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SHOULD THE UK WITHDRAW FROM THE EU: LEGAL ASPECTS AND EFFECTS OF POSSIBLE OPTIONS

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Abstract :

The possibility that the United Kingdom (UK) might withdraw from the European Union (EU) does still look unreal to many people [1]. It has however become less unrealistic [2]. This is the case since the British Prime Minister, David Cameron, announced the holding of a referendum on the UK's membership of the EU in 2017, should his political party remain in power after the 7 May 2015 general elections.

Paradoxically, this would happen at a time when the UK has actually achieved most of the aims of her European policy:

- enlarging the EU without deepening it and without changing its institutions, and while obtaining a budget rebate;
- keeping the full benefits of the EU's internal market, despite getting several optouts on major other policies (euro, Schengen, area of freedom, security and justice) and while pushing to more liberal policies;
- preserving national control on the British foreign and defence policies and a veto power on any decision in the field of European foreign and defence policies, and putting a break on any try to move in those fields, while getting the EU to liberalise external trade;
- obtaining a better control of subsidiarity and, finally, getting rid of federalist symbols.

In any case, most, if not all, other Member States of the EU would like the UK to remain an EU member. Their authorities will be ready, if needed, to help the country to try and find some ways and means to facilitate this. But they have already made widely known that they will not do that at any price.

THE LEGAL FRAMEWORK

To begin with, if the UK decided to withdraw from the EU, on which legal basis and according to what legal procedure would this happen? The text of Article 50, a provision which was introduced in the Treaty on EU (TEU) by the Lisbon Treaty [3], is pertinent in that regard. It reads as follows:

"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

1. See the so-called "Brexit Barometer" launched in the beginning of 2015 by the think-tank "Open Europe" (London), which has the ambition to assess the probability of Britain leaving the EU within the next British Parliament. On 27th February 2015, their guess was: "as things stand, we assess the prospects of Brexit at 17%, but we will be making regular adjustments" (Open Europe website).

2. See Denis MacShane book: *Brexit, How Britain will Leave Europe*, Ed. I.B. Tauris, London, 2015 (234 p.).

3. The Lisbon Treaty entered into force on 1st December 2009.

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.

A qualified majority shall be defined in accordance with Article 238(3)(b) of the Treaty on the Functioning of the European Union.

5. If a State which has withdrawn from the Union asks to rejoin, its request shall be subject to the procedure referred to in Article 49."

From paragraph 1 of Article 50, it is clear that, in EU law, the decision of withdrawal is of a unilateral character. It belongs exclusively to the Member State concerned, without any need to be agreed by the other Member States. It would not even need to be explained or justified. It must be taken by the Member State in question 'in accordance with its own constitutional requirements'. The completion of this requirement can only be verified by the competent authorities of that State. This would certainly be done before the notification of that State's decision [4].

The second paragraph of Article 50 provides for an optional procedure, which in principle will be followed. This provision allows to negotiate a withdrawal treaty (WT) between the withdrawing State and the rest of the EU. If such a negotiation between the UK and the EU was successful, the date of the UK's withdrawal from the EU would then be the date of entry into force of the WT they would have agreed on together. Otherwise, if such a WT was not concluded, the withdrawal would automatically happen two years after the notification of the UK's decision to the European Council.

If a WT was not concluded, the UK would certainly try to negotiate and conclude another kind of agreement with the EU. This would be highly opportune, in order to settle, in particular, the new trade relationship

they would have to establish among them. Ideally for the British economy, such an agreement should give the UK as much access as possible to the EU's internal market (actually, the EEA's [5]).

In any case, whatever the option chosen, at least some minimal transitional measures would be very opportune [6]. This is because the economies of the UK and of the rest of the EU, after more than forty years of membership, have become closely intertwined and interdependent (share of trade in goods and in services, share of investment, mobility of people, either working or retired). As EU citizens, millions of British people live, either working or retired, in other EU countries, while millions of other EU citizens live in the UK. Many industries and enterprises are established both in the UK and on the continent. The exchanges of goods and services are intensive.

During the period necessary to negotiate, sign and ratify a WT between the UK and the rest of the EU, the UK would legally remain a full Member State of the EU. Her nationals would (in principle) continue to exercise their full rights in all EU institutions. The only legal exception provided for in Article 50 (4) is that her representative in the European Council (the Prime Minister) and in the Council (Ministers) as well as in their preparatory bodies (Ambassador in the COREPER [7], diplomats and civil servants in other bodies) would not be allowed to participate on the EU side in the negotiation of the future WT. Politically and in practice, it is probable that the actual capacity of the UK to exercise an influence on the functioning of the EU and on decisions taken by the institutions would be seriously affected, including on matters unconnected with her withdrawal.

It is interesting to note that, contrary to a treaty of accession of a new Member State in the EU (which has to be based on Article 49 TEU), as well as to a treaty revising the EU Treaties (which has to be based on Article 48 TEU), neither a common accord in the Council, nor a ratification by the other Member States, are required by Article 50 TEU to agree on a WT. This is despite the fact that a WT would have to be "accompanied" by some amendments to the

4. A unilateral right for a Member State to withdraw from the EU without any condition was clearly the will of the authors of the Treaty of Lisbon. This is confirmed by the discussions in the European Convention on the corresponding article of the Constitution for Europe (draft Constitution, Volume I, CONV 724/03, annex 2, p.134). Article 50 is silent about the possibility or the interdiction for a Member State, after having notified a decision to withdraw, to change its mind and to cancel its notification within the two years period.

5. The European Economic Area (EEA) was established by several Agreements signed in 1992. It comprises now the twenty eight EU Member States and three of the four Member States of the European Free Trade Association (EFTA), ie Iceland, Liechtenstein and Norway. The EEA allows the three EEA EFTA States to largely participate to the EU's internal market. Switzerland, which is an EFTA Member, is not a Member of the EEA.

6. For an example, see the Research Paper 13/42 of the House of Commons Library, a document of 106 pages published in July 2013: "It would not be possible to withdraw from, say, the Common Agriculture Policy overnight without causing enormous disruption for farmers" (p. 11).

7. COREPER is the acronym for "Comité des Représentants Permanents des Etats Membres" (Committee of the Permanent Representatives of the Member States).

EU Treaties, for example to modify the provisions, such as Article 52 TEU, listing the names of the Member States. It shows that the authors of the Treaties, aware of the difficulties involved, but also of the political necessity for the EU not to be seen as procrastinating if one of its Members wanted to leave, tried to facilitate the way forward.

All the same, given the complexity of the matter, it is probable, not to say certain, that the delay of two years foreseen in Article 50 would not be sufficient. In that case, paragraph 3 of Article 50 allows for that period to be extended [8]. A longer period might also be needed for the UK to prepare the national legislation which would be necessary as a substitution to EU acts. Some parts of the WT could, if it was considered appropriate by both parties, be applied provisionally at the date of its signature [9], while waiting for its conclusion by both Parties.

On top of that treaty, a revision treaty would have to be adopted in parallel, on the basis of Article 48 TEU [10], because Article 50 does not provide that the WT could contain amendments to the EU Treaties. The WT would not be primary law and, thus, would be subject to the jurisdiction of the EU Court of justice.

AVOIDING BREXIT BY GETTING A SPECIFIC EU MEMBER (SEMI-MEMBER) STATUS ?

Before looking at what could happen in case of "BREXIT", one should briefly examine another scenario, which seems to be still supported by some people in London. Their idea is that the UK could legally remain a Member State of the EU, while obtaining a specific status, through a revision of the EU Treaties. Such a specific status could, according to some, allow the UK to continue to participate both in the internal market and in the corresponding EU decision-making process, while obtaining the right not to participate in some, in many, or even in any other EU policy.

It is clear that the current EU Treaties do not authorise that possibility. They should thus be

modified. In accordance with Article 48 of the EU Treaty, this would require a common agreement and a ratification of the modifications "*by all the Member States in accordance with their respective constitutional requirements*", which may require a referendum in some Member States, such as the Republic of Ireland.

The timing of the procedure to be followed in such a case would be a serious difficulty: who should ratify in the first place the necessary amendments to the EU Treaties? Should that be the UK, through organising a referendum immediately after the successful end of the negotiations with the EU? In that case, it would be difficult for the British Government to convince the British people to vote in favour of a text which any of the other twenty seven Member States might reject later. The British authorities might, for that reason, request their partners in the EU to accept to be the first to ratify the revision of the Treaties, in order for the British people to be sure about what they would be called to approve in the referendum. However, one wonders how it would be possible to convince the 27 other Member States to organise the politically hyper-sensitive procedure of trying to ratify a new EU Treaty. This would especially be the case in the current political climate, and without even knowing if the British people would later accept the results! One may add that obtaining these ratifications would take a long time [11]. The procedure would thus raise serious political difficulties. Similar difficulties would be raised by any scenario providing for whatever modification of the current EU Treaties.

In addition, the scenario mentioned above would also raise serious questions of substance. Actually, the EU institutions and the other Member States would have imperative reasons for not accepting for the UK a special status of the kind described, because:

-i) this would affect the EU's decision-making autonomy on issues which are at the heart of its *raison d'être*, and thus might put into question its existence;

8. According to Article 50(3) TEU, that decision would require the agreement of the UK as well as unanimity in the European Council (an abstention would not prevent unanimity: see Article 235(1) TFEU).

9. See Article 218 (5) TFEU.

10. That "revision treaty" should be ratified by all remaining Member States of the EU, in accordance with their respective constitutional requirements.

11. In Belgium, the Federal Parliament will not be only one to ratify. The Parliaments of the three Regions and of the three Communities will also need to do so.

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-ii) such a status would be extremely attractive for some non EU members States: it might open the door to requests from those States, such as Switzerland, Norway, Iceland, Liechtenstein and the three "States of a small dimension" (Andorra, Monaco and San Marino) [12] . It might also become a domestic policy problem in some EU Member States, such as in Sweden, Denmark or others, where Eurosceptic parties could play with the idea, risking thus to open another existential issue for the EU;

-iii) the hope that such a suggestion could be successful is based on an overly optimistic evaluation of the UK's actual leverage: while 50% of her exports go to the rest of the EU, the rest of the EU sells only 10% of its exports to her [13]. Given that, her power of negotiation would not be as strong as some people think. Moreover, half of the EU's trade surplus with the UK is accounted for by just two Member States - Germany and the Netherlands - , while a revision of the EU Treaties would require also the positive vote of the other 25 Member States, among them some are suffering a trade deficit with the UK.

Taking those elements into account, is it plausible that the EU would accept to confer on the UK such a *special status* of "semi-member"? I do not think this will happen. It is much more realistic to think that the EU would stick to its constant policy. This means that a possible agreement would provide that the UK would have the obligation to follow the *acquis communautaire* and its dynamic evolution as decided by the EU, without having a right of decision on that evolution. It would be unreasonable to expect the EU to make an exception to these rules and to abandon the principle of autonomy of its decision-making. By the way, this policy was always supported in the past by the British authorities, both in Parliament and in Government. The principle according to which, in a single market, all economic operators must follow the same rules, that the interpretation of these rules must be the same for all, and that their implementation should be legally guaranteed, cannot suffer exceptions.

This also means that preserving the main specific characteristics of EU/EEA law would be essential. One

must recall that, as compared with classic international law, these specificities are primacy, direct effect, uniformity of interpretation, absence of reciprocity, control of implementation by the independent Commission and sanctions (if needed) decided by the independent Court of Justice. These specificities make the internal market credible for the economic operators, which trust is absolutely essential. This is why the preservation of the characteristics of the EU Law would also be one of the key basic principles underlying the EU's negotiating position.

One must thus expect that the conditions imposed by the EU will include, in any case, the non-participation in the legislative decision-making in the EP and in the Council. They might also include the acceptance of the role of the Commission and the Court of Justice, without a British national being a member of these institutions. They would certainly include a financial contribution, inferior, but of a comparable magnitude to the current British contribution per head to the EU budget. A comparable scheme is the objective aimed at by the EU in the negotiating mandate of an agreement with Switzerland, adopted in May 2014 [14].

A different solution, in which a "special status" would "exceptionally" be conferred upon the UK, giving her advantages which have been consistently refused to Norway, Switzerland and others, would not be acceptable for the Member States and the Institutions of the EU.

To conclude, even if this first scenario left unaffected the Treaty's provisions on free movement of people [15], its chances of success would be very weak.

THE SEVEN LEGAL OPTIONS AFTER "BREXIT"

By contrast, the scenario of the UK leaving the EU would not depend on any decision taken by the EU's institutions or by its other Member States. It would be a unilateral decision which could freely be taken by the UK alone, without any possibility for others to oppose it. The problem would be for the UK to build

12. The Council of the EU has decided, on 16th December 2014, to authorise the Commission to open negotiations with Andorra, Monaco and San Marino on "one or several Association Agreement(s)" to provide for their increased participation in the EU's internal market and related horizontal and flanking policies. "The Council will aim in these negotiations at the fullest possible implementation of the principles of the European single market, while taking into account the particular situation of these three countries in line with the Declaration on Article 8 TEU". The Declaration referred to was adopted by the Intergovernmental Conference which adopted the Treaty of Lisbon, and annexed to its Final Act. It reads as follows: "The Union will take into account the particular situation of small-sized countries which maintain specific relations of proximity with it".

13. See the Final Report of the Centre for European Reform (CER) on the UK and the EU single market The economic consequences of leaving the EU, published by the CER in June 2014 (92 pages).

14. See foot-note 25.

15. At the date of writing, it seems that the British Government has decided to choose this topic of discussion as one of the major axis of its European policy and of its possible requests for reform. This political choice is linked with the progress in the polls of the United Kingdom Independence Party (UKIP), the British xenophobic and anti-EU political party. It is a risky choice, as it may lead the British Government to demand a revision of the EU's Treaties.

a new relationship with the rest of the European Union, which seems unavoidable, geography and history being what they are, and that the road to come back to the EU, once having withdrawn, would not be easy and quick [16].

Seven options could be imagined for a new kind of relationship to be established between the UK and the EU after a "BREXIT". As shown below, not any of these options would appear to be satisfactory for the UK.

-1) According to a first option, the establishment of a new structured relationship between the EU and the UK would be provided for in the withdrawal treaty itself, which would establish custom-made arrangements.

The negotiations of such a withdrawal treaty would be extremely difficult.

The British negotiators would try to pick and choose among EU policies and, therefore, to follow a sectorial approach rather than a global one. In concrete terms, that would mean that the British Government would try to keep the benefits of EU policies, and especially of the EU internal market. It would request to keep that benefit for most sectors of the UK's economy, on a case by case basis, in accordance with the British economic interests.

In the same time, it would try to avoid, or rather to minimise, the budgetary, economic, legal and political costs of the withdrawal. Actually, the Government would have to try and show its population that it has 'recovered its full sovereignty'. It would try to make this demonstration while avoiding losing too many benefits, and without endangering the country's economy, the way of life of its citizens and the role of the UK on the international scene.

However, as has already been mentioned, the UK's leverage in the negotiations to get as much an access as possible to the EU's internal market would not be as strong as some people believe. It should be stressed that the guidelines of a possible

agreement with the UK would require the *consensus* of the European Council, i.e. of the Heads of State or Heads of Government of all the twenty seven Member States other than the UK, some of which are running trade deficits with the UK.

On the EU's side, the institutions, and particularly the Commission, which would be the EU negotiator [17], would be keen to strictly preserve the decision-making autonomy of the EU. They will also request to be given the legal capacity to control the respect by the UK of her future obligations. That would probably be one of the key basic principles on which the negotiating position of the EU would be based. Besides, the EU would try to resist a sectorial approach, but such an approach would be difficult to avoid, as the UK would wish not to be bound by some EU policies anymore. This might be the case for the Common Agriculture Policy, the Fisheries Common Policy, the Economic, Social and Territorial Cohesion Policy, or the few EU texts which exist on Social Policy. It is thus possible that the British strategy of "cherry-picking" would have to be partly accepted by the EU.

In the areas related to the EU internal market which would be covered by the EU-UK agreement, the UK would, in any case, be obliged, in order to preserve a single playing field for all economic operators in the internal market, to follow the pertinent EU legislation, without having the right to influence its content. On top of that, the UK would also have to accept to pay a significant financial contribution, as shows the example of the current financial contributions of Norway and Switzerland [18].

During the negotiation, each member of the EU Council would naturally act according to the interests of the State which he/she is representing. The decision to conclude a WT is to be taken by the EU Council at a qualified majority voting, with the approval of the European Parliament [19], which will have thus a right of veto. Except if the agreement extends to areas covered by Member States' powers, which should not normally be the

16. Article 50(5) TEU provides that "If a State which has withdrawn from the Union asks to rejoin, its request shall be subject to the procedure referred to in Article 49". This means that any "ex Member-State" would have to follow the full procedure of accession, as a new applicant country, without any automatis or privilege right to "rejoin".

17. See Article 218 (3) TFEU.
18. See below.

19. See Article 50 (2) TEU. The qualified majority in the Council would be calculated according to Article 238 (3, littera b) TFEU.

case [20], it would not need to be ratified by the EU Member States. It remains that an agreement would later have to be negotiated and signed with the EEA EFTA Members (and ratified by the EU, by the UK, by the 27 remaining EU Member States and by the three EEA EFTA States), in order to take into account the new relationship to be established between the EEA and the UK.

Finally, one may remember that, during or at the end of the negotiation, Article 218 (11) TFEU will allow "a Member State, the European Parliament, the Council or the Commission (to) obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the Treaties." According to this provision, "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". The use of that procedure could of course be a cause of delay.

-2) the second option would be for the UK to try and join Iceland, the Liechtenstein and Norway as a Member of the EEA, together with the twenty seven remaining Member States of the EU.

The incentive for the EU to push the UK to join the EEA (which legally implies that the UK would also have to join the EFTA) would not be obvious. The acceptance of the UK would be even more doubtful [21].

Such an option would have the advantage of simplicity. The EEA Agreement allows the three EEA EFTA States (Iceland, Liechtenstein and Norway) to participate in a large part in the EU's internal market and to enjoy the four freedoms, without being committed to other EU policies, such as agriculture, fisheries, judicial affairs, foreign policy, etc... These countries have to follow the evolution of the EU legislation concerning the internal market, without having a right to influence much its content.

However, the EEA is currently not working in an optimal

way. In a Commission Staff Working Document dated 7 December 2012 [22], the External European Action Service and the Commission complained about the increasing backlog of the three EEA EFTA States in accepting new EU legal acts. About 580 pertinent EU acts had not yet been integrated at the beginning of 2014 [23], some of them important, for example decisions of EU executive Agencies on financial services. In Conclusions adopted by the EU Council on 16 December 2014, the Council takes a more conciliatory tone:

"31. The Council expresses its satisfaction at the agreement between the EU and the EEA EFTA side, as noted by the EU and the EEA EFTA Ministers of Finance and Economy in their informal meeting of 14 October 2014, on the principles for the incorporation into the EEA Agreement of the EU Regulations establishing the European Supervisory Authorities in the area of financial services. The Council hopes that the technical work preparing the incorporation of these Regulations will be finalised as soon as possible."

On a more negative note, the Council added:

"32. The Council nonetheless notes with concern the recurrent backlog and delays incurred during the entire process of incorporation of EU legislation into the EEA Agreement, as well as in the implementation and enforcement of relevant legislation in the EEA EFTA states. In this context, the Council strongly emphasizes the need for renewed efforts in order to ensure homogeneity and legal certainty in the European Economic Area.

33. While welcoming efforts made by the EEA EFTA States over the last years to step up the pace of incorporation, the Council regrets that these efforts were still insufficient to effectively and comprehensively address the existing problems. It notes in particular that the questioning of the EEA relevance of EU legislation by the EEA EFTA states, the extensive use made of the possibility under the Agreement to request adaptations and exceptions, as well as delays in the clearance of constitutional requirements and in the implementation and enforcement of already adopted EEA legislation in the EEA EFTA states contribute to a fragmentation

20. Unless it would contain some UK's commitments on foreign policy or/and on defense policy. In that case, the UK herself would be demanding that the WT become a "mixed agreement", to be ratified not only by the EU and the UK, but also by each of the remaining twenty seven other Member States.

21. See the Research Paper of the House of Commons 13/42, at page 17.

22. Document SWD (2012) 425 Final "A review of the functioning of the EEA", available on the website of the European Parliament.

23. To be compared with 7000, which is the number of acts already integrated in EEA law since the entry into force of the EEA Agreement in 1994. It should be taken into account that this figure includes a number of texts which are less substantial than others, such as very technical texts, modifications of previous ones, recommendations, etc.

of the internal market and to asymmetric rights and obligations for economic operators. The Council encourages the EEA EFTA states to actively work towards a sustainable and streamlined incorporation and application of EEA relevant legislation as this is paramount to safeguard the overall competitiveness of the European Economic Area."

It remains true that the advantages of avoiding a complex negotiation would be such that the EU might envisage that option [24]. When looking at current discussions between the EU and Switzerland [25], it is however not impossible that, one day, the EU might request that the EEA change its institutional architecture, especially if the dysfunctions noted by the EU Council would continue. And it is also a fact that the current EEA EFTA States themselves are complaining [26] that the EU does not sufficiently take their interests and their constitutional problems into account.

In any case, the main obstacle would probably come from the UK. While the aim of its withdrawal from the EU would be to become less dependent on the EU power to legislate, it would be politically quite difficult to accept:

- a) to integrate in the British legislation all new EU legal acts affecting the internal market, without having the right to substantially influence their content [27],
- b) to be submitted to the rule according to which the EEA EFTA States shall speak with one voice in the Joint Committee [28],
- c) the jurisdiction of the EFTA Surveillance Authority and of the EFTA Court [29],
- d) and to pay to the EU a financial contribution of a comparable magnitude as the contribution of a Member State [30] to the EU budget.

Finally, admitting a new State to the EEA would need an accession treaty to that organisation, which would have to be concluded, not only by the EU and the UK, as for the WT, but also by each of the thirty EEA Member States (twenty seven from the EU and three from EFTA).

-3) the third option would be for the UK to try and become a member of the European Free Trade Agreement (EFTA).

This option would not be an adequate answer to the UK's needs.

It would mean that the UK would, like Switzerland, become a member of EFTA, but without becoming a member of the EEA. But the fact is that, given the development both of the EEA and of the bilateral relations of Switzerland with the EU, the Free Trade Agreement (FTA) between the EU and the EFTA States [31] has now nearly become an empty shell, which contains very little. Only trade for fish and some agricultural products are covered (no other goods, no services). This agreement neither has links with the EEA, nor with the 1972 Trade Agreement (modified several times) between Switzerland and the EU.

Finally, becoming a member of EFTA would not give to the UK an automatic right to become a party to the many FTAs concluded between the EFTA States (and not by the EFTA itself) and a number of third countries [32].

-4) the fourth option for the UK would be to try and follow the current 'Switzerland way'.

Such an option would not look very attractive for the UK. It would also be probably unacceptable for the EU.

This option would mean that the EU and the UK would aim at concluding as many sectorial bilateral agreements as needed (120-130 currently in the case of Switzerland, only a few of them being very substantial).

Some observers think that such an option might be acceptable for the UK, despite the fact that Switzerland has no agreement with the EU on services and on financial services, while two-fifths of British trade is on services. One has to stress that this would definitely be a serious shortcoming.

The same observers also note that this option has for the UK the advantage that the framework of the

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24. At a first stage, the EEAS and the Commission actually suggested that option, among others, to the European States of a small dimension with which they are now preparing to negotiate "one or several association agreement(s)" (Andorra, Monaco and San Marino), in application of the 16th December 2014 Council's Decision.

25. See the mandate of negotiation given to the European Commission by the Decision of the Council of the EU taken on 6th May 2014 'authorising the opening of negotiations between the European Union and the Swiss Confederation on an institutional framework governing bilateral relations', a new treaty which would impose on this country obligations of a comparable nature to, albeit going even a little bit further than, those accepted by the three EEA EFTA countries.

26. See: The EEA Agreement and Norway's other agreements with the EU, (2012-2013), available on the website of the Norwegian Ministry of Foreign Affairs, and: The EEA Review and Liechtenstein's Integration Strategy, (2013), available on the CEPS' website.

27. Article 102 EEA Agreement.

28. Article 93 EEA Agreement.

This means that one of the EEA EFTA States might block the transposition into EEA law of a new EU law or of a modification of an existing one, even if the other EEA EFTA States would urgently need that transposition for economic reasons.

29. Article 108 EEA Agreement.

30. According to the excellent Final Report of the Centre for European Reform (CER) on the UK and the EU single market The economic consequences of leaving the EU, published by the CER in London in June 2014 (92 pages), the financial contribution of the three EEA EFTA States (Iceland, Liechtenstein and Norway) to the EU was €1.79 billion for the period 2009-2014. The Norwegian contribution per head to the EU during that period was comparable to the British net contribution per head to the EU budget during the same period (9% less). Figures given in the Research Paper 13/42 of the House of Commons Library are comparable: for the year 2011, 17% less per head for Norway as compared with the UK.

31. There is no free trade agreement between the EU and the EFTA as such.

32. Contrary with what seems to be implied at page 17 of the Research Paper 13/42 of the House of Commons Library.

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arrangements between Switzerland and the EU is based on classic international law. Switzerland is not bound by the judgments of a Court like the EU Court of Justice for the EU Member States, or like the EFTA Court for the EEA EFTA countries. Actually, this does not fully reflect the reality: Switzerland often finds itself in the same *de facto* situation as the EEA EFTA States, which means that it has to follow EU Regulations and Directives (including their interpretation by the EU Court of Justice) without participating in their making [33].

Moreover, the relationship of Switzerland with the EU is most probably going to change. This is because the EU is quite unhappy with the present state of its relations with Switzerland. In Conclusions adopted on 14 December 2010, the EU Council described these relations as "highly complex", "not ensuring the necessary homogeneity", causing "legal uncertainty". It added that *this system "has become complex and unwieldy to manage and has clearly reached its limits"*. In further Conclusions adopted on 20 December 2012, the EU Council reaffirmed "*that the approach taken by Switzerland to participate in EU policies and programmes through sectoral agreements in more and more areas in the absence of any horizontal institutional framework has reached its limits and needs to be consolidated (...) further steps are necessary in order to ensure the homogeneous interpretation and application of the Internal Market rules. In particular, the Council deems it necessary to establish a suitable framework applicable to all existing and future agreements. This framework should, inter alia, provide for a legally binding mechanism as regards the adaptation of the agreements to the evolving EU acquis. Furthermore, it should include international mechanisms for surveillance and judicial control.*"

This is why the EU has decided in May 2014 to launch important negotiations with Switzerland on "*an international agreement on an institutional framework governing bilateral relations with the Swiss confederation*" [34].

This mandate is quite ambitious: it requires to include in the future agreement provisions giving a role of surveillance to the European Commission itself, as well as a possible judicial control to the EU Court of Justice itself. The agreement should also impose on Switzerland a maximum time-limit for the implementation in Swiss law of changes to the *acquis communautaire* decided unilaterally by the EU. It is to be stressed that such provisions, if agreed, would go further than the provisions of the EEA, ie being more demanding for Switzerland than for the EEA EFTA Members.

-5) the fifth option would be for the UK to try and negotiate a free trade agreement or an association agreement with the EU, like the EU has concluded with most countries in the world.

That option is not likely to satisfy either British needs or EU requirements.

There is no existing EU free trade or association agreement which has a scope as large as it would be wished and needed by the UK in substance, and which provides for the surveillance and judicial instruments that the EU might insist on, in case of agreeing on a substantive access to the EU's internal market. The EU would in any case demand in such an agreement that a part of the *acquis* would have to be adopted by the UK: labour market rules, health and safety, competition policy, product standards, consumer protection, technical specifications, etc. Without such conditions, the necessary acceptance of the EU Council to sign an agreement would not appear to be possible.

In such a scenario, the UK would also have to negotiate trade agreements with non EU countries or organisations [35], as she would not retain the rights and obligations provided for in the agreements concluded by the EU with third countries. It would be difficult for the UK to negotiate with third countries FTAs which would be as beneficial for her economy as the existing FTAs concluded by the EU. The UK would obviously have much less bargaining power than the EU, as she accounts for around respectively

33. Switzerland also has to contribute financially to the EU. Its contribution per head is currently about 55% of the current net UK's contribution per head to the EU budget, taking into account that its access to the EU internal market is much narrower than that of the EEA EFTA States.

34. As already mentioned, the mandate of negotiation given to the Commission was adopted by the EU Council on 6th May 2014. The text of the mandate, leaked to the Swiss press, is now public.

35. The EU has concluded more than two hundred FTAs with third States or organisations, covering 35% of the world trade.

3% and 4% of global exports of goods and services in the world, as compared to around respectively 15% and 25% for the EU [36].

-6) the sixth option would be for the UK to try and negotiate a Customs Union with the EU, along the lines of the existing Association Agreement between Turkey and the EU.

This does not seem to be a good solution either. The relations between Turkey and the EU provide the model of an Association Agreement comprising a Customs Union. If the UK accepted such an arrangement with the EU, it would not be free to adopt its own customs tariffs, because it would have to follow the decisions made by the EU. It would also have to accept the preferential agreements concluded by the EU with third countries, and to abide by part of the EU *acquis*. Besides, this option would not give access to the EU's internal market and would not cover services.

In short, such an option would not suit British needs.

-7) Finally, the seventh option would be that, in case no agreement were to be found on any of the six options examined above, the UK would simply become a third State vis-à-vis the EU, as from the date of its withdrawal, in a similar way as the United States, China or other countries.

What would happen in practice, in such a case? From a domestic point of view, starting from the date of its withdrawal from the EU, the UK would be liberated from its legal obligation to implement EU law. This would concern EU regulations, directives, decisions, international treaties and other EU norms governing the internal market and the four freedoms (free movement of goods, persons, services and capital). It would also include existing EU law concerning all other EU policies, such as agriculture and fisheries, security and justice, transport, competition, taxation, social, consumer protection, trans-european networks, economic and territorial cohesion, research, environment, energy, civil

protection, common commercial policy, development cooperation with third countries, humanitarian aid, etc. By the same token, the remaining 27 Member States would naturally not be bound anymore to respect EU law *vis-à-vis* the UK.

In most areas for which the UK would cease to apply EU law as the result of the withdrawal, Westminster would have to adopt new national laws. For example, this would probably be the case for legislation on competition, on the protection of consumers and of the environment, on agriculture and fisheries policies, etc. That would raise difficult domestic political questions and would be time consuming. EU Regulations would automatically be abrogated, but a thorough review of all national laws adopted for the application of EU Directives would have to be made, in order to choose between three options: either to abrogate them, or to keep them unchanged, or to modify them.

One should take into account that, in order to be able to continue to export to the EU, British products and services would still, in practice, have to comply with EU standards. Thus, the UK would have to adopt a significant number of national laws and regulations in order to fill the legal void left by the inapplicability of the EU Regulations. Borders would have to be reestablished with EU Member States (they might have to be established with the Republic of Ireland, in case no special agreement were to be concluded).

Regarding trade, the EU and its Member States would become third Countries vis-à-vis the UK, and *vice-versa*.

Regarding trade with third countries, the UK, being a member of the World Trade Organisation, would benefit from its rules.

As already mentioned, the UK would lose the benefit of the two hundred agreements concluded by the EU with third countries or regional organisations. It is true that the UK is, like all EU Member States, a signatory *in its own rights* of many of these agreements, when they are *mixed agreements* [37]. Legally, the commitments on trade contained by

36. According to the last WTO statistics available on its website at the time of writing, the figures for the share of the world trade during the year 2011 were respectively the following:

-exports of goods: 2.7 % UK, 14.9 % EU;
-imports of goods: 3.5 % and 16.2 %;
-exports of services: 6.6 % and 24.7 %;
-imports of services: 4.3 % and 21.1 %.

37. The so-called "mixed agreements" are international agreements concluded both by the EU and by its Member States, because their content is covered partly by the Member States' competences and partly by the EU's competences. All provisions of mixed agreements are subject to the jurisdiction of the Court of Justice of the EU.

SHOULD THE UK WITHDRAW FROM THE EU: LEGAL ASPECTS AND EFFECTS OF POSSIBLE OPTIONS

these agreements must be regarded as having been taken solely by the EU [38], because the EU has signed and concluded them on the basis of its exclusive competence on commercial policy [39]. Therefore, subject to a decision on the part of the third countries concerned, which would most probably necessitate a renegotiation anyway (for example for the fixation of quotas), the commercial part of these agreements would not legally bind the third countries concerned vis-à-vis the UK anymore. In other fields, such as trade in services, including financial services or air transport, the agreements concluded by the EU with third countries or organisations would, similarly, not be applicable anymore to and by the UK. Finally, one cannot say that the WTO is very successful nowadays. This is especially the case on liberating trade in services, which is the strongest sector of the UK's exports.

WHICH WAY WOULD BE THE BEST IN ORDER TO TRY AND AVOID BREXIT?

It is quite reasonable to say that a withdrawal of the UK from the EU should ideally be accompanied by the establishment of a new comprehensive and structured relationship with the EU, through the conclusion of a bilateral international agreement. The absence of such an agreement would have extremely negative effects, especially for the UK's economy [40], but also, to a lesser degree, for the rest of the EU.

In the absence of any bilateral agreement between the UK and the EU, public authorities, economic operators and individuals would have to adapt to the new legal situation. Personally, I would not think that one could build a new legal theory, according to which "*acquired rights*" would remain valid for millions of individuals (what about their children and their grand children?), who, despite having lost their EU citizenship, would nevertheless keep its advantages for ever [41] (including the right of movement from and to all EU Member States? Including the right to vote and to be a candidate in the European Parliament?). Such a theory would not have any legal support in the Treaties and would lead to absurd consequences.

Thus, the short answer to the question above is that public authorities, economic operators and natural and legal persons of both the United Kingdom and the EU Member States would, as from the date of the withdrawal, have to adapt to the new legal situation. As for the economic operators and individuals from EU Member States who are established or permanent residents in the UK (and vice versa), they would not benefit anymore from being a EU citizen in an EU State. Their situation would be governed by the new legal context. Those who had a right to permanent residence could keep it, as a right derived from the European Convention on Human Rights (already mentioned). They could continue to exercise their rights, based on their particular contracts and in conformity with the applicable local law. Those who had not a right to permanent residence could, in theory, be forced to leave according to local rules on immigration. This would likely lead to difficult human situations and to legal disputes. It is mostly probable that solutions, at least ad interim, would be found rapidly. Any agreement would be based on classic international law and in particular on the principle of reciprocity. This means that all rights obtained in favour of British citizens in EU Member States (which will not be able to negotiate individually with the UK, as they are all bound together by EU law on these issues) will have to be granted to nationals of all twenty eight EU Member States.

In the absence of such an ad hoc agreement, even ad interim, the situation of some individuals would become difficult. Without any agreement in the short to medium term, it could get worse. This could of course be changed through an appropriate agreement, including on transitional measures applicable for a certain duration and in specific situations.

My personal conclusion is clear: none of the seven options available, in case the UK were to decide to withdraw from the EU, looks satisfactory. I do not see any other option which, from a British point of view, could reconcile the economic viability of a deal and its political acceptability. Any option would take the UK in one of two directions. The first direction would

38. On the basis of Article 207 TFEU.

39. See Article 3 (1)(b) TFEU.

40. This was even partly recognised in *The Europe Report: a win-win situation*, a report written by Gerard Lyons, the economic advisor of Boris Johnson, Greater London Authority, August 2014.

41. A contrario, see Jochen Herbst "Observations on the Right to Withdrawal from the EU: Who are the 'Masters of the Treaties'?", *German Law Journal* (6:2001), at page 1755. The reasoning of the author is (wrongly according to me) based on a single sentence in the judgment of the ECCJ Case C-26/62, the famous *Van Gend and Loos* judgment, which was not at all (obviously in a 1963 judgment) concerning this question, but stating that Community law was a new legal order of international law which concerned not only the States but also their nationals, and that this law was becoming part of their "legal heritage" (I would add "as long as they remain EU citizens, ie nationals of a Member State of the EU"!).

be that the UK would become a kind of "satellite" of the EU, accepting the obligation to transpose into her domestic law all EU regulations and directives for the single market. The second one would be for the UK to start trade negotiations from scratch, both with the EU and with all countries in the world, without having much bargaining power.

It follows that everybody has a strong interest in finding a solution which would allow the United Kingdom to remain a Member State of the European Union. With smart diplomatic moves, reaching this objective is not excluded. It would be encouraged by the adoption of some of the reforms which are currently suggested by the British authorities and which would help them to convince the British people in case of a referendum. Actually, a number of European leaders would be happy to consider the adoption of some of these reforms, which they do consider also as appropriate.

One cannot say the same about some other suggestions played with in the past by British politicians. Such is the case of suggestions concerning important domains, in particular the freedom of movement of people. This would not be accepted by all other Twenty Seven EU Member States. This includes suggestions aimed at allowing discrimination between EU citizens working in the UK, according to their nationality. One may add that, given the current political climate, any reform should avoid to be based on a revision of the EU Treaties, as this will politically be unfeasible, at least in the few years to come.

The main option which was suggested in 2013 by the British government was a "repatriation of powers" from the EU to all Member States. In order to prepare that option carefully, the British Government asked all Ministerial Departments, as well as independent organs and persons, to analyse carefully the legal situation on the current share of powers between the EU and its Member States. The working hypothesis was that too many legal powers, in too many fields, had been transferred to the EU in the successive EU treaties. As written in the Michael Emerson

2015 book "*Britain's Future in Europe, Reform, renegotiation, repatriation or secession?*" (CEPS, Brussels, 180 pages): "*The British government has assembled the most comprehensive-ever assessment of the workings of the EU, called the 'Balance of Competences Review'. This is based on 32 volumes and 3,000 pages of evidence submitted by over 1,500 independent sources, now published in coherent analyses.(...) The evidence shows that the sharing of competences between the EU and member states has mostly been refined through years of negotiation and experience of reaching plausible balances.*".

That British review of powers was done at a period during which the British authorities were convinced that the eurozone would inevitably push for a revision of the EU Treaties, to be able to strengthen its governance after the crisis. They thought that, in this case, the UK could accept such a revision, but would be able to request in exchange a revision of the Treaties, either through a "repatriation of powers" or through a special status of "semi-EU member" for the UK. However, the eurozone has not pursued an EU Treaty revision: instead, it chose to act by concluding inter-governmental agreements and through decisions of the ECB.

It results from the above that, for the UK, the adoption by the EU of reasonable reforms, without revising the EU Treaties, appears to be the only realistic solution, both politically and legally, including to try and answer the "key-issues" listed by Prime Minister Cameron in his *Sunday Telegraph* article in March 2014 [42]. Much could be done without changing the Treaties, if supported by a strong political will. It is more a question of political will of the Member States and of culture in the EU Institutions.

This could include substantive policy measures, such as a calendar in view of completing the internal market, especially in services [43], to launch new optional cooperation policies, for example on energy, and on industrial cooperation in defence equipment programmes. This could include as well measures aimed at improving the functioning of the institutions,

42. See my opinion on this: 'Cameron can skip Treaty change, says lawyer', *Financial Times*, London, 6th May 2014, p. 3.

43. Services represent about 70 % of the exports of the UK.

by streamlining the Commission, organising it in teams presided by powerful Vice-Presidents, as decided by the current President of the Commission Mr Jean-Claude Juncker, and by encouraging all institutions, not only but especially the European Parliament, to stay within the limits of their legal powers [44] and to concentrate on major subjects.

The European Council has already shown its willingness as regards the British question, by stating in June 2014 that the political concept of an "**ever closer union**" should not be interpreted as a strict legal provision, and that it does allow for different "paths" (and not "speeds") of integration. One could also recall that the EU Treaties oblige the EU to respect the history, culture and traditions of the peoples of Europe (Preamble and Article 3(3) TEU) and to respect the national identities of the Member States, their fundamental structures, political and constitutional, as well as their essential State functions (Article 4(2) TEU). This might deserve to be recalled to the public, maybe through some kind of Declaration.

Other ideas might be explored, such as practical ways of:

-1) Cutting red tape and better respecting subsidiarity:

The mandate given by Jean-Claude Juncker, the present President of the Commission, to his First Vice-President, Frans Timmermans, goes exactly in that direction. It seems that Frans Timmermans has begun his task in a forceful manner. In any case, it must be recalled that, by definition, one EU legislation replaces 28 national laws (28 different red tapes) and allows the single market to function better. There is no simple legal option available to avoid red tape: this cannot be solved by a Treaty. Preventing EU legislation from creating unnecessary and cumbersome obstacles to economic life is day-to-day work, which is taken more seriously today than it was the case in the past, both by the Member States and by the EU Institutions (see for example the Program "REFIT" [45]).

A closer scrutiny of the Commission's proposals by national authorities is the pre-requisite. I would suggest also non legal mechanisms, such as seriously improving the current Impact Assessment system and making it autonomous and common to the European Parliament, the Council and the Commission, developing performance indicators and regularly assessing some EU laws after a few years of implementation.

On top of that, one should recall some realities: *"the amount of EU-based legislation adopted by national parliaments needs an objective perspective. A thorough House of Commons study showed that for the UK 6.8% of primary legislation and 14.1% of secondary legislation had a role in implementing EU law, compared to various political speeches alleging as much as 75% without quoting any serious source"* [46].

-2) Involving more and better national parliaments in the EU's life:

Article 12 TEU and Protocols 2 and 3, texts which have been added by the Lisbon Treaty, confer interesting new powers on national parliaments (NP). According to the domain concerned, either one third or one quarter of NP may, based on control of subsidiarity, oblige the Commission to review a legislative proposal.

It is true that this has been rarely used: too short delays are imposed on NP, their cooperation is not organised in an optimal way and their opinions are not binding ("yellow cards", not "red cards"). This could be improved in practice, without changing the Treaties, by offering practical facilities to NP, applying delays with flexibility, and with the Commission agreeing on a political commitment in principle to follow their conclusions.

-3) Last but not least, protecting the rights of the non euro EU Member States:

More and more people think that, in the medium term, the eurozone will be forced to integrate further, either through an EU Treaty revision, or through a

44. This last point is not as natural as it sounds: a March 2014 paper published by CEPS (a serious think tank established in Brussels) pleads to confer new powers upon the EP, despite the fact that these powers are not conferred on it in the Treaties, and without changing the Treaties: for example control over the European Council, control over the Commission in its task of checking the implementation of EU law by the Member States, and powers on eurozone issues not covered by the EU Treaties ("Shifting EU Institutional Reform into High Gear: Report of the CEPS High Level Group". The Group was chaired by Ms Danuta Hübner, MEP). REFIT (Regulatory Fitness and Performance) is a programme of the European Commission. It aims at making EU law simpler and to reduce regulatory costs, thus contributing to a clear, stable and predictable regulatory framework supporting growth and jobs.

45. REFIT (Regulatory Fitness and Performance) is a programme of the European Commission. It aims at making EU law simpler and to reduce regulatory costs, thus contributing to a clear, stable and predictable regulatory framework supporting growth and jobs.

46. Michael Emerson, already quoted, on page 2.

«Eurozone Treaty», an intergovernmental agreement outside the EU Treaties but linked to them. In such a case, non eurozone EU members fear that the eurozone might adopt decisions having a negative impact on them, especially concerning the single market. In order to reassure them, the eurozone, or more exactly the members of the eurozone with the addition of some other EU members (the so-called "pre-in" eurozone members), could confirm in such a new treaty their legal obligations, and accept to submit them to the control of the EU Court of justice:

- to guarantee the rights of non eurozone countries, including on the integrity of the single market,
- to respect the «*acquis communautaire*» and the exclusive and exercised powers of the EU under the Treaties,
- to respect the legal primacy of the EU Treaties and of the EU's law over the eurozone treaty,
- to accept to ensure openness of their activities, and
- to give the right to participate in meetings for those willing to join the euro within a given delay.

The implementation of this kind of ideas would concern objectively important issues. It would be wise to concentrate on those, rather than pretending

that the immigration of EU workers in the UK is the major problem in the future relations between the UK and the EU. On that issue, it is sufficient to recall that the present EU legislation authorises Member States to adopt measures against abuses. The EU Court of Justice reminded that possibility in a recent judgment [47]. That legislation might also be made more precise if need be. On the contrary, some suggestions currently discussed in London would imply a revision of the EU Treaties and would affect the very principle of free movement of persons. One may think that insisting on such suggestions would not be conducive of a short and positive negotiation with the EU.

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47. Judgment 11th November 2014, Case C-333/13 Elisabeta Dano, Florin Dano v Jobcenter Leipzig. However, the Court also recalled that: "the status of citizen of the Union is destined to be the fundamental status of nationals of the Member States, enabling those among such nationals who find themselves in the same situation to enjoy within the scope ratione materiae of the FEU Treaty the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for in that regard".