

Brexit - Four reflections, three projections and a personal note

Thank you for inviting me to speak here today before this esteemed audience in these palatial surroundings. I am privileged to share four reflections on Brexit with you, make three forecasts and drop a personal note. Before doing so, disclosure and disclaimers are in order.

1. The United Kingdom was an eccentric member with many opt-outs

The UK has the most eccentric membership conditions already. Beyond the budget rebate (Margaret Thatcher's "I want my money back"), the UK does not participate in three areas of EU law; it has permanent opt-outs from

1) the single currency (together with Denmark which effectively is part of the Euro Area with the DKR being at its central rate in ERM-II and Danmarks Nationalbank following the ECB's monetary policy),

2) the Schengen border-free travel arrangements (together with Ireland), and

3) the Area of freedom, security and justice (with Ireland and Denmark).

Furthermore,

4) the UK enjoys a clarification of the application of the Charter of Fundamental Rights of the European Union (together with Poland),

5) saw cease to apply to it as from 1 December 2014 “a large majority of EU acts and provisions in the field of police cooperation and judicial cooperation in criminal matters adopted before entry into force of Lisbon Treaty while choosing to continue to participate in 35 of them”, and

6) had a social chapter exception (Major government opt-out revoked by Blair government).

2. The New Settlement for the UK within the EU

These club rules were considered too stringent for the UK's Conservative Party and UKIP, so further deviations were sought, and obtained: the "New Settlement for the United Kingdom within the European Union", with exceptions and clarifications concerning:

1) Economic governance – EU is multiple currency area; London's position

2) Sovereignty: the UK is not committed to further political integration ("ever closer union") and these words cannot be used to as a basis for an extensive interpretation of EU competences

3) Social benefits and free movement of persons: restrictive interpretation of current law and an alert and safeguard mechanism for UK ("a pull factor arising from a Member State's in-work benefits regime")

4) Competitiveness, regulatory burden reduction and subsidiarity.

It is important to note that these further exceptions to club membership rules would have had effect on the remaining Member States, as well, in that they were supposed to give binding interpretations of law applicable across the Union. Let me also remind

you that the ‘ever closer union’ provision requires governance to be as close to citizens as possible¹.

3. The Brexit referendum had many flaws

It was called to end intra-Tory hostilities: the permanent Tory revolt against ‘Europe’, and was considered easily winnable when called.

For these long-standing domestic political reasons, a consultative referendum was agreed, which allegedly preserved the sovereignty of Parliament (of course, no State parliament is sovereign in the EU as EU law, adopted by democratic means at the European level, takes precedence – I had an exchange of views on understanding the constitutional systems of the UK and the EU with the FT’s Philip Stephens):

1) without the participation of EU nationals living in the UK (who do have participation rights in local and EP elections, on the basis of EU law), with the exception of Irish, Cypriots and Maltese, as Commonwealth privileged, and excluding UK nationals living elsewhere in the EU

2) without a qualifying threshold on the turnout and the outcome (compare this with the requirements for calling industrial action which

¹ “RESOLVED to continue the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as closely as possible to the citizen in accordance with the principle of subsidiarity”, preamble to the TEU.

the Conservative Government wanted to see adopted as UK law: If I am well-informed, under proposed industrial action legislation a 50% turnout threshold for ballots would apply and in core public services such as education, health, fire and transport services, 40% of those eligible to vote must support the industrial action services):

72.2 % turnout

Leave 51.89%

Remain 48.11 %

Í Will of the peopleÍ : 37% want UK to leave

The observed preference of 37% of the electorate was declared afterwards to express “the will of the people”.

3) without prior clarity on the alternatives: “Brexit means Brexit” but does it imply membership of the single market or of the customs union, which even Turkey participates in? Since her speech on 17 January, we know that Theresa May wants to get out of the single market and the customs union. The referendum result is summarised as: “the British people (õ) voted to leave the European Union and embrace the world”.

“Not partial membership of the European Union, associate membership of the European Union, or anything that leaves us half-in, half-out. We do not seek to adopt a model already enjoyed by other countries [Norway, Switzerland, Albania]. We do not seek to hold on to bits of membership as we leave.” Theresa May said she aims for “the freest possible trade in goods and services between Britain and the EU’s member states.”

“What I am proposing cannot mean membership of the single market. European leaders have said many times that membership means accepting the “four freedoms” of goods, capital, services and people.”

4) without prior agreement on how to treat different outcomes among the UK four nations. That the PM of the UK makes the point “that no new barriers to living and doing business within our own Union are created” and insists on “maintaining the necessary common standards and frameworks for our own domestic market” is telling of the level of division within the Disunited Kingdom.

4. The referendum culminates years of political and media EU bashing

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The referendum was lost by a PM who consistently had depreciated Europe, misrepresented the EU and commented negatively on everything European, in line with Conservative PMs before him.

May I remind the audience of what John Major said when the then-PM returned home from Maastricht in 1991 where the EU was set up and the single currency adopted: he had won “game, set, match for Britain”.

The referendum follow-up is overseen by an PM whose avowed hostility to a non-EU European project (the European Convention of

Human Rights) is entrenched and – May I say so? – frightening and rather ridiculous when countries governed by Presidents Erdogan and Putin still adhere to the ECHR.

The lack of informed opinion on what the EU is doing, and how, is appalling. Media hostile to the European project, owned by billionaires, dominate the tabloid landscape and the once-revered BBC is no much better these days: giving ‘balance’ between opinions by broadcasting nonsense and misinformation as valid viewpoints.

Unfortunately, the UK is not alone here: in the Netherlands, PM Rutte has a long legacy of misrepresenting Europe and making disparaging remarks on our Union.

Three projections

1. Continuity

A lot of the rules applying in the UK will remain the same because they are part of English and Welsh (and Scottish, or Northern Irish) law and have been so, for the past 40 years or since their adoption more recently. If they have been adopted by way of implementation of directives, such rules need to be specifically abrogated by subsequent UK legislation. If they apply by virtue of EU regulations or other directly applicable law (primary EU law), they will be replaced by UK law.

Theresa May: “as we repeal the European Communities Act, we will convert the ‘*acquis*’ – the body of existing EU law – into British law.”

8 Case law, currently compliant with European Court jurisprudence, will only deviate over time, and will continue to apply to UK nationals in the EU-27.

Continuity is also to be expected because the EU rules will continue to apply for marketing UK products and services in the EU-27. So, just like their counterparts in Korea and Vietnam, Australia and Canada, service providers, farmers and manufacturers on the British Isles will have to respect EU standards to operate on the single market.

As the “new, comprehensive, bold and ambitious free-trade agreement”, “the new strategic partnership [the UK] seek[s] with the EU” may, as the British MP suggested, “take in elements of current single market arrangements in certain areas – on the export of cars

and lorries for example, or the freedom to provide financial services across national borders”, continuity would certainly be expected in those areas.

Continuity can also be expected were the European Court rules on the EU citizenship rights of UK nationals attaching to their status after Brexit.

Where the UK ‘opts into’ EU areas of cooperation (R&D, defense, intelligence): EU or similar rules will apply (e.g. privacy guarantees).

The UK remains bound by international norms, such as the Basel and FSB (IOSCO, FATF, etcetera) standards in the financial sector.

So much for Theresa May’s assertion: “(...) we will not have truly left the European Union if we are not in control of our own laws.”

2. Disentanglement: complex and messy

The disentanglement is going to be a long affair, complex and messy.

The UK government has grossly underestimated the complexity of disentanglement and of conducting trade negotiations with third countries.

WTO rules are not going to help avoiding major trade barriers to be present if there is no comprehensive trade agreement after 2 years (or a possible extension of this period).

Whatever the outcome of the free trade arrangements, trade between the UK and the EU-27 cannot be more free than within the Union.

As for the truly global vocation of Britain, let me remind you that the EU is the world's largest trading bloc ("the biggest player on the global trading scene", the Commission boasts) applying relatively low tariffs across the board.

Time does not allow to mention more than a few issues:

- Citizenship (EU citizenship)
- Jurisdiction and recognition
- Pass-porting for financial services
- Equivalence of supervisory standards in financial services
- Repatriation of euro settlement from London to the Euro Area (where the ECB's localisation policy suffered defeat at the CJEU)

for lack of competence to extend payments rulemaking into settlement, not on grounds of discrimination: Case T-496/11)

Article 50 is particularly unsuited for the disentanglement of a Member States from the Union – it does not specify any consequences for, or guarantee existing rights of, EU nationals and companies – expect lengthy proceedings before the CJEU.

Article 50 TEU, inserted with a view to never being invoked (like the referendum: held with the intention of not being lost), does not adequately respect the rights of EU citizens. It should include guarantees for these rights to be protected.

EU citizenship, although based on State nationality, extends beyond this and has been interpreted to imply residence rights for third-country parents of minor EU nationals. It may be expected to be relied upon by UK nationals in the EU-27, and the European Court may very well uphold UK citizens' rights beyond Brexit.

(EU citizenship implies non-discrimination on the basis of nationality when the Treaty applies, to move and reside freely within the EU, to vote for and stand as a candidate in European Parliament and municipal elections, to be protected by the diplomatic and consular authorities of any other EU State, to petition the European Parliament and to complain to the European Ombudsman.)

Theresa May is right to, now only, insist on a priority deal on the rights of citizens across the internal EU border (UK<>rest) but has threatened to use these citizens as pawns in the negotiations. Taking citizens hostage is not what democratic governments should do. Unilateral granting of rights to UK citizens in the 27, and offering them dual nationality (and, thereby, assured continued EU citizenship) without having to relinquish UK nationality is what would suit the 27 to do.

(An idea floated in the European Parliament [Amendment 882 proposed to the Draft report of Guy Verhofstadt by Luxembourg MEP Charles Goerens]: Let UK nationals opt for associate citizenship – requires Treaty change)

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Relevant before this audience: there will be lots of disputes to settle: expect litigation, arbitration, expert advice.....

PM

Text of Article 50 on the slide, and overview of the Brexit negotiation process developed at the Jacques Delors Institute in Berlin.

3. Long-term impact

Loss is how I would sum up the long-term consequence of Brexit, if it materialises in the end.

Regulatory divergence, notably in the area of financial services will increase. The current situation is one in which the Single Rulebook is not as 'single' as its name, even after the CRR/CRD-IV review amendments proposed by the Commission. And this assessment, confirmed in my experience as ABoR member, only concerns prudential norms and does not even include the regulatory variety in conduct of business rules.

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Bureaucracy, increased border controls, less free business will result.

Loss of British influence in the law and practice of the EU. British much-valued input into the law, and the practical approach, will be sorely missed. Instead of around the table with us, our fellow Europeans from England will be on the other side, or absent.

Regionalism, in the UK and in the EU: more focus on regions, less on States, which I have elsewhere argued may be a good thing².

There is no time to discuss the possible reversal of the Brexit notification, beyond saying that I expect further litigation on this. If the

² ADEMU Lecture, Fiesole, 10 October 2016: **Sustainable Economic and Monetary Union in Europe in turbulent times.**

UK were to re-enter a revamped EU, or its outer circle, Article 49 (accession) will apply.

A personal note

What can our personal position be in these times of turmoil?

Allow me to share the response I intend to give: going inward, deepening self-knowledge and being prepared to take action, when needed: raising our voice, doing what is right including, when unavoidable, resorting to non-violent resistance

René Smits

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