

## Brexit. Brexit?

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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.<sup>1</sup> 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 interconnect-edness of the present world where the flows of causality accelerate ('butterfly defect')<sup>2</sup> 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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<sup>1</sup> The Atlantic: The Best Year in History for the Average Human Being, [theatlantic.com/international/archive/2015/12/good-news-in-2015/421200/](http://theatlantic.com/international/archive/2015/12/good-news-in-2015/421200/) (downloaded: 2016. április 7.).

<sup>2</sup> Goldin, I. and Mariathan, 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.<sup>3</sup> 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.<sup>4</sup> 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 19<sup>th</sup> 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.<sup>5</sup>

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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<sup>3</sup> 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.

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

<sup>5</sup> 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 refugees 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<sup>6</sup> of member states as enshrined in the Treaty are all among the

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<sup>6</sup> 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,<sup>7</sup> Article 50 will be invoked and negotiations will be started to conclude the agreement setting out the

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<sup>7</sup> *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.<sup>8</sup> 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

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<sup>8</sup> 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,<sup>9</sup> 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 positions 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.

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<sup>9</sup> 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<sup>10</sup> upon which the EEA Joint Committee has little, if any, influence in the so called ‘decision-shaping’ phase after the

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<sup>10</sup> 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.<sup>11</sup> 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

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<sup>11</sup> 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.<sup>12</sup> 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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<sup>12</sup> 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 Brexiters'.

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 countries 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<sup>13</sup> 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

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<sup>13</sup> *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 partnership'.

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 than 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 than 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,<sup>14</sup> 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

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<sup>14</sup> 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<sup>15</sup> 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

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<sup>15</sup> 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.<sup>16</sup> 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

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<sup>16</sup> 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'.<sup>17</sup> 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'.

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<sup>17</sup> 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 type'<sup>18</sup>, 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...)<sup>19</sup> 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.<sup>20</sup> 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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<sup>18</sup> Duff (n 8) p. 9.

<sup>19</sup> 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.

<sup>20</sup> 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.