordance with their respective constitutional requirements.
5. If, two years after the signature of a treaty amending the Treaties, four fifths of the Member States have ratified it and one or more Member States have encountered difficulties in proceeding with ratification, the matter shall be referred to the European Council.

The notification, which is consequently indispensable for the procedure to open, has not yet happened, but lawyers, politicians and institutions have already been kept busy for months on the question of how to proceed. Brexit will remain with us over the coming years.

Réka Somssich*

What Language for Europe?

Immediately after the final results of the Brexit referendum in June had been announced, politicians, both at the European and national level, raised their voices against the dominance of the English language in EU institutions and have even questioned its legitimacy and maintainability as official language of the European Union. In the early hours of 24 June 2016, Jean-Luc Mélenchon, a left-wing MEP, tweeted that 'English cannot be the third working language of the European parliament.'[1] Among the statements in the same line, the one that received the most attention was without any doubt that of the Polish MEP and chair of the European Parliament's constitutional affairs committee, Danuta Hübner, who argued that English should be deleted from the official languages of the EU as by virtue of the relevant Regulation each Member State has the right to notify only one language to the EU to become at the same time an official language of the Union.[2]

As a succinct consequence of the Brexit referendum and in a symbolic way, the President of the European Commission, Jean-Claude Juncker, when assessing the outcome of the referendum at the plenary session of the European Parliament on 28 June, used exclusively German and French and avoided using English. Before then he had generally used all three languages in a balanced way when addressing this forum.[3]

The last news bringing the language issue to the fore again exploded in October 2016 when some anonymous sources from the EU administration reported that the chief negotiator of the Brexit process, Michel Barnier, wanted French to be the language of the divorce talks,[4] although this information was declared false by the chief negotiator himself after the British prime minister, Theresa May, made it clear that her government will not accept the use of French language. In his reaction, Barnier underlined that the language of the negotiations will be agreed upon by the parties concerned.[5]

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1 https://twitter.com/JLMelenchon/status/746300956577505280

2 http://www.politico.eu/article/english-will-not-be-an-official-eu-language-after-brexit-senior-mep/

3 See: http://europa.eu/rapid/press-release_SPEECH-16-2353_en.htm (the English version of the speech is only available in translation).

4 http://www.reuters.com/article/us-britain-eu-language-exclusive-idUSKCN12L1E0

5 https://www.theguardian.com/politics/2016/oct/21/theresa-may-brexit-negotiations-language-french

The aftermath of the Brexit referendum was not the first time that an attempt was made to appease the overwhelming influence of English in the EU administration. In mid-2004 a group of French legal and linguistic experts launched an initiative to establish French as the 'legal language of the EU'.[6] Increasing the use of German in the European institutions was an important element of the campaign programme of the CDU in 2008,[7] while in 2012, the European Commission was sharply criticised by French journalists for having published the Eurozone recommendations only in English (while the United Kingdom was not member of the Eurozone).[8] What is interesting is that in the past it was mainly France and Germany who had raised their voices against the extended use of English in order to gain more room for their own languages; with Brexit it is interesting to see that Polish politicians have also felt motivated to enter this campaign.[9]

It is true that with Brexit the proportion of native speakers of English in the EU will drop from 14% to 1%. This must however not necessarily mean that the current *lingua franca* of the EU should and will disappear from the official or working languages.

I The Language Regime of the EU and Its Eventual Amendment for Brexit

Under EU law, one distinguishes between 'authentic languages', 'official languages' and 'working languages'. The term authentic language is used for the languages in which the founding Treaties (as international agreements) shall be authentic and as such have authoritative force. While the Treaty establishing the first Community, the European Coal and Steel Community was only authentic in French, the Treaty establishing the European Community and in 1992 the Treaty on the European Union were already based on the principle of equal authenticity of the official languages of the Member States. Although the first national language of Luxembourg, Luxembourgish has since the beginning not been an authentic language of the Treaties, the Irish language became one of the authentic Treaty languages in 1973, when Ireland acceded to the Communities (although not an official language of the Communities themselves at that time).

It is Article 55 (1) of the Treaty on the European Union (TEU) which enumerates the languages in which the TEU is drawn up and shall be authentic. It currently contains 24 languages and was last amended by the Act of Accession of Croatia. Paragraph (2) of the same Article stipulates that the Treaty may also be translated into any other languages as determined by

6 https://euobserver.com/political/17510

7 https://www.euractiv.com/section/languages-culture/news/sprechen-sie-deutsch-merkel-wants-more-german-spoken-in-eu/

8 http://www.euractiv.com/section/languages-culture/news/commission-denies-english-language-favouritism/

9 Which is not surprising, knowing that Polish is, with Spanish, the 4th mostly spoken mother tongue in the EU representing 8% of the population (*Europeans and their languages,* Report, Special Eurobarometer 386, 2012, 10).

Member States among those which, in accordance with their constitutional order, enjoy official status in all or part of their territory. These translations will however not be authentic versions, meaning that their text cannot be considered as authoritative.[10] For the Treaty on the functioning of the European Union, Article 358 TFEU provides that the provisions of Article 55 of the TEU shall apply to that Treaty too. It means that the TFEU is authentic in the same languages as the TEU, with the same implications.

The official and working languages of the EU are listed in the very first Regulation adopted by the European Community in 1958, Regulation No 1 determining the languages to be used by the European Economic Community.[11] The Regulation is based on the current Article 342 TFEU, according to which the rules governing the languages of the Community institutions should be taken by the Council unanimously.

The Regulation does not provide a definition of what one should understand by official language and working language. One can presume that the former is used in the context of the external communication of the EU (publishing documents, legal acts, sending documents to Member States and citizens), while the latter in its internal communication (using languages within and among EU institutions)[12] but this differentiation is however not specified anywhere. The Regulation has three main principles on external communication. The first one is enshrined in Articles 2 and 3. The former specifies that any individual or Member States must be able to communicate with the EU institutions in any of the official languages, while Article 3 provides that communication initiated by EU institutions should be in the language of the Member State to which it is addressed or the jurisdiction of which the individual concerned is subject to. Availability of legal acts in the various official languages is laid down in Article 4, according to which 'Regulations and other documents of general application shall be drafted in the official languages.' Under 'other documents', one should understand directives and decisions of general application.[13] Finally, Article 5 expresses another aspect of legal certainty when it provides for the simultaneous publication of the Official Journal of the European Union in all the official languages. The obligation to publish in all of the official languages means that any language version is equally authentic. On the internal aspects of language use, the Regulation is less explicit. Article 6 authorises institutions to stipulate in their rules of procedure which of the languages are to be used in specific cases, while Article 7 confers upon the Court of Justice the right to define the language rules for its procedures.

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[10] As Theodor Schilling points out, this Treaty provision was motivated by the same inspiration as the Council Conclusions of 2005 on the official use of additional languages within the Council and possibly other Institutions and bodies of the European Union facilitating upon agreement with Member States the adding of non-official translations of legislative measures into languages which are official in certain regions only to the Council archives [Theodor Schilling, 'Language Rights in the European Union' (2008) 10 German Law Journal, 1233].

[11] EEC Council: Regulation No 1 determining the languages to be used by the European Economic Community (OJ 17, 6.10.1958, p. 385–386).

[12] Alain Fenet, 'Diversité linguistique et construction européenne' (2001) 2 Revue trimestrielle du droit européen, 239.

[13] Phoebus Athanassiou, 'The Application of Multilingualism in the European Union Context' (2006) 2 Legal Working Paper Series (ECB), 9.

Article 1 of the Regulation – which was amended at the occasion of each accession[14] – enumerates the official and working languages of the EU institutions. The two categories overlap completely. That would mean in practice that any of these languages could be used in principle, both in internal and external communications. Currently the scope of the official languages and working languages coincide with the authentic languages of the Treaties as well. This was however not always the case. In 1973, by the time of the accession of Ireland, Irish became an authentic language of the Treaties but it was not admitted to the official and working languages, although Irish is the first official language of Ireland and English is only the second one.[15] However, as a matter of fact, legislation and administration in Ireland– especially in the 70's – was mostly dominated by English, therefore there could not have been any special interest fed by the need for legal certainty to include Irish among those languages into which all EU acts should be translated by virtue of Article 4 of the Regulation. All the more so because, until the very last phase of the accession negotiations with Malta, it was presumed that Maltese (being the first official language of Malta, alongside English)[16] would share the status of Irish. While all the candidate countries had already started the coordinated translation process of the acquis at the end of the nineties the Regular Report of 2000 on Malta's progress towards the accession still noted that no part of the acquis had yet been translated.[17] The next year's Report urged the Maltese administration to undertake additional efforts in the area of translating the acquis 'without prejudice to the outcome of the accession negotiations', which suggests that the issue of whether Maltese would in fact become an official language of the EU was still pending at that time.[18] Finally, the negotiations resulted in admitting Maltese not only to the authentic languages of the Treaties but to the official and working languages as well, by amending Regulation No 1 accordingly. This very fact gave Ireland an impetus to engage itself in a campaign to convince the Council to grant Irish the same status as other official languages and requested the amendment of Regulation No 1. The efforts of the Government proved to be successful and the Regulation was modified in 2005 in order to include Irish in Article 1.[19]

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[14] Until the accession of Croatia in 2013, for every new acceding country, it was always the Act of Accession which amended Regulation No 1, while in the case of Croatia it was a Regulation adopted in order to adapt EU legislation to the accession of Croatia which adapted the Regulation [Council Regulation (EU) No 517/2013].

[15] Article 8 (1) of the Constitution of Ireland provides that 'The Irish language as the national language is the first official language' while Article 8 (2) states that 'the English language is recognised as a second official language.' A derogatory rule is foreseen by paragraph (3) according to which 'Provision may, however, be made by law for the exclusive use of either of the said languages for any one or more official purposes, either throughout the State or in any part thereof.'

[16] Article 5 (1) of the Constitution of Malta provides that 'the National language of Malta is the Maltese language.' Paragraph (2) of the same Article stipulates that 'the Maltese and the English languages and such other language as may be prescribed by Parliament (by a law passed by not less than two-thirds of all the members of the House of Representatives) shall be the official languages of Malta and the Administration may for all official purposes use any of such languages: Provided that any person may address the Administration in any of the official languages and the reply of the Administration thereto shall be in such language.'

[17] Regular Report of 8 November 2000 from the Commission on Malta's towards Accession, p. 63, available at: http://ec.europa.eu/enlargement/archives/pdf/key_documents/2000/mt_en.pdf, last visited: 27.12.2016.

[18] SEC (2001) 1751, p. 75.

[19] Council Regulation (EC) No. 920/2005.

However for both Irish and Maltese, severe temporal derogations were introduced concerning the publication of legal acts in these languages. For Maltese, it was on the eve of accession that it became clear that the practical implications of admitting Maltese to the official languages had not been properly considered. A Regulation, adopted the first day of Malta's EU membership,[20] therefore provided that the requirement of drafting in Maltese should – for a temporary period of three years – cover only regulations adopted jointly by the European Parliament and the Council. The preamble of the Regulation makes it clear that the derogation was necessary because of the lack of qualified translators. The derogation ended in 2007.

The temporary period foreseen for Irish was formulated in a more cautious way. The 2005 amendment of Regulation No 1 provides that – as with Maltese – with the exception of the same type of Regulations adopted under the ordinary legislative procedure, publication of EU acts in Irish was not compulsory for a period of five years counted from the 1 of January 2007 which could be lengthened by the Council unanimously for subsequent five-years intervals. Unlike the Regulation on the Maltese derogation, the 2005 amendment did not give details of why it was necessary to introduce the temporary measures: it only refers in its preamble to practical reasons. One can however easily assume that the reasons must have been the same, as it can already be read in the subsequent Regulations providing for further prolongations: an insufficient number of trained translators. Admitted to the official languages in 2005, Irish is still not a fully-fledged official language of the EU. The derogation was extended already twice, once in 2010[21] and for the second time in 2016[22] for a subsequent five years period ending in 2021. Although the 2016 Regulation urges institutions to continue their proactive approach to increasing the availability of information in Irish on the activities of the Union and expresses its wishes to end the interim period before the end of the most recently added five year term with a timetable annexed to the Regulation on the gradual reduction of the derogation, there is no legally binding ultimate deadline for putting an end to the derogations, and therefore further extensions are in principle possible.

As can already be seen, whether an official language of a Member State becomes an official language of the EU is primary a matter for the accession negotiations. Contrary to what some contend[23] there is no written rule that a Member State could only 'register' one of its official languages as an official language of the EU. Although Article 8 of Regulation No 1 rules on the use of languages with regard to Member States with several official languages, it has quite a vague wording. According to this provision, if a Member State has more than one official language, the language to be used shall, at the request of such State, be governed by the general rules of its law. This provision does not therefore exclude that several national languages of a single Member State could be added to the list of EU official languages, even if it has so far never been the case. Article 8 of Regulation No 1 and the constitutional derogatory provisions

[20] Council Regulation (EC) No 930/2004.
[21] Council Regulation (EU) No 1257/2010.
[22] Council Regulation (EU, Euratom) 2015/2264.
[23] See for instance the statement of Danuta Hübner cited above.

of the two Member States offer sufficient flexibility to define or redefine the status of English in these countries, with an overall impact at European level

As such, what is certain on the basis of the above provisions is that deleting English from the authentic languages of the Treaties and the official or working languages of the EU will in no way be an automatic consequence of Brexit. It cannot be either a matter for the divorce negotiations as is the language issue normally on the table in the case of accessions. By virtue of Article 8 of the Regulation, it could only be done at the request of a state where English is one of its several official languages and, as there are two Member States of this kind, it would most probably be at their joint request. In addition the Council Regulation can only be amended unanimously.

It is highly improbable that either of the two states concerned would propose the deletion of English from the official languages, taking especially into account that the derogation of Irish became the rule rather than the exception and that, on the eve of Brexit, Irish does not seem be a language at European level that could be a realistic alternative to English for Irish citizens, despite a gradual reduction of the derogation until 2022.[24] This against the fact that the development of an Irish terminology is progressing very rapidly. Irish has the second largest number of entries in the European multilingual terminology database (IATE) among the official languages added in 2004 and in 2005, after Polish.[25] It should however also be taken into account that the development of not only EU but also general legal terminology started some decades ago and it was only in 2003, with the adoption of the Official Languages Act in 2003, that Acts of Oireachtas (Parliamentary Acts in Ireland) are to be published in both in Irish and English immediately after enactment.[26]

On the other hand, abandoning English would mean for both Maltese and Irish an opportunity to strengthen or even consolidate their status, not only at a European but also at a national level. The gradual reduction of the derogation until 2022 would in fact coincide with the decision of the eventual future of English due to Brexit.

At the same time leaving the current language system untouched – which is the most realistic scenario – would mean that Ireland and Malta would contribute to the official languages of the EU with two national languages each. This could give rise to campaigns in favour of recognising regional languages such as Catalan or Basque as official languages of the EU[27] as happened in the case of Irish after Maltese became an official language of the EU in 2004.

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[24] According to the data available only 2% of the Irish population is native speaker and an additional 9% speaks the language at a very high standard [*Terminology for the European Union. The Irish Experience: The GA IATE Project* (Fiontar 2013) p. 55.].

[25] Ibid, 29.

[26] Ibid, 54.

[27] Victor Ginsburgh, Juan D. Moreno-Ternero, Shlomo Weber, 'Ranking Languages in the European Union: Before and After Brexit' [2016] Ecares Working Paper, 15.

II The Status of English as Natural Lingua Franca

It can be assumed that, regardless of the whether English remains an official language of the EU and despite any effort to promote other EU languages, the preponderance of English will not be defeated in practice at European level at least. The extended use of English does not depend on UK being a Member State but rather on general trends in language learning and language skills, influenced by a number of phenomena at global scale.

According to a survey *(Europeans and their languages)* carried out in 2012 in 27 Member States by Eurobarometer, at a national level English is the most widely spoken foreign language in 19 of the 25 Member States where it is not an official language. Thirty-eight percent of the European population identified English as the first foreign language in which they are able to have a conversation, followed by French (12%) and German (11%). The fourth place is taken by Spanish (7%) and the fifth by Russian (5%). The proportions are even more striking in some Member States; 90% of respondents in the Netherlands and 86% in both Denmark and Sweden replied that they are able to communicate in English.[28] In addition, the survey reports that there has been a drop of 2-3% compared to 2005 in the proportions of those who are able to communicate in German or French.[29] Moreover 67% of the respondents thought that English is the most useful foreign language[30] and 79% named it as the most useful for their children to learn in the future, while German and French were indicated only by 20% each.[31] The survey's findings are in line with the data published by Eurostat in 2013, according to which 94 % of secondary school students learn English as a foreign language and the second most popular foreign language, French, represents only 19%.[32]

Another comprehensive study undertaken after the Brexit referendum and focusing on the potential linguistic implications of Brexit *(Ranking languages in the European Union after and before Brexit)* concludes that English would keep its status as lingua franca in the EU even if it drops out from the official languages. That conclusion is supported by their findings, according to which even if the number of English speakers will, after Brexit, equal the number of German speakers (approximately 121 million people), the large majority of German speakers (91 million) will live in German speaking countries, while only a small proportion (4,4 million) of the English speakers will live in countries where English is an official language.[33]

Despite Brexit, English seems to be undefeated. However France and Germany will most probably not miss the opportunity to make attempts to restore the status of their respective languages. As David Fernandez Vitores submits, the cooperation agreement of 2000 between the two countries will most probably be strengthened or even reformed. In this agreement France and Germany committed themselves to mutually support each other should the status

28 Eurobarometer, 21.
29 Eurobarometer, 19.
30 Eurobarometer, 69.
31 Eurobarometer, 75.
32 Eurostat press release 158/2013, 26 September 2013.
33 Ginsburgh et al. (n 27) 16.

or function of their respective languages be threatened by the institutional and organisational dynamics of the EU.[34]

It is however less probable that coordinated actions and targeted initiatives will be able to dissuade Europeans to consider English as the most useful foreign language and orientate them towards major continental languages. The issue is rather whether the dominance of English as a *lingua franca* at the European institutions could be mitigated.

The current situation clearly shows the dominance of English, although only in practice and without a legal basis. As mentioned above, Article 6 of Regulation No 1 authorises EU institutions to stipulate, in their rules of procedure, which of the languages are to be used in a specific case. This authorisation seems to offer a high degree of flexibility for the institutions to regulate internal language use or procedural rules falling outside the scope of Articles 2 and 3. However, none of the institutions has stipulated the language in which internal communication should be managed as part of its Rules of Procedure. Likewise, the Court of Justice of the European Union authorised by Article 7 only regulated language use in the different Court procedures but remained silent on the language used during deliberations, even it is common knowledge that this language is French. However, the Court is the only institution where French was not defeated by English. Having a look at the numerous EU agencies, one can see that most of them indicate a knowledge of English as being indispensable for working there, and although application forms to the European Personal Selection Office can be filed in any of the three main languages, English, French or German, English is definitely the most dominant language from these three.

The increasing dominance of English over the last decades is quite evident. While in the 70's 60% of the draft legislation was prepared in French,[35] by 2008 72% of the first versions of administrative and legislative documents were written in English, and only 14% and 3% were written in French and German, respectively. The shift was quite significant and impressive compared to 1997, where the drafting language was 45% for English and 41% for French, an almost balanced situation.[36] Most probably the 1995 accession of two Scandinavian countries and Austria and the accession of 2004 with eight Central European countries and Malta and Cyprus, where French is definitely not among the most spoken foreign languages, contributed significantly to the fast emergence of English within the administration. In 2014 that proportion was already 82.5% for English and 2% for German.[37] In 2012 the spokesman of the European Commission, when reacting to the criticism of having made Eurozone recommendations available first only in English admitted that English is the most widely used language within the

[34] David Fernández Vitores, 'Does Brexit spell the end of for English as lingua franca of the EU? EUROPP European Politics and Policy?' LSE, http://blogs.lse.ac.uk/europpblog/2016/09/15/does-brexit-spell-the-end-for-english-as-the-lingua-franca-of-the-eu/.

[35] Robert Philipson, *English-Only Europe – Challenging Language Policy* (Routledge 2003, London) 130.

[36] Réka Somssich et al., *Lawmaking in the EU multilingual environment* (European Commission, DGT 2010), 89.

[37] Ginsburgh et al. (n 27) 15.

EU institutions, which justifies that documents are first drafted and sometimes published in that language.[38]

It can be seen that the dominance of English does not have much to do with the UK being a Member State of the Union. It is rather a consequence of the language skills of those who are working at the EU institutions, and that, at present, is a consequence of preference for languages at the whole European level, which is not so much influenced by EU trends but rather by the position of English on a global scale. There is however a very important point to be made here: English can only remain the de facto working language of the institutions if it is safeguarded among the official and working languages of Article 1 of the Regulation.

If English is deleted from the official and working languages, the question that must be raised is which of the existing languages could take its place. Can French gain back its status lost decades ago? Could the position of German be redefined? What happens if English is no longer a language to which EU legislation would be officially translated but remains the language of business talks and international negotiations and, what is more, will most probably stay the language of academic writings and conferences on the EU? That would mean that all these talks, negotiations and discussions might be held without an adequate English vocabulary as new acts and terms would not have English equivalents from their inception. It is almost impossible to imagine the EU, major player of the world market of 500 million inhabitants, not to have its legislation, 'economic statutes' available in the language of world trade. In the case of such a scenario, the EU would become the symbol of an isolating integration.

If English remains an official language, the issue is whether language use within the EU institutions could be changed artificially in favour of French or/and German in order to mitigate the dominance of English by requiring the knowledge of these languages by employees.

Moreover, one should not disregard the fact that language remains always a question of self-identity or self-determination, even within large international organisations and supranational bodies. Continuing to use English as the main communication tool in the institutions without the UK being part of this system could have two distinct consequences. On the one hand, it could be considered as an identity crisis, where the European mechanisms would function in a language that is not the first official language of any of its Member States. At the same time it could also have a positive reading: the EU would be using a neutral language in its communications without preferring any of the official languages of its states. It should however be added that the English used as drafting language and language of communication at the institutions is already a 'contaminated' form of English, bearing the traces of foreign influence apparent in constructions and phrases which are often incomprehensible to English natives themselves.[39] It cannot be ruled out that 'Euro-English', even if maintaining its position in the daily functioning of the institutions, will even more Europeanised and lose its close connections with British English.

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38 EurActive.com, http://www.euractiv.com/section/languages-culture/news/commission-denies-english-language-favouritism/.

39 Manuela Guggeis, 'Multilingual legislation and the legal linguistic revision at the Council of the European Union' in Pozzo–Jacometti, *Multilingualism and the Harmonisation of European Law* (Kluwer Law International, 2006) 115.

III The Potential Impact of Brexit on Special, Restricted Language Regimes

The generous approach of Regulation No 1 on the ability to communicate with the EU administration in one's own language does not apply to all EU bodies and procedures. It was in its judgment in the *Kik* case[40] in 2003 when the Court of Justice of the European Union underlined that even if the Treaty contains 'several references to the use of languages in the European Union. None the less, those references cannot be regarded as evidencing a general principle of Community law that confers a right on every citizen to have a version of anything that might affect his interests drawn up in his language in all circumstances'.[41] This judgment was taken in relation to the language regime of the OHIM responsible for registering Community trademarks, where applicants can choose the language of the procedure only from five given languages (English, French, German, Italian and Spanish).[42] Christina Kik, the applicant in that case, chose Dutch as the procedural language, claiming that the exclusion of all official languages other than those determined by the Regulation establishing the OHIM runs against the principle of non-discrimination and linguistic equality. The Court upheld the restricted language regime with regard to trademarks, arguing that the language regime of a body such as the Office is the result of a difficult process which seeks to achieve the necessary balance between the interests of economic operators and the public interest in terms of the cost of proceedings.[43] It did not however enter into the reasons of the choice of the specific languages.

This problem came up some years later when discussions on the proposal for the Unitary Patent Regulation started. As the shortcomings of the existing system, based on a classical international agreement (European Patent Convention), were mainly due to the high translation costs patenting entails in those countries where protection is sought[44] one of the cornerstones of the proposed EU legislation was to reduce the number of languages into which patent claims and descriptions should be translated. The language regime proposed by the Regulation[45] was even more restricted than that applied to trademarks, as it proposed to use the same official

40 Case C-361/01 P, *Christina Kik v OHIM*.

41 Paragraph 82 of the Judgment.

42 Under Regulation (EC) 40/94 on Community trademarks, the application for a Community trademark shall be filed in one of the official languages of the European Community while the applicant must indicate a second language which shall be a language of the Office the use of which he/she accepts as a possible language of proceedings for opposition, revocation or invalidity proceedings.

43 Paragraph 92 of the judgment.

44 The European Commission considered in its Impact Assessment accompanying the proposal on a unitary patent that even if the London Agreement reduced the costs of validation requirements in some Member States, the overall cost of validation in the three Member States with the EPO official languages (GER , FR, UK) equals EUR 680. These costs reach EUR 12,500 in 13 Member States and over EUR 32,000 if a patent is validated in the whole EU. It is estimated that the actual validation costs are around EUR 193 million per year in the EU (SEC (2011) 483 final, para. 3.1.)

45 Proposal for a Council Regulation implementing the enhanced cooperation in the area of the creation of a unitary patent. Brussels, 13.4.2011, COM (2011) 216 final, 2011/0094 (CNS).

languages as European Patent Office (English, French and German) in charge of granting current European (but not EU) patents accepts.

Spain and Italy had raised their voice against the proposed language system since the beginning, mainly because of dropping their languages from the procedural languages as compared to the trademark regime. This systematic resistance led to the rejection of the proposal by these two countries and as the adoption of the language regime required unanimity by virtue of the Treaty, both Regulations (the one on the unitary patent and the other on the language rules)[46] could only be adopted under enhanced cooperation, with Italy and Spain keeping out of the cooperation. What is more, the two countries lodged actions for annulment against the decision on the enhanced cooperation and Spain alone against the Regulation on the language regime. As the Court of Justice rejected both claims,[47] the entry into force of the acts remains dependent solely on the ratification of the Convention on a European Patent Court establishing the judicial framework for the implementation of the Regulations.

Although the two Member States whose languages were left outside did not question English being among these procedural languages, Brexit could trigger a revival of the language issue for unitary patents. Even if English is at the same time an official language of the European Patent Office (a non-EU organisation) and the language of the majority of European patents, similar objections can be raised at EU level against English under both of the restricted regimes as in the case of certain aspects of Eurozone processes or documents. When the Council in 2012 empowered the European Central Bank to serve from 2014 on as the Eurozone's central supervisor, the ECB in its first draft Regulation proposed English to be the language of communication with the national competent authorities (NCA).[48] Under the public consultation, the draft provision was sharply criticised for favouring the working language of the ECB and shifting translation costs onto the national authorities,[49] therefore the proposed article was replaced by a provision according to which the ECB and NCAs shall adopt arrangements for their communications within the Single Supervisory Mechanism (SSM), including the language(s) to be used.[50]

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46 Regulation (EU) No. 1257/2012 of the European Parliament and the Council of 17 December 2012 implementing the enhanced cooperation in the area of the creation of unitary patent protection, Council Regulation (EU) No. 1260/2012 of 17 December 2012 implementing the enhanced cooperation in the area of the creation of unitary patent protection with regard to the applicable translation arrangements.

47 Joined Cases C-274/11 and C-295/11, *Kingdom of Spain and Italian Republic v Council of the European Union*, Case C-147/13, *Spain v Council*.

48 Article 23 of the Draft SSM Framework Regulation of February 2014 proposed that unless otherwise provided communication between the ECB and NCAs shall be carried out in the English language only and that ECB legal acts addressed to one or more NCAs shall be adopted in the English language only.

49 See for instance comments by the German Banking Industry available at https://www.bankingsupervision.europa.eu/legalframework/publiccons/html/framework.en.html

50 See Article 23 of Regulation (EU) No 468/2014 of the European Central Bank of 16 April 2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the European Central Bank and national competent authorities and with national designated authorities (SSM Framework Regulation) (ECB/2014/17)

So, even if Brexit will not necessarily reopen Pandora's Box as far the languages included in the existing new restricted language regimes are concerned, it will certainly call the status of English into question with regard to any future restricted regime.

IV The Reverse Effect of Brexit on English used in the UK and the Remaining Member States

In an absurd way, it seems that Brexit could have a kind of standard raising effect on English language tests for workers (mainly for doctors) in the UK. In a position statement, the Royal College of Surgeons has called on the government to ensure that Brexit discussions permit the UK to strengthen language tests for doctors from the European Union. It claims it should be able to use the same tests in the future as for non-EEA citizens. Currently, while non-EEA citizens must undergo the Professional and Linguistic Assessment Board (PLAB) test, only general language skills can be tested for EEA citizens, as EU law does not allow them to demonstrate their English skills in clinical settings. Experience showed that significantly more doctors from EEA countries had to be suspended for inappropriate communication skills than doctors from non-EEA countries who had been selected on the basis of special language tests.[51]

On the other hand, while trying to relativize the future role of English within the EU institutions, in some of the Member States a liberal approach can be witnessed towards the use of English in administrative procedures in order to attract firms from the UK. In September 2016 France's financial regulator, the *Autorité de contrôle prudentiel et de resolution* (ACPR) and financial markets authority, the *Autorité des Marchés Financiers* (AMF), announced that they intend to simplify the process for registering companies and will make it possible for UK financial companies wishing to establish themselves in France by virtue of the so-called passport mechanism to supply documents and forms to be submitted to the supervisory authority in English instead of French. In addition, an English-speaking contact point was appointed by the two authorities to guide applicant firms through the procedure.[52]

V Conclusions

Although the speech of the President of the European Commission of 28 June suggested that the Brexit vote would be followed by a considered and conscious approach disadvantaging and eventually abandoning English on such occasions, reality shows that it is not exactly the case. In his speech given in Peking at the EU-China Business Summit on 13 July, Jean-Claude Juncker

[51] The British Medical Association, http://careers.bmj.com/careers/advice/Use_Brexit_to_strengthen_language_tests_for_EU_doctors,_royal_college_says.

[52] Press release of 26 September 2016 available at: https://acpr.banque-france.fr/fileadmin/user_upload/acp/Communication/Communiques%20de%20presse/280916_PR_EN_ACPR_AMF_licencing_procedures_Brexit.pdf.

still decided to follow this line when he said that 'In Europe, we are used to 24 official languages. That is the reason why I am not expressing myself in English but in French, because French is an as important language as English.'[53] However his State of the Union Address of 14 of September was delivered exclusively in English[54] and in his next speech before the plenary of the European Parliament of 5 October he again used the three de facto working languages of the Commission, even if the English proportion represented a weaker part against the two other languages.[55]

That shows that, even at the institutional level, there is still a rather hesitant attitude towards the future of English. At this moment it is quite unpredictable to see whether Brexit will really rearrange the current language use or English will remain the European *lingua franca*, with or without the UK.

[53] http://europa.eu/rapid/press-release_SPEECH-16-2522_fr.htm
[54] http://europa.eu/rapid/press-release_SPEECH-16-3043_en.htm
[55] http://europa.eu/rapid/press-release_SPEECH-16-3322_en.htm

Petra Jeney*

The European Union's Area of Freedom, Security and Justice without the United Kingdom – Legal and Practical Consequences of Brexit

The United Kingdom's participation in the European Union's Area of Freedom, Security and Justice (AFSJ), formally known as Justice and Home Affairs cooperation (JHA), was never an easy exercise. From the very beginning of the JHA cooperation, the United Kingdom had secured the option of staying out entirely, or alternatively to decide on a case by case basis whether to participate in the various measures and instruments adopted under the auspices of the AFSJ policies. Fragmented as it has become, the AFSJ still represents one of the most defining aspects of European integration: free movement with no internal borders and an area providing justice based on shared values, all directly accessible by European citizens. In addition, security cooperation at the European level has grown in order to enhance a common response to increasing threats. Against this backdrop, Brexit poses two fundamental questions: what will the future modalities between the EU and UK be after the UK actually leaves the EU, and how will the current jigsaw-like AFSJ emerge after the UK's departure? More broadly, a question mark also hangs over whether a more streamlined and less fragmented policy area will take shape or whether the path paved by the UK will merely act as a catalyst for further disintegration of the AFSJ, encouraging other Member States to seek individual treatment to the point where it will become the rule.

This paper will examine these two issues in detail as the United Kingdom begins to unbundle itself from ASFJ policies. To this end, the mosaic nature of the UK's participation in the AFSJ will be mapped out through an examination of the various AFSJ policies. Based on this, the modalities of potential EU-UK cooperation once the UK leaves the EU will be explored. An attempt will also be made to speculate how the coherence of the AFSJ will be affected by the UK's departure.

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I Schengen and Borders

The Schengen regime was originally created in 1985 by only five of the then 12 Member States through international treaties outside the legal regime of the then European Communities.[1] Since the Schengen area's establishment, it has been the consistent position of the UK to stay out of the European border-free zone. This stance, which stems from the time of creating the Schengen area, sowed the first seeds of the special status that the UK subsequently secured for itself when justice and home affairs cooperation was pulled under the auspices of the European Union[2] and the Schengen regime was integrated to EU law.[3] The UK position of neither being a member of the Schengen regime nor participating in the EU's border cooperation policy was formalised by a Protocol agreed[4] on the eve of signing of the Treaty of Amsterdam, in what is Protocol 19 TFEU today. In essence, the Protocol lays down that the UK is in principle not covered by the Schengen *acquis,* or by the rules that 'build on' them; however the UK does have the option of requesting to take part in individual pieces of the *acquis,* subject to the following conditions; the Council of Ministers needs to approve the UK's request: and the UK also becomes bound to any subsequent measure adopted on the same field. Should the UK decide not to participate in a subsequent measure, it will cease to participate in the original, earlier piece to which it signed up. The Court of Justice of the European Union (CJEU) has added to this that the UK cannot participate in any Schengen measure that is closely linked to another Schengen measure in which the UK does not participate.[5]

In practice, the UK has requested and has been allowed to participate in a number of measures under the Schengen regime related to criminal and police cooperation[6] and, regarding these matters, it also enjoys access to the Schengen Information System.[7]

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1 *Agreement 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the Gradual Abolition of Checks at their Common Borders, Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders made on 19 June 1990.*

2 See the third pillar as established by the *Treaty on the European Union 1992.*

3 *Treaty of Amsterdam 1997.* 1999/435/EC: Council Decision of 20 May 1999 concerning the definition of the Schengen *acquis* for the purpose of determining, in conformity with the relevant provisions of the Treaty establishing the European Community and the Treaty on European Union, the legal basis for each of the provisions or decisions which constitute the *acquis* OJ L 176, 10.7.1999, p. 1–16, 1999/436/EC: Council Decision of 20 May 1999 determining, in conformity with the relevant provisions of the Treaty establishing the European Community and the Treaty on European Union, the legal basis for each of the provisions or decisions which constitute the Schengen *acquis* OJ L 176, 10.7.1999, p. 17–30.

4 Protocol integrating the Schengen *acquis* into the framework of the European Union, Protocol on the application of certain aspects of Article 7a of the Treaty establishing the European Community to the United Kingdom and to Ireland Protocol on the position of the United Kingdom and Ireland.

5 Case C-77/05 *UK v Council* [2007] ECR I-11501.

6 2000/365/EC Council Decision of 29 May 2000 concerning the request of the United Kingdom of Great Britain and Northern Ireland to take part in some of the provisions of the Schengen *acquis.*

7 The UK does not have access to the SIS alerts related to immigration. The UK requested and was granted with access to the second generation of the SIS, the SIS II including biometric data.

The UK's involvement in Frontex operations, the EU agency for operational coordination at the external borders of the EU, has been an especially complex matter. When the Agency was conceived, the Schengen Member States refused the UK's request to opt in and participate. This also gave rise to court litigation, with the CJEU confirming the Council's position.[8] While the UK was not allowed to participate fully in the Agency's work, the Frontex Regulation nonetheless contains very specific provisions on how nevertheless to allow the UK to take part in operational cooperation at the external borders.[9] Indeed, as the annually published Frontex General Reports show, the UK frequently takes part in Frontex operations. In 2015, for example, the UK led one joint return operation and participated in ten out of the 22 joint operations organised under the auspices of Frontex.[10]

With the UK having remained outside the Schengen area since its creation, its departure from the EU will not bring any marked changes to the Schengen regime. However, the UK will cease to be bound by those individual Schengen measures to which it still decided to opt in, and in general it will lose the possibility to participate in any subsequent Schengen *acquis* the EU may adopt. Furthermore, the UK will not be able to participate in Frontex operations and will not have direct access to the SIS alerts related to police and judicial cooperation. If any further cooperation is desired regarding these specific matters, it will need to be based on separate international agreements between the EU and the UK specifically designed to that end. With regard to operational cooperation, technical inter-agency agreements may need to be negotiated and implemented additionally after Brexit. Continued access to the SIS, and storing personal data, however, will surely need to be based on a full-fledged international treaty respectively ratified by the contracting States involved. Naturally, the scope of such access, namely whether it will comprise criminal and policing-related data or go further to encompass immigration related data will be a sensitive negotiating item. Once Brexit takes effect, the time required to create the new legal basis for establishing a potential framework for working together outside the EU context will surely affect the level of cooperation and information exchange between the UK and EU Member States. Compared to the current regime of cooperation, any potential new framework could very well risk a decline in the intensity and effectiveness of this relationship.[11]

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8 See case referred (n 5).

9 EU Regulation 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union as amended by Regulation 1168/2011, Article 11 on facilitation on information exchange, Article 12 on the general commitment on facilitating operational cooperation and specifically the UK's involvement in joint return operations, Article 20(5) on UK participation in Frontex operations allowed by an absolute majority of the Frontex Management Board, Article 23(4) UK representative is present at the Frontex Management Board meetings, but has no right to vote.

10 Frontex General Report 2015. http://frontex.europa.eu/assets/About_Frontex/Governance_documents/Annual_report/2015/General_Report_2015.pdf but see the general reports on 2014, 2013 and 2012 to the same effect.

11 For a similar conclusion see B. Ryan (2016), 'The EU's Borders: Schengen, Frontex and the UK' *Free movement immigration blog,* Garden Court Chambers, London (www.freemovement.org.uk/brexit-and-borders-schengen-frontex-and-the-uk/).

II Asylum

The United Kingdom opted in to all the EU asylum law instruments which were adopted during the so-called first phase of the Common European Asylum System (CEAS), meaning that it was initially bound by the Qualification Directive, the Procedures Directive, the Reception Conditions Directive and the Dublin and Eurodac Regulations.[12] When these instruments were amended or recast during the second phase of the CEAS, the UK decided to opt in only to the Dublin and Eurodac Regulations, and to the new instrument establishing the EU asylum agency, which was called the European Asylum Support Office.[13] As a consequence of this, while most EU Member States repealed the first phase versions of Directives on Qualification, Procedures and Reception Conditions among themselves through the adoption of second phase instruments, the UK and Ireland remained bound by those first phase items. The question of whether the UK is still bound by an AFSJ instrument in which it participated originally but, on the eve of its amendment/recast, decided not participate in the new instrument replacing the original is an issue that neither the Treaties nor the Protocols address specifically. The special protocols providing for the UK's special status concern legislation stemming from and building on the Schengen acquis, as discussed above, judicial cooperation in criminal matters and police cooperation, are elaborated in detail below. This issue has not emerged in CJEU cases, either. Both in academic writing and in practice, the default position has been that the UK remains bound by the first phase asylum legislation *vis-á-vis* the other EU Member States, which could not only have repealed the first phase acquis among themselves but not in relation to the UK.[14]

After Brexit, neither the first phase nor the three second phase EU asylum law instruments will bind the UK. This will have two major repercussions. First, in relation to the first phase instruments – the Directives on Qualification, Procedures and Reception Conditions – the UK will cease to be under the obligation to ensure the heightened and additional forms of international protection, procedural rights and guarantees that these instruments afford to asylum-seekers. Unless the UK decides to keep its domestic refugee law in its current state,

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[12] Respectively: Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted OJ L 304, 30.9.2004, p. 12). Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures for granting and withdrawing refugee status OJ L 326, 13.12.2005, p. 13). Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers OJ L 31, 6.2.2003, p. 18). Commission Regulation (EC) No 1560/2003 of 2 September 2003 laying down detailed rules for the application of Council Regulation (EC) No 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national OJ L 222, 5.9.2003, p. 3–23; Council Regulation (EC) No 2725/2000 of 11 December 2000 concerning the establishment of Eurodac for the comparison of fingerprints for the effective application of the Dublin Convention OJ L 316, 15.12.2000, p. 1. and to Council Regulation (EC) No 407/2002 of 28 February 2002 laying down certain rules to implement Regulation (EC) No 2725/2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention OJ L 62, 5.3.2002, p. 1.

[13] Regulation (EU) No 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office OJ L 132, 29.5.2010, p. 11–28.

[14] See Steve Peers, *EU Justice and Home Affairs Law,* Vol I. (Oxford University Press 2016) pp. 32–33.

which is harmonised with the first phase legislation, all the added value that EU asylum law provided will be gone. The UK will obviously continue to be bound by the 1951 Geneva Convention Relating to the Status of Refugees. However, all the innovations and standards of EU asylum law, which purposefully went beyond the rights and protection afforded by the 1951 Geneva Convention, will not necessarily continue to apply in the UK. The following selected examples highlight how significant issues are at stake should the UK decide to eliminate the first phase EU asylum law from its domestic law.

EU asylum law created a new, additional form of international protection for those persons who do not qualify under the 1951 Geneva Convention's definition as refugees, called subsidiary protection. In order to be granted subsidiary protection rather than refugee status, it has to be shown that the person fled their own country where they faced serious harm (death penalty, torture and/or indiscriminate violence arising from an armed conflict).[15] If this subsidiary protection ceases to be available for asylum seekers, then the range of forms of protection provided for them will become narrower by falling back to the 1951 Geneva Convention's level, which provides protection only for those who have been persecuted on specifically mentioned grounds, hence qualify as refugees. The Qualifications Directive also introduced minimum standards regarding the rights to be granted to recognised refugees (employment, social benefit, education, housing), an area where the 1951 Geneva Convention merely provides options to the Contracting States. The Procedures Directive maps out in detail the procedural rights and guarantees to be afforded to asylum seekers in processing their claim, conducting personal interviews, and handling the asylum procedure, such as right to information, right to interpretation, the right to legal assistance and guarantees for unaccompanied minors. The 1951 Geneva Convention is largely silent on these procedural matters. To reiterate, any and all innovations of first phase EU asylum law will disappear unless the UK deliberately maintains its domestic legislation, which has been aligned with EU asylum law. Should that not be the case, the 1951 Geneva Convention, as complemented with the jurisprudence of the European Court of Human Rights,[16] will be the sole framework shared between the EU and the United Kingdom regarding asylum law. If the UK were to afford international protection in a more restricted way, one plausible result could be that asylum seekers would tend not to file their application in the UK but elsewhere in the EU.

The second imminent effect of Brexit on asylum law would, however, be more detrimental to the UK itself, as it would lose access to Eurodac data and cease to benefit from the Dublin system. In practical terms, this would mean that the UK would not be able to directly retrieve information from Eurodac containing the personal data, including fingerprints, of asylum seekers who have already filed an asylum application and have registered in an EU Member State. In the same vein, as the UK will not be able to transfer asylum-seekers back to those EU Member States

[15] See Article 15 of the 2004.83 Directive serious harm consists of death penalty or execution; or torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.

[16] See the ECtHR's case law on the non-refoulement principle elevating human rights standards in refugee law under the auspices of the European Convention of Human Rights.

where the first application for asylum was made (or should have been made), the problem of how to filter dual or multiple applications will occur immediately. The UK will also not benefit from the European Asylum Support Office's (EASO) operational, research and other support.

One possible option to maintain access to Eurodac, to continue to benefit from the Dublin system and to keep operational contacts with the EASO would be to enter into international agreements after Brexit. All EEA countries (Norway, Iceland, Switzerland and Liechtenstein) have done so. Given its special status, Denmark also benefits from these EU instruments through international agreements.[17] It must be emphasised, however, that all these countries 'associated' themselves with EU asylum law and it was on that basis that subsequent agreements were entered into, and these allow access to Eurodac, Dublin transfers and EASO support. Association in this context means that Norway, Iceland and the other countries unilaterally accept all EU asylum laws that are adopted; should any specific EU asylum law not be recognised then the underlying international agreement is suspended, hence access to Eurodac, Dublin transfers and EASO support becomes unavailable. The issue naturally arises that, should the UK wish to benefit from the above EU asylum instruments, it must align itself to EU asylum law in general, from which it is about to depart. It is highly implausible that, without some association with EU asylum law, any such international agreement would be fostered from the EU's side, if for no other reason than it would set a precedent contrary to the practice followed so far in relation to the EEA countries.

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[17] 2006/167/EC: Council Decision of 21 February 2006 on the conclusion of a Protocol to the Agreement between the European Community and the Republic of Iceland and the Kingdom of Norway concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Iceland or Norway (Text with EEA relevance); OJ L 57, 28.2.2006, p. 15–15, 2009/487/EC: Council Decision of 24 October 2008 on the conclusion of a Protocol between the European Community, the Swiss Confederation and the Principality of Liechtenstein to the Agreement between the European Community and the Swiss Confederation concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Switzerland OJ L 161, 24.6.2009, p. 6–7; 2006/188/EC: Council Decision of 21 February 2006 on the conclusion of the Agreement between the European Community and the Kingdom of Denmark extending to Denmark the provisions of Council Regulation (EC) No 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national and Council Regulation (EC) No 2725/2000 concerning the establishment of Eurodac for the comparison of fingerprints for the effective application of the *Dublin Convention* OJ L 66, 8.3.2006, p. 37–37; Council Decision of 7 March 2011 on the conclusion of a Protocol between the European Community, the Swiss Confederation and the Principality of Liechtenstein on the accession of the Principality of Liechtenstein to the Agreement between the European Community and the Swiss Confederation concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Switzerland OJ L 160, 18.6.2011, p. 37–38; Council Decision of 7 March 2011 on the conclusion of a Protocol between the European Community, the Swiss Confederation and the Principality of Liechtenstein on the accession of the Principality of Liechtenstein to the Agreement between the European Community and the Swiss Confederation concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Switzerland OJ L 160, 18.6.2011, p. 37–38; Arrangement between the European Union and the Kingdom of Norway on the modalities of its participation in the European Asylum Support Office, OJ L 109, 12.4.2014, p. 3–8; Arrangement between the European Union and the Principality of Liechtenstein on the modalities of its participation in the European Asylum Support Office OJ L 170, 11.6.2014, p. 50–57; Arrangement between the European Union and the Republic of Iceland on the modalities of its participation in the European Asylum Support Office OJ L 106, 9.4.2014, p. 2–3.

III Legal Migration

The UK has largely stayed out of the instruments through which the EU has sought to facilitate the legal migration of third country nationals to the EU, and is therefore absent from the Directives on the status of long term residents, on the entry and stay of seasonal workers, researchers, students, highly skilled workers, and the corresponding single procedure to reside and work in the EU.[18] The instruments to which the UK did opt in are few, such as the Regulation on uniform residents permit and social security coordination, and Decisions on information exchange on migration policy and the Migration Network.[19] The loss of these instruments will not leave a significant vacuum when the UK leaves the EU.

IV Irregular Migration

The UK has similarly abstained from participating in the bulk of the EU legislation tackling irregular migration. In this vein, the UK is not bound by the so-called Returns Directive, aligning EU Member States' legislation on expulsion and deportation procedures and laying down common minimum standards regarding those procedures.[20] Nor does the UK take part in the Sanctions Directive, which provides administrative and criminal sanctions to those who employ illegally staying third country nationals,[21] the Directive on defining the facilitation of

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[18] Respectively: Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents OJ L 16, 23.1.2004, p. 44–53; Directive (EU) 2016/801 of the European Parliament and of the Council of 11 May 2016 on the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects and au pairing OJ L 132, 21.5.2016, p. 21–57; Directive 2014/36/EU of the European Parliament and of the Council of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers OJ L 94, 28.3.2014, p. 375–390; Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State; OJ L 343, 23.12.2011, p. 1–9; Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment OJ L 155, 18.6.2009, p. 17–29; Council Directive 2005/71/EC of 12 October 2005 on a specific procedure for admitting third-country nationals for the purposes of scientific research OJ L 289, 3.11.2005, p. 15–22; Council Directive 2004/114/EC of 13 December 2004 on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service OJ L 375, 23.12.2004, p. 12–18.

[19] Council Regulation (EC) No 1030/2002 of 13 June 2002 laying down a uniform format for residence permits for third-country nationals OJ L 157, 15.6.2002, p. 1–72; Council Regulation (EC) No 859/2003 of 14 May 2003 extending the provisions of Regulation (EEC) No 1408/71 and Regulation (EEC) No 574/72 to nationals of third countries who are not already covered by those provisions solely on the ground of their nationality OJ L 124, 20.5.2003, p. 1–3; 2008/381/EC: Council Decision of 14 May 2008 establishing a European Migration Network OJ L 131, 21.5.2008, p. 7–12.

[20] Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals OJ L 348, 24.12.2008.

[21] Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals OJ L 168, 30.6.2009, p. 24–32.

unauthorised entry[22] and the Directive on assistance in cases for the purposes of removal by air;[23] the list could only go on. As such, Brexit will not bring much change with respect to irregular migration as the UK has already distanced itself from this regulatory field of the EU. There is however one specific area, which may cause some headache after Brexit. The EU has concluded a number of readmission agreements with third countries to take back their nationals whose presence in the EU is found to be unauthorised. Some of these agreements go even further and ensure that the third country not only takes back its own nationals but also any other person who holds a visa for that third country or who has transited, resided or has been present in that country.[24] The UK has participated in most of these treaties, although it does not apply the agreements with Turkey, Azerbaijan, Armenia and Cape Verde in practice.[25] After Brexit, all these agreements will need to be renounced from the side of the UK but, more importantly, new, it will be necessary to conclude bilateral readmission agreements. The difficulty with such agreements, however, is how to offer a bargaining chip for the third country to actually undertake the obligation of taking back their own nationals and other persons, which the UK now has to secure alone.

V Judicial Cooperation in Criminal Matters

Up until the Treaty of Lisbon, the UK was fully engaged with the other EU Member States regarding measures related to judicial cooperation in criminal matters, becoming bound by the growing body of substantive and procedural EU criminal law unanimously adopted in the Council. The Treaty of Lisbon ended the intergovernmental nature of judicial cooperation in criminal matters and introduced the Community method to this area as well. In parallel with this, the UK's involvement in this area also significantly changed.

Protocol 21[26] to the Treaty of Lisbon brought a distinct change to the UK position by introducing the opt-out regime, akin to the one applicable to judicial cooperation in civil matters. The Protocol brought with it the following changes. First of all, the UK, together with Ireland,[27] became an opt-out country by default, meaning that in principle these States do not

[22] Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence OJ L 328, 5.12.2002.

[23] Council Directive 2003/110/EC of 25 November 2003 on assistance in cases of transit for the purposes of removal by air OJ L 321, 6.12.2003, p. 26–31.

[24] Over the last ten years, the EU has concluded 17 readmission agreements with Hong Kong, Macao, Sri Lanka, Albania, Russia, Ukraine, FYROM, Bosnia & Herzegovina, Montenegro, Serbia, Moldova, Pakistan, Georgia, Armenia, Azerbaijan, Turkey and Cape Verde respectively.

[25] Peers (n 14) pp. 453.

[26] Protocol 21 on the Position of the United Kingdom and Ireland in Respect of the Area of Freedom Security and Justice.

[27] Ireland has no opt-out regarding to anti-terrorist sanction see Article 9 of Protocol 21. The UK has also made a declaration of the same effect; see Declaration 65 attached to the Final Act of the Intergovernmental Conference which adopted the *Treaty of Lisbon.*

subscribe to the EU criminal law acquis that has been developed after the entry into force of the Treaty of Lisbon unless they unilaterally wished to opt in to individual measures. With regard to the latter, an opt-in notice is to be given within three months after the initial proposal is made, or alternatively at any time after the measure is adopted. In practice, the UK has by and large opted in to half of the measures adopted in the field of EU criminal law following the entry into force of the Lisbon Treaty,[28] at times even after initial concerns regarding a given proposal.[29] The UK has notably been absent from the Children's rights in criminal proceedings Directive, the Presumption of innocence Directive, the Confiscation Directive and the Right to access to a lawyer Directive,[30] although absence from some more recent instruments could also be attributable to the upcoming referendum.

Even so, the second new feature with regard to the UK's position after the entry into force of the Treaty of Lisbon, introduced by Protocol 36 on transitional provisions attached to the Treaty of Lisbon, is more striking than the mere extension of the opt-out regime to the field of criminal law, with the possibility to opt in to individual measures. According to this Protocol, it became possible for the UK to invoke a block opt-out, i.e. to disentangle itself from all pre-Lisbon EU criminal law in one go and to inform the Council later that it still wishes to accept certain individual measures. The block opt-out did not encompass the acquis which were amended during the transitional period of five years after the entry into force of the Treaty of

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28 Directive 2014/62/EU of the European Parliament and of the Council of 15 May 2014 on the protection of the euro and other currencies against counterfeiting by criminal law, and replacing Council Framework Decision 2000/383/JHA OJ L 151, 21.5.2014, p. 1–8; Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters OJ L 130, 1.5.2014, p. 1–36; Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA Directive 2011/99/EU of the European Parliament and of the Council of 13 December 2011 on the European protection order OJ L 338, 21.12.2011, p. 2–18; Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings; OJ L 280, 26.10.2010, p. 1–7; Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings; OJ L 142, 1.6.2012, p. 1–10. Directive 2013/40/EU of the European Parliament and of the Council of 12 August 2013 on attacks against information systems and replacing Council Framework Decision 2005/222/JHA OJ L 218, 14.8.2013, p. 8–14.

29 See for example Commission Decision of 14 October 2011 on the request by the United Kingdom to accept Directive 2011/36/EU of the European Parliament and of the Council on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA extending the territorial scope of the Directive to the United Kingdom held a year after its initial adoption.

30 Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings OJ L 132, 21.5.2016, p. 1–20; Directive 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings; OJ L 65, 11.3.2016, p. 1–11; Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union; OJ L 127, 29.4.2014, p. 39–50; Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty OJ L 294, 6.11.2013, p. 1–12.

Lisbon, and those instruments which the UK opted into after the entry of the Treaty of Lisbon. The timeframe for invoking the block opt-out was the end of the transitional period, which expired on 1 December 2014. The UK did avail itself of this possibility and notified the Council of its intention to opt out of the EU criminal law acquis adopted before the Treaty of Lisbon, despite the fact that all these items were adopted with unanimity at the time in the Council, including the British vote.[31] With the same move, the UK also informed the Council of its intention to re-opt in to some 35 pre-Lisbon instruments, including policing related ones (see below),[32] and was authorised by the Commission and the Council to do so.[33] The instruments to which the UK decided to opt back into included the European Arrest Warrant, participation in Europol and Eurojust and exchange of criminal records, which were the biggest concerns for the other EU Member States at the time.

In sum, despite the strong opt-out regime introduced by Protocols 21 and 36 and invoked in practice, the UK continued to be part of the most important aspects of EU judicial cooperation in criminal matters, namely participation in most of the mutual recognition instruments, chiefly the European Arrest Warrant (see the discussion below), selected pieces of EU procedural guarantees and substantive criminal law, participation in the criminal cooperation agencies and networks and maintaining information exchange.

Once Brexit becomes a reality, the landscape will be profoundly different, with the quality and intensity of criminal cooperation in all likelihood falling back to the level of where it was prior to the nineties, at best. This bleak scenario will be illustrated in detail below, in the context of four specific areas of EU judicial cooperation: judicial cooperation instruments based on the mutual recognition principle; EU procedural guarantees of suspected and accused persons; EU substantive criminal law; and Eurojust.

1 Mutual Recognition Instruments, European Arrest Warrant

The most affected area will probably be the judicial cooperation instruments based on the so-called mutual recognition principle. Mutual recognition, seen as a marked departure from the classical mutual legal assistance-based criminal cooperation, was probably the EU's most distinct contribution to judicial cooperation between EU Member States' authorities. Based on

31 UK notification according to Article 10(4) of Protocol 36 to TEU and TFEU ST 12750/13 Brussels, 26 July 2013.

32 Notification of the United Kingdom under Article 10(5) of Protocol 36 to the EU Treaties 15398/14 27 November 2015.

33 See the respective Commission and Council decision authorising the UK to opt back to the listed measures 2014/857/EU Council Decision of 1 December 2014 concerning the notification of the United Kingdom of Great Britain and Northern Ireland of its wish to take part in some of the provisions of the Schengen *acquis* which are contained in acts of the Union in the field of police cooperation and judicial cooperation in criminal matters and amending Decisions 2000/365/EC and 2004/926/EC; 2014/858/EU Commission Decision of 1 December 2014 on the notification by the United Kingdom of Great Britain and Northern Ireland of its wish to participate in acts of the Union in the field of police cooperation and judicial cooperation in criminal matters adopted before the entry into force of the Treaty of Lisbon and which are not part of the Schengen *acquis.*

the mutual recognition principle, direct exchange between the competent authorities, with no involvement of the executive branch, has become the norm. Judicial acts of another EU Member State authority are recognised and enforced as if they were domestic in nature and the double criminality principle is set aside in respect of 32 listed offences.[34] Grounds for the refusal of recognition and enforcement of a judicial act of another EU MS authority have been severely curtailed; limited to a handful of instances involving the *ne bis in idem* principle, territoriality and amnesty.

The flagship instrument of EU judicial cooperation based on the mutual recognition principle is undoubtedly the European Arrest Warrant (EAW), which created a very effective and much simplified extradition and surrender procedure.

The EAW, however, also proved to be the most problematic mutual recognition instrument. The proportionality of its use, the lack of fundamental rights guarantees and especially the absence of fundamental rights-based grounds for refusal remain recurring issues of concern in its application and interpretation.[35] Over time, EU procedural rights legislation, the recent case law of the Court of Justice of the European Union and, and more generally, the EU Charter of Fundamental Rights placing EU criminal law in a fundamental rights context since the Treaty of Lisbon entered into force have improved the application of the EAW. And while the EAW has featured in the tabloid headlines of the British press many times,[36] it nonetheless proved important enough to opt back into when London's choice was made on what to keep and what to abandon from the pre-Lisbon criminal law *acquis.*[37]

Without mutual recognition in place after Brexit, extradition between the UK and EU Member States will become significantly lengthier and more complex, with the fall-back legal instrument being the system of multilateral extradition built upon the European Convention on Extradition of 13 December 1957, which the EAW was meant to replace entirely. As with most other EU mutual recognition instruments, the EAW also relies on instruments adopted previously under the auspices of the Council of Europe (CoE) and contains a so-called disapplication clause, which provides that EU Member States discontinue applying the CoE Extradition Convention among themselves, and only apply the Convention *vis-á-vis* non-EU states.[38] Once Brexit takes place, the discontinuation clause of the EAW will no longer apply to the UK and the 1957 Extradition Convention will reanimate for EU UK extradition matters as

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34 The first list of the criminal offences not being subject to the double criminality rule was created by the European Arrest Warrant, and remained a standard ever since. The list itself is not unproblematic as it does not define the offences but merely enlists them see also C-303/05 *Advocaten voor de Wereld VZW* ECLI:EU:C:2007:261 where the CJUE has not shared these concerns.

35 C-404/15 and C-659/15 PPU *Aranyossi and Căldăraru* ECLI:EU:C:2016:198.

36 E.g. http://www.dailymail.co.uk/news/article-2058212/British-woman-thrown-cell-European-Arrest-Warrant-crime-boyfriend-allegedly-committed-15-years-ago.html.

37 http://www.dailymail.co.uk/news/article-2808591/Britain-haven-Europe-s-rapists-murderers-child-molesters-without-EU-arrest-warrant-Tories-warn.html.

38 Article 31 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA).

the UK will then be regarded as a third country. The 1957 Extradition Convention applies the double criminality principle, allows the non-extradition of nationals, allows a political offence exception (albeit curtailed by subsequent protocols), has no time limits and creates an obligation for the requested State to extradite under public international law, which is admittedly less cumbersome then EU law. The less strict regime of extradition will also make it easier to avoid extradition for those EU Member States' citizens who stay in the UK and are subject to an extradition request from an EU Member State. This is not particularly good news for a country which, up until now, has received a comparatively high number of requests from EU Member States (with 95% of the persons requested and extradited to the other EU Member States not being British citizens) whereas the UK itself has made significantly fewer requests to other EU Member States.[39]

If an extradition regime stricter than that of the 1957 Extradition Convention is sought then that will necessitate the conclusion of an EU-UK agreement on this matter. The EU has already concluded extradition agreements with non-EU countries, such as with Norway and Iceland,[40] and with the United States[41]. A common feature of these agreements is that, despite their bilateral nature, they create a much looser legal framework than the EAW, chiefly that the possibility to deny the extradition of nationals is maintained.

The situation is very similar with regard to a number of other mutual recognition instruments which the UK retained from the acquis prior to the Treaty of Lisbon or opted into post-Lisbon. With regard to those EU mutual recognition instruments which contain a disapplication clause, the disapplied international treaty (in most instances a Council of Europe convention), will be revived and become applicable between the EU Member States and the United Kingdom, since the latter, post-Brexit, will be considered a third country. This, for example, will be the fate of the European Investigation Order. In its place, the 1959 European Convention on Mutual Assistance in Criminal Matters and its Protocols (1959 MLA) will be applicable again. This Convention is based on mutual legal assistance and lacks the intensity and compelling nature of the EU mutual recognition instruments, stating no deadlines for fulfilling requests and containing no provisions for real time investigating measures, just to mention but a couple of the drawbacks of the 1959 MLA Convention as compared to the European Investigation Order.[42] In practice, the drawbacks of the 1959 MLA Convention might be overcome, thanks to the very close working relationships between the UK competent authorities

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39 In 2015 alone, the UK received approx. 12 000 EAW requests, arrested some 2000 and surrendered 1000 persons to other EU Member States while it made approx. 220 requests and received 150 arrested and 120 surrendered persons. Wanted from the UK: European Arrest Warrant statistics 2009 - May 2016 (Calendar Year) Wanted by the UK: European Arrest Warrant statistics 2009 – May 2016 (Calendar Year) See http://www.nationalcrimeagency.gov.uk/publications/european-arrest-warrant-statistics/wanted-by-the-uk-european-arrest-warrant-statistics.

40 *Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the surrender procedure between the Member States of the European Union and Iceland and Norway* OJ L 292, 21.10.2006, p. 1–1.

41 *Agreement on extradition between the European Union and the United States of America* OJ L 181, 19.7.2003, p. 27–33.

42 Article 34. Directive 2014/41/EU of the European Parliament and the Council of 3 April 2014 regarding the European Investigation Order in criminal matters.

and those of the EU Member States, which have been established under the EU regime. This may breathe new life into the otherwise flexible arrangements provided by the 1959 MLA Convention and will perhaps enable a degree of cooperation that is comparable to the one departed from. The other option is of course to conclude a self-standing EU-UK mutual legal assistance agreement, as the EU has already done with the USA[43] and Japan[44].

In the same vein the same can be said of the Framework Decision on Confiscation Orders,[45] the Framework Decision on Taking account of Convictions,[46] and the Council Framework Decision on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences.[47] In all these cases, the Council of Europe Conventions will revive and provide a fall back option. It has to be pointed out, however, that, as international treaties, the problem posed by non-ratification and reservation by either the UK or some other EU Member State may further hinder cooperation, not to mention the lack of any centralised enforcement mechanism, which is the norm regarding international agreements.

There are quite a few EU mutual legal instruments, however, which do not build on a Council of Europe or other convention and which could readily serve as a fall back option after Brexit. This, for example, is the case regarding the Framework Decision on the Mutual Recognition of Financial Penalties[48] and the Framework Decision on mutual recognition to decisions on supervision measures as an alternative to provisional detention,[49] which the UK judicial authorities will no longer be able to benefit from (e.g. financial penalties issued being directly recognised and enforced by another EU Member State).

In essence, saying goodbye to the EU mutual recognition instruments will have a significant impact on judicial cooperation in criminal matters between the EU and the UK when it comes to extradition and requesting legal assistance. Particularly with regard to extradition, the current

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43 *Agreement on mutual legal assistance between the European Union and the United States of America* OJ L 181, 19.7.2003, p. 34–42.

44 *Agreement between the European Union and Japan on mutual legal assistance in criminal matters* OJ L 39, 12.2.2010, p. 19–35.

45 Council of Europe Convention of 8 November 1990 on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime see Article 21 Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders.

46 *The European Convention of 28 May 1970 on the International Validity of Criminal Judgments* see Article 4 Council Framework Decision 2008/675/JHA of 24 July 2008 on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings.

47 *The European Convention on the International Validity of Criminal Judgements of 28 May 1970, The European Convention on the transfer of sentenced persons of 21 March 1983* and the Additional Protocol thereto of 18 December 1997. See Article 26 Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union.

48 Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties.

49 Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention.

level and intensity of surrender and extradition procedures ensured by the EAW may necessitate the conclusion of a new agreement between the EU and the UK in order to go beyond the fall-back 1957 CoE Extradition Convention and maintain the effectiveness of cooperation now enjoyed inside the EU.[50]

2 Procedural Rights and Victim Protection

Since mutual recognition instruments provide only very few grounds for EU Member States to refuse to recognise and enforce the judicial order of the other Member State, it is always essential that procedural guarantees available for suspected and accused persons are ensured at the same level throughout the EU. This requirement triggered a series of EU legislation, harmonising various aspects of procedural rights in the course of criminal procedures, with the shared aim of going beyond the protection provided by the rights and liberties guaranteed by the European Convention of Human Rights (ECHR) as interpreted by the European Court of Human Rights. After Brexit, the UK will need to decide whether to maintain its domestic legislation, which is already harmonised with EU procedural guarantees, namely regarding absentia trials,[51] the right to interpretation and translation[52] and the right to information[53], or to discard it. The latter would mean that while UK citizens facing criminal prosecution in EU Member States will benefit from a higher level of procedural guarantees harmonised at the EU level, EU citizens tried in the UK will have recourse to the protection level afforded by UK domestic law, subject to the obligations set by the ECHR only. Furthermore, the EU victim protection instruments,[54] to which the UK opted into, will also cease to apply after Brexit, and the forms of protection will only be shared on the basis of UN and CoE conventions, unless the UK decides that despite leaving the EU it maintains the previously harmonised domestic legislation.[55]

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[50] See also Peers EU Referendum Brief 5: How would Brexit impact the UK's involvement in EU policing and criminal law? http://eulawanalysis.blogspot.be/search?updated-max=2016-06-21T11:34:00-07:00&max-results=7&start=15&by-date=false.

[51] Council Framework Decision2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial.

[52] Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings.

[53] Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings.

[54] Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA Directive 2011/99/EU of the European Parliament and of the Council of 13 December 2011 on the European protection order OJ L 338, 21.12.2011, p. 2–18.

[55] *United Nations Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)* adopted on 18 December 1979, the CEDAW Committee's recommendations and decisions, *United Nations Convention on the Rights of the Child adopted on 20 November 1989* and the *Council of Europe Convention on preventing and combating violence against women and domestic violence adopted on 7 April 2011.*

3 EU Substantive Criminal Law

In exercising its block opt-out from EU criminal law, the UK has already untangled itself from most of the EU's substantive criminal law legislation. The instruments to which it opted into after the Treaty of Lisbon are the Child Pornography Directive,[56] the Directive on Trafficking in Human Beings,[57] the Cybercrime Directive[58] and the Directive on Counterfeiting of Means of Payment.[59] Apart from the Directive on Counterfeiting, the other three mentioned instruments build on international conventions,[60] which will continue to serve as a shared framework after Brexit.

4 Eurojust

The UK has participated in the work of Eurojust, the judicial cooperation unit of the EU, ever since its establishment and, after exercising the block opt-out, it re-opted in to all the instruments providing the legal framework under which the Unit operates.[61] In fact, the UK has been actively involved in cooperation under the auspices of Eurojust, and in 2015 alone it requested cooperation in 87 out of all the approximately 2000 cases that Eurojust administered. In the same period, other EU Member States requested the UK to take action in 243 cases.[62] Out of the total number of 274 coordination meetings held in 2015,[63] the UK organised 28 and

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56 Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA OJ L 335, 17.12.2011, p. 1–14.

57 Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA OJ L 101, 15.4.2011, p. 1–11.

58 Directive 2013/40/EU of the European Parliament and of the Council of 12 August 2013 on attacks against information systems and replacing Council Framework Decision 2005/222/JHA OJ L 218, 14.8.2013, p. 8–14.

59 Directive 2014/62/EU of the European Parliament and of the Council of 15 May 2014 on the protection of the euro and other currencies against counterfeiting by criminal law, and replacing Council Framework Decision 2000/383/JHA OJ L 151, 21.5.2014, p. 1–8.

60 In the case of the *Cybercrime Directive the Budapest Convention (Council of Europe Convention on Cybercrime 2001), Child Pornography Directive Lanzarote Convention (Council of Europe Convention on Protection of Children against Sexual Exploitation and Sexual Abuse 2007), Trafficking in Human Beings Palermo Convention (United Nations Convention against Transnational Organized Crime and the Protocols There to 2000).*

61 Decision 2002/187/JHA on setting up Eurojust, as amended by Council Decision 2003/659/JHA, and Council Decision 2009/426/JHA of 16 December 2008 on the strengthening of Eurojust, commonly referred as Eurojust Decision.

62 72 bilateral (between two EU MSs) and 15 multilateral (more than two EU MSs) cases see *Eurojust Annual Report 2015.* p. 11.

63 Coordination meeting are attended by judicial and law enforcement personnel and are designed to facilitate the exchange of information, identify and implement means and methods to support the execution of MLA requests and coercive measures (e.g. search warrants and arrest warrants), coordinate ongoing investigations and prosecutions, and detect, prevent or solve conflicts of jurisdiction, *ne bis in idem* related issues and other legal and evidential problems.

participated in 69.[64] Out of the 13 coordination centres,[65] allowing for real time information exchange and simultaneous execution of operations, the UK participated in 7 and organised 1.[66] If the UK still wishes to cooperate with Eurojust after Brexit, this will need to be based on a separate agreement[67] so as to allow information exchange and the secondment of liaison officers/magistrates. The degree and intensity of cooperation will largely depend on the terms of such an agreement. The agreement between Eurojust and the United States, for example, allows for very close cooperation between the judicial authorities, but even there, participation in strategic meetings needs the approval of the Member States concerned and cooperation is request-based.[68]

Summarising the above, the UK's departure from the EU will mutually impact the UK and the EU Member States when it comes to judicial cooperation in criminal matters. Since the legal framework of cooperation and information exchange will largely disappear, the impact will likely be negative on both sides. Maintaining the current efficiency of extradition secured by the EAW will be a matter of prime concern and a separate agreement will likely be necessary. Other mutual recognition items will be replaced by international treaties at best, or simply vanish after Brexit, again calling for the adoption of new agreements. Cooperation with Eurojust will certainly need an underlying agreement. Procedural guarantees will be based on the protection level afforded by the ECHR, unless the UK unilaterally decides to maintain domestic legislation to that effect. To re-establish cooperation through new international treaties and other instruments will take time to conclude and will bring with them a transition period of uncertainty that risks the degradation of the quality and intensity of cooperation that has existed heretofore.

VI Judicial Cooperation in Civil Matters

Judicial cooperation in civil matters also emerged as an area of common interest under the Justice and Home Affairs cooperation envisaged by the Treaty of the European Union. As opposed to criminal cooperation, cooperation in civil matters was already placed under the Community method by the Treaty of Amsterdam, and qualified majority voting has subsequently become the rule.[69] From the outset, the United Kingdom has enjoyed an opt-out related

64 *Eurojust Annual Report 2015.* p. 15.

65 Eurojust's coordination centres facilitate the exchange of information among judicial authorities in real time and enable direct support towards the coordinated, simultaneous execution of, *inter alia,* arrest warrants, searches and seizures in different countries.

66 *Eurojust Annual Report 2015.* p. 17.

67 Article 26a of the Eurojust Decision.

68 Article 7 *Agreement between Eurojust and the United States of America* (2006).

69 The Treaty of Amsterdam inserted a new Tittle IIIa on Visa, Asylum, Immigration and other Policies related to the Free Movement of Persons to the then EC Treaty, where Article 73o TEC provided that for a transitional period of 5 years the Council shall act unanimously on a proposal from the Commission and only consult the European Parliament. After the expiry of the transitional period however the Council shall take a decision to transit to the co-decision procedure with qualified majority vote when acting under the above title.

to the instruments adopted in the field of judicial cooperation in civil matters. Despite the general opt-out position and the recurring arguments related to the difficulties in alleviating the differences between the civil law tradition and common law, the UK did opt in to a number of instruments of judicial cooperation in civil matters. These included the those facilitating the free circulation of judgments in the area of civil and commercial matters, including legislation related to the recognition and enforcement of judgments,[70] instruments enhancing cross-border recovery of claims and enforcement of judgments,[71] and instruments related to insolvency,[72] service of documents,[73] and taking of evidence.[74] All these instruments are designed to enhance the efficiency of cross-border litigation and to ensure that judgments are recognised and enforced by the courts of other EU Member States. Since most of the above legal acts have been in force for quite some time, there is ample data available to demonstrate their positive effects. All reports evaluating the above instruments show the clear reduction in the length of procedures and the amount of expenses and the benefits of easily available documentation and evidence. Legal certainty has been also improved to a great extent, given the assurance that judgments will be recognised and enforced in the other EU Member States.[75] In addition to this, in the field of civil procedure, the overall effect of the mutual recognition principle was the abolition of the so-called exequatur procedure (an interim decision of the enforceability of the underlying foreign judgment). Abandoning this largely formal interim phase proved to significantly shorten proceedings and also make them less expensive.

After Brexit, these instruments will no longer be available to either the UK authorities or natural and legal persons. This will mean that their added value of efficiency, direct judicial communication and, last but not least, the mutual recognition regime whereby judicial acts are

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70 Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast).

71 Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims; REGULATION (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure; Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure Regulation (EU) No 655/2014 of the European Parliament and of the Council of 15 May 2014 establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters.

72 Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings.

73 Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) No 1348/2000.

74 Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters.

75 Report on the application of Regulation (EC) No 1393/2007 of the European Parliament and of the Council on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents) COM(2013) 858 final Assessment of the socio-economic impacts of the policy options for the future of the European Small Claims Regulation 2013, Report on the application of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings COM(2012) 743 final, Study on the application of Articles 3(1)(C) and 3, and Articles 17 and 18 of the Council Regulation (EC) NO 1206/2001 of 28 May 2001 on cooperation between the courts of the member states in the taking of evidence in civil or commercial matters – just to name a few out of the many evaluations see http://ec.europa.eu/justice/civil/document/index_en.htm.

in principle recognised – unless there are public policy objections – will be gone. In some cases – for example to the service of documents and choice of court agreements – cooperation will be possible on the basis of international conventions mostly adopted under the auspices of the Hague Conference on Private International Law.[76] These however operate on the mutual assistance principle with the involvement of central authorities and contain significantly fewer obligations for state parties. However, for EU instruments facilitating the enforcement and enforceability of judgments – the European Enforcement Order, European Order for Payment and European Small Claims Procedure – these are all based on the principle of mutual recognition and there will simply be no underlying instrument. This will clearly be to the disadvantage of the parties to cross-border civil procedures.

There is one particular instrument in the area of EU judicial cooperation in civil matters, related to family matters, to which the UK did opt in, known as the Brussels II bis Regulation.[77] This instrument deals with matters related to the recognition and enforcement of matrimonial matters, parental responsibility and civil law aspects of child abduction. With respect to parental responsibility and child abduction matters, the Regulation builds heavily on the 1980 and 1996 Hague Conventions.[78] However, it takes the ideas of the two instruments much further through the introduction of the mutual recognition principle, shortened procedural deadlines, direct communication between the competent authorities and making the refusal to transfer the child much more difficult for the requested authority. These advances of the Regulation will be lost when Brexit takes place and cooperation will be undertaken solely under the rules of the old Hague Conventions. Similarly, the recognition and enforcement of judgments related to matrimonial matters will share the same fate, with old international agreements[79] replacing the Regulation.

It needs to be added, however, that in the area of judicial cooperation in civil matters there is a specific 'custom' of transforming the adopted EU acquis to international agreements. Denmark has been an opt-out country (with no possibility to opt in to individual EU measures) ever since the EU began to pursue judicial cooperation in civil matters, yet it has availed itself of a number of EU legal acts adopted in this field through international agreements.[80] These

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[76] E.g. *1965 Convention on the Service Abroad of Judicial and Extrajudicial Documents in civil or Commercial Matters; 2005 Convention on Choice of Court Agreements; 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).*

[77] Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000.

[78] Respectively *the Hague Convention of 1980 on the Civil Aspects of International Child Abduction* and *the Hague Convention of 1996 on Jurisdiction, Applicable law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children.*

[79] *The Luxembourg Convention of 1967 on the Recognition of Decisions Relating to the Validity of Marriages; the Hague Convention of 1970 on the Recognition of Divorces and Legal Separations.*

[80] See *the 2005 and 2008 Agreements between the European Community and the Kingdom of Denmark on the service of judicial and extrajudicial documents in civil and commercial matters,* also *the 2005, 2009 and 2014 Agreements between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters.*

international agreements simply replicate the underlying EU act, and include a so-called guillotine clause, meaning that the agreement is terminated should the EU amend the underlying legislative act which Denmark does not wish to accept. The adoption of such agreements has always been a very smooth exercise, not only because the state party was an EU Member State, but also because these agreements repeat verbatim the EU legal act they mimic, with no possibility to add or deduct anything from the original EU act.

Adopting Denmark-type agreements may serve as a model after Brexit, should the UK still wish to benefit from the advantages of EU judicial cooperation in civil matters. One advantage of this approach would be that instruments already known and used would remain applicable, though their legal nature would certainly change if they became international treaties instead of EU Regulations. The other clear advantage would be that, through keeping the content of the foreseen agreements identical to the underlying EU regulations, the negotiation time would be immensely reduced and so both parties and the judicial authorities could continue to benefit from such instruments with only a brief hiatus. By contrast, should alteration to the underlying EU law be required by the UK, this could lead to lengthy negotiations, during which there will be fewer and less developed legal instruments available upon which to base cooperation.

It needs to be underlined as well that, in the area of judicial cooperation in civil matters, it is not only the vested interest of public authorities in cooperating in a timely and efficient manner that is at stake. Thousands of ordinary natural and legal persons are affected daily by EU judicial cooperation instruments, on both the UK's and the EU's side. Their interest in continuing to benefit from the advantages of a common area of justice will need to be taken into account when it comes to designing the future instruments of cooperation.

VII Police Cooperation

Police cooperation has been the single field within Justice and Home Affairs in which the UK has participated without hesitation and was in fact a key player in shaping it. Legislative instruments adopted in this field have largely targeted areas of information exchange between law enforcement authorities and the gradual establishment and strengthening of Europol, the European Union Agency for Law Enforcement Cooperation. Before the Treaty of Lisbon, police cooperation had two distinct legal bases, one originating in the Schengen Agreement, and especially the Convention Implementing the Schengen Agreement producing the so-called Schengen acquis; and the other found in Title VI on Police and judicial cooperation in criminal matters of the former Treaty of the European Union as modified by the Treaty of Amsterdam. These two distinct legal bases had the following consequences for the UK's participation in police cooperation prior to Lisbon.

With regard to police cooperation emerging in the framework of the Schengen acquis, the Schengen Protocol[81] was applicable to the UK. As discussed above, according to this Protocol,

[81] See (n 4).

the UK could request its participation in an individual measure which was subject to the Council's approval. It was, however, not possible for the UK to participate in a measure, even of a police cooperation nature, which was built on a portion of the Schengen acquis to which the UK had not acceded originally. This was the case with regard to law enforcement access to the Visa Information System. The UK had wished to participate in this mechanism but, because it did not participate in the underlying Visa Regulation, its request to do so was refused by the Council and later by the CJEU.[82] In 2000 the UK requested to opt in to a great number of criminal and police cooperation measures adopted under the Schengen regime.[83] This opt-in meant that the UK was also to participate in future measures adopted based on these instruments. In effect, the UK has applied this part of the Schengen acquis since 2005, along with the SIS, to which it acceded in 2015. In fact, up until the block opt-out in 2013 (discussed below) the UK participated in all police cooperation available under the Schengen acquis, apart from that related to hot pursuit by police officers.

The UK fully took part in the third pillar cooperation under Title VI of the TEU, which is the second tenet of EU police cooperation based on Title VI of the TEU. This changed dramatically with the entry into force of the Treaty of Lisbon, which introduced the opt-out regime to police cooperation and the block opt-out from pre-Lisbon measures, in the same manner as in judicial cooperation in criminal matters. In practice, this meant that with regard to the post-Lisbon instruments the UK still opted in to the Passenger Names Record Directive[84] and the Regulation providing access for law enforcement authorities to Eurodac.[85] The UK has been notably absent from the new Europol Regulation, despite Europol having a British Executive Director,[86] and the European Police College, this irrespective of the fact that the UK had been its main training facility.[87] After the block opt-out was exercised, the UK still re-opted

82 C-2482/08 *UK v Council* [2010] ECR I-10413.

83 2000/365/EC: Council Decision of 29 May 2000 concerning the request of the United Kingdom of Great Britain and Northern Ireland to take part in some of the provisions of the Schengen *acquis*.

84 Directive (EU) 2016/681 of the European Parliament and of the Council of 27 April 2016 on the use of passenger name record (PNR) data for the prevention, detection, investigation and prosecution of terrorist offences on serious crime OJ L 119, 4.5.2016, p. 132–149.

85 Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice OJ L 180, 29.6.2013, p. 1–30.

86 Regulation 2016/794/EU of 11 May 2016 of the European Parliament and the Council on the European Union Agency for Law Enforcement Cooperation (Europol) and replacing and repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA OJ L 135, 24.5.2016, p. 53–114.

87 Regulation (EU) 2015/2219 of the European Parliament and of the Council of 25 November 2015 on the European Union Agency for Law Enforcement Training (CEPOL) and replacing and repealing Council Decision 2005/681/JH OJ L 319, 4.12.2015.

in to the majority of the police cooperation instruments adopted prior to the entry into force of the Treaty of Lisbon. This included access to the SIS in relation to persons subject to a EAW or an international arrest warrant, stolen objects, terrorist suspects under surveillance, and the Customs Information System mostly used for tracking down drug traffickers., as well as the so-called Prüm Decisions, allowing access to other EU Member States' fingerprint, DNA and licence plate police databases, ECRIS, the access to and exchange of criminal records, the Joint Investigation Teams decision facilitating the formation of European investigation teams and finally participation in Europol.

What will be the immediate impact of Brexit regarding police cooperation? There will simply be no access to EU level (SIS, CIS and Eurodac) and national (criminal records, fingerprint, DNA, license plates) databases, nor to the Europol Analytical Work Files, containing sensitive police intelligence, unless agreements (either in the form of full-fledged international treaties or operational understandings) are agreed. Even so, such agreements will not provide UK law enforcement authorities with direct access but would only provide the possibility for the UK to request and later receive information. It has to be underlined that non-EU States, such as Norway and Iceland, were granted access to the SIS and to the databases dealt with by the Prüm Decisions upon fully integrating to the Schengen Area. At this moment, it is doubtful that this would be the intention of the UK since it has never fully participated in the Schengen system, even as an EU Member State.

The situation regarding criminal records is even bleaker, as the EU has so far not concluded any agreement with a non-EU state allowing it access to ECRIS, of which the UK is currently one of the biggest users.[88]

With regard to the exchange of Passenger Names Records and combating terrorist financing, the situation is somewhat better, as the EU has signed agreements with non-EU states, for example the Agreements on PNR signed with the US, Canada and Australia and the agreement on tracking terrorist financing signed with the US.

A particular difficulty of all such agreements is that they contain measures regarding the transfer of personal data and hence not only do full-fledged international treaties need to be concluded but these agreed instruments will have to pass the scrutiny of the European Parliament and that of the Court of Justice of the European Union. The conclusion of international agreements containing the transfer of personal data agreements has not been easy exercises in the past: neither the Parliament nor the Court had any scruples in striking down an already concluded agreement, even when the other party was the United States.[89]

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88 Exchanging information on criminal convictions, http://www.publications.parliament.uk/pa/cm201516/cmselect/cmeuleg/342-xxiii/34213.htm.

89 See how the European Parliament refused to give green light to *SWIFT Agreement between the EU and the US on transferring banking data in 2010* http://www.europarl.europa.eu/sides/getDoc.do?language=en&type=IM-PRESS&reference=20100209IPR68674 and recently the CJEU judgment invalidating the Commission's 'Safe Harbour' Decision to allow the Commission's 'Safe Harbour' decision which allows transfers of personal data to the USA, C-362/14 *Schrems v Data Protection Commissioner* ECLI:EU:C:2015:650.

VIII Conclusion

The above discussion shows that Brexit will have different consequences on EU-UK cooperation depending on which of the various policy fields is being considered under the broader Area of Freedom Security and Justice umbrella. In some areas, such as border control/management, or legal and irregular migration, hardly any change will be felt, either on the UK's or on the EU's side. International protection will be affected both in scope and content unless the UK keeps its EU harmonized refugee legislation, still the cooperation instruments – such as the Dublin transfers – will not be available anymore. In other areas, however, such as judicial cooperation in criminal matters or police cooperation, the effects of the loss of the current legal framework will be very significant and immediately felt. Extradition, legal assistance and access to databases, for example to Eurodac, SIS, fingerprint and DNA databases and to criminal records, just to name a few, will all be curtailed as there will be no – or at best fewer fully-fledged – instruments that can be invoked readily. In the area of judicial cooperation in civil matters, authorities, citizens and legal entities will all realise that judgements resulting from cross-border litigation will no longer be mutually recognised and enforceable and instruments to secure the enforceability of foreign judgments will not be available either.

Throughout the above discussion, the adoption of new international agreements was pointed out on numerous occasions as a likely possibility for creating a new legal basis for cooperation after the UK leaves the EU. It must be underscored, however, that negotiating any such agreements, especially those which involve access to databases containing personal data, will take a long time. In terms of timing, the most fortunate solution would be to conclude the drafting of the desired agreements by the eve of the UK's departure. That said, such ambitious timing will probably be very difficult to achieve and the period of uncertainty that will emerge up until such instruments are actually adopted and ratified jeopardises cooperation. For the UK, this means that instruments that were previously available will no longer be 'on the books' and their replacement(s) will not yet have been concluded. For the EU, the conclusion of a new web of instruments with the UK in the field of AFSJ will create a number of problems. First, the negotiations with the UK will form a massive part of the agenda of both the Commission and the Council, taking considerable time away from dealing with intra-EU matters. Second, in areas where no international agreements have been concluded with third countries before, competence issues between the EU and its Member States may arise when the Commission's negotiating mandate is fine-tuned in the Council. Third, regarding those policies of ASFJ where the EU has already concluded international agreements with third countries, the EU must be very cautious in providing avenues for access and participation to the UK that are in line with existing practices. The alternative would be an exceptionalist approach, where cooperation with the UK is based on more advantageous terms than other countries, namely the Schengen member States EFTA states, could only hope for.

The other question is how Brexit will affect the shaping of the ASFJ and whether it foreshadows further disintegration or if the tide will turn and a more streamlined and less fragmented policy area will emerge. Clearly the special opt-out status of the UK already provided a prelude to its complete departure from the AFSJ. The opt-out status, however, has not become

a desired status for other Member States so far. To the contrary, Governments of opt-out Member States have actually secured the avenues to become fully associated with this field on their own initiative, insofar as there was support from their electorate. Ireland and Denmark have both launched referenda on this matter, with no success however. Having said that, maintaining the current pattern of cooperation, as a minimum programme, will be only possible if the EU remains able to deliver the objectives pursued by the AFSJ. At the height of the current 'migration crisis' and challenges to internal security, that puts an additional responsibility on the EU. Unless the EU remains able to convince public opinion that AFSJ cooperation is to the benefit to the general public in all EU Member States, sentiments will only grow that it is possible to stay out, and the UK's departure will serve a model for this.

Éva Lukács Gellérné*

Brexit – a Point of Departure for the Future in the Field of the Free Movement of Persons

Abstract

On 23 June 2016, voters in the United Kingdom (UK) rejected remaining in the European Union (EU) and the result initiated processes that can lead to the eventual resolution of the present UK-EU contractual relations.[1] The 'New Settlement', approved in February 2016, and the period since the June referendum may serve us with many ideas regarding the conceptual elements of future contractual relations. In addition to the statements of Heads of State and Governments, several approaches can be found at both EU and national level which foreshadow future directions. Our considerations need to be seen through that prism. Firm political support for the four freedoms of the Internal Market and emphasis on the guiding principle of 'everything can be put on the table once the Article 50 process is triggered', are regarded as such, as along with the activity of the European Commission (its proposals in the field of free movement), the case-law of the European Court of Justice (ECJ) on social rights and some newly enacted legislation in the target countries of intra-EU migration. The article is centred around two questions, namely why the British attempt to restrict free movement of persons is not an isolated phenomenon and what are the chances of shielding the fundamental principle and inherent rights of free movement in the post-Brexit process. The article argues that the 2016 February 'New Settlement' is taken not only as a basis for negotiations with the UK but also as a basis for the internal law-making process of the EU. It is important because a deal with the UK will be much smoother if the internal debate around the most crucial issues will be closed prior to the decisive part of the Brexit negotiations. The article also argues that the EU-UK deal will probably not be more restrictive than the 'New Settlement': as such, the debate is no longer only about another opt-out for the UK but also about the unity of the remaining Member States.

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1 NKE, Stratégiai Védelmi Kutatóközpont – *Elemzések 2016/2. Brexit olvasatok.*

I Introduction

1 Focused Context-Setting

Internal British procedures are in themselves challenging the Brexit process (namely whether the British government should seek Parliamentary approval before triggering Article 50, the 'divorce clause' or if voting could only come after a deal with the EU has already been agreed, in the form of ratification),[2] but the real question is the future relationship between the UK and the EU and its Member States. In the negotiation process that presumably ends in 2019,[3] one of the focal points is the free movement of persons. At the centre of the debate is clearly the vision of the extent of the rights related to free movement. Through Brexit, the debate has gained a new dimension and so citizens of the world's fifth biggest economy voted for intervention from their government, aiming to protect their jobs and their generous welfare system. The positive effect of migrants on the British economy has been reiterated by several economic analysts, which can be summarised as 'At the national level, falls in EU immigration are likely to lead to lower living standards for the UK-born.'[4] In spite of the definite economic conclusion, voters instead questioned the idea of an 'ever closer union' and they favoured the traditional British 'splendid isolation' idea of the 19th century. What prompted the fears exactly – whether it was the powerhouse and its far-reaching competences in Brussels, or the mass arrival of immigrating nationals from other EU countries, can't be answered conclusively. The reasons were manifold; political, economic, but mostly sociological and psychological, and they have been analysed extensively.[5]

In fact, the UK's ties to the EU have always been economically motivated and were loosened in the last decades, ever since the EU started to expand its competences and more recently also due to the biggest economic crash for more than 80 years. The UK is one of the countries to which EU legislation applies selectively; it is the Member State with the most opt-outs.[6] The UK

[2] A legal challenge – to force the government to give Parliament a vote before Article 50 is triggered – was approved by the High Court.

[3] The date might be not only be influenced by the EU-UK talks. Britain need to reach an agreement with the 163 WTO members. See for more http://uk.reuters.com/article/uk-britain-eu-trade-idUKKBN13U1GT.

[4] 'This is partly because immigrants help to reduce the deficit: they are more likely to work and pay taxes and less likely to use public services as they are younger and better educated than the UK-born. It is also partly due to the positive effects of EU immigrants on productivity' see Jonathan Wadsworth, Swati Dhingra, Gianmarco Ottaviano and John Van Reenen, 'Brexit and the Impact of Immigration on the UK' Centre for Economic Performance, LSE, PaperBrexit05, May 2016, page 16.

[5] Eiko Thielemann (LSE), Daniel Schade (LSE), 'Free Movement of Persons and Migration – Report of the hearing' held on 21st January, 2016, LSE European Institute, Commission on the Future of Britain in Europe, London: 'Overall, a disparity remains, on the one hand, between the negative public perceptions of the effects of migration, and, on the other, the more nuanced impression given by much of the available academic data, which suggests that effects are either negligible or positive.' (Page 4).

[6] http://www.euractiv.com/section/uk-europe/linksdossier/europe-a-la-carte-the-whats-and-whys-behind-uk-opt-outs/#ea-accordion-background, download: 20 November 2016

is not a member of the Eurozone, it has not signed up to the Economic and Monetary Union, it is not part of the border-free Schengen area, Britain has secured opt-outs from justice and home affairs legislation and the UK is not a signatory to the Fundamental Charter of Human Rights.[7] These are four key areas in which new laws do not automatically apply to the UK and its citizens (the UK can opt-in to legislations according to its discretion).

The so-called 'New Settlement' preceding the Brexit vote[8] was (ex post facto could have been) in fact a further example of 'opt-outs'. However, this opt-out was (could have been) very different from the former ones, in that this was intentionally and with consent based on reciprocity. The Brexit vote contributed to the principle of reciprocity (and the lack of it) becoming a key feature of the whole after-Brexit regime.

2 Main Issues Around the 'New Settlement' in February 2016

It is worth reiterating some of the ideas floated before and during the negotiations on the 'New Settlement' in the field of free movement of persons because these ideas play a crucial role in understanding current changes in national laws and in fine-tuning future expectations.

As a starting point, on 10 November 2015 UK Prime Minister David Cameron launched a discussion on the EU membership of the United Kingdom, highlighting four key areas where the UK was seeking reforms.[9] In the field of free movement, Cameron proposed that people coming to Britain from the EU must live there and contribute for four years before they qualify for in-work benefits or social housing, and additionally, exporting child benefit overseas should come to an end. On 17 December 2015 the General Affairs Council discussed the British reform proposals.[10] On 2 February 2016, Donald Tusk disclosed a multi-point package of proposals, which contained a series of measures reflecting the British requests.[11] The Heads of State and Government agreed and adopted the European Council Conclusions on Brexit (this is called the 'New Settlement') at their meeting on 18-19 February 2016.[12]

The content and uncertainties of the 'New Settlement' are well-known and well-documented.[13] It is important to summarise what the European Council and European Commission have finally undertaken:

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[7] According to of Protocol 21 of the Treaties the United Kingdom and Ireland shall not take part in the adoption by the Council of proposed measures pursuant to Title V of Part Three of the Treaty on the Functioning of the European Union (Area of Freedom, Security and Justice), including Article 79 of TFEU aiming at developing a common immigration policy.

[8] http://www.consilium.europa.eu/en/press/press-releases/2016/02/19-euco-conclusions/, retrieved: 10-03-2016

[9] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/475679/Donald_Tusk_letter.pdf, retrieved: 02-02-2016. The four areas were: economic governance, competitiveness, sovereignty and immigration.

[10] http://www.consilium.europa.eu/hu/press/press-releases/2015/12/18-euco-conclusions/, retrieved: 31-01-2016.

[11] http://www.consilium.europa.eu/en/press/press-releases/2016/02/02-letter-tusk-proposal-new-settlement-uk/, retrieved: 10-03-2016.

[12] http://www.consilium.europa.eu/en/press/press-releases/2016/02/19-euco-conclusions/, retrieved: 10-03-2016.

[13] See for more detail 'House of Commons, Library, Brexit: impact across policy areas' Briefing paper, Number 07213, 26 August 2016. Gellérné-Lukács, Éva – Töttős, Ágnes – Illés, Sándor, 'Free movement of people and the Brexit' (2016) 4 (65) Hungarian Geographical Bulletin, p. 421–432. DOI: 10.15201/hungeobull.65.4.9.

– to amend Regulation 883/2004 on the coordination of social security systems in order to give Member States, with regard to the indexation of exported child benefits (Section D., point 2. a.) – complemented by a Commission declaration in Annex V.;
– to amend Regulation 492/2011/EU on freedom of movement for workers within the Union to include an alert and safeguard mechanism in case of mass inflow of workers which allows restrictions to non-contributory in-work benefits to the extent necessary for newly arriving workers, within a period of 7 years, and for four years for each worker (Section D., point 2. b.) – complemented by a Commission declaration in Annex VI.;
– to adopt a proposal to complement Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely in order to fight marriages of convenience (Declaration of the European Commission on issues related to the abuse of the right of free movement of persons in Annex VII).[14]

The 'New Settlement' envisaged the amendment of secondary law and also laid down Union preference.[15] It can be said that not only the UK, but potentially every receiving country was given the opportunity to apply the alert mechanism and to control public finances through restrictions on social benefits while maintaining the inflow of human capital. Angela Merkel announced immediately after the February 2016 decision that Germany would also consider the application of the restrictions on exporting family benefits.[16]

Union preference and mutual applicability of the safeguard are no longer self-evident and will be subject to further negotiation, although it is emphasised by politicians that while the 'New Settlement' was a single, unique agreement especially to keep the UK in the EU, at that point in time a clear consensus was reached which shall not be forgotten.

II Circumstances and Conditions Influencing the Future Relationship with the UK

This section will examine the following topics: (i) political statements on the free movement of persons after Brexit, (ii) development of the case-law of the Court of Justice of the European Union (ECJ) on economically inactive persons, (iii) new legislative proposals of the European Commission in the field of free movement and (iv) some highlights of changes in certain Member States' national laws. It is intended to present that while there is a strong support for free movement on the political level, behind the scenes some divergent processes can be witnessed.

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14 This topic is discussed in detail by Ágnes Töttős, 'The Fight against Marriages of Convenience in the EU and in Hungary' (2015) II, Pécs Journal of International and European Law, p. 55–65.

15 Point 2. b.: 'The future measures referred to in this paragraph should not result in EU workers enjoying less favourable treatment than third country nationals in a comparable situation.'

16 http://www.theguardian.com/world/2016/feb/23/germany-angela-merkel-eu-countries-keen-copy-uk-child-benefit-peg, downloaded 15 April 2016.

1 Political Statements on Free Movement of Persons

The unity and inextricability of the Single (Internal) Market has always been a compass. Hungary experienced it during the transitional period starting 1 May 2004 and lasting until 1 May 2011.[17] During this period, there were restrictions on individual employment in the old Member States but, serving the balance, there were restrictions on free movement of capital in the new Member States.[18] The unity has also recently been demonstrated towards Switzerland. The Swiss referendum in 2014 called for quotas on EU immigration but the European Commission declared that 'This core principle of the free movement of persons is a cornerstone of our relationship. It is a fundamental right. It is not simply 'negotiable', as some tend to believe'.[19] Negotiations stalled and Switzerland now faces the dilemma of dropping its planned immigration control or losing its full access to the EU's Internal Market because of the guillotine clause. The Swiss Parliament has approved rules to implement the new constitutional provision concerning immigration aimed at remaining consistent with the Swiss-EU bilateral agreement.[20]

With regard to Brexit, EU political leaders – including union's chief Brexit negotiator *Michel Barnier* – repeatedly stick to the mantra that there can be no pre-negotiations before the UK tenders its formal notice of intent to leave the EU. There is a firm stance on 'no negotiations without notification'. It is rooted in the joint statement adopted at the informal meeting of the 27 Heads of State on 29 June 2016.[21] The joint statement stresses that the four freedoms that underpin the European Union's internal market work together, meaning that 'Access to the Single Market requires acceptance of all four freedoms'.[22] Peter Altmaier, Chief of the German Chancellery has confirmed that 'These four fundamental freedoms are at the heart of the single market' and 'That means that any country that would like to participate in the single market, basically has to accept the single market as it exists'.[23] The V4 countries have a genuine, firm standpoint which has been articulated several times that 'the V4 countries will be uncompromising' and 'Unless we feel a guarantee that these people [living and working in Britain] are equal, we will veto any agreement between the EU and Britain'.[24]

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17 Dr. Gellérné dr. Lukács Éva – dr. Szigeti Borbála, *Munkavállalási szabályok az EU tagállamaiban az átmeneti időszak alatt* ('Rules of employment in EU Member States during the transition period'), (KJK Kerszöv 2005, Budapest).

18 Sándor Illés – Gábor Michalkó, 'Relationships between international tourism and migration in Hungary: Tourism flows and foreign property ownership' (2008) 1 (10) Tourism Geographies, pp. 98–118.

19 Developments following the Swiss referendum on 9th February – statement by European Commissioner László Andor on behalf of European Commission to European Parliament plenary session, Strasbourg, 26 February 2014.

20 On 16 December 2016 the Swiss parliament adopted the change in laws on foreigners.

21 http://data.consilium.europa.eu/doc/document/ST-26-2016-INIT/en/pdf Downloaded 28 November 2016. https://epthinktank.eu/2016/07/04/outcome-of-the-european-council-of-28-june-2016-and-the-informal-meeting-of-27-heads-of-state-or-government-on-29-june-2016/ Downloaded: 29 November 2016.

22 Ibid, point 4.

23 http://www.express.co.uk/news/world/684801/Peter-Altmaier-freedom-movement-single-market?_ga=1.232016026.428302222.1480426969 Downloaded: 29 November 2016

24 https://www.theguardian.com/politics/2016/sep/17/eastern-bloc-countries-will-uphold-citizens-rights-to-live-in-uk, downloaded: 30 September 2016

Last but not least, the Heads of States of Government have confirmed recently that 'We stand firmly behind our statement of 29 June 2016 in its entirety and will continue to adhere to the principles laid down therein. We reiterate that any agreement will have to be based on a balance of rights and obligations, and that access to the Single Market requires acceptance of all four freedoms'[25].

According to British press releases, on 18 November 2016, at a conference where Theresa May and Angela Merkel met, the latter politely rejected that giving any assurances for Britons living in the European Union and EU citizens living in the UK to keep their rights to residence, work and healthcare after Brexit.[26] At the same time, however, when on 28 November 2016 May met Polish Prime Minister Beata Szydlo, who stressed the need to obtain guarantees for the one million Poles in the UK, May ,refused to confirm their rights 'insisting that the Government must not "reveal its hand" ahead of the Brexit negotiations.'[27]

2 Economically Inactive Persons in the Case-Law of the Court of Justice of the European Union

During 2013-2015 the ECJ was again faced with the question whether economically inactive EU citizens and their families are entitled to claim social assistance and special non-contributory benefits in the same way as migrant workers, and again the ECJ has been criticized. 'Again' can be said because since 1993, when the Maastricht Treaty introduced the concept of union citizenship, this theme has been periodically re-ignited. And 'again' because the ECJ in the 2000s was criticized for being too liberal when using union citizenship to overcome the distinction between economically active and inactive persons, and now it has been criticised for accepting the strict limitations set out in the Residence Directive[28] and for rejecting the claims in question on this basis.[29]

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25 Informal meeting of the Heads of State or Government of 27 Member States, as well as the Presidents of the European Council and the European Commission Brussels, 15 December 2016. SN 96/16

26 http://www.politico.eu/article/uk-theresa-may-pre-brexit-expats-plan-nixed-by-german-chancellor-angela-merkel-negotiations-european-union-residence/, download: 28 November 2016

27 http://www.telegraph.co.uk/news/2016/11/28/eu-must-compromise-win-good-brexit-deal-britain-rest-union-warns/, download: 29 November 2016.

28 Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (Text with EEA relevance).

29 Laura Gyeney, 'The limits of Member State solidarity: The legal analysis of the Dano and the Alimanovic cases' (manuscript, Hungarian Yearbook of International Law and European Law, 2016) (accepted for publication). Gyeney Laura, 'A szociális turizmuskérdése az Európai Unió bíróságának joggyakorlatában' ("The issue of social tourism in the case-law of the European Court of Justice') (2016) 2 Létünk, 167–182.

The legal literature on union citizenship, including these cases, is copious, and tends to focus on the boundaries of Member States' solidarity with respect to migrant persons.[30] Prior to the Maastricht Treaty, a clear distinction prevailed between economically active and non-active Union citizens. In the post-Maastricht era, the ECJ has unambiguously decided for the benefit of migrant persons and contributed to extending free movement rights to economically non-active persons.[31] The ECJ followed the same line of logic in its cases: a lawfully resident Union citizen can rely upon the equal treatment clause of the Treaty with respect to all situations and all social benefits falling within its scope of application,[32] and residence has been regarded as lawful until an expulsion order has been initiated. The majority of legal scholars welcomed the ECJ's activism. It is necessary to note, however, that there were authors who have criticised this line of interpretation: 'the most worrying feature of the Court's recent jurisprudence on Union citizenship from Sala to Bidar is the absence of a convincing methodology and the tendency to interpret secondary Community law against its wording and purpose'.[33]

After two decades, a clear shift can be traced.[34] The *Brey* judgement,[35] the *Dano* judgment[36] and the *Alimanovic* judgment[37] are the landmark cases of the new wave. The *Brey* case focused on whether an economically inactive union citizen can take recourse to social assistance without jeopardizing their right of residence. In *Dano* and *Alimanovic* there was no intention to work and no close link with the host state and the question was whether benefits should be paid under these circumstances. The ECJ has departed from its former line of general argumentation and the decisive factor was the textual interpretation of Directive 2004/38/EC and the unwarranted use of social benefits contained therein. It was logical that, under these terms and conditions, the cases could only signal a change in the jurisprudence of the ECJ. Without sufficient resources, the residence of a citizen of another Member State was no longer lawful,[38]

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30 Herwig Verschueren, 'Free Movement or Benefit Tourism: The Unreasonable Burden of Brey' 16 (2014) European Journal of Migration and Law, p. 147–179. Herwig Verschueren, 'Preventing 'benefit tourism' in the EU: a narrow or broad interpretation of the possibilities offered by the ECJ in Dano?' (2015) 52 Common Market Law Review, p. 363–390. Varjú Márton, Nyircsák Adrienn, 'A tagállamokat minimális szolidaritási kötelezettség sem terheli az uniós polgárságból eredő elvárások alapján' http://hpops.tk.mta.hu/blog/2014/11/europai-birosag-dano-itelet.

31 Á. Castro Oliveira, 'Workers and other persons: Step-by-step from movement to citizenship – case law 1995-2011' 39 (2002) Common Market Law Review, p. 77–127. Bjorn Kunoy, 'Union of national citizens: the origins of the court's lack of avant-gardisme in the Chen case' 43 (2006) Common Market Law Review, p. 179–190.

32 See for more detail in Gellérné Lukács Éva, *Személyek szabad mozgása az Európai Unióban* ('Free movement of persons in the EU') (szociológiai e-könyvek, Tullius Kft 2008, Budapest). Uniós polgársággal foglalkozó fejezet (chapter dealing with union citizenship): p. 154–174. http://www.shp.hu/hpc/userfiles/eumunkavallalas/gellerne_lukacs_eva_szemelyek_szabad_mozgasa_az_europai_unioban_honlap.pdf

33 Kay Hailbronner, 'Union citizenship and access to social benefits' 42 (2005) Common Market Law Review, 1245–1267, p. 1251.

34 Giulia Barbone, LLB King's College London, Dano and Alimanovic – the end of a social European Union, Posted on January 22, 2016 https://blogs.kcl.ac.uk/kslreuropeanlawblog/?p=1012#.WGuNqpUzXX4.

35 Judgement of 19 September 2013 in Case C-140/12, *Pensionversicherungsanstalt v Peter Brey.*

36 Judgment of 11 November 2014 in Case 333/13 *Elisabeta Dano, Florin Dano v Jobcenter Leipzig.*

37 Judgment of 15 September 2015 in Case 67/14 *Jobcenter Berlin Neukölln v Nazifa Alimanovic and Others.*

38 Para 51. of the *Alimanovic* case.

or even if it was lawful under Article 14 (4) b) of Directive 2004/38/EC, benefits were legitimately rejected on the basis of Article 24 (2). The key issue was that the benefit which had been claimed qualified as social assistance and this qualification made it impossible to count on it as part of sufficient resources. It was irrelevant that, on the basis of Regulation 883/2004/EC, it should have been granted. The ECJ disregarded the necessity of individual assessment in *Alimanovic* and the concrete effect of the claimed benefits on the sustainability of the social assistance system.[39]

It seems that the ECJ has recently faced rather clear-cut cases; the claimants were real non-actives, and, for these clear-cut cases, the Residence Directive gave a clear-cut answer. It is not that a gate has forever been closed to job-seekers, students or ex-workers; it seems rather a confirmation that Member States have no unlimited responsibility for migrant persons. What is more interesting for the future how the ECJ or the Union legislator will think it over and how it will clarify the following loose ends:

– the definition of economically inactive persons versus job-seekers,
– the relationship between Directive 2004/38/EC and Regulation 883/2004/EC, hence if a benefit will qualify as social assistance in terms of the Directive and special non-contributory benefit under Regulation 883/2004/EC at the same time, the relationship (hierarchy) between these two instruments needs to be solved, and finally,
– how the necessity for individual assessment will be regulated in detail, when it is precisely this condition that can be set aside.

Why this issue is so extensively discussed here? Because the outcome of the Brexit vote was most heavily burdened by the issue of social benefits to migrants, especially for those who are not working. The UK was one of the leading lobbyists in this field. In 2013 'Britain and Germany have joined forces to demand an end to the abuse by so-called 'benefits tourists' of the European Union's free movement directive'.[40] The European Commission launched research on the impact of non-actives on the social security systems of the Member States which rejected the welfare magnet hypothesis.[41] However, this has not changed the immense political weight of the question – the best proof of this is Brexit itself.

[39] Para 59. of the *Alimanovic* case. '(…) no such individual assessment is necessary in circumstances such as those at issue in the main proceedings.'

[40] http://www.telegraph.co.uk/news/politics/10014508/Britain-and-Germany-demand-EU-cracks-down-on-benefits-tourism.html. Britain and Germany demand EU cracks down on 'benefits tourism' 24 April 2013. Theresa May as home state secretary has initiated the process. Downloaded: 20 November 2016.

[41] A fact finding analysis on the impact on the Member States' social security systems of the entitlements of non-active intra-EU migrants to special non-contributory cash benefits and healthcare granted on the basis of residence, DG Employment, Social Affairs and Inclusion via DG Justice Framework Contract, Final report submitted by ICF GHK in association with Milieu Ltd, 14 October 2013 (revised on 16 December 2013).

3 The EU 'Internal Processes'

The European Commission have launched two proposals in 2016 that forecast considerable changes in the field of free movement. The first was the amendment of the Posting of Workers Directive 96/71/EC in March and the second the amendment of the social security coordination regime (Regulation 883/2004/EC) in December.[42] Both have been articulated by the European Commission as means of enhancing the protection of workers and fairness within the Internal Market.[43] It is problematic however, that both proposals could be the subject of an East-West disagreement, more precisely a disagreement between sending and receiving countries.

a) Social benefits – proposal for the amendment of Regulation 883/2004/EC

In the field of social benefits, first the 'New Settlement' is to be recalled. It contained the following: 'Member States may reject claims for social assistance by EU citizens from other Member States who do not enjoy a right of residence or are entitled to reside on their territory solely because of their job-search.'[44] This clear statement bears similarities with the conclusions of the recent case-law of the ECJ and even goes beyond it: it excludes, from the beneficiaries of social assistance, job-seekers by definition.

The proposal of the European Commission for the amendment of the current framework mirrors the above tendencies. Preamble (5a) states that 'In order to improve legal clarity for citizens and institutions, a codification of this case law is necessary.' In order to provide for clarity, the insertion of Article 4 (2) is suggested: '2. A Member State may require that the access of an economically inactive person residing in that Member State to its social security benefits be subject to the conditions of having a right to legal residence as set out in Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.'

Article 4 (2) refers to economically inactive people and provides for restrictive measure in their respect. Preamble (5a) sets forth that 'The verification of the legal right of residence should be carried out in accordance with the requirement of Directive 2004/38/EC'. Clearly, the European Commission proposes to set up a hierarchy between Directive 2004/38/EC and

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[42] Proposal for a Directive amending Directive 96/71/EC of The European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, COM(2016) 128 final. Proposal for a Regulation amending Regulation (EC) No 883/2004 on the coordination of social security systems and regulation (EC) No 987/2009 laying down the procedure for implementing Regulation (EC) No 883/2004 (COM(2016)815 final). Amendment of the regulations was discussed in the past, too, but from different angles, see Jos Bergham-Paul Schoukens (eds.), *The social security of moving researchers* (Acco Nederland 2011, Den Haag).

[43] http://ec.europa.eu/social/main.jsp?langId=hu&catId=569&newsId=2699&furtherNews=yes, downloaded: 15 December 2016. With regard the posting directive the Commission believes that these changes are necessary to ensure better protection for posted workers and to eliminate wage differences between posted and local workers, which can lead to unfair competition between companies.

[44] Section D., point 1. a.

Regulation 883/2004/EC in favour of the Directive. It entails the following chain of events: if a migrant claims social benefit, first the conditions of their legal residence will be examined, including the existence of sufficient resources. If the person would not meet the sufficient resources requirements of the Directive, their residence would be deemed unlawful and access to social security benefits would be denied.

There is the proposal for hierarchy, but no definition of an economically inactive person is given. Preamble (5a) states that 'For these purposes, an economically inactive citizen should be clearly distinguished from a jobseeker, whose right of residence is conferred directly by Article 45 of the Treaty on the Functioning of the European Union'. But this text is not at all reflected in Article 4 (2), and so the situation of those who want work but do not have work shall be decided case-by-case, whether they are job-seekers in terms of the TFEU or not. If job-seeking is treated as part of work statuses, the situation becomes even more complicated.[45] For example, a member state would not be precluded from considering somebody economically inactive if they had been working for years but became a jobseeker for more than 6 months, or even a family member who is the primary carer of the children. Is a person who, based on previous insurance, employment or residence receives benefits under Regulation 883/2004/EC but is out of work, economically inactive? The personal scope seems obscure, which can give rise to different (even unnecessarily restrictive) decisions in individual cases and could influence all sub-schemes of social security.

There is no mention of individual assessment either. Obviously the individual assessment test is part of the Residence Directive; it should be inherent in the verification process, but after *Alimanovic,* the question is clear: in which cases can the personal test be disregarded? This issue is not dealt with in the proposal, which could probably lead to the complete elimination of the test in practice.

Probably, if these proposals will be accepted by the EU Member States (including at present the UK) and the restriction of rights of economically inactive persons will become a reality, it is may facilitate Brexit negotiations.

b) Posted workers' rights – proposal for the amendment of Directive 96/71/EC

In the field of posting, the Commission proposed that each posted worker needs to receive the same remuneration as a worker of the host state in the same position (equal pay for equal work). The wage requirement exists at present as well, but it is confined to the minimum wage; it does not prescribe 'same remuneration'. Also, the Commission proposed that if the anticipated length of posting exceeds 24 months, the labour law of the host Member State can be applied. At present, there is no time limitation for the duration and choice of labour law. Ten national Parliaments, mainly from Central and Eastern European (CEE), signalled their concerns

[45] http://www.poverty.org.uk/summary/work%20statuses.shtml. This is e.g. a UK interpretation on definitions which shows that the present state of affairs is not very clear.

regarding subsidiarity, which triggered the yellow-card procedure.[46] The parliaments argued that the proposal impinges on their national jurisdiction in setting wage levels. It was also emphasised that wage difference is an economic factor – in the same way as price difference in the field of free movement of goods or the level of capital adequacy in the field of free movement of capital. As none of the latter is considered to result in unfair competition then why should wage difference? Economic analyst Bruegel confirmed that 'If a version of the 'same pay at the same place' principle is introduced, European firms would become less competitive globally, due to the less competition and the associated efficiency losses'.[47] This opinion is also shared by Business Europe, the association of national business federations of 34 European countries. The approach of the European Commission is shared by workers' representations and civil organisations, also from CEE countries: 'The rule of equal pay for equal work in the same workplace should apply in the field of work migration too – and that without exception.'[48]

The European Commission disregarded the concerns of national parliaments when it declared that the proposal did not breach the subsidiarity principle.[49] Consequently, the negotiations of the proposal in the Council working groups have started again under the Slovak Presidency. In the event of approval – which is likely sooner or later, because the CEE countries alone do not have enough votes to block it – the conditions of posting will change to the detriment of CEE-established companies. It is important to note that CEE-established is not equivalent to CEE-owned companies; there are several companies that are subsidiaries of their Western parent or have simply been established by Western groups of owners who employ a CEE workforce using this construction. Posted workers are therefore usually low- or semi-skilled workers who live in CEE countries and only work temporarily in other countries through posting and it is likely that they will lose their job before they could enjoy the strengthened protection that is envisioned by the equal pay for equal work principle. Their work will be taken over by the low- or semi-skilled workers of the present host states or they will continue as undeclared workers. Undeclared work is already a huge problem in the EU,[50] and if artificial compensatory regulations are introduced it could grow ever larger.

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46 Member States' national parliaments can disagree with a proposal up to eight weeks after its publication. Under this 'yellow card' procedure, a total of one-third of the votes assigned to national parliaments requires the Commission to re-examine its proposal, as a result of which it can amend or withdraw it. Poland would be mostly hit because out of the estimated 1.9 million posted workers approximately 300,000 are Polish citizens.

47 http://bruegel.org/2016/03/social-dumping-and-posted-workers-a-new-clash-within-the-eu/. Elena Vaccarino and Zsolt Darvas, '"Social dumping" and posted workers: a new clash within the EU' 7 March, 2016. Downloaded 29 September 2016.

48 http://migrationonline.cz/en/free-movement-of-workers-in-the-european-union-in-the-context-of-the-amended-directive-on-the-posting-of-workers. Martin Rozumek, 'Free Movement of Workers in the European Union in the Context of the Amended Directive on the Posting of Workers' 5 September 2016.

49 http://europa.eu/rapid/press-release_IP-16-2546_en.htm. Downloaded 15 December 2016.

50 http://bruegel.org/2016/03/social-dumping-and-posted-workers-a-new-clash-within-the-eu/. Vaccarino, Darvas (n 47). Also adds: 'The elephant in the room is undeclared work, which is a much bigger problem than possible problems caused by posted workers on all three accounts: fairness of competition, protection of the rights of mobile workers and possible negative impacts on declared home country workers.'

Here, it should be noted that the UK could be a supporter of the position of CEE countries and join in to block the proposal. The UK also supported the blocking minority against the Posting Enforcement Directive.[51] Competitiveness is a key issue for the UK, and setting wage levels in EU legislation could be an issue that would not fit its economic principles. Additionally, if wage levels are artificially set and CEE workers would lose their jobs, it could be feared that these low and semi-skilled workers will head towards the UK, which could also generate tensions.

4 Highlights of Recent Changes in National Laws Related to free Movement and Benefits

Hungarian migrant workers are employed in the largest numbers in Germany, the UK, and Austria,[52] and our focus is on the trends in these countries. It is argued that Germany and Austria have introduced restrictive internal laws on access to social benefits for migrant persons which, regarding its objectives, goes parallel to what the UK tried to achieve.

Germany operates a wide social net which covers all social security risks, including temporary inability of persons to finance their living. However, a new bill has been drafted in October 2016.[53] EU citizens should in principle be exempt from Hartz IV benefits and social assistance if they did not work here or had acquired social insurance claims through previous work, according to the draft bill. Only after a period of five years, if their stay had been consolidated without state support, should citizens of the EU be entitled to benefits. For EU citizens, who are excluded from social assistance in the future, the draft law foresees a new entitlement to one-time bridging: for the last four weeks, the affected persons should receive aid to meet their immediate needs for food, shelter, body and health care. At the same time they would be given a loan for the return trip to their home country, where they could then apply for social assistance. It is worth noting that not only EU migrants are entitled to these social benefits but also asylum seekers. In central Germany, every fourth currently eligible person is a foreigner[54] and out of the 1.5 million foreigner beneficiaries 500,000 are third-country nationals.

The situation in *Austria* is also very complex. It is worth recalling that on 1 May 2011 the transitional period, during which access to Austria's labour market had been restricted for

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51 Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System.

52 Illés Sándor, 'Külföldiek az Európai Unióból' (2001) 2 (79) Statisztikai Szemle, pp. 162–177. Illés, Sándor – Kincses, Áron, 'Hungary as a receiving country for circulars' (2012) 2 (61) Hungarian Geographical Bulletin, pp. 197-218.

53 http://www.zeit.de/politik/2016-04/andrea-nahles-eu-buerger-sozialleistungen. 'Bundesarbeitsministerin Andrea Nahles (SPD) will den Sozialhilfeanspruch von Ausländern aus anderen EU-Staaten drastisch beschränken.' Downloaded: 10 October 2016.

54 http://www.mdr.de/nachrichten/wirtschaft/inland/mehr-hartz-iv-auslaender-fluechtlinge-100.html. Downloaded: 10 October 2016.

workers from the EU-8 newcomer Member States, expired. Social and wage dumping was feared in two scenarios: (i) when Austrian companies employ workers from the EU-8, disregard relevant laws and pay lower wages than provided for in collective agreements, and (ii) foreign companies post workers to Austria but pay remuneration (minimum wages) applicable in their country of origin and not in accordance with the Austrian wage level. The initiative stressed the protection of workers' rights (the enforcement of the 'equal pay for equal work' principle) but also that the competitive advantage of these undertakings through paying lower wages was a relevant push factor. In 2014, one of the flagship initiatives of the government was therefore the launch of the so-called Act on Fight against Social Dumping.[55] The law contains penalties if minimum wages and salaries (as provided for in the collective agreements) are not paid and if documents (e.g. relating to employment contracts and insured status) are not available in German. The new changes to Austrian law enter into force on 1st January 2017. In essence, the authorities will gain power from more control mechanisms and further measures to fight against wage and social dumping, and the lessons are transferable, therefore, in June 2011, Austria and Germany signed an agreement designed to enhance cooperation between Austrian and German authorities in the field of posted workers. 'The improved cooperation includes speeding up the investigation of relevant facts and penalties for employers engaged in wage and social dumping, especially when major forms of organised social fraud are taking place'. [56] Moreover, conditions of lawful residence have also been tightened recently.[57]

The UK enjoys special status in Europe. Its population is rapidly growing and demographic ageing hits it less than any other country. The UK population is projected to increase by 9.7 million over the next 25 years, from an estimated 64.6 million in mid-2014 to 74.3 million in mid-2039. This is a growth of more than 10%.[58] Over the 10-year period to mid-2024, the UK population is projected to increase by 4.4 million to 69.0 million and it is projected to reach 70 million by mid-2027.[59] It puts tremendous pressure on public services such as housing, education, healthcare and social assistance. The UK first passed new laws regarding residence-related benefits in 2004. Prior to 1st May 2004, Union citizens who were present in the UK possessed the right of residence in terms of European Community law, and they needed to evidence their intentions to live permanently in the UK to successfully stand the Habitual Residence Test (HRT). From 1st May 2004, in response to concerns about the impact of the enlargement of the European Union, HRT legislation was amended. The change on 1st of

[55] https://www.wko.at/Content.Node/Service/Arbeitsrecht-und-Sozialrecht/Arbeitsrecht/Entgelt/Lohn-_und_Sozialdumping_Begriff_und_Ueberpruefung.html. Download: 10 September 2016.

[56] http://www.eurofound.europa.eu/hu/observatories/emcc/case-studies/tackling-undeclared-work-in-europe/law-against-wage-and-social-dumping-austria. Downloaded: 10 September 2016.

[57] See for more TRANSWELL project http://www.bath.ac.uk/casp/projects/transwel/index.html. Downloaded 10 September 2016.

[58] http://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/populationprojections/bulletins/nationalpopulationprojections/2015-10-29#tab-Main-points. Download 10 March 2016.

[59] http://www.theguardian.com/world/2015/oct/29/uk-population-expected-to-rise-by-almost-10-million-in-25-years. Download 10 March 2016.

January 2004 meant that a prerequisite was introduced before the original test: an initial test to determine whether the person has a 'right to reside', and then the original HRT is carried out. Any person who does not have a right to reside automatically fails the HRT and consequently cannot qualify for residence-based benefits.[60] Additionally, on 1 May 2014 restrictions were introduced for claiming social benefits. British commentators were quite clear regarding the intentions of the legislative amendment: 'On January 1 new rules were introduced to stop new arrivals claiming benefits for up to three months, to deter people from coming from Romania and Bulgaria when work restrictions were lifted.'[61]

III Projections and Scenarios

The question is which EU or UK citizens and how they can be admitted to the UK or the EU, or whether there will be a continued application of the EU free movement rules. The form and content of the cooperation agreement between the EU and the UK will surely be decisive for the free movement of persons. Some experts believe that the current forms of cooperation – either the European Economic Area model or the Switzerland model – could set the example for the new relations between Britain and the EU. This solution would inherently include free movement of persons and the competence of the European Court of Justice. Some commentators suggest, instead, a 'continental partnership' that does not include the four basic freedoms of the EU (free movement of goods, services, persons – including workers – and capital).[62] A mixed model can also be envisaged, in which security and defence matters and paying into the EU budget could be seen as a concession and used as leverage for access to the Internal Market.[63] In the last months, commentators have even suggested that the UK should secure a CETA-like agreement (deal) with the EU, by which Canada gained access to the single market without accepting freedom of movement. It has been put forward as a possible post-Brexit model for UK trade with the EU. In this case, the issues of living and working conditions and access to public services or welfare would be ignored.[64]

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60 Éva Lukács Gellérné, 'Free Movement of Persons – a Synthesis' 51-84, in Réka Somssich, Tamás Szabados (eds.), *Central and Eastern European Countries After and Before the Accession,* Volume I, (Department of Private International Law and European Economic Law, Faculty of Law, ELTE University 2011, Budapest).

61 http://www.dailymail.co.uk/news/article-2632914/Child-benefit-worth-30million-paid-Britain-families-EU-Cameron-admits-impossible-stop-it.html. Downloaded: 10 July 2016.

62 http://euranetplus-inside.eu/eu-uk-battle-over-free-movement-of-workers-after-brexit/. Downloaded: 30 November 2016.

63 http://euranetplus-inside.eu/eu-uk-battle-over-free-movement-of-workers-after-brexit/. Downloaded: 30 November 2016.

64 The CETA is a free trade agreement and not a customs union: important areas are out of its scope; it is evidently not full access to the Internal Market.

1 Free Movement – Residence and Employment Rights

In the field of free movement, EU law contains a dual regime. For intra-EU migration, Directive 2004/38/EC and Regulation 492/2011/EC are in force. These legal sources are applicable on the basis of reciprocity. For incoming migrants from third countries, there is a complete different set of common rules. Several directives have been adopted that grant rights unilaterally.[65] The EU follows a selective and sectoral approach; it grants admission for researchers, highly-skilled workers, seasonal workers, intra-corporate transferees and unremunerated categories if they meet the requirements laid down in these directives. Procedure rules have also been harmonised through the Single Permit Directive (SPD)[66] and, in addition to access to the labour market, equal treatment is also granted in several other fields.[67] Long-term resident third-country nationals, for example, enjoy equal treatment with respect to employment, education, vocational training, social protection and assistance, as well as enhanced protection against expulsion. These directives do not give workers access to the EU labour market in general: low and semi-skilled third-country nationals are admitted by each Member State at its discretion. However, the SPD covers all workers that have been admitted, meaning that the comprehensive set of rights is granted to almost all third-country workers employed on the basis of national or EU law.[68]

This sectoral, unilateral system means that, even in the absence of any contractual relationship with the EU, UK nationals who would meet the requirements laid down in the directives would have access to the EU labour market and would also enjoy equal treatment in the designated areas. Long-term residence status could also be required by UK nationals. Reciprocity as such would not bind the UK in this case.

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65 Directive 2003/86/EC on the right to family reunification, Directive 2003/109/EC concerning the status of third country nationals who are long-term residents, Directive 2004/114/EC on the conditions of admission of third country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service; Directive 2005/71/EC on a specific procedure for admitting third country nationals for the purposes of scientific research, Directive 2009/50/EC on the conditions of entry and residence of third country nationals for the purposes of highly qualified employment, Directive 2014/66/EU on conditions of entry and residence of third country nationals in the framework of an intra-corporate transfer, Directive 2014/36/EU on conditions of entry and residence of third country nationals for the purpose of employment as seasonal workers, Directive 2016/801/EU on the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects and au pairing. Directives 2004/114/EC and 2005/71/EC are repealed by this Directive with effect from 24 May 2018 when the transposition deadline expires. Yves Pascouau, 'Intra-EU mobility of third-country nationals State of play and prospects' (April 2013) http://www.epc.eu/documents/uploads/pub_3496_intra-eu_mobility_of_third-country_nationals.pdf, download 23 November 2016.

66 Directive 2011/98/EU on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State.

67 Kees Groenendijk, 'Equal treatment of workers from third countries: the added value of the Single Permit Directive' (2015) 16 ERA Forum, 547–561, DOI 10.1007/s12027-015-0403-2.

68 Ibid, p. 547. The UK has opt-out in this field; it adopted a regime for all third-country nationals.

Because of the unilateral grant of rights, EU nationals would not enjoy the same rights in the UK. Moreover, theoretically the UK could introduce different rules for each EU country. Honestly, it would be unprecedented: the UK's Immigration Rules also have horizontal application. What is more awaited is to have a common system for EU citizens. The content could be positioned between two models or 'extremes'. The first is the continued application of the present EU free movement rules and the second is the extension of present third-country immigration rules to EU citizens. The latter would definitely be the more restrictive solution. The ultimate path for a renewed relationship is subject to negotiations, but the prevailing opinion is that 'some migration controls [are] reconcilable with the concept of free movement of workers and the right to reside'.[69]

The UK's Immigration Rules for non-EU nationals are quite strict: these require a minimum level of sufficient resources for economically non-active persons (including family members), namely: a minimum annual income of GBP 18,600. The requested sum is well-understandable if we recall the UK's tax credit system.[70] In the UK, anyone who works for low wage can obtain 'in-work benefits' amounting to a maximum of GBP 6-7,000 annually.[71] 'In-work benefits' can be claimed by low wage earners whose annual income does not exceed GBP 15,000. The underlying principle of the tax credit system is to provide for a minimum level of protection (income) for citizens, in other words, to guarantee a safety net – a minimum subsistence level of GBP 15,000 annually – for everyone.[72] If the person's income exceeds 15 thousand pounds, no credits are granted. Based on these rules, non-EU nationals cannot avail of tax credits if they have a temporary stay visa. It was presumed in the Brexit process that a major limitation of these benefits would affect the financial motivation of potential migrants with regard to migration to the UK.[73] However, this has not been regarded as primary motivation: according to the Oxford Migration Observatory, the first pull factor is employment, (78%), followed by studying and family reunification.[74]

Additionally, most non-EU visa categories set the requirement of some English language skills, which could also exclude many EU workers. Additionally, the points-based system is designed to channel in mostly skilled workers who have already obtained a job offer. It can't be overlooked that non-EU citizen workers cannot be employed in the United Kingdom as unskilled labour (for 'low- skilled jobs')[75], meaning that these jobs are available – in the absence

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69 http://www.shearman.com/~/media/Files/NewsInsights/Publications/2016/08/Brexit-Free-Movement-of-Persons-FIAFR-080516.pdf. Downloaded: 30 November 2016.

70 https://www.gov.uk/topic/benefits-credits/tax-credits. (The official UK governmental page for tax credits.)

71 Child Tax Credit, Working Tax Credit and Universal Credit

72 Gellérné Lukács Éva, Töttős Ágnes, *A Brexit elkerülése érdekében létrejött uniós megállapodás szabad mozgást érintő kérdései magyar szemmel* (kézirat, 2016 április).

73 http://archive.openeurope.org.uk/Article/Page/en/LIVE?id=22825&page=PressReleases#. 'Restricting these in-work benefits would make a huge difference to potential migrants' financial incentives while allowing free movement to stand.

74 Downloaded: April 13 2016. http://www.migrationobservatory.ox.ac.uk/commentary/pulling-power-why-are-eu-citizens-migrating-uk

75 https://www.gov.uk/tier-2-general/overview Retrieved: 11-03-2016.

of British workers to take them up – mostly for EU citizen workers. The present assumption is that low-skilled jobs are met by UK and EU nationals, therefore non-EU nationals are accepted instead for jobs requiring special knowledge. The assumptions are based on statistics which show, for example, that 70% of workers from the EU-8 Member States are in low-skilled jobs and even those with qualifications can only get jobs with lower educational requirements. This reflects the complexity of being overqualified and the relatively poor English language skills of new EU migrants (whether real or perceived). According to the House of Commons, the demand of the British economy for low an semi-skilled workers needs to be satisfied and if the present (more restrictive) immigration rules were introduced for EU nationals it is questionable whether the demand for low-skilled workers of the economy will be met.[76]

There are countless legal options between the two extremes, from allowing workers only through the EEA-model to a special British model. British politicians emphasise that there must be a genuine British model and several possible scenarios have come to light.[77] However, it needs to be kept in mind that the scenario has to be acceptable for all the EU Member States, both sending and receiving states. The EU is burdened with very divergent interests concerning free movement of persons, and pressure is present regardless of Brexit. The remaining EU Member States, when declaring their positions in the Brexit process, evidently give signals to their partners of their priorities in this field in general. The different interests of sending and receiving states within the EU have to be reconciled before the two-year long negotiation process comes to an end. Free movement of workers and the self-employed while they exercise economic activity will not be questioned by any of the remaining Member States; it is common ground that the 1958 Rome principles are acknowledged by all states. Equal treatment ('as regards employment, remuneration and other conditions of work and employment'[78]) and searching for work is also a prerogative which derives directly from the Treaty. Benefits for workers, job-seekers or economically inactive persons are, however, not explicitly included in the Treaty and are a completely different matter. National actions also confirm that here a separate approach is followed. It is expected that the EU as a whole is on the edge of making a definite shift towards a more restrictive approach in the field of benefits.[79]

2 Social Security Coordination and Cross-Border Healthcare

Polish Prime Minister Beata Szydlo brought in social security coordination as a new element of negotiations by 'adding that there must also be "proper coordination of social security systems on both sides of the English Channel" as part of the agreement.'[80]

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76 House of Commons, Library, *Brexit: impact across policy areas,* Briefing paper, Number 07213, 26 August 2016.

77 Sherman and Sterling LLP, 'Brexit: Free Movement of Persons' Client Publication, 5 August 2016. This paper foresees five scenarios: brake on free movement, brake on benefits, limitations on free movement of non-EU nationals, quantitative limitations on free movement and points-based system.

78 Article 45 (2) TFEU.

79 See the following point (3.2. social security coordination).

80 http://www.telegraph.co.uk/news/2016/11/28/eu-must-compromise-win-good-brexit-deal-britain-rest-union-warns/. Downloaded: 29 November 20

Social security coordination is a complicated set of rules which faces now the first substantive amendment since its entry into force (1 May 2010).[81] It covers all relevant risks and benefits and is hallmarked by famous instruments like the European Health Insurance Card. The UK attempted to limit the export of family benefits, and this appeared in the 'New Settlement'. However, it not only had problems with exporting family benefits but also with the reimbursement of unemployment benefits.[82] In a nutshell, the Regulation lays down that if a migrant worker has worked in a country and became unemployed but subsequently returns to their country of origin then they can claim unemployment benefits there. However, the benefit paid by the country of origin has to be reimbursed by the former country of employment.[83] The UK's view is that reimbursement could be claimed only if the unemployed person would be eligible for benefits under UK law, which requires a period of two years' work for eligibility. Consequently, Department for Work and Pensions said: 'This Government does not pay benefits to someone in another country when they would not have been eligible for them in the UK'.[84] Millions of pounds were claimed from the UK by Poland, the Czech Republic and Slovakia, but a solution has not really been found for this issue. It is noteworthy that the European Commission proposed, in its December 2016 amendment package, the complete termination of the reimbursement system. It would definitely go along with the UK's desire.

Moreover, reciprocity comes up here again. Regulation 883/2004/EC is complemented by Regulation 1231/2010/EC, which extends its scope to those third-country nationals who are legally residing in one EU Member State but 'are in a situation which is not confined in all respects within a single Member State'.[85] These rights are granted unilaterally. Consequently, similarly to residence rights, if a UK national is treated as a third-country national, they could avail themselves of Regulation 1231/2010/EC to claim rights if the requirements are met, and no reciprocity needs to be provided for EU nationals in the UK.

The reciprocal application of Regulation 883/2004/EC could in principle work with certain exceptions in the post-Brexit era, especially if the presently ongoing modification process will end in favour of the concerns of the UK. In the event of rejection of its reciprocal application (which seems unlikely), the precise examination of all rights will become necessary, along with deciding on competence and procedural rules in EU-UK relations or in UK – individual member state relations (possibly through bilateral social security agreements). In my opinion, the latter would not be beneficial for CEE countries; they need to argue for an EU-UK horizontal social security agreement in the absence of reciprocal application of the Regulation.

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81 Gellérné Lukács Éva, 'Az 1408/71/EGK tanácsi rendelet modernizációja' in Király Miklós (szerk.), *Európajogi Tanulmányok* 7., (ELTE Állam- és Jogtudományi Kar Nemzetközi Magánjog és Európai Gazdasági Jogi Tanszék 2006, Budapest) p. 63–83.

82 http://www.dailymail.co.uk/news/article-2771512/Poles-demand-millions-Britain-pay-benefits-Eastern-European-governments-want-cash-returning-migrants.html. Download 2 December 2016.

83 Regulation 883/2004/EC Articles 61-64.

84 Ibid.

85 Article 1 of Regulation 1231/2010/EC extending Regulation 883/2004 and Regulation 987/2009 to nationals of third countries who are not already covered by these Regulations solely on the ground of their nationality.

Finally, there is Directive 2011/24 on cross-border healthcare[86] that became an integral part of the Internal Market and is also intertwined with a thousand threads with the Regulation. It enhances the free movement of patients in order to obtain healthcare in other Member States, combined with reimbursement by the insurance fund of the country of affiliation.[87] The fate of this piece of legislation can hardly be forecasted because its usage is quite limited; however, its potential is growing and it contains business opportunities, from which the UK might not wish to be excluded.

IV Conclusion

The article has aimed at arguing that restricting the free movement of persons is part of a global trend and is not a Brexit-specific issue. Restrictions in this field date historically back to new accessions – including those of Portugal and Greece, the EU-8 states, and finally to Romania, Bulgaria and Croatia. Moreover, there is the relatively fresh situation evolved after the 2014 referendum with Switzerland, where the restriction of immigration was also voted for. The EU declared that the acceptance of all four freedoms is a prerequisite for gaining access to the internal market and hasn't shown any signs of softening its firm stance on the matter. If Switzerland unilaterally pulls out of the free movement of persons agreement, the guillotine clause will result in the annulment of every other agreement. Switzerland seems to be left with a choice of all or nothing.

Brexit has been an engine for generating rapid reactions from politicians in other Member States, who emphasised individually and as the European Council that 'access to the Single Market requires acceptance of all four freedoms'.[88] It must be kept in mind, however, that the concept of free movement as a freedom contains at least two layers: that of persons and that of benefits. The European Council has made it clear in February 2016 in the 'New Settlement' that the 'Free movement of workers within the Union is an integral part of the internal market which entails, among others, the right for workers of the Member States to accept offers of employment anywhere within the Union'. However, it has also been laid down that 'free movement of workers may be restricted by measures proportionate to the legitimate aim pursued' and 'Member States have the possibility of refusing to grant social benefits to persons who exercise their right to freedom of movement solely in order to obtain Member States' social assistance although they do not have sufficient resources to claim a right of residence'.[89] The Heads of State and Governments accepted unanimously that the free movement of workers is protected while economically inactive persons' free movement rights are subjected to the fulfilment of

86 Directive 2011/24/EU on the application of patients' rights in cross-border healthcare.

87 Gellérné Lukács Éva, Gyeney Laura, 'Határon átnyúló egészségügyi ellátás az Európai Unióban' (2014) 2–3 (52) Egészségügyi Gazdasági Szemle, p. 24–35.

88 Informal meeting of the Heads of State or Government of 27 Member States, as well as the Presidents of the European Council and the European Commission Brussels, 15 December 2016. SN 96/16.

89 New Settlement, Section D, introduction and points 1. a-b.

residence conditions (especially that of sufficient resources). Finally, it has been set forth that certain factors, such as reducing unemployment, protecting vulnerable workers and the risk of undermining the sustainability of social security systems, might provide a legitimate basis for limiting the free movement of persons, workers or their benefits. The 'New Settlement' itself has confirmed a structured approach to free movement.

The article argues that the 2016 February 'New Settlement' is taken not only as a basis for negotiations with the UK but also as a basis for the internal law-making process of the EU. Both the EU's internal processes and the ECJ took stock towards a restrictive approach for social rights of economically inactive persons. The ECJ 's case-law from 2013–2015 confirmed that economically inactive persons and those job-seekers whose job search has exceeded 6 months could not have claimed to be lawfully resident without having sufficient resources. The ECJ has referred to the Residence Directive as the main source of its decisions. The most important issue was the determination of 'social assistance' within the meaning of the Residence Directive. The ECJ declared that a special non-contributory benefit that falls within Regulation 883/2004/EC and to which migrant persons are entitled, can, at the same time, be 'social assistance' within the meaning of the Residence Directive. This express categorisation has indicated a shift in the relationship between the two instruments, namely, that Member States can prioritise the application of the Directive. The new proposal of the Commission on the amendment of Regulation 883/2004/EC made it clear that Member States can make the award of benefits dependent upon lawful residence and sufficient resources. If accepted, this will lead to the exclusion of economically inactive persons from a range of social benefits. Finally, if we recall the 'New Settlement', it is exactly what it contains: 'Member States may reject claims for social assistance by EU citizens from other Member States who do not enjoy a right of residence or are entitled to reside on their territory solely because of their job-search.'[90]

The article examines what the chances are of shielding the fundamental principle and inherent rights of free movement in the post-Brexit process, especially for CEE migrant citizens. The assumption is that the 'New Settlement' could be used as a springboard for Britain to start its Brexit negotiations but it is highly probable that there will be no further restrictions. In my view, first, EU citizens currently resident in the UK or UK citizens in another Member State would be permitted to stay. Second, for newcomers, there will be a reciprocal, common set of rules which will allow full free access to each other's labour markets. The demand for low- and semi-skilled workers in the economy shall be met. Preference for EU workers in the UK and preference for UK workers in the EU will be granted. However, there is a considerable chance that non-contributory income support benefits ('in-work benefits') will not be available for a certain period of time (also on a reciprocal basis within EU-UK relations). No cash benefits will be paid for first job-seekers, but placement services will be available (job-search is a prerogative under the TFEU). These rules will be horizontally applicable within the EU, too. Restrictive rules will be introduced for economically inactive persons (including family

[90] Section D., point 1. a.

members), also in the whole EU. The latter will be admitted to obtain lawful residence or to join the worker/self-employed person only if sufficient resources to fund their living are guaranteed and recourse to means-tested public resources will only be allowed in case of short-term temporary difficulties.

Short-term social security benefits, such as sick-pay, will be provided for the period of the economic activity, and unemployment benefit for a period of a maximum six months after having become economically inactive (unemployed). Long-term benefits such as invalidity benefits resulting from work accident or occupational disease and old-age benefits will be awarded and even exported to the country of origin. This is ongoing practice in almost every EU country. Acquired rights can't disappear in thin air; this is a horizontal, EU neutral issue. Family benefits will be granted in full but only if the respective family members reside within the UK together with the worker, or within the EU together with the worker.

The 'New Settlement' introduced the commitment to regulate the indexation of family benefits which are paid for children living outside the UK. The reasons were clear: the UK wanted to stop the export of, or wanted to export a reduced child benefit in these cases.[91] The financial scale of the problem did not seem to be outstanding: out of 13 million children covered by benefits, only 35,000 live in other EU countries.[92] However, the issue received a great amount of attention and was one of the main topics of the Brexit referendum debate. Whether there will be export of child/family benefits or only in indexed amounts will be dependent upon the current negotiations within the EU on the amendment of Regulation 883/2004/EC. The original proposal of the Commission does not contain indexation, but there will surely be attempts to introduce this method for the EU as a whole. The UK was not the only country highly concerned in this field: 'Following the council's resolution, adjusting child benefits to living costs in recipients' home country will also be possible in Germany from 2020,' said Marcus Weinberg, a Christian Democrat spokesman on family affairs. 'That isn't just appropriate, it's also fair.'[93] Other social assistance, such as housing benefits and subsistence support will not be available for economically inactive persons. A considerable cloud remains over whether workers will qualify for these benefits. The amendment of Regulation 492/2011/EU is not on the agenda now, meaning that the concept of 'social advantages' is fully valid within the EU. Germany, France and the Scandinavian states would not be interested in changing the regime towards UK nationals but could attempt to change it towards all EU nationals; no prognosis can yet be given.

It might gain in importance that the UK Prime Minister, Theresa May, was the Home Secretary in 2013 when, together with her counterparts in Germany, Austria and the Netherlands, they campaigned for tighter restrictions to migrants' access to social benefits and other

[91] Read more: http://www.dailymail.co.uk/news/article-2534738/Poland-hits-Cameron-plan-stop-child-benefit-exported-EU.html#ixzz45ViZrb9A. Downloaded 1 April 2016.

[92] http://bruegel.org/2016/02/child-benefits-for-eu-migrants-in-the-uk/. Uuriintuya Batsaikhan, 'Child benefits for EU migrants in the UK' 18 February 2016. Letöltve: 2016. április 1.

[93] http://www.theguardian.com/world/2016/feb/23/germany-angela-merkel-eu-countries-keen-copy-uk-child-benefit-peg. Downloaded 15 April 2016.

state-funded services.[94] The above-proposed amendment of Regulation 883/2004/EC for economically active citizens and reimbursement of unemployment benefits, as well as other possible Member State suggestions on indexation of family benefits would serve this purpose. A deal with the UK might be much smoother if the internal EU debate around these crucial issues could be closed prior to the decisive part of the Brexit negotiations, resulting in provisions in EU secondary legislation that would meet the UK's concerns. The real question now seems rather whether other benefits (income replacement, income support, social housing, subsistence allowances for workers) will be brought into the negotiations.

Finally, Ian Lindsay, the British ambassador in Hungary, declared that the UK wants its 'own British model' and also that the UK is a big trading nation.[95] Clearly the UK's moves aim to control EU immigration while maximising opportunities for trade. And there has been a Brexit campaign, and a focal point of that campaign was to limit the free movement of workers. Probably no UK government wants to come back from negotiations with European partners without some limits on migration. On the other hand, it is clear that Germany and France seem determined to put preserving the unity of the remaining EU member states ahead of their future relationship with the UK. Based on the great political weight of this topic, it is feared that free movement issues will be used as 'bargaining chips' in the EU exit talks,[96] and extensive negotiations will take place. It seems very unlikely that the UK will be able to disentangle itself from the essential elements of free movement; what seems likely is that it will accept eventually a set of reciprocal provisions that will highly mirror the EU free movement regime with the restrictions set forth in the 'New Settlement'.

[94] http://www.telegraph.co.uk/news/politics/10014508/Britain-and-Germany-demand-EU-cracks-down-on-benefits-tourism.html. Britain and Germany demand EU cracks down on 'benefits tourism' 24 April 2013.

[95] http://mno.hu/kulfold/brit-nagykovet-az-eu-t-hagyjuk-el-nem-europat-1363406. Downloaded: 3 December 2016.

[96] British Trade Secretary Liam Fox described free movement of persons as 'one of our main cards'.

Mária Réti* – Klára Bak**

The Common Agricultural Policy with and without the United Kingdom – CAP Brexit

Several analysts from different fields of sciences are making an attempt to uncover the reasons for Brexit, or at least they are trying to predict its consequences at the level of scenarios. In our analysis, we are concentrating on one of the most defining policies of the European Union, the Common Agricultural Policy, and its regulation regime, as well as its development and permanent correction, by skimming the attitude of the United Kingdom concerning the theme.

In our study we are referring to the role of agriculture, which is known as a significant one, to the reasons for its importance and its multifunctional characteristics. Also, we are overviewing the basis, the essence, the main reforms of the Common Agricultural Policy's regulation regime and we are going to outline the main features of the multi-dimensional Common Agricultural Policy's system, which nowadays includes rural development as a result of the reforms.

On the side of the United Kingdom we intend to sketch the relationship between the United Kingdom and the Community before and after the accession regarding agriculture and the Common Agricultural Policy.

I General Approach to the Theme

The role of agriculture is prominent worldwide also in the area of the European Union. The sector traditionally has a great importance, equally from the economic, social, political and cultural perspective; the results of the sector have an effect on the development of countries, on the prosperity of the regions.

Agriculture assures the food supply, namely the nutrition of the population, offers key solutions in the fight against poverty and hunger. Agriculture plays a key role in the production of such goods that meet food safety and consumer protection requirements, promoting hereby health protection and sustainability.

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The fact that agricultural workers are the foundation of rural communities and have a crucial role in both keeping rural areas and rural communities alive, as well as in preserving the rural environment underlies the manifold importance of the agricultural sector. Farming constitutes the basis for the operation of 'upstream' and 'downstream' sectors linked to agriculture (e.g.: food processing), increasing the chances of greater employment in rural societies. Taking the complex role of farmers into account, their decent livelihood and reasonable living are basic issues.

Agriculture has a significant role, not only in rural development, but also in agricultural environmental protection, natural reserve protection and landscape conservation to balance current global challenges that we are facing in 21st century, e.g. climate changes, preservation of water resources and biodiversity, soil protection; in summary, the sustainability of our environment.

Nowadays the diverse role of agriculture and, generally speaking, its influence on development; all in all its multifunctional characteristics, are undisputable**.** However, *the fundamental task of agriculture is considered as supplying the population with food.*

As a result of the lack of food due to World War II and the destruction in Europe the question of food supply for the population became vital. The reconstruction of Europe could not have been imaginable without the recovery of agriculture.

The different European countries attempted to supply food, to revive agriculture, to produce and to trade, typically with significant state interventions, taking their unique and distinguishing geographical features, along with their agricultural and agricultural political traditions, into consideration. Due to the specific features of agriculture in different countries and the logically correlated reasons concerning European integration ambitions after World War II, the inclusion of agriculture in the Common Market had been regarded as questionable for a long time. From the beginning of integration, it became obvious and it made the negotiations complex that consensus was called for between the agricultural-oriented and the industrial-centred European countries for the interest of achieving it.

Agriculture and the trade in agricultural goods became part of the Community's[1] Common Market after long, stormy debates; in parallel with it the *Common Agricultural Policy* (hereinafter CAP) *became undisputedly one of the most valuable, but maybe the most difficult policy of the European Union and one in need of permanent corrections and reforms. The Common Agricultural Policy, as a specific policy, was established to promote the function and development of the common market of agricultural goods.*

Although it has been some decades since the Common Agricultural Policy was founded and the circumstances within the Community and outside it have dominant changed, which have obviously been reflected in the reforms of CAP, the basic purposes of CAP have however remained the same. On one hand, the main aim of the Common Agricultural Policy is to enable there to be a continuous supply food at proper quality criteria, besides reasonable prices for

[1] We remark that the term 'Community' is used as the synonym of European Economic Community, European Community and European Union in our analysis.

consumers. On the other hand, one aim of the legislative regime is to offer decent salary for agricultural workers to ensure them an appropriate standard of living. As far as dealing with the world outside the Community, the main aim of CAP is to protect the internal market: CAP relies on Community preference as a basic principle.

To achieve these aims, the treaty bases, the principles of CAP and the regulation of market organisation, were conceptualised and exploited. The first contractual print of the regulation process was the Treaty of Rome, (1958).[2] The concept written by the 'Six Founders' in the field of Common Agricultural Policy were launched in practice optimal.

The connection between the United Kingdom and the Community was mostly characterised by a 'with or without' relationship. The British ambition to enter the Common Market and even to get a remarkable share on it was one of the motivations which may definitely be highlighted. As is commonly known, it was only *in 1973 that the United Kingdom entered the Community, but by that time, besides other policies, the basic regulations of CAP had been established and the system was working, although not immaculately.* No sooner had the British signed their general ambitions for reforms regarding Community budget than, in 1974, it was necessary to deal with the British overpayment for their initiative.[3]

Concerning the British overpayment, the predominance of expenditure on CAP in the Community expenditures, among other aspects, came up as a basic issue. The British needed to face the fact, that while they became an important payer of the Community budget by contributing to the financial support of CAP to a great extent, they got fewer sources than other more agricultural-focused members with regards to their agricultural features. On this issue, British ambitions obviously tended to balance the position of United Kingdom considering the income and outgoing rates. The breakthrough was due to Margaret Thatcher and her Cabinet, who achieved a special system, the so-called 'rebate' system for the United Kingdom, which was a kind of modifying mechanism to balance the British overpayment. *The CAP, as a permanent negotiable issue, has always been on the agenda because of the British ambitions related to the savings, financial attention and budget imbalance, competitiveness.*[4]

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[2] We have to mention as it is known that on 25th March 1957, two treaties were signed in Rome. The Treaties gave birth to the *European Economic Community (EEC)* and to *European Atomic Energy Community (Euratom).* In this publication we use the term *Treaty of Rome for the EEC Treaty.*

[3] Paris: Summit Meeting of the Heads of State or Government, 1974.

[4] See for the theme http://theconversation.com/the-uks-eu-rebate-explained-58019, 30.12.2017.

II About the Establishment and Treaty Basis of Common Agricultural Policy

1 About the Establishment of Common Agricultural Policy

In the following we will outline some of the main features of the Common Agricultural Policy, which the British had to face upon entry.

We should take the 'four freedoms' principle (free movement of goods, services, people and capital) laid down in the Treaty of Rome as a starting point for the negotiation of the establishment of CAP in the area of the Community. On the basis of this principle, it became essential to create a customs union[5] and its optimal functioning was considered to be a fundamental question from the aspect of integration. However, with regard to the free movement of agricultural goods, numerous difficulties have arisen. Regulating the trade in agricultural products at Community level caused difficulties that at the turn of 1957/58 and later on because Member States concerned by the integration had before their own agricultural systems showing a strong connection e.g. with their unique but distinguishing geographical features. Due to the optimal operation and protection the Member States had applied strong, nationally appropriate, individually suitable, market organisational provisions[6] by providing strong state interventions, such as price guarantee, bank guarantees, special taxes, support systems, contingency funds and protective external tariffs against abroad.[7] The agricultural systems in operation and the national agricultural policies of the Member States linked to them had showed remarkable differences also in their theoretical principles. For example, there were huge differences between the countries with export-orientated and traditionally import-orientated agricultural systems.[8] Besides the differences between the countries, the agricultural structure of certain Member States represented considerable domestic differences, too.[9]

With regard to the national agricultural systems, agricultural policies and national regulations, it became obvious, that it would not be possible simply to join the countries' agricultural products in the trade of goods covered by the customs union. Another solution needed to be found, and this solution could be achieved in the context of developing a common agricultural policy, the basis of which had been laid down in the Treaty of Rome. Although it was questionable to involve agriculture in the Common Market, and the Common Agricultural

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5 'The customs union intend to realize whole, internal, free trade, while it applies common external customs duties and common trade policy' see for it: Tibor Palánkai, *Az európai integráció gazdaságtana* VI. Edition, (Aula Kiadó Kft. 2001, Budapest) p. 37. See for treaty basis: *Treaty of Rome The Customs Union,* Articles 12-29.

6 A good example for it may be the United Kingdom with the Agricultural Act set in force 1947 and the Agricultural Marketing Act set in force 1958. We will return to these acts.

7 Thomas Oppermann, *Europarecht* (Verlag CH Beck 1991, München) pp. 475–503, especially: p. 476.

8 See as above Oppermann (n 7) p. 476.

9 The small-scale farm structure (in Italian and in some German areas) stood against large-scale farms.See e.g.: as above.

Policy in the Treaty, *the Treaty of Rome*[10] ruled that 'the common market shall extend to agriculture and trade in agricultural products' under the Title II 'Agriculture' in Article 38 section (1). In Article 38 section (4) it was clearly recorded that 'the operation and development of the common market for agricultural products must be accompanied by the establishment of a common agricultural policy among the Member States.'

We must remark, in agreement with the analysts who are dealing with this theme, that the establishment of CAP's treaty basis was actually based on the compromise between agricultural and industrial interests, between the French and the Germans.[11]

Besides the great compromise between the agricultural-orientated and the industrial-focused countries, we also need to draw attention to the unique national features regarding the agricultural sector. These factors have affected the regulatory regime of CAP and its modifications, not only at the time of its establishment but they have also continuously influenced it since then.

2 About the Treaty Bases of CAP

Actually, the bases of CAP in the main fields have not been changed since the establishment of the Treaty of Rome.[12] The Treaty of Functioning of the European Union (hereinafter TFEU) records 'The Union shall define and implement a common agriculture and fisheries policy,[13] the internal market shall extend to agriculture, fisheries and trade in agricultural products.' in Article 38, precisely in section (1) under the Title III 'Agriculture and Fisheries'. The Treaty defines the concept of an agricultural product;[14] furthermore it fixes that the rules laid down for the establishment and functioning of the internal market shall apply to agricultural products unless Articles 39-44 of TFEU rule otherwise.

The general rules are followed by special rules ensuring the opportunity to realize the objectives of CAP recorded in the Treaty, which will be described in detail in the following passage.

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[10] See for *Treaty of Rome* (n 2). We need to point out that the conference held in Messina may be considered to be a milestone, because after having long debates they made an agreement on adding agriculture to the system of the common market with regard to the foundation of European integration.

[11] See for it e. g. T. Hitiris, *Az Európai Unió gazdaságtana* (Műszaki Kiadó 1995, Budapest) pp. 163–204, especially p. 172. The Hungarian technical literature covering this topic highlights the fact that the German agricultural policy also had a protectionist spirit throughout the debates and the Germans demanded remarkable compensation for their agricultural producers. See Péter Halmai, 'Közös agrárpolitika' in Tamás Kende, Tamás Szűcs, *Az Európai Unió politikái* (Osiris 2001, Budapest) p. 298.

[12] In fact, the agricultural systems and policies of the Member States were replaced by a Community-regulated regime which applied interventionist mechanisms by setting the Treaty of Rome in force. The bases of CAP concerning decision making procedure changed; consultation was replaced by co-decision.

[13] We remark that the issue of fisheries policy became topical with the entry of the United Kingdom, Denmark and Ireland. As a result of the extension of the Community in 1983, the Common Fisheries Policy (CFP) was introduced.

[14] TFEU (1) section 38 Article; We must remark that by definition of agricultural product the Annex II. of the Treaty was important, because the products subject to the provisions of Articles 39 to 46 were listed in this Annex.

The purposes of CAP according to Article 39 are the following:
– *to increase agricultural productivity by promoting technical development, as well as by ensuring the rational development of agricultural production and the optimum utilisation of the factors of production, in particular labour;*
– *thus to ensure a fair standard of living for the agricultural community, in particular by increasing the individual earnings of persons engaged in agriculture;*
– *to stabilise markets;*
– *to assure the availability of supplies;*
– *to ensure that supplies reach consumers at reasonable prices.*

The Treaty linked to the purposes of CAP also rules that, by working out the common agricultural policy and the special methods for its application, account shall be taken of the special nature of agricultural activity, the need for appropriate adjustments; and the fact that in the Member States agriculture constitutes a sector in strong relation with the economy.

By defining the aims we need to mention that none of them has a privilege, they are equal. However, the list includes conflicting aims. Besides the factors presented in our analysis so far, we also intend to emphasise that, by forming the objectives of CAP, the main aspects considered were the unique features of agriculture and agricultural production, the unpredictability of agricultural markets, the variability of demand and supply and the instability of prices and incomes. It is important to take the interrelationship between agriculture and the other fields of the economy into account as a crucial factor.

The TFEU records precisely that, in the interest of achieving the written aims, it is necessary to establish the common organisation of agricultural markets. ('CMO') This market organisation means one of the following aspects, depending on the product:

– common competitive rules;
– compulsory coordination of the various national market organisations;
– establishment of European market organisation.[15]

In the European practice, the common organisation of agricultural markets is primarily realised by the European market organisations. The TFEU refers to the fact that the common market organisation established in the forms in accordance with the Treaty may include all the provisions needed to achieve the aims, especially the regulation of prices, financial assistance for the production and marketing of the various products, storage and carryover arrangements and common measures for stabilising imports or exports.[16]

The market organisations were product-specifically laid down; the goal of regulation was rational, central intervention, which tended to influence the free movement of agricultural markets in order to ballast the market by considering the system of objectives of CAP. The concept of the market organisation means the group of common rules and mechanisms, the objectives of

[15] TFEU section (1) Article 40.
[16] TFEU section (2) Article 40.

which are to ensure the regulation of a specific product or a group of products.[17] The basis of the system meant common prices regarding agricultural products and agricultural product's groups.[18] The aim is to achieve such a standard of price at the wholesale stage which satisfies both consumers and typical agricultural producers without causing overproduction.

The typical elements of the market organisation system are the following:

– price regime, as a significant element of the regulatory regime, in correlation with it e.g. interventional measures; financial aids; significant export aids, application of customs duties and fees; agricultural levy mechanisms[19] for the protection of the internal market;
– contingencies, quantity regulation by quotas: measure functioning as a quantitative limit for production.

To achieve the aims of the market organisation effectively, section (4) Article 40 TFEU rules on the establishment of one or more agricultural guidance and guarantee funds.[20]

In the key fields of CAP, besides the market policy focused on the market organisations, another determining aspect is the structural policy.[21] In this context, the improvement of structurally underdeveloped regions, speeding up the establishment of agricultural structures and the progress of rural areas must be pointed out.

The basic principles of CAP may fundamentally originate from its treaty bases and the secondary law material that is built on it, as well as the market organisations. The main feature

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17 Mihály Kurucz, *Az európai agrárjog alapjai* (ELTE Jogi Továbbképző Intézet 2003, Budapest) p. 27; see for this also Halmai (n 11) 'Az Európai Unió Politikái' 301–302, especially for the definition of CMO: p. 302.

18 At the beginning of CAP need to be highlighted: common grain price.

19 The agricultural levy system functioned till 1995. We will return later to this topic.

20 The valid funds are: European Agricultural Guarantee Fund (EAGF); European Agricultural Fund for Rural Development (EAFRD) See for the valid regulation of the funds: Regulation (EU) no 1306/2013 of the European Parliament and of the Council of 17 December 2013 on the financing, management and monitoring of the common agricultural policy and repealing Council Regulations (EEC) No 352/78, (EC) No 165/94, (EC) No 2799/98, (EC) No 814/2000, (EC) No 1290/2005 and (EC) No 485/2008, Title II Chapter 1.; Title IV. Chapter 1-2. See for the Regulation: http://eur-lex.europa.eu/legal-content/HU/TXT/?uri=CELEX%3A52016PC0159, 01.01.2017.; For EAFRD there is another regulation: Regulation (EU) No 1305/2013 of the European Parliament and of the Council of 17 December 2013 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD) and repealing Council Regulation (EC) No 1698/2005 the European Parliament and the Council of the European Union. See on the web: http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32013R1305&from=hu, 01.01.2017. It is important, that regarding the funding of CAP there is a predetermined maximum budget which is fixed for 7 years at a time as with all EU policies. We must remark, that as a share of the EU budget, the budget of CAP has decreased very much over the past 30 years, from almost 75% to around 40%. See for the datas: European Commission: Agriculture, The EU's common agricultural policy (CAP): for our food, for our countryside, for our environment. See on the web: file:///C:/Users/user/Downloads/ agriculture_en%20(1).pdf, 01.01.2017.

21 In the frame of structural policy in the 1970s already had been laid down council directives: Council Directive 72/159/EEC of 17 April 1972 on the modernization of farms; Council Directive 72/160/EEC of 17 April 1972 concerning measures to encourage the cessation of farming and the reallocation of utilized agricultural area for the purposes of structural improvement; Council Directive 72/161/EEC of 17 April 1972 concerning the provision of socio-economic guidance for and the acquisition of occupational skills by persons engaged in agriculture.

of the principles is that their main essence has not been modified since the beginning. We must remark that, after the treaty basis had been established in the Treaty of Rome, it took some years to develop a model conforming to the spirit of the treaty bases. Within this topic, the Stresa Conference of 1958, a series of negotiations with endless, marathon debates over price policies, must be highlighted. As a result of them, by 1960/62 the principles had been laid down.[22] *The principles of CAP are the followings:*

– *'principle of market unity';*
– *'principle of Community preference';*
– *'principle of the distribution of costs.'*

'Market unity' means the free movement of agricultural products. On the basis of CAP, the Member States jointly decided to cease duty and other import barriers to trade with one another. The principle of market unity also reflects the intention that each State Member has gradually gives up their different but defining and unique intervention systems in agriculture by applying common-level regulation in this field. The market unity of agricultural products has required a centralised policy and market organisation, which also lead to common prices. It is important to establish prices so that the farmers can earn a reasonable income compared to workers in other economic sectors in order to realise the objectives of CAP.

The 'principle of Community preference' means the preference of common products, which includes the protection against the cheap products coming from a third country.

The 'distribution of costs' means that the State Members undertake together to share the costs of CAP as well as its financial support.

Taking the treaty bases of CAP, the method system of market organisations and the principles of CAP into consideration, in our opinion the field of price regulation in CAP with state intervention and agricultural levy system were the most important fields regarding CAP's operation a long time. When featuring the main characteristics of the prices of agricultural products, we need to highlight that, in the first phase of CAP, the prices of agricultural products were artificially created higher than the prices on the world market.[23] Logically, this price policy stimulated the agricultural workers to produce more because the producers could expect their products to be taken over via interventional state purchases at an artificial and beneficial price. From the side of the consumer, stable consumer prices were predictable; however, they paid more for the agricultural products than they rationally needed to cost. The artificial price regime bothered the British consumers also significantly.[24] The system resulted in a considerable

[22] The work was coordinated by Sicco Mansholt, vice-president of the Committee responsible for agriculture. He called the conference in Stresa to work out the principles of CAP. After the conference the Committee made some recommendations and its results were realised in 1962. It is important to mention the so-called 'Mansholt 2. Plan' regarding the agricultural structural policy. According to the document the improvement of the agricultural farm is also important (Modernisation). Oppermann (n 7): quoted p. 477.

[23] The level of agricultural prices was higher than the world market prices by 40-45%. By the end of the 1980s the producers had to face by 30-35% higher prices than without aids. As a result of it the consumers had to pay more for the agricultural products than it would have been rational. See Palánkai (n 5) pp. 296–297.

[24] See for this Palánkai (n 5) quoted p. 300.

growth of the variety of products, and the rate of the Community's self-sufficiency increased remarkably, too. The malfunctions, the overproduction, the imbalance of demand and supply, as well as the need for modification were visible.

III United Kingdom – Community – CAP: Before and After the Accession

By the 1840s, the United Kingdom was regarded as self-sufficient concerning its food supply. In Ireland, due to the famine that claimed a lot of victims as well as the industrial and commercial lobby, which became increasingly vocal, grain imports were encouraged by abolishing the Corn Laws.[25] With reference to the analyses exploring historical events, the leader of the Tories, Sir Robert Peel[26] supported free trade because he came to the conclusion that, from the aspect of the development of internal market, a high standard of living is needed. Considering this fact, it was inappropriate to restrict imports. Several hundreds of taxes designed to reduce imports were abolished.[27] At the beginning of 20th century, the British government also introduced protectionist measures, and after that, following the French and German patterns, it applied protective customs duties, the so-called punitive customs duties, against the external market in order to respond to the crises of overproduction in 1930s.[28]

The destruction during World War II had a tremendous effect on the United Kingdom similarly to other countries. The British could still only get some types of food via the rationing system until 1954[29] and Marshall Aid took a significant role in the reconstruction of the country.[30] On behalf of the United Kingdom, the question of judging its own status and opportunities in the reconstruction, its relation to Western European integration intentions and how the policy of isolation was going to be formed were on the agenda. The extent to which the United Kingdom relied on its relationship with the Atlantic area, the USA and the British Commonwealth was also questioned. Finally, it was necessary to predict the status of the United Kingdom in world trade, the situation of its colonies, as well as the future of the British people after World War II.

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25 The Corn Laws were introduced by the Importation Act 1815, it measured about tariffs and restrictions on imported grain. It was repealed by the Importation Act 1846, see György Tibor Szántó: *Anglia története,* (4th edn, Maecénász Kiadó) pp. 193–195.

26 Sir Robert Peel: a British statesman and member of the Conservative Party, served twice as Prime Minister of the United Kingdom (1834–1835 and 1841–1846) and twice as Home Secretary (1822–1827 and 1828–1830).

27 Szántó (n 25) pp. 193–194. According to the relevant analyses, it is worth mentioning that the conservative system failed after abolishing the corn laws and the free trade brought a lot of serious problems: producers went bankrupt in large numbers, agricultural workers swapped their livelihood for working in cities and industry. The fields remained uncultivated. The work adds that the United Kingdom thereby avoided the greater misery of revolution.

28 Kurucz (n 10) especially p. 10.

29 Szántó (n 25) p. 240. For the situation of England see the summary: The costs of the war exceeded 25 million pounds, England lost half of its gold and foreign exchange reserves, one third of its fleet and one quarter of its national fortune.

30 Éva Szilágyi: *Az Egyesült Királyság uniós politikájának dilemmái: integráció vagy elszigetelődés?* (2005) 4 EU Working Papers, p. 81.

In his well-known speech in Zürich, *Sir Winston Churchill*[31] treated the Western European fusion process in two minds; he *supported the idea of a 'United States of Europe,' but he did not intend to take part in establishing it*, he just wanted to support it.[32] Churchill had already elaborated his ideas in his speech in Fulton by clarifying that he trusted in the alliance between the 'population of the English-speaking Commonwealths' and the USA regarding their development.[33] The reason we would like to highlight *Churchill's speech in Fulton* is that, besides the revival of industry and trade relations, it *includes a clear reference to food supply as one of the basic challenges of the United Kingdom in terms of its reconstruction after World War II.* Churchill said 'Because you see the 46 millions in our island harassed about their food supply, of which they only grow one half, even in war-time, or because we have difficulty in restarting our industries and export trade after six years of passionate war effort, do not suppose we shall not come through these dark years of privation as we have come through the glorious years of agony'.[34]

Churchill's speech revealed the importance of agriculture and food supply and logically came from it the regulation of these fields. With regards to the agricultural regulation of the United Kingdom, an important stage was the establishment of the Agricultural Act in 1947.[35] *The aim of the Act was to ensure plenty of food and to offer a decent livelihood for farmers.* The Act accurately defines the following: 'Guaranteed prices and assured markets. 1.-(1) The following provisions of this Part of this Act shall have effect for the purpose of promoting and maintaining, by the provision of guaranteed prices and assured markets for the produce mentioned in the First Schedule to this Act, a production stable and efficient agricultural industry capable of producing such part of the nation's food and other agricultural produce as in the national interest it is desirable to produce in the United Kingdom, and of producing it at minimum prices consistently with proper remuneration and living conditions for farmers and

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31 Sir Winston Leonard Spencer-Churchill, British statesman – Prime Minister of the United Kingdom from 1940 to 1945 and again from 1951 to 1955.

32 'We must build a kind of United States of Europe. In this way only will hundreds of millions of toilers be able to regain the simple joys and hopes which make life worth living. (…) The first step in the re-creation of European family must be a partnership between France and Germany. In this way only can France recover the moral leadership of Europe. There can be no revival of Europe without a spiritually great France and a spiritually great Germany. (…) In all this urgent work, France and Germany must take the lead together. Great Britain, the British Commonwealth of Nations, mighty America, and I trust Soviet Russia – for then indeed all would be well – must be the friends and sponsors of the new Europe and must champion its right to live and shine.) Churchill's speech in Zürich 19th September 1946. The speech can be found at the website: http://www.churchill-society-london.org.uk/astonish.html, 30.12.2016.

33 'If the population of the English-speaking Commonwealths be added to that of the United States with all that such co-operation implies in the air, on the sea, all over the globe and in science and in industry, and in moral force, there will be no quivering, precarious balance of power to offer its temptation to ambition or adventure.' Churchill's speech in Fulton 5th March 1946. The speech can be found at the website: https://www.cia.gov/library/readingroom/docs/1946-03-05.pdf, 30.12.2016.

34 See as above.

35 See the original text of the Agricultural Act 1947, http://www.legislation.gov.uk/ukpga/Geo6/10-11/48/part/I/enacted, 30.12.2016.

workers in agriculture and an adequate return on capital invested in the industry. (2) This Part of this Act shall extend to Scotland and Northern Ireland.'[36]

Concerning the British domestic legislation on agriculture and trade related to it, another act, the *Agricultural Marketing Organisation Act of 1958* must be pointed out, too. It also included important provisions. It regulated agricultural marketing schemes, incorporated provisions as to milk marketing boards and milk marketing schemes, the importation of agricultural products and sales of home-produced agricultural products.[37]

While the United Kingdom set strict agricultural regulations in force, the United Kingdom voted against the integration of the 'Six' manifested in the Treaty of Rome, despite having been asked to join them.[38] At the same time, the UK was in favour of the free trade market, it allied with other western European countries outside the European Economic Community and they founded the European Free Trade Alliance in 1960.[39]

Later on, the UK's attitude to integration and the accession to the Community changed. At the beginning of the 1960's, the British point of view was clear: despite the earlier ideas the United Kingdom decided on its future, not outside but within the common market in particular, by validating its economic interest in it. The entry of the United Kingdom into the integration system was motivated by gaining new markets. The reasons for the changes in the United Kingdom's point of view regarding the accession have been analysed by several experts and they concluded that the changes were rooted in correlating circumstances. The 'Six Countries' had taken advantage of integration and they demonstrated the multiplication effect on national income by the end of 1960s.[40] Studies in this area also show that the British economy achieved an increase in its performance between 1950 and 1973; however, it was still left behind by those countries which had already taken advantage of integration.[41] The hopes of the United Kingdom for the British Commonwealth of Nations did not come true; its colonial empire was falling apart and its trade relations were restructured. While reconstructing its trade relations, the importance of the mainland of Europe became evident and significant for the United Kingdom. Furthermore, the USA also encouraged their accession to the Community.[42] With regards to the

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36 The Act concerned for the following products: 'fat cattle, fat sheep, fat pigs, cow's milk (liquid), eggs (hen and duck in shell), wheat, barley, oats, rye, potatoes, sugar beet'. See the original text of the Agricultural Act 1947 http://www.legislation.gov.uk/ukpga/Geo6/10-11/48/part/I/enacted, 30.12.2016.

37 See for it: http://www.legislation.gov.uk/ukpga/1958/47/pdfs/ukpga_19580047_en.pdf, 04.01.2017.

38 Szilágyi (n 30) p. 82.

39 The European Free Trade Association (EFTA) was founded by Austria, Denmark, Norway, Portugal, Sweden, Switzerland and the United Kingdom, to promote closer economic cooperation and free trade in Europe. See for history of EFTA: http://www.efta.int/about-efta/history, 03.01.2016.

40 For the relations and data see: Ferenc Mádl, Az európai gazdasági közösség joga (Akadémiai Kiadó 1974, Budapest) especially: p. 28. The relevant analysis indicates that the national income of Dutch and Italians tripled and the national income of Belgium and France doubled in USD from 1953 to 1967.

41 See for it: Miklós Somai, 'A britek és az EU közös költségvetése – különös tekintettel a rebate-re' [2014, summer] Külügyi Szemle, see on the web: http://kki.gov.hu/download/6/0a/c0000/KSZ2014_2_Somai.pdf, 01.01.2017.

42 The USA was motivated to stop the reduction of UK's influence.

fact that the French had prevented the British accession twice, it was only *1973* when de Gaulle's influence on it was not strong and *UK accessed the Community*.[43]

At the time of the accession of the United Kingdom – as we have already noted – the Community's specific agricultural policies had been established, an institutional structure had been put in place, and the regulatory regimes were operating but not immaculately. The situation was the same concerning CAP.[44] The British worried about the rules of CAP from the beginning, especially they feared that with their entry the food prices became higher.[45]

After the British entry, in 1974 the United Kingdom fought out at the Summit Meeting, which took place in Paris[46] *to discuss about British overpayment.*[47] In this circle at the Summit Meeting the institutions of the Community were invited to find out and work out a correction mechanism.[48] The other issue was at the Summit Meeting that the European Regional Development Fund (ERDF) was established, which turned out to be significant in relation to agriculture, even at its early stage. The ERDF (with effect from 1th January 1975) had to cope with several problems, and was responsible for balancing the regional imbalances rooted in the dominance of agriculture. The Head of the nine Member States generally decided to establish the ERDF in order to finance the growth of the most underdeveloped regions. The goals of CAP and regional policy were harmonised, which is a good example of matching common policies. The Summit Meeting assigned the aim of regional policy to correct imbalances, 'resulting notably from agricultural predominance, industrial change and structural under-employment.'[49]

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43 For the process analyse see Szilágyi (n 30) quoted.

44 Although accession did not result in the desired economic development, at the referendum on 5th June 1975 most of the UK society voted to remain in the Common Market. The desired economic development was not realized according to the analysts, because of the Oil Crisis. See Somai (n 41) quoted p. 78. Although accession did not result in the desired economic development, at the referendum on 5th June 1975 most of the UK society voted to remain in the Common Market.

45 See Somai (n 41) quoted p. 78.

46 Precisely 9-10. December 1974. Paris, Summit Meetings of the Heads of State or Government.

47 The reason was that, as the greatest food importer in the world and as a net payer, the United Kingdom financed countries which, in terms of average income per head, were significantly richer than the British See for the correlations: Palánkai (n 5) quoted pp. 164–165.

48 1974. Paris, Summit Meetings of the Heads of State or Government; see ibid: 'Britain's membership of the Commnunity (…) 37. They invite the institutions of the Community(the Council and the Commission) to set up as soon as possible *a correcting mechanism of general application* which, in the framework of the *system of 'own resources'* and in harmony with its normal functioning, based on objective criteria and taking into consideration in particular the suggestions made to this effect by the British Government, could prevent during the period of convergence of the economies of the States, the possible development of situations' unacceptable for a Member State and with the smooth working of the Community.' see on the internet: http://aei.pitt.edu/1459/1/Paris_1974.pdf, 10. 01. 2017.

49 1974, Paris, Summit Meetings of the Heads of State or Government' Regional policy 22. 'The Heads of Government have decided that the European Regional Development Fund designed to correct the principal regional imbalances in the Community resulting notably from agricultural predominance, industrial change and structural under-employment will be put into operation by the institutions of the Community with effect from 1 January 1975.', See on the internet as above: http://aei.pitt.edu/1459/1/Paris_1974.pdf, 10. 01. 2017. , It is worth mentioning that in the ERDF the position of the United Kingdom was advantageous.

One year later, in 1975 a general correction mechanism was formulated at the Summit Meeting of Heads of Government in Council in Dublin.[50] However, the United Kingdom was struggling on with overpayment and finally it was effective, because *Margaret Thatcher and her conservative Cabinet achieved a breakthrough in Fontainebleau in 1984.*[51] The document of Fontainebleau, the so-called 'Conclusions of the Presidency' fixed the followings: 'The basis for the correction is the gap between the share of VAT[52] payments and the share of expenditure allocated in accordance with the present criteria'.[53] The UK was obliged for 66% from this difference from 1985.[54] *This is the so-called rebate.* A very valuable part of the document included that the correction will be fixed in a Council Decision.[55] The Council Decision was issued in May 1985.[56] Our point of view the position of the UK is well demonstrated by fighting out the rebate. In the correlation of rebate and the CAP mechanisms we point out the specialities of the British agriculture[57] had a key role during the negotiations. The UK as net contributor financed the CAP strongly but it benefited from the sources exiguously. However, we must remark that e.g. in the trade of agricultural products the preferences of internal market and CAP were naturally given for the British[58] and outwards (areas outside from the Community,

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50 Meeting of Heads of Government in Council in Dublin on 10 and 11 March 1975 – Summary of decisions and conclusions
'I. Budgetary correcting mechanism
The Heads of Government meeting in Council agreed on the correcting mechanism described in the Commission communication entitled 'Unacceptable situation and correcting mechanism'
(R/340/75 (FIN 84)), subject to the following provisions:
1. The criteria concerning the balance of payments deficit and the two-thirds ceiling are dropped.
2. The following provisions will be incorporated into the agreed mechanism :
a. The correcting mechanism shall be subject to a ceiling of 250 million units of account. However, as soon as the amount of the Community budget exceeds 89 000 million units of account, the ceiling shall be fixed at an amount representing 3 % of total budget expenditure.
b. When a moving average drawn up over 3 years indicates that the balance of payments on current account of the country in question is in surplus, the correction shall only affect any difference between the amount of its VAT payments and the figure which would result from its relative share i:a the Community GNP.'
See for it the note: file:///C:/Users/user/Downloads/1975_march_dublin__eng_.pdf, 01.01.2017. See among the analysts especially: Somai (n 41) p. 80.

51 For the European Council Meeting at Fontainebleu see the document: Conclusions of the Presidency, file: ///C:/Users/user/Downloads/1984_june_-_fontainebleau__eng_.pdf.

52 Value Added Tax.

53 See (n 51)

54 See (n 51). Conclusions of the Presidency, '(…) from 1985 the gap (base of the correction) as defined in § 1 is, for them period referred to in § 4, corrected annually at 66.'

55 4. 'The correction formula foreseen in § 2 (2nd indent) will be a part of the decision to increase the VAT ceiling to 1,4%, their durations being linked.' See as above Fn.47.

56 'Council Decision of May 1985 on the Communities' System of Own Resources (85/257/EEC, Euratom', access to the internet: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A31985D0257, 01.01.2017.

57 The national economics rate of the agriculture in the UK after 20 years of the accession was 2,2%. In Portugal this data is 17,5%, in Greece 21,6%, in Italy 8,5%, in France 5,4%. (The basic year is 1991.) See: Palánkai (n 5) p. 294.

58 See for it: National Farmers Union: EU Referendum UK's Farming Relationship with the EU, p. 4. The document is available on the web: http://www.nfuonline.com/assets/61993/, 15.01.2017. See especially ibid, 'The UK is a net importer of agri-food products, totalling £39.6bn in 2014.3 We import nearly twice as many agri-food products

for instance WTO frame system) the Community and not the UK stepped up as wholesale negotiator.[59]

IV The Reforms of Common Agricultural Policy[60]

1 The Reforms of Common Agricultural Policy – External and Internal Reasons

The British ambitions for correctional mechanisms of the Community budget had an influence on the reforms of CAP. Besides the British reform ambitions, CAP needed to be permanently modified for external and Community reasons, as we have mentioned several times. It has had huge reforms. *In the reforms the British took part naturally, actively.*

One of the most important Community reasons of the reforms was the reduction of overproduction. The regulatory regime of CAP achieved significant results and the food supply became more secure in the area of the Community. The previously sketched regulatory mechanisms featuring CAP, the high and supported prices compared to the prices on the world market with state interventions led to overproduction. *Moreover, the system was difficult and expensive.* Thus the British point of view regarding reducing the outgoings was reasonable. From the aspect of reforms, controlling expenditure on agriculture was a fundamental issue. The behaviour and example of the United Kingdom shows it clearly. The status of small-scale and impoverished farmers could not be solved.[61] The problems of the CAP regulatory regime became worse through the expansion of the Community and the new entrants also influenced the reforms. After the accession of the United Kingdom, Denmark and Ireland, in 1981 Greece and Spain, followed by Portugal in 1986 acceded to the Community. After that, the Central and Eastern European countries became Members too.[62] Most of the newly acceded countries had significant agricultural sectors, so at each accession the Community needed to address new

from the other EU countries than we export, however our exports are significant. In 2014 we exported £12.8bn worth of products. Approximately 73% of our total agri-food exports were destined for other European member states. For some sectors the EU market is critical. Thirty-eight per cent of all lamb produced in the UK goes to Europe. France alone purchased more than £200m worth of UK lamb in 2014.' See for it also: Boglárka Koller, Péter Halmai, János Bóka, 'Válás "angolosan", a BREXIT politikai, jogi és gazdasági agendái' (2016) 20 Államtudományi Műhelytanulmányok, Nemzeti Közszolgálati Egyetem, pp. 15–16.

59 Koller, Halmai, Bóka (n 58): see as above p. 16.

60 Péter Halmai, 'Az Európai Unió agrárrendszere' (2007) 3 Mezőgazda, extended, restructured edition, pp. 106– 154; Miklós Somai: 'Agrártámogatások az Európai Unióban' pp. 3–9, see on the web: http://real.mtak.hu/17418/1/Somai_Agr%C3%A1rt%C3%A1mogat%C3%A1sok....pdf; Hitiris (n 11); Oppermann (n 7) quoted pp. 501–503; Palánkai (n 5) quoted, pp. 301–309; Nicola Cantore, Jane Kennan, Sheila Page, 'CAP reform and development Introduction, reform options and suggestions for further research' 14 May 2011, see on the web: https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/7245.pdf, 01.01.2017.

61 Palánkai (n 5) quoted p. 300.

62 The establishment of the Social Fund occurred, but the amount of budget credit supplied for the Fund was low.

needs because these countries had to be matched into the 'system'. From the social aspect it is also worth mentioning that CAP made an attempt to work out a so-called 'dynamic policy' which was only partly successful.[63]

Among the external reasons for CAP reforms we must refer to the GATT agreements, which have a basic influence on agricultural world trade and to the content of WTO contractual frame system.[64] The aim was to liberalise agriculture and agricultural trade step by step.

From 1986, GATT negotiations[65] focused on agricultural world trade, and it is important to mention that, at the series of meetings in Uruguay, significant issues were resolved, such as reducing system-distorting subsidies and barriers. In this field we need to point out that *the agricultural agreement attached to the Declaration of Marrakesh*[66] *which ended the Uruguay Round affected the regulation regime of CAP. Namely, the agricultural levy system, which had been applied in the regulation regime of CAP, was modified this time.* As economic analytics point out, the thing is that the levy in relation to the price policy functioned as a 'moving customs duty' in case of import of agricultural products to the Community. It protected the internal market and its agricultural producers.[67] Until 1995, CAP strongly featured tough import reductions, high customs duties and the application of levy mechanisms. Its aim was clear, to prevent the entry of competing agricultural products to the Community, or at least to reduce their entry. Obviously, this restrictive regulation was incompatible with the liberalised favoured GATT agreement system. Considering the agricultural agreement related to the Marrakesh Declaration[68] special customs duties were introduced instead of border protection measures.[69] The agreement also obliged the European Union to reduce the high levels of export subsidies. Support under 'green box' policies did not suffer from this general obligation, to not have any influence on trade. Regional aid and funding with a positive effect on environmental protection belong to this category. Considering CAP reforms, it is crucial to highlight the agreement on the application of sanitary and phytosanitary measures,[70] which includes the requirement of food safety. Transparency was taken as a basic requirement in this regard.

63 The Social Fund was established but the budget credits which were granted in it were exiguous.

64 We must mention that the expansion of the Community after 2000s was significant: in May 2004 the Mediterranean, Central and Eastern European countries of Cyprus, The Czech Republic, Estonia, Latvia, Lithuania, Hungary, Malta, Poland, Slovakia and Slovenia acceded, joined by Bulgaria and Romania in January 2007.

65 *GATT (General Agreement on Tariffs and Trade)* had the aim of simplify international trade; the agreements focused on harmonising customs policy. The parties undertook the principle of the greatest benefit and they agreed to remove the customs duties and other barriers to trade. The existing system functioned well in relation to industrial products, but it had not been true for agricultural products.

66 Marrakesh Declaration of 15 April 1994, See: https://www.wto.org/english/docs_e/legal_e/marrakesh_decl_e.htm.

67 See for it Palánkai (n 5) quoted p. 302; Halmai (n 60).

68 See: https://www.wto.org/english/docs_e/legal_e/14-ag.pdf, 02.01.2017.

69 See for the topic see from law and economic aspects Halmai (n 60) p. 69–72.

70 See: https://www.wto.org/english/docs_e/legal_e/15-sps.pdf, 01.01.2017.

2 Certain Stages in the Reform of CAP

The first main change appeared in the Mac Sharry Plan (1991). Its aim was an overall reform of Common Agricultural Policy.[71] Before the reform plan was finalised and parallel with it, the debate on increasing the budget[72] made the United Kingdom active again. According to the British, increasing the budget was not needed and expenditure related to agriculture had to be reduced. They highlighted the importance of better control of outgoings and financial discipline.

The aim system of the *Mac Sharry reform* was clear and obvious. *Prices of agricultural products needed to be reduced continuously. There was also a call to replacing the system of protection through prices with a system of compensatory income support.* As a result of price reductions, the income of producers also decreased. Reforms were expected to decouple the price and income policy, to approximate prices to the standard price on the world market, with direct payment. We also mention that the reform concentrated e.g. on small-scale farmers by supporting them.[73] The analysts point out well-founded that the so-called set-aside was a basic element of the reform.[74]

The new phase of the reforms after the reform in 1992 was called *'Agenda 2000'*[75]. *At this stage, the reform was built on the multifunctional characteristics of agriculture and for this reason CAP was supplemented by a second pillar, namely rural development.*[76] (Common Agricultural and Rural Policy for Europe - CARPE) Since then the system has been based on more than one pillar. The multifunctional characteristics of agriculture became the centre of attention. The outcome of the agreement reached at the end of the Berlin European Council (24-25 March 1999) continued the reform of CAP. The main elements of the reform were a new stricter adjustment of EU prices to world prices, partly offset by direct aid to producers. Questions of sustainability, such as agricultural environmental protection, came into the spotlight by offering assistance. Modulation was introduced, whereby State Members had the opportunity to reduce direct payment to farmers and to reallocate support in favour of rural development under appropriate conditions. It is important to highlight the British point of view concerning Modulation. The UK introduced Modulation the practice as a new opportunity of CAP.[77]

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71 We need to remark that the plan was opposed by the French considerably, so the plan was implemented in modified form.

72 In 1988 the Delors Package doubled the amount for structural funds.Delors II planned to increase the outgoings of the EU.

73 See Somai (n 60) p. 7.

74 See Halmai (n 60) pp. 112–114; Siegfried Jantscher, 'Die Gemeinsame Agrarpolitik (GAP) der EU' (1996) Heft 1 (22) Eckpunkte eines Zukunftorientiertes Reformkonzeptes, p. 3, see on the web: http://wug.akwien.at/WUG_Archiv/1996_22_1/1996_22_1_0085.pdf, 10.01.2017.

75 'Agenda 2000' is a document which was published in 1350 pages by the European Council in July 1997. In this document the Committee made a suggestion to 15 Member States concerning the development of the European Union after 2000. Topics: the Budget of EU, Structural Funds, (which support the poorest regions of Europe) and the reform of CAP, with regards to the Central and Eastern European countries which intended to enter the EU.

76 The concept was not new; the conference held in Cork, Ireland had defined the principles on this topic.

77 In the UK the introduction of Modulation was in a restrictid measure. Portugal and France introduced also the Modulation. See for this: Halmai (n 60) p. 129.

On 26 June *2003*, EU agriculture ministers meeting *in Luxembourg* reached an agreement which effectively overhauled the CAP (Fischler[78] reform). The British were glad to the reform.[79] *By reforming CAP a series of new principles and mechanisms were introduced. Support was decoupled from production volumes.*[80] The decoupled aid which has been provided since 2003 became a 'single farm payment'. *It is important that the single farm payment was related to obligations concerning environmental protection, food safety and sanitary and phyto-sanitary requirements. (Cross compliance).* The cross compliance was regulated in the Council Regulation No. 1782/2003 of 29 September 2003.[81] It must be highlighted that the part of cross compliance were the 'Statutory Management Requirements' (SMR) and the 'Good Agricultural and Environmental Condition'.[82] This cross compliance was a response to the expectations of European citizens. Considering the contractual system of WTO, the aim of the decoupling support from volumes of production was to put the single payment system into the 'green box' for the future. It is also important that the Council Regulation No. 1782/2003 of 29 September 2003 included for the modulation strict rules.[83]

The consolidation of the 2003 reforms was completed with the *Health Check* by the Commission *in 2009.*

It intended to strengthen complete decoupling of aid through gradual elimination of the remaining payments coupled to production by taking them into the single farm payment scheme. The first pillar funds of CAP were modulated at a higher rate[84] than earlier to the second pillar, rural development. Its aim is to make the rules for public intervention and control of supply more flexible in order not to inhibit farmers from reacting to market signals.

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78 He was the European Union's Commissioner for Agriculture, Rural Development and Fisheries 1995–2004.

79 Margaret Beckett, the then Secretary of State for Environment, Food and Rural Affairs declared the followings: 'It is hard to overstate the importance of this morning's agreement in transforming the core elements of the CAP and laying down a new direction for its future evolution.' http://www.telegraph.co.uk/news/worldnews/europe/1434219/Historic-CAP-reform-praised-by-Beckett.html, 10.01.2017. We remark that the British point of view regarding reforms was not independent from the question of the Community budget and from the interests of UK in the Community budget in the future, as Péter Halmai refers on it. See for it Halmai (n 60), especially: pp. 155–156.

80 It was evident that the distorting effect of previous mechanisms for agriculture and trade in agricultural products needed to be reduced.

81 Council Regulation (EC) No 1782/2003 of 29 September 2003 establishing common rules for direct support schemes under the common agricultural policy and establishing certain support schemes for farmers and amending Regulations (EEC) No 2019/93, (EC) No 1452/2001, (EC) No 1453/2001, (EC) No 1454/2001, (EC) 1868/94, (EC) No 1251/1999, (EC) No 1254/1999, (EC) No 1673/2000, (EEC) No 2358/71 and (EC) No 2529/2001, See on the web: http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32003R1782, 01.01.2017. We remark that in the frame of the reformpacket several laws was laid down, e.g. by the Council and the Commission.

82 Article 4-5 Council Regulation (EC) No 1782/2003 of 29 September 2003.

83 Article 10 Council Regulation (EC) No 1782/2003 of 29 September 2003.

84 Article 7 Council Regulation (EC) No 73/2009 of 19 January 2009 establishing common rules for direct support schemes for farmers under the common agricultural policy and establishing certain support schemes for farmers, amending Regulations (EC) No 1290/2005, (EC) No 247/2006, (EC) No 378/2007 and repealing Regulation (EC) No 1782/2003, See on the web: http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32009R0073&from=HU, 10.01.2017.

The reform packet of CAP in 2013[85] *has a complex goal system. Its general goal is to meet the challenges of 21th century. The reform packet is based on the expectations of society and leads to significant changes.* It aim to promote sustainability, to ensure food supply harmonising with food security and agricultural environmental protection requirements, to maintain biodiversity, and e.g. to protect the soil. The direct payment system will be more reasonable such as the trade in agricultural products. Moreover the reform intends to make the position of farmers stronger in the food chain. In the reform packet young farmer's support is in the focus, the approach to rural development is more integrated and more targeted and ensuring work places plays a key role. The reform packet looks at competitiveness, simplification, innovation, efficient agriculture based on knowledge as highlighted aspects. It is important that the reform fixes fair remuneration for the public goods supplied by farmers.[86]

By reviewing the reforms of CAP we may conclude that the relevant ambitions of the United Kingdom were simplification, financial discipline, financial control, reduction of outgoings, competitiveness and multi-pillar system of agriculture. These ambitions have been rational, have helped the permanent, namely more balanced operation of CAP. Moreover, the Community accepted the net contributor status of the UK to the EU Budget and respected the significance of the economy, society, history and culture of the UK, as well as its competence. Besides all, the UK decided on Brexit.

At this moment we can only second-guess how Brexit will affect the status of British agriculture. In the United Kingdom both agriculture and as a connected field, environment[87] are very important areas. The farming community is a valuable part of society. Moreover, rural development, environmental and nature protection have always been appreciated by the British.[88] A crucial question is what the United Kingdom will do for these areas which are significant to its economy, society and culture. Each of these fields is valuable on its own but they are also linked with each other. The way of regulating these fields is a key issue.

Another question is how the United Kingdom will treat the needs of producers and consumers. We can only speculate on the answers. We know that agricultural producers want to maintain their standard of living; they intend to continue to trade with EU Member States and WTO in the future, also on favourable terms.[89] The internal market is very important for

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85 From the regulation packet of the reform see especially: Regulations 1303-1308/2013 of the European Parliament and of the Council, and Regultion 1310/2013 we based emphasizedly on: Regulation (EU) No 1307/2013 of the European Parliament and of the Council of 17 December 2013; see for it: http://eur-lex.europa.eu/legal-content/HU/TXT/HTML/?uri=CELEX:32013R1307&from=en, 01.01.2017.

86 The reform ensures greater flexibility for the Member States and gives the ability to moving between the pillars easier. See for it e.g.: http://www.europarl.europa.eu/atyourservice/hu/displayFtu.html?ftuId=FTU_5.2.3.html, 11.01.2017.

87 Ian Hodge: 'Brexit: the agricultural issues' 16. May, 2016, The UK in a Changing EU, see on the web: http://ukandeu.ac.uk/brexit-the-agricultural-issues/, 11.01.2017.

88 It is not by incidence that the British supported the introduction of the Modulation. See (n 76).

89 See for it: National Farmers Union: *EU Referendum UK's Farming Relationship with the EU,* quoted pp. 18–20, The document is available on the web: http://www.nfuonline.com/assets/61993/.

the UK's agricultural producers regarding agricultural export and import,[90] although we must remark that the British famers want also new opportunities for trading in the world.[91] In agreement with the analysts who are dealing with this theme,[92] our point of view is that the British must realise that, in the WTO contractual frame system, they will negotiate as an important country but only as one country; they will be not a wholesale negotiator when compared to the EU. In this context, how British agricultural production can be maintained after Brexit is another question. An important topic is the securing of active workforce for farming and agricultural production. Farming has namely the specific feature that it often needs seasonal workers because the production is not always permanent. According to data regarding the employment in the UK's agriculture sector the country employs for seasonal work a lot of non-UK workers who are in a large number from other EU countries [93] When the UK leaves the EU the country will face the question how to solve seasonal working in the agriculture sector.

Regarding agriculture from the consumer aspect, we have to point out that they want to buy food which meets health safety and food safety requirements at an appropriate price. As already mentioned, food security, sanitary and phyto-sanitary as well as health and safety and environmental protection requirements are set at high standards in the frame of CAP. Farmers might have difficulties to suit these requirements. In the course of Brexit, the question of how the UK will uncouple its legislative regime concerning agriculture, agricultural producers, agricultural production and trading with agricultural products and in connection with them concerning environment and rural development from that of the EU will undoubtedly come up. Our point of view is that if the UK wants to continue trading in agricultural products with the EU Member States after Brexit, the country must continue to accept e.g. the Community's food and health safety, sanitary and phytosanitary rules.

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90 Hodge (n 87) quoted ibid 'Trade in agricultural products is closely connected with the EU: about 70% of food imports come from the EU and 60% of exports go to the EU.' The prices of the agricultural goods are influenced obviously by this connection.

91 See (n 85).

92 Koller, Halmai, Bóka (n 58) quoted.

93 See for it: National Farmers Union: *EU Referendum UK's Farming Relationship with the EU,* pp. 6–7, The document is available on the web: http://www.nfuonline.com/assets/61993/, 15.01.2017. The document includes an interesting case study regarding the topic of seasonal employment in the agriculture. It is the following: 'Cobrey Farms is a family partnership in South Herefordshire which grows asparagus, blueberries, rhubarb, potatoes and arable crops. In 2015 we grew asparagus requiring 960 people to harvest, grade and pack. Asparagus production is highly labour intensive requiring people to cut the asparagus in fields by hand with limited ability to mechanise. The harvest labour is employed on a temporary seasonal basis with employees being housed on site. In 2015 52% were Bulgarians, 40% Romanian, 7.5% from other EU countries and only three UK nationals. It is critical to be able to employ people from other countries as we have been unable to fill positions from the UK labour market. In 2015 we received 44 direct UK applications which we tried to recruit, however once a job was offered all but three UK born people rejected the offer of work. Without the opportunity to work with foreign nationals we would be unable to grow these crops and harvest them successfully.' Catherine Chinn, HR Manager, Cobrey Farms.

V Conclusions

The CAP with reforms will most probably remain a valuable, complex, multi-pillar specific policy and legislative field of the Community long into the 21st century. Along with more rational Community financing than before, the reformed CAP ensures food supply, food safety, protects its producers, its consumers, and the environment, favours its young farmers, and stresses rural development, workplaces and innovation in the agricultural sector. All in all the legislative regime supports sustainability. The withdrawal of the United Kingdom as a net contributor and a country of great reputation is a definite loss for the Community. However, we believe that Brexit will not affect the main direction, goals and basic principles of the CAP regime, CAP will operate as a traditional Community achievement also in the future.

Notes

Enikő Győri*

What shall We Do without the Brits? Some Thoughts on Brexit

Seeing the title of my paper, the reader might think that I have been falling into a deep melancholy, since 17.4 million[1] British citizens out of 64 million made their decision: they have had enough of the common Europe and instead will entrust their own leaders to manage their businesses. In the early hours of 23 June 2016, what I felt was more like anger. The community of Europeans have already had enough troubles to cope with (unstoppable migration flows, terrorism, security policy challenges to the South and East, ongoing economic crisis), and now we will spend two years finding out how to let a country go. There is no precedent of this kind,[2] no *know how;* all we have at hand is a densely intertwined legal system that must now be scrutinised, one detail at a time, in order to achieve a harmonious divorce and division of assets between the mutually disappointed parties. A nightmare.

My second thought was that plenty of academic-like writings will be published on something about which not only those who remain in Europe do not have a clear picture but even those who figured it out do not have one. Almost half a year has passed since June 23 but we are no wiser than we were before. What we know is that *Brexit means Brexit* – as prime minister May put it clearly quite quickly, underlining that what happened cannot be undone by some tricks and the *Remain* camp should give up hoping that a new referendum might be organised. We also know that the UK will notify its intention to withdraw[3] to Brussels in March 2017 and, by virtue of the founding treaties, the negotiating parties will have two years to reach an agreement. However, as far as the content, the modus vivendi with Europe is concerned, we are still groping in the dark.

The third thing that came to mind was how likely it is that many will attempt to exploit this situation and at last try to remake the Union in their own image, something which would have

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1 *Remain*:16.141.241 votes (48.1%), *Leave*: 17.410.742 votes (51.9%), Total electorate: 46 500 001, Turnout: 72,2%. http://www.electoralcommission.org.uk/find-information-by-subject/elections-and-referendums/upcoming-elections-and-referendums/eu-referendum/electorate-and-count-information.

2 It must be mentioned that with 53% majority against 47% the citizens of Greenland decided on 23 February 1982 to leave the European Communities. The withdrawal of 1985 cannot however be compared to the current leaving of the UK, as it was not the decision of an entire country, but only that of a specific part of a country, namely Denmark.

3 Art. 50 of the *Treaty on the European Union.*

been much more difficult with the Brits still in. And I am afraid that, if this is what happens, it will bring us no good at all.

Based on all that, this paper is not intended to be an academic work but more of a pamphlet. I will not argue in favour of any of the existing models (Norwegian, Swiss, Canadian or other) for the UK. The UK will do it for itself once it has its ducks in a row and made up its mind. Most probably, the two years of intensive negotiations surrounded by an ongoing war of communication will end with an agreement on a new type of *sui generis* relationship. I will instead try to focus on the unexpected nature of what happened and summarise the various aspects of the withdrawal and their impact on the specific Member States, including the risks they entail for Hungary.

I Were We Surprised?

Yes, we were. Even if everyone knows that, where referendums are concerned, anything is possible. Even if we don't believe it can happen. And then, here we are.

It is however true that, looking at how the facts worked out, one should not have any reason to wonder. It's certain that 2016 will not be written in golden letters in the history book of the European Union, nor that of the world. Any time political leaders canvassed the population (whether voluntarily or because they had to) on a given subject, the citizens either did not give the answer the initiators of the referendum expected to receive or did not give it in the same way as they expected. In brief, all voted either against the leading elite or against an issue supported by Brussels. It started with the Dutch,[4] continued by the Brits[5] and, with some geographical diversion, by the Colombians,[6] followed by the Hungarians,[7] the Walloons[8] and, at the end, the Italians[9]. And not to mention the American presidential elections.

It is therefore evident that there is a general feeling of dissatisfaction. Questions like how to find the remedy, who will do it and what it will consist of are still open. No sign of answers. After the Brexit referendum, the leaders of the EU issued a down-to-earth declaration:[10]

[4] The Dutch citizens rejected at the referendum held on 6 April 2016 the ratification of the EU Association Agreement with the Ukraine.

[5] British referendum of June 23 on EU membership.

[6] The Colombian citizens rejected, at a referendum held on October 2 2016, the peace agreement negotiated by President Santos with the terrorist guerrilla movement FARC.

[7] The Hungarian citizens answered, on October 2 and with an overwhelming majority in the negative, the question whether Brussels should be entitled to take decisions on the composition of the population. The referendum was however invalid as the proportion of the voters did not represent at least the half of the total electorate.

[8] In Wallonia no referendum was held but the regional parliament, at its first voting on 14 October 2016 refused to ratify the EU-Canada Free Trade Agreement.

[9] On December 4 2016, Italian voters rejected the constitutional reforms of Prime Minister Renzi.

[10] Joint Statement by Martin Schulz, President of the European Parliament, Donald Tusk, President of the European Council, Mark Rutte, Holder of the Presidency of the Council of the EU and Jean-Claude Juncker, President of the European Commission.

no reason to panic; we respect the decision; we will negotiate and we will solve the problem. Although it is clear from the political statements that there are diverging views on the withdrawal and the follow-up, open confrontations have not been expressed. This is because everyone tries to stick to the agreement of no negotiations until the intention to withdraw has been announced and while the Brits have not revealed their starting position. Nevertheless, this is the only issue on which there is a consensus: on any other aspect of Brexit there is little common ground.

Instead of finding a remedy (i.e., instead of self-criticism, a change of direction and speaking with one voice), the European mainstream is complaining about the rise of populism and is blaming it for everything that's wrong. What populism stands for exactly, no one has clearly defined yet. However, if we try to capture the meaning the Western elite attaches to that word we could say that populists are those who win against the will of the elite and the mass media.[11]

This quite critical and ironic definition also demonstrates how blaming populists for Brexit is based on an oversimplified explanation of the facts. The intrinsic reasons have been there since the very beginning. The British have always remained outsiders in Europe, and not only because they consider the continent, in everyday language, 'overseas.' As a powerful player on a global scale and as a former colonial power, the UK has never considered the old continent as its exclusive playing field. With its unwritten constitution and its peculiar concept of sovereignty, the UK has never really acclimatised to the Brussels' atmosphere, nor has it ever wanted to. It was not among the founding states; it acceded to the European Communities at a later stage, at a moment when the main objective of these was still to foster economic relationships. It has never been keen on deepening the integration; it kept out from the monetary union, cherry-picked when it came to cooperation in the fields of justice and internal affairs and was undisguisedly hostile if someone raised political union or European federation.

Having a look at the embeddedness of the different Member States in the European Union, we see the United Kingdom among the tail-enders, both at the structural level (the extent to which it is dependent on other Member States concerning its economic, commercial and financial indicators, its foreign, neighbourhood and security policy and its participation in the EU decision making process) and at the individual level (whether its citizens feel at home in other Member States, how much they trust the Union and its politics and how much they are interested in the EU decisions).[12] It might be that Prime Minister David Cameron only wanted to turn the chaos in his party into order, but with the referendum he threw caution to the wind. British Euroscepticism was always around and the referendum gave it a chance to manifest itself.

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11 Hermann Tertsch, 'El adiós al legado de 1968' ABC, 22 of November 2016, p. 15.

12 For the structural and individual cohesion of the different Member States see Josef Janning: Making Sense of Europe's Cohesion Challenge. European Council on Foreign Relations, May, 2016, ecfr.eu. In both categories the UK occupies the last place.

II A Loss?

Definitely. There is an axiom in the Brussels world: the EU has emerged strengthened from every crisis and the crisis was always overcome by deepening the level of integration. I am convinced that, this time, not even the most optimistic or the most ardent EU fans will be able to approach Brexit through this axiom. At least if we are willing to ponder and take the figures into account.

The current population of the Union, 500 million inhabitants, will shrink by 12.5% to 437.5 million at a time where at a global scale we are definitely lagging behind in the demographic competition. At the beginning of the 20th century, 20% of the world's population still lived in Europe. This proportion today is 5-7% and will fall by the end of the century to 4%. One of the last supporters of the federal Europe, Jean Claude Juncker, also underlined this in his speech in December 2016 'We are a key part of the global economy, accounting for 25% of global GPD. Ten years from now, it will be 15%. In 20 years from now, not one single Member State of the European Union will be a member of the G7.'[13] The UK alone constitutes 14.8% of the EU's economic area and accounts for almost 20% of EU exports.[14] It would therefore be unwise to make ourselves believe that we will come out of this story in a better shape than we were before. One thing is for sure: the Union will be different after Brexit; it must rethink itself to be able survive in the political and economic race. For populations outside the continent, the European model and living standard is attractive but it still remains an open issue whether this can be maintained after the weakening to be suffered as an inevitable consequence of Brexit.

I am certain that, after the not only bumpy but at the same time shocking start (where we saw all those political leaders who had something to do with having a referendum on the island state's Union membership were about to resign), the UK will gather its forces and bargain for the best deal possible. It will be able to get control back, even if an important part of the mostly pro-EU staff is having moral issues with working on the withdrawal, while until now they have been working to implement the obligations deriving from the membership. The British administration is professional enough to identify British interests, even with it being split into three parts.[15]

At this moment it is still not possible to see whether this will lead to a hard separation (with many restrictions) or to a soft, slow divorce, or, alternatively, to a fast, dirty withdrawal (without real agreement) or to a fair, flexible agreement (with different rules for different sectors, eventually including even different regimes for certain parts of the country) or to a comprehensive one. Not even the most Eurosceptical believe that the ties with the old continent should

[13] Speech by European Commission President Jean-Claude Juncker at the 25th Anniversary of the Maastricht Treaty: 'EU and Me' in Maastricht, 11 December 2016. In www.ec.europa.eu, http://europa.eu/rapid/press-release_SPEECH-16-4343_en.htm.

[14] Tim Oliver, 'What impact would a Brexit have on the EU?' Dahrendorf Analysis, LSE, March 2016, p. 3.

[15] The competences are shared by the Department for Exiting the European Union, the Foreign and Commonwealth Office and the Department of International Trade.

be cut. The British economic interest is to maintain contacts as smoothly as possible, not to lose foreign companies and to safeguard the City as financial centre. What the UK wants is to regain control over its borders, legislation and finances; it wants separation from the Union, not from Europe.

As Europe also would only lose from a drastic divorce, we can assume a gradual separation and a longer transitional period. This will be, of course, communicated by the British as being them getting back everything they wanted and making a much better deal than membership was, while the EU of 27 will certainly interpret it as a clear loss for Britain.

The real question is, however, what will happen to Europe.

III What will Change in the EU?

It is worth making an inventory of what will change within the Union with the withdrawal of the UK, regardless of the specifics of the agreement.

Balance of power. Within the Union there are several cleavages: North-South, East-West and small Member States – big Member States. The weight of the Member States in the EU institutions and in the decision-making process had been specified according to these dividing lines. Now all this must be reconsidered. The remaining 27 states will of course seize the moment to improve their own position, which already foreshadows conflicts. The balance of power will certainly change with the UK leaving the EU.

EU budget. Although it is also an issue for the balance of power, a separate treatment is necessary. In 2015 the contribution of the UK to the budget of the EU was GBP 8.5 billion.[16] The seven-year Multiannual Financial Framework will end in 2020. All contributions and benefits had been fixed until that date by the Heads of State and Government of the EU 28 in 2013. From the moment of Brexit, the UK contribution will be missing from the budget although it was already earmarked.

Seat of the EU bodies. The bodies and agencies located in the UK (European Medicines Agency, European Banking Authority) should find a new seat for themselves, therefore a race will start between the remaining Member States to be the headquarters of these bodies.

Spirit, attitude towards the European project. Each Member State has its own approach to the main issues regarding European integration. Many simplify this question to an issue of having more or less Europe, whether the Member State concerned is willing to deepen political integration, if it has difficulties with handing over part of its competences and whether it treats Brussels as an enemy or identifies itself with the Union. This dividing line lies between the supporters of the federal Europe and those who believe in the (nation) states of Europe. The group of those who are proud of their national identity and are not willing to give it up will significantly shrink with Brexit. As Karel Schwarzenberg, the former Czech foreign minister,

[16] Oliver: 'What impact would a Brexit have on the EU?' Dahrendorf Analysis, LSE, March 2016.

put it: 'The EU will miss the English style of thinking… Europe, which will be determined by French centralism and implemented with German precision, fills me with horror'[17]

EU policies. Spirit and attitude also determines the direction in which the EU moves in certain areas: whether economic relations will be dominated by free trade or protectionism, the extent to which European defence will be developed on the basis of NATO, if the internal market will be used to enhance competitiveness or it will instead be the social dimension that will be strengthened, etc. With the UK leaving the EU, those supporting free trade and an internal market serving competitiveness will be definitely fewer and the NATO camp will also be smaller. At the same time, Brexit could offer a new opportunity to strengthen European defence policy, as the UK was always reluctant to back this process.[18]

We are at least still two and half years away from the real Brexit to happen, but we can already notice that EU policies will certainly change. New winds have arrived in the form of a legislative proposal regarding one of the basic freedoms, the (until now untouchable) free movement of workers. In February 2016, the UK was bargaining a deal about the specific conditions under which it would be authorised to restrict the free movement of workers as a Member State.[19] Since then, several Member States have made attempts to raise obstacles to this freedom and the European Commission itself has issued a proposal that goes against the unrestrictability of the four freedoms (see the new legislative proposals on posted workers, which is clearly in contradiction to the principle of freedom to provide services). The majority of the Western European countries welcome these initiatives; moreover, they expect the legislation to be changed.[20]

This proves that, for both objective and subjective reasons, the EU cannot remain the same after Brexit as it was before. The question is which direction it will be taking.

IV Reactions from Brussels and by the Member States

Brexit – as we could see – will weaken the Union; however, the EU institutions and the Member States cannot admit it in their external communications. The EU leaders evaluating the British referendum immediately published a sober statement[21] that suggested unity and which was later interpreted by everyone according to their own taste. These reactions also reveal how the different Member States experience the withdrawal of the UK.

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17 http://diepresse.com/home/politik/aussenpolitik/5079726/Schwarzenberg_Leider-verfaellt-Kurz-dem-Populismus

18 See the statement of the Austrian Vice Chancellor, L. Mitterlehner on Brexit: 'It is still a positive sign in the light of the US presidential elections that London that has always been the lengthened arm of Washington in the EU will lose its influence' (www.diepresse.at).

19 A New Settlement for the United Kingdom within the European Union. Extract of the conclusions of the European Council of 18-19 February 2016 (2016/C 691/01) Official Journal of the European Union, 2016.2.23.

20 On 12 December 2016 eight ministers of seven Member States *(BE, DE, FR, LU, NL, AT, SE)* published a common article under the title 'Posted workers: the free movement of persons should not mean the freedom to abuse,' http://www.lemonde.fr/idees/article/2016/12/12/la-liberte-de-circuler-ne-doit-pas-etre-celle-d-exploiter_5047228_3232.html#tv1MSOMCmMCkudrm.99.

21 http://www.consilium.europa.eu/en/press/press-releases/2016/06/24-joint-statement-uk-referendum/

A common point of these assessments is that every Member State regrets the decision of the UK to leave the Union but respects it and wants no punishment for that. They intend to maintain close contacts with the UK in the future, however the primary objective is to keep the Union of 27 together. All expect the UK to define the framework within which it intends to engage with the EU first; any negotiation can only come afterwards. No one can conduct preliminary discussions. There is full consensus on refusing any outcome where the Brits would keep exclusively those elements of the common internal market, which are favourable for them (no cherry-picking).

This is the official position, the surface. Nevertheless, at the same time, everyone dropped the mask to some degree. It is difficult not to hear the irony, the tone of revenge, the intention to tease and provoke, behind the words of the representatives of the EU's institutions. Designating Michel Barnier as chief negotiator on behalf of the European Commission can hardly be seen as anything else. One cannot therefore be surprised that the Member States want to keep the control over the process and the European Council by laying down guidelines will supervise the negotiations; they will not be fully entrusted to the Commission.

It goes without saying that the centre of gravity of the Union will shift to the South. The Southern Member States might think that the great moment has come for them at last (they even held a hasty Mediterranean summit) to achieve a change in economic governance by favouring an encouragement of growth and investments instead of strict budgetary mechanisms and the rule of the free market without frontiers. Communitisation of debts is an old objective that they believe to have got closer to by now. The Mediterranean countries are, of course, not fully united: while the conflict between the Italians and Greeks with the Germans are not recent, the Spanish, who are unconditionally pro-European do tend to avoid conflicts with Merkel, who is so keen on the enforcement of rules (at least as far as rules concerning economic policy issues are concerned).

At this moment it cannot be seen yet whether Germany would give up its strong attachment to the proper enforcement of rules, but what can easily become reality – and this project would be shared beyond the Southern states by France, who would moreover take the lead in it – is the deepening cooperation within the Eurozone, accompanied by a common economic policy and special Eurozone institutions, namely creating a real fiscal pillar in addition to the common currency. Institutionalising the Eurozone, which is a French objective shared by most political groups, could easily lead to a Europe of concentric circles. If we want to be realistic, in such a Europe there would not be too much room in the inner circles for the Central and Eastern Europeans.

It is impossible not to notice that in Western Europe there are some who believe that the time has come to get rid of the Eastern countries who should belong to the Union only through an outer circle. Despite the success shown by the fact-based data (the gap between the former Eastern bloc and the old EU in the intensity of economic and commercial relations and the embeddedness indicators have improved significantly), most of the Western European countries could not assimilate the *big bang* enlargement. The former communist countries are still often identified as sources of problems; they are used as scapegoats in order to have someone to be blamed in case of a trouble around Westerners' own houses. It is an easy narrative to argue that

these countries are not real democracies; they only joined the Union for money and take jobs away. Since the start of the migration crisis, they have also been identified as xenophobic.

This line can easily meet another camp, those who see in the withdrawal of the outsider Brits an opportunity to make a real federation out of Europe: the Brits are free to leave and they should do so as fast as possible, and we can finally realise the political union of the continent (we can read Belgian and Spanish statements of this kind and many in the European Parliament are of this view, too).

The only problem is that the supporters of this theory are increasingly fewer in the Member States, and at every democratic survey it turns out that citizens are not really open to such changes. However, that will not necessarily upset the decision makers.

A big question is what Germany wants to get out of this situation. The UK was often its ally when it came to pushing something through against France. Strengthening the Southern countries does not really serve Merkel. Although closer economic coordination is welcome by Germany, clearing others' debts is not something they want. Moreover, it would not make good sense to squeeze out the Eastern countries: the volume of Germany's trade with the four Visegrád countries is much larger than the one it has with France: Large German enterprises made important investments in Central Europe. At the same time, Germany is disappointed that these countries do not share the *Willkommenskultur* and expects them to receive migrants on a compulsory basis. While Germany is benefiting from the Balkan border blocks, like Austria it is restricting the access of those coming from Eastern Europe to its labour market. Germany dislikes that the cohesion policy costs it a lot while the Member States of this region are clear beneficiaries of this policy. For historical reasons, it is however improbable that Germany would play a part in pushing Poland to the edge of Europe. It is thus quite a contradictory picture and network of interests.

How does all this impact the Visegrád countries? They see a great opportunity in Brexit and a chance to address the faults and weaknesses.[22] The EU must change; it should listen to the call of time, to the message the Brits passed to them with their withdrawal. They will not hurry the Brits and will do their best to have good relations with them even in the future. In their statements they are committed to safeguarding the interests of their several hundred thousand citizens working in the United Kingdom, meanwhile they hope secretly that many of their qualified workers will return if living in the UK becomes more difficult for them.

Based on the above, it is quite clear that not everyone has the same perception on the aftermath. At the September Summit in Bratislava (where, after a long time, the Heads of State and Government held their meeting in a European capital instead of Brussels), it still seemed that the political leaders of the Member States who gathered together to define the new direction are committed to a revision and to admitting the failures. The joint statement reflected a sober, realistic diagnosis and the intention to remain together.[23] They decided to continue the

[22] Communiqué of the V4 Prime Ministers, Krynica, 13 September 2016.

[23] The Bratislava Declaration and Roadmap: http://www.consilium.europa.eu/en/press/press-releases/2016/09/pdf/160916-Bratislava-declaration-and-roadmap_en16_pdf/.

discussions on the future of Europe at the beginning of 2017 in Valetta and to round off the process on 25 March 2017 at the celebrations for the 60th anniversary of the Rome Treaties by setting out the directions for their common future together.

The only problem is that the events of the months that have passed since the Bratislava summit do not point to a higher degree of convergence and mutual understanding or decoding the messages of the citizens. The most divisive issue is still that of the mandatory quotas for refugees. Although the September statements by Merkel and Juncker still suggested that they would give up that very controversial decision of September 2015, which even proved to be unworkable in practice, today these voices have faded and there is only faint hope that the concept of flexible solidarity, endorsed by the Slovak Presidency, will be adopted. Strengthening European defence is a matter of consensus in principle, but for the time being there has been very little real progress. It is therefore not apparent what the leaders of Europe think on the future of the EU. Thus, it is difficult to believe that a powerful project that is acceptable for everyone and attractive to the European citizens could be adopted before next Spring.

What is more, 2017 will complicate the internal political situation in many Member States. The EU is not known for reforming or renewing itself in a year with German and French elections. Extreme, Eurosceptic political parties are on the rise everywhere, and competing with them will eat up the energies and attention of the mainstream parties. Speeches are getting tougher, as are Member States' rules on migration issues becoming, but there has been no breakthrough in the Union arena.

Criticism of the EU, or a more moderate evaluation of the facts by the less conformist Visegrád countries, is immediately seen in Western Europe as hostility towards the EU or a revival of nationalism. We still do not know how durable this coming together of the Visegrád countries will be and whether the salami-slice strategy, which Western Europe has always aimed to apply, will eventually defeat the unity of the four countries. We should not forget however that the V4 countries, by consolidating their economic situation and by their political stability, have become stronger within the Union; it is not only their voices that has become louder. Public opinion is still supporting Europe, but one must be cautious in case Eurosceptics reap the rewards of EU criticism. Another danger is if the Central European countries, especially those who – with good reason or without – have been criticised heavily by Brussels in the recent years believe that the rise of extreme parties in Western Europe will serve their interest and that, through these parties, a better Union will emerge from the chaos. It suffices to have a look at earlier statements made by these parties to see that none of the extreme left or extreme right parties could be considered as friends of Central Europe; they do not have a vision of a Union in which this region could have a proper place. It is therefore better to ignore the Siren voices. Instead, the V4 countries should have a narrative that is powerful enough to discourage the key parties of Western Europe from getting rid of them or pushing them to the peripheries, and, instead, enable them to see their own interests in the close cooperation with these countries. For open, export-oriented countries with the majority of their economic relations with Europe, surviving at the peripheries of the Union or even outside of it does not open avenues.

V Special Cases: Ireland and Spain

The geographic location of the various Member States will influence the volume of the loss they will suffer with the withdrawal of the Brits; those in the neighbourhood will be affected more than countries not located in the proximity of the UK. There are however two Member States in specific situations who should be mentioned briefly in more detail.

One is Ireland, for which the UK is the number one economic partner. Because of their extremely close connections and concentrations, Brexit will touch upon the vital interests of Ireland. According to John Bruton, former Irish Prime Minister, Brexit might hit Ireland's economy even harder than Britain's – even though Ireland had no say in that decision.[24] The weakening of sterling following the referendum already put Irish exporters in a difficult situation, as Britain takes two-fifths of Irish-owned firms' exports. Because of the limited domestic market, the majority of Irish firms send their workers to the USA for further training or, alternatively, try to attract the talented ones from over there.

Northern Ireland had been affected for decades by the struggles of the Irish nationalists for the unification of the island, while the unionists wanted it to remain within the UK. A ceasefire was achieved through the Good Friday Agreement of 1998, due to which checks at the North-South border were eliminated. Brexit thus threatens the recently re-established free circulation, it risks newly created political and cultural contacts being cut, endangering the stability of the Northern part of the green island. They could take the permeability of the Norwegian-Swedish border as an example, but we should not forget that non-EU Member State Norway is a member of the EEA and the UK would not necessarily be interested in EEA membership. One of the most problematic points of the divorce talks will certainly be how to uphold the free movement between Ireland and the other EU Member States while making sure that EU citizens cannot enter the UK without controls.

At the same time Dublin, with its low corporate taxes, qualified workforce, geographical proximity and similar business culture, is trying to present itself as an attractive alternative for investors or for those who are considering leaving London behind due to Brexit. Even so, not even the benefits of the eventual transfer of company headquarters would compensate Ireland for a hard Brexit. Ireland is the most interested in letting the UK leave the Union but slowly, with the most favourable conditions and by maintaining the closest possible cooperation.

The other Member State which is strongly concerned is Spain, whose southern peninsula, the entrance to the Mediterranean Sea, has been under British control for over three hundred years. Gibraltar is part of the UK with a high degree of autonomy. Due to the EU membership of the UK, EU treaties are applicable in Gibraltar, therefore the results of the British referendum concern it the same way as any other region of the UK. The population of Gibraltar, the Government, the political parties, chambers of commerce and the trade unions all supported the Remain campaign. This is predictable, since Gibraltar's economic model is strongly

[24] http://www.economist.com/news/europe/21709354-making-it-one-few-european-countries-wants-be-kind-britain-ireland-may-suffer

dependent on European markets. Around 10 million tourists visit the peninsula each year by crossing the still easily permeable border, as do 20-30,000 workers on a daily basis, while 40% of the workforce already consists of migrant workers (including some 100 Hungarians).[25]

Spain intends to exploit Brexit to revise the Treaty of Utrecht of 1713, when it made the bad decision to cede control of Gibraltar to Britain. The overly low tax regime and the flourishing financial services and gambling sectors on the Rock are an affront to it and it is upset that fishing vessels and customs guards from the peninsula often infringe its territorial waters. Spain therefore proposed joint (Spanish-British) sovereignty to save Gibraltar's EU status. Under this proposal Spain would bear responsibility for the external relations of the peninsula while Gibraltar would enjoy strong sovereignty, including financial autonomy and double citizenship (and, as such, EU citizenship in the light of the carrot and stick approach). The Spanish ambassador to the UN did officially submit the proposal for joint sovereignty over Gibraltar to the fourth committee of the UN in charge of decolonisation issues (according to Spain, Gibraltar is the last colony in Europe).[26]

One should recall that in 2002 the citizens of Gibraltar, who have a strong British identity, already rejected the idea of joint sovereignty in a referendum. The UK consistently rejects the idea of joint sovereignty and sees the future of Gibraltar as a matter for the Brexit negotiations. Spain, on the other hand, wants to solve the issue on a bilateral basis and hopes that the carrot and stick approach will work.

We should also add that Spain and the UK are important investors in each others' countries. A survey drawn up between July and September at the request of the British Chamber of Commerce says that three out of ten UK firms plan to cut back investments in Spain by an average of 10% or more (60% said they will maintain current investment levels, while only 8% reported that they are planning to increase them)[27]. Disinvestment would definitely not serve the Spanish economy, which has just found its own path. Approximately 150,000 Spanish citizens live in the UK, while 300,000 Brits habitually live in Spain, holding significant real estate assets. An additional 15 million British tourists visit the country each year. As such, Spain is interested in a soft, less painful and more organised Brexit and not to press the UK on every last detail. That is also true for the UK: it should take into account the interests of its citizens residing in Spain and currently benefiting from their EU citizenship (convertibility of pensions, European health care).

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25 As far as the border is concerned, it is important to underline that it is currently a Schengen border and custom border with passport and custom checks. London wants to avoid it becoming more complicated to cross the border. Moreover, Gibraltar has its own immigration rules, by virtue of which special Gibraltar rules could be adopted in the future for EU citizens.

26 'IV Comisión de la Asamblea General de la ONU adopta por consenso Decisión sobre Gibraltar', Comunicado del Ministerio de Asuntos Exteriores y de Cooperación de España, 8 de noviembre de 2016 www.exteriores.gob.es.

27 Survey by AFI, El País, 18 November 2016, p. 40.

VI Conclusions

The withdrawal of the UK will, without any doubt, weaken the EU at the moment when an important reorganisation has started in the post-cold war world order. Serious challenges threaten the world that is ruled by liberal democracies, guaranteed by international institutions and legal order and the stability and balance of power established after the fall of the Berlin Wall. In the East, Russia has questioned international law and is engaging in power politics, while in Asia and Africa ISIS is taking control over new territories. The conflict in the Middle East can explode any time. China is leveraging its economic policies and other countries on the rise are becoming important actors in the global economy and politics (India, Brazil). Europe is losing ground; its reserves are less than anyone else's. It is therefore impossible not to see Brexit as a loss.

We don't know yet what direction the US is taking after Trump's election, but one thing is for sure: it will expect the EU to stand more on its own feet when it comes to defence. Brexit, even in a military sense, is a serious wrench for the old continent. However, it would be counter-intuitive for the president elect to believe that making NATO's work impossible or reducing the intensity of cooperation with Europe would serve his interests: the US needs allies, especially if it is really considering bailing out of the TTP, as Trump declared. Immediately after that announcement China applied for taking the lead in the creation of a US-free Asian-Pacific Free Trade Area.

One issue is what the new US President will do, but another equally important question is what will happen to Europe. Further disagreement inside will significantly weaken the EU at international level. The Europe project should be kissed awake with new initiatives, making the EU 27 more powerful. Organising itself into concentric circles or splitting it into sub-areas would just handicap the EU in the international competition. The European social model should not be treated as an axiom. It should be seen to what extent it is maintainable and whether it can be adjusted to the challenges of the 21th century. In the meantime, some taboos will fall, there is no other solution. We should come back to a proper balance of rights and obligations, to taking more individual and common responsibility. For that we should have strong Member States, who mutually accept one another and are ready to take decisions, following sound evaluations, on which issues they intend to have closer cooperation and which questions will be retained as national competences for reasons of efficiency. It does not make sense, therefore, to speak about less or more Europe in general. National identities should be retained and European identity should not be seen as a menace for them: the two should not be set against each other. The strengthening of competitiveness should be favoured and the EU policies (energy policy, digitalisation, R&D+I) should be adjusted to this objective. If it is not to happen, Europe will irreversibly lag behind in the international race, it will lose its character and only history books will tell us about its past glory and the universality of the European spirit.

Péter Györkös*

Mushu to Mulan

Mushu to Mulan: So, what's the plan?
Mulan: Umm….
Mushu: YOU DON'T HAVE A PLAN???
Mulan: Hey, I'm making this up as I go.

The day before, on 22 June 2016, my daughter was returning home from Nottingham where she is a medical student. She questioned me about the referendum. My reaction was clear: knowing the pragmatism of the Brits, I excluded an irrational decision. Her reaction surprised me. Being in her clinical year, she was rotating in several hospitals across the region. Her conclusion: no chance of remaining. And she was right.

This, and what happened afterwards, leads me to ask three questions.

Q1: What is the reason for this vote and what is the impact on the UK?
This is a sensitive question that only the British people can answer. It touches on issues such as the generation gap and the geographical gap. The answer will be interesting and relevant, but cannot come from outside.

Q2: What will the relationship between the EU27 and the UK look like?
For starters, the UK will leave the EU but not Europe. It is up to both sides to design their new relationship and here Article 50 is not of much help. And, much like Disney's Mulan was making it up as she went, my impression is that the Brits did not have a plan either. Maybe they don't even have one now.

Two things seem clear. First, none of the four existing models of closer cooperation with the EU would fit the UK and so they will need to carve out a fifth one. Second, Art. 50, entirely in the hands of the UK, offers temporary shelter. No negotiations without notification is clear enough but still rather problematic. The risk is that the UK will draw up an unworkable model based on wishful thinking and then try to hammer it through its partners with all its might.

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And yet the withdrawal agreement is the easier one, with 'only' the Member States at the negotiating table, even though I wouldn't underestimate the challenge of getting the European Parliament's consent. At the same time, as both Art 50(2) and common sense stipulate, the withdrawal agreement cannot be isolated from the issue of our future relationship with the UK. And that is a much more complicated issue, both politically and institutionally.

When it comes to our future relationship, today the future is more important than the past. This is because, if we look frankly at the global picture, we may well end up in a lose-lose situation, where the EU is losing big-time and the UK is losing big-time – and with that, the West and the Transatlantic Partnerships are losing, too. We can only hope that the sculptors of the UK model will be realistic and pragmatic enough, but recent developments indicate a hard Brexit is unlikely to be avoided.

Yet realism and pragmatism are also called for within the EU27. Some of the initial ideas on the future of this relationship are alarming. An infamous study by Bruegel, for example, proposes a hierarchy among the four freedoms, relegating free movement into second class. Here, in Germany, I also hear siren voices trying to lure the Government (unsuccessfully so far!) in this direction and force a smaller group of Member States to pick up the 'UK bill'. It's too early to dramatize these developments but the risk is there. And if I consider the recent conflation of free movement with migration by the President of the EP, or the European Commission's approach to the Posted Workers Directive, including the flagrant dismissal of the 'yellow card' shown by national parliaments, then the risk is even bigger.

Q3: What will happen to the EU27?

To me, this is the real question. First reactions were promising: don't panic, keep together. *'Der Zusammenhalt'* of the remaining members is the only basis and hope for the future. But it cannot be taken for granted. Uncomfortable questions in some capitals lead to irresponsible ideas of further fragmentation.

In order to keep the EU27 together, we need three things: first, an analytical examination of the reasons for Brexit; second, the re-establishment of control where it is breaking down, along the lines of previously agreed rules; and third, strict adherence to the Treaty, when it comes to new developments in the process of European integration.

Brexit is a symptom, not the cause, of our problems. It is the consequence of a complicated situation in the EU, even if the UK was never really integrated as deeply as other Member States are. One can argue that the country's geography and history played an important role, but from my perspective the chief causes of Brexit were the feeling of a loss of control – particularly relevant when it comes to migration – and the gradual alienation of Brussels from Member State capitals. Coupled with the failure of the British political class to explain the fundamental difference between migration and freedom of movement within the Single Market – just like their failure to paint an honest picture of Brexit's consequences – the images from Calais and the Western Balkan route added fuel to the fire.

A systemic loss of control, then, is the biggest problem with the state of our union in my view. Turning a blind eye to the abuse of budget rules and to the failure to protect our external borders put the two biggest achievements of European integration in question – the euro and

citizens' free movement inside a Single Market flanked by Schengen – threatening to undermine our European economic model and way of life. With the tacit consent of the guardian of the Treaties, the blatant disregard of the rules during the financial and then the migration crisis led to an overall loss of confidence, and a feeling of insecurity among Europeans. We have to return to the rules, back to Schengen and back to the Stability and Growth Pact.

A return to the rules is also the only possible basis for the consolidation of an EU of 27 members, whose perceptions and vision may not be fully congruent. A diverse bunch – lest we forget – *united in diversity.* The foundation of our present and future can only be the respect for the jointly agreed rules. It is extremely dangerous and counterproductive to ignore rules in favour of inchoate 'values' discussions.

While it may be difficult, the institutions have to accept that our Union is a Union of Member States, where the institutions serve the member states and not the way around.

We have to recognize that the justification of the European project has to be adjusted. Peace on our continent is the greatest value, but to respond to today's challenges we need to be able to do more than simply refer to the war cemeteries. What more exactly is up for discussion – but for an open and honest discussion, where criticism of decisions or of institutions (or, God forbid, even of specific people) is not shunned as a rejection of the legacy of the founding fathers. To put it another way, if we are facing unprecedented challenges then views departing from the current mainstream or from politically correct language should not be rejected out of hand, or else we will end up with the war cemeteries only.

We have to return to the equal treatment of the Member States. The differentiated application of the SGP rules, the silence about the long lasting breach of the Schengen and Dublin rules by some and the hectic attacks against the fifth (and only against the fifth) fence on the green external border of the EU and of the Schengen zone are clear evidences that some are more equal than others.

Last but not least, we must recognise that the rules for planning and shaping the future are also laid down in the Treaties. Both the Treaty amendments and enhanced co-operation have clearly designed rules. Attempts at blackmail with a multi-speed Europe (which is, by the way, a reality), a group of the avant-garde (what kind of avant-garde?) and a group of twelve (why twelve, why not eleven or thirteen?) are undermining the remaining confidence and trust.

In the wake of the Bratislava summit, we see three areas with a de facto consensus: security, growth and youth. However, at this stage we are still too much of a hostage to a totally failed concept of a virtual quota. Last year, by-passing two decisions of the European Council, the Commission submitted a proposal on the relocation of 160,000 asylum seekers. Twelve months later, 4700 have been relocated – a clear demonstration of Member States' unwillingness to go down this path. Not to mention the lack of interest on the side of those to be relocated, who usually have a very concrete destination country or even town in mind.

The EU has to return to the real agenda and to give up metaphysical discussions on virtual solutions. Beyond the return to order and European legislation, we have to get back to creating a sense of security, both inside and outside the EU. The list of potential areas affected, starting from information sharing between the intelligence and law enforcement services up to a European army, is long. The same applies for economic reform. The Hungarian model is clear

evidence that budgetary discipline and structural reforms are complementary policies; they can go hand in hand. Those who want to spend more for the sake of spending are simply pushing the burden onto future generations (or on other Member States' tax payers). We have to return to a realistic approach to trade policy. The EU cannot afford to give up its say on designing the future rules of world trade. We have to shape the future of transatlantic relations while remaining ready to reconsider EU-Russian relations. The EU needs a new agenda towards the Western Balkan states and a rather fast recalibration of the partnerships with our neighbours. We have to embark very quickly on an effective, industry oriented digital agenda, otherwise we can forget the legacy of the European industries, and we will lose millions of jobs.

Three months after the Brexit referendum and months before triggering Art. 50, there is a complex European situation with many internal tensions and external pressures. Brexit could have two different impacts. One way is to deepen the conflicts and accelerate the fragmentation, the polarisation, leading to a lose-lose outcome. Sleepwalking again? The other option is a pragmatic, realistic but still ambitious agenda, where everybody tries to save and protect Europe, as a continent and as an institutional community, as a global player. The second version requires a lot of realism and engagement from both sides, from the EU27 and from the UK as well.

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