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# Brexit or Britin: is it really colder outside?

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## Abstract :

The possibility that the United Kingdom (UK) might withdraw from the European Union (EU), after more than 40 years of membership, looks unreal to many<sup>1</sup>, but it has now become less so<sup>2</sup>. This has been the case since the British Prime Minister, David Cameron, announced the organisation of a referendum on the UK's membership of the EU before the end of 2017, should his political party remain in power after the 8th May 2015 parliamentary elections. As the elections gave the Conservative Party a majority in the House of Commons, David Cameron confirmed that a referendum would indeed be organised. At the time of writing, the law has been adopted and the question will be: "Should the United Kingdom remain a member of the European Union or should it leave the European Union?"

Paradoxically, the possibility of an UK withdrawal has emerged at a time when the EU has been pushed by its Member States to evolve in directions which correspond to many, if not most, of the UK's European policy objectives: the EU has been enlarged to many new Member States<sup>[3]</sup>, without any significant strengthening of its institutions; there is more flexibility for Member States to participate or not in some policies; in particular, the UK has managed to maintain access to the internal market, despite achieving several permanent opt-outs on other major policies (the euro, Schengen, criminal justice and police cooperation); national control by the Member States over foreign and defence policies has been carefully preserved; the UK has been able to keep (with others) its budget rebate; the EU is liberalising external trade; the Commission and the Council control the respect of the principle of subsidiarity<sup>[4]</sup> better than they did in the past; finally, the Lisbon Treaty, which does not contain anymore federal symbols<sup>[5]</sup>, "even marks a halt to the hopes of the "federalists"<sup>[6]</sup>", and gave some powers to national Parliaments<sup>[7]</sup>.

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

## 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 could this happen? The text of Article 50, a provision which was introduced in the Treaty on EU (TEU) by the Lisbon Treaty<sup>[8]</sup>, sets this legal basis and procedure. 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 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.

1. See the so-called "Brexit Barometer" launched at 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 pages).

3. Nine member States in 1973, after the accession of Denmark, the Republic of Ireland and the United Kingdom, and twenty eight since the accession of Croatia in 2013.

4. According to which decisions must be taken as closely as possible to the citizen (see Article 1, second sub-paragraph, and Article 5(3) of the Treaty on European Union (TEU) as well as Protocol n°3 "On the Application of the Principles of Subsidiarity and Proportionality").

5. Contrary to the failed "Treaty establishing a Constitution for Europe": see Jean-Claude PIRIS, "The Constitution for Europe: A Legal Analysis", Cambridge University Press, 2006, 289 pages.

6. See Jean-Claude PIRIS: "The Lisbon Treaty: A Legal and Political Analysis", Cambridge University Press, 2010, 448 pages, at page 339.

7. See Article 12 TEU, Protocol n°2 "On the Role of National Parliaments in the European Union" and Protocol n°3 "On the Application of the Principles of Subsidiarity and Proportionality", especially Articles 6 and 7.

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

9. A right for a Member State to withdraw from the EU, unilaterally and unconditionally, results clearly from the will of the authors of the Treaty of Lisbon. This will is confirmed by the debates 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 year period referred to in that Article.

10. The procedure requires : the adoption by consensus of guidelines by the European Council, the negotiation between the UK and the Commission (on behalf of the EU), the consent of the European Parliament (by a majority of the votes cast: see first sub-paragraph of article 231 TFEU) and the conclusion by the Council acting by a qualified majority. The Treaty would be concluded between the UK and the EU and would not need to be ratified by the 27 other Member States.

11. The European Economic Area (EEA) was established by several Agreements signed in 1992. It now comprises the twenty eight EU Member States and three of the four Member States of the European Free Trade Association (EFTA), i.e. Iceland, Liechtenstein and Norway. The EEA allows these three EEA EFTA States to participate largely in the EU's internal market. Switzerland, which is an EFTA Member, is not a Member of the EEA: it has chosen, instead, to negotiate a number of specific bilateral agreements with the EU.

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

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(3b) 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 that Article, 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 of approval 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 probably be done before the notification of that State's intention to the European Council[9].

The second paragraph of Article 50 provides for an optional procedure. This provision allows the negotiation of 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[10], the date of the UK's withdrawal from the EU would then be the date of entry into force of the WT that 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.

Should a WT not be 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 between each other. Ideally for the British economy (about half of British trade is undertaken with the rest of the EU); such an

agreement should give the UK as much access as possible to the EU's internal market (actually, the EEA market[11]).

In any case, whatever the option chosen, at least some minimal transitional measures would be very opportune. 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, study, work or are 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 exchange of goods and services is intensive.

During the period necessary for negotiating, signing and ratifying a WT between the UK and the EU, the UK would remain a Member State of the EU. Its 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 the UK's representative in the European Council (the Prime Minister) and in the Council (Ministers) as well as in their preparatory bodies (Ambassador in the COREPER[12], diplomats and civil servants in other bodies) would not be allowed to participate on the EU side of the negotiation of the future WT. Politically and in practice, however, it is highly probable that the actual capacity of the UK to exercise influence over the functioning of the EU and decisions taken by the institutions would be seriously affected, including matters unconnected to its 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, in spite

of the fact that a WT would necessarily "be 'accompanied' by" some amendments to the EU Treaties. A revision treaty would necessarily be needed to modify some of their provisions, for example Article 52 TEU which lists 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 not to complicate the way forward. In spite of that, given the complexity of the matter, it is highly probable, not to say quite certain, that the period 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<sup>[13]</sup>. A longer period might also be needed for the UK to prepare the national legislation which would be necessary to substitute 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<sup>[14]</sup>, 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<sup>[15]</sup>, because Article 50 does not provide for the WT to contain amendments to the EU Treaties. The WT would not be primary law and, thus, would be subject to the jurisdictional control of the EU Court of justice, including for its compatibility with the EU Treaties.

#### **WOULD IT BE POSSIBLE TO AVOID A BREXIT BY CONFERRING TO THE UK A SPECIAL EU MEMBER (OR HALF-MEMBER) STATUS?**

Before looking at what could happen in the event of a "BREXIT", one should briefly examine another scenario, which some people in London still seem to believe is possible. Their idea is that the UK could legally remain a Member State of the EU, and yet obtain a special status, through a revision of the EU Treaties. Such a special status would, in their eyes, 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, or in many, or even

in any other EU policies. The current EU Treaties do not authorise such a possibility: they would therefore have to be modified. In accordance with Article 48 TEU, 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 would 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 cause a serious problem: who should first ratify the necessary amendments to the EU Treaties? Should it be the UK, with the organisation of a referendum immediately after a successful end of the negotiations with the Twenty Seven? 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. Therefore, the British authorities would probably ask their partners in the EU to be the first to ratify the revision of the Treaties, so that the British people would be sure of what they were being 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! Moreover, obtaining these ratifications might take a long time<sup>[16]</sup>. This might make it necessary to postpone the organisation of the British referendum. The procedure would therefore raise serious political difficulties. One may stress that similar difficulties would be raised by any scenario providing for a modification of the current EU Treaties.

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

**13.** 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) of the Treaty on the Functioning of the European Union (TFEU)).

**14.** See Article 218 (5) TFEU.

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

**16.** In Belgium, for example, ratification would not only need the approval of the Federal Parliament: the Parliaments of the three Regions and of the three Communities would also have to give their approval.

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-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 its existence into question;

-ii) such a status would be extremely attractive to other States: it might open the door to similar requests from third countries, such as Switzerland, Norway, Iceland, Liechtenstein and the three "States of a small dimension" (Andorra, Monaco and San Marino)[17] and maybe also create political difficulties in some EU Member States, such as Sweden, Denmark and others, whose eurosceptic political parties might be tempted to play with this idea, risking the emergence of another existential issue for the EU;

-iii) the hope for the success of this suggestion is based on an overly optimistic evaluation of the UK's actual leverage: while 50% of its exports go to the rest of the EU, the rest of the EU sells only 10% of its exports to the UK[18]. Its power of negotiation would therefore 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, including some which have a trade deficit with the UK.

If one takes these political considerations duly into account, would the option of the UK being given a special "semi-member" status appear plausible? I do not think so.

It is much more realistic to think that the EU would stick to its constant policy when negotiating agreements giving access to the single market to third European States. This policy requires that such a comprehensive agreement be accompanied by the obligation to follow the "acquis communautaire" and its dynamic evolution as decided by the EU, without the third State concerned having a right of decision over 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. 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, can have no exception. Incidentally, this policy has always been supported by the British authorities, both the Parliament and the Government, when applied to Norway, Switzerland, and others.

This also means that preserving the specific characteristics of EU 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 an independent institution (the Commission) and adoption of sanctions (if needed) by an independent jurisdiction (the Court of Justice). These specificities make the internal market credible for the economic operators, while their trust is vital. This is why the preservation of the characteristics of EU law would also be one of the key basic principles underlying the EU's negotiating position.

Thus, it is reasonable to expect that the conditions imposed by the EU will include the non-participation of British representatives in the legislative decision-making, both in the European Parliament 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. As already mentioned, a comparable scheme is the objective aimed at by the EU in the negotiating mandate of an agreement with Switzerland, adopted in May 2014. A different solution, in which a "special status" would "exceptionally" be conferred upon the UK, conceding advantages which have consistently been refused to Norway, Switzerland and others, would not be acceptable to the Member States and the institutions of the EU.

17. The Council of the EU 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 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".

18. See 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).

Thus, and even if this first scenario left the Treaty's provisions on free movement of people unaffected [19], its chances of success would be very weak.

### THE SEVEN POSSIBLE OPTIONS AFTER "BREXIT"

By contrast, the other scenario, in which the UK chose to withdraw from 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 be freely taken by the UK alone, without any possibility for others to oppose it. This being said, the UK would then face a formidable challenge, which would be to build a new relationship with the rest of the EU. This would be unavoidable, for many geographical, economic, historical and political reasons, and knowing that the road back to the EU, once having withdrawn, would not be easy or quick[20].

Seven different legal framework options might be imagined to establish a new relationship between the UK and the EU after a BREXIT.

However, none of these options would 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 a withdrawal treaty, which would establish custom-made arrangements.**

This is the option which is referred to in Article 50 (2) TEU on a possible withdrawal. The negotiations over such a withdrawal treaty would be extremely difficult.

For the UK's part, the Government would try to pick and choose among EU policies and, therefore, to follow a sectorial approach rather than a global one. In concrete terms, it would try to keep all benefits that EU policies bring to the UK. Thus, it would certainly try to keep the advantages given by participation in the internal market for most sectors of its economy. It would request to

keep access to the internal market, on a case by case basis, in accordance with British economic interests in the different sectors.

At 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 the withdrawal decided by the UK would allow it to 'recover its full sovereignty'. It would have to show this and yet avoid losing too many benefits, and without endangering the country's economy, its citizens' way of life and the role of the UK on the international scene.

As already mentioned, the UK's leverage in the negotiations to achieve as much 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"[21] to a possible agreement with the UK would require the "consensus"[22] of the European Council, i.e. of the heads of State or heads of government of all other twenty seven EU Member States, some of which are running trade deficits with the UK.

For the EU's part, the institutions, and particularly the Commission, which would be the EU's negotiator[23], would be keen to preserve strictly the EU's decision-making autonomy. They will also request to be given the legal capacity to control the respect by the UK of its future obligations. These two issues would probably be among the key basic principles on which the negotiating position of the EU would be based. Besides, the EU would resist a sectorial approach. On the contrary, the UK would no longer wish to be bound by some EU policies, such as perhaps the Common Agricultural Policy, the Common Fisheries Policy, the Economic, Social and Territorial Cohesion Policy, or the few EU texts which exist on Social Policy (as this policy remains largely decided at national level).

In areas related to the EU's internal market which would be covered by the EU-UK agreement, the UK would be obliged by the EU, in order to preserve

*19. At the time of writing, the British Government has decided to choose this topic of discussion as one of the major axis of its possible requests when negotiating with the EU. 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 request a revision of the EU's Treaties. British requests on this issue might find it extremely difficult to find agreement amongst some of the other twenty seven Member States. It is however by no means certain that this position, which has been approved by a part of the Conservative Party, will be changed, despite the relative failure of the UKIP in the May 2015 elections.*

*20. According to Article 50(5) TEU, "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 automatic or privileged right to "re-join".*

*21. See Article 50(2) TEU.*

*22. See Article 15(4) TEU.*

*23. See Article 218 (3) TFEU.*

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a single playing field for all economic operators in the internal market, to follow the pertinent EU legislation, without having any right to vote for their adoption and modifications. On top of that, the UK would also have to accept to pay a significant financial contribution, as shown by the examples of the current financial contributions made by Norway and Switzerland[24].

During the negotiation, each member of the EU Council would naturally act according to the interests of the State which he/she is representing, as well as to the interests of the EU. The decision to conclude a WT must be taken by the EU Council by a qualified majority, with the approval of the European Parliament[25], which would have thus a right of veto. Except if the agreement extended to areas covered by Member States' powers, which should not normally be the case[26], it would not need to be ratified by the EU Member States. However, 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 the new relationship to be established between the EEA and the UK into account.

Finally, one may remember that, during or at the end of the negotiation, Article 218 (11) TFEU allows "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 would of course take time and be a cause of delay.

**-2) The second option would be for the UK to join Iceland, Liechtenstein and Norway as a Member of the EEA.**

The incentive for the EU to push the UK to join

the EEA (which legally implies the UK also having to join EFTA) would not be obvious. Moreover, the UK's acceptance of this would be even more doubtful[27].

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 of 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 EU legislation concerning the internal market as well as its evolution, without really being able to influence its content.

However, the EEA is not currently working in an optimal way. In a Commission Staff Working Document dated 7th December 2012[28], the External European Action Service and the Commission complained about the increasing backlog within the three EEA EFTA States in terms of implementing new EU legal acts. About 580 pertinent EU acts had not yet been integrated at the beginning of 2014[29], some of them important, for example decisions of EU executive Agencies on financial services. In the conclusions adopted by the EU Council on 16th December 2014, the Council took 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."*

However, the Council added:

*"32. The Council nonetheless notes with concern the recurrent backlog and delays incurred*

24. See below foot notes 36 and 39

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

26. Unless it contained some of the UK's commitments on foreign policy or/and on defence policy. In which case, the UK itself would request 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.

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

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

29. 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.

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 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 is true that the advantages of avoiding an extremely complex negotiation would be such that the EU might envisage that option[30]. However, looking at current discussions between the EU and Switzerland[31], it is not impossible that, one day, the EU might request that the EEA change its institutional architecture, especially if the bad functioning noted by the EU Council continued. It is also a fact that the current EEA EFTA States themselves complain[32] that the EU does not take their interests and their constitutional problems sufficiently into account.

In any case, the main obstacle would probably come from the UK itself. While the aim of its withdrawal from the EU would be to become less

dependent on the EU's power to legislate, it would be politically quite difficult to accept:

- a) to integrate into British legislation new EU legal acts affecting the internal market, without having the right to influence substantially their content[33],
- b) to be subject to the rule according to which the EEA EFTA States shall speak with one voice in the Joint Committee[34],
- c) the powers conferred on the EFTA Surveillance Authority and on the EFTA Court[35],
- d) and to pay the EU a financial contribution of a magnitude comparable to that of a Member State[36] to the EU budget.

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

### **-3) The third option would be for the UK to 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. However, given the development both of the EEA and of bilateral relations of Switzerland with the EU, the Free Trade Agreement (FTA) between the EU and the EFTA States[37] has nearly become an empty shell, as it now contains very little. Only trade for fish and some agricultural products are covered (no other goods, no services). This agreement has neither links with the EEA, nor with the 1972 Trade Agreement (modified several times) between Switzerland and the EU. Moreover, becoming a member of EFTA would not give to the UK an automatic right to become a party to the

30. Actually, the EEA and the Commission suggested that option, initially and amongst 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 Decision of the EU Council.

31. See the mandate of negotiation given to the European Commission by the Council of the EU in its Decision 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 further than, those accepted by the three EEA EFTA countries.

32. 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 website of the Centre for European Policy Studies (CEPS, Brussels).

33. See Article 102 EEA Agreement.

34. See 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.

35. See Article 108 EEA Agreement.

36. According to the already quoted Final Report of the Centre for European Reform on the UK and the EU single market The economic consequences of leaving the EU, 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, therefore, 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.

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many FTAs concluded between the EFTA States (and not by EFTA itself) and a number of third countries[38].

**-4) The fourth option for the UK would be to follow the current 'Swiss way'.**

Such an option would not be attractive to the UK. In any case, it would probably be unacceptable to the EU. It would actually mean that the EU and the UK would have to conclude as many sectorial bilateral agreements as needed: while 120 to 130 agreements are currently in force between Switzerland and the EU, only a few of them are substantial.

Some think that such an option might be acceptable to the UK, despite the fact that Switzerland has no agreement with the EU on services, and in particular on financial services, whilst a good share of British trade is in services. They argue that the framework of the 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 the EFTA Court for the EEA EFTA States. However, this does not fully reflect reality: in fact, in order to be able to export to the EU, 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[39].

Moreover, Switzerland's relationship with the EU is most probably going to change. This is because the EU is unhappy with the present state of play with this country. In its Conclusions adopted on 14th 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 20th December 2012, the EU Council reaffirmed "*that the approach*

*taken by Switzerland to participate in EU policies and programmes through sectorial 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 finally 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*[40]". This mandate is ambitious: it requires the inclusion in the future agreement of provisions that provide the European Commission with a role of surveillance, as well as a possible judicial control to the EU Court of Justice, without opening their composition to Swiss nationals. The agreement also aims to impose on Switzerland a maximum time-limit for the introduction into Swiss law of changes to the *acquis communautaire* decided by the EU. It is to be stressed that such provisions, if agreed, would go further than the provisions of the EEA, i.e. that the EU would request much more from Switzerland than it requested from the EEA EFTA Members two decades ago. Thus, it is quite doubtful that the UK would accept such an option.

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

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

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

38. Contrary to what seems to be implied on page 17 of the Research Paper 13/42 of the House of Commons Library.

39. 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's internal market is much narrower than that of the EEA EFTA States.

40. 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.



On the one hand, there is no existing EU free trade or association agreement which has a scope as large as it would be desired and needed by the UK in substance. On the other hand, no existing agreement of this kind provides for the surveillance and judicial instruments that the EU would insist on, because there are none in which the EU has conceded substantive access to its internal market. If it did concede such access to the UK, the EU would request that a part of the *acquis* 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 appear improbable.

Moreover, that option would oblige the UK to negotiate trade agreements with non-EU countries or organisations<sup>[41]</sup>, because the rights and obligations provided for in the agreements concluded by the EU with third countries would not apply anymore to the UK. It would then be difficult for it to negotiate FTAs with third countries which would be as beneficial for its economy as the existing FTAs concluded by the EU. The UK would obviously have much less bargaining power than the EU, as it accounted for respectively 2.4 % of global exports of goods and services in the world in 2013 (this figure includes British exports to the other 27 EU member States), as compared to 16.4 % for the EU<sup>[42]</sup> (this figure does not take into account the EU's intra-trade between its 28 member States).

**-6) The sixth option would be for the UK to 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 for British interests. Relations between Turkey and the EU provide the model of an Association Agreement comprising 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 some of the EU *acquis*. Besides, this option would not give access to the EU's internal market and would not cover services.

**-7) Finally, the seventh option would be that, if no agreement were to be found in terms of 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. Brexit would then fully apply.**

**What would the concrete consequences of a Brexit be?**

**-i) Consequences 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). This would also concern existing EU law for 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 twenty seven Member States would naturally no longer be bound 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 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

<sup>41</sup>. The EU has concluded more than two hundred FTAs with third States or organisations, covering 35% of the world trade.

<sup>42</sup>. According to the WTO statistics available on its website at the time of writing, the figures for the share of the world trade during the year 2013 were the following (figures for the UK include the British exports to the other Member States of the EU, while figures for the EU include the UK's external trade outside the EU):  
-exports of goods: the UK exports 2 % of the world exports, the EU 15 %;  
-imports of goods: 3.5 % and 16.2 % respectively for the UK and for the EU;  
-exports of services: 6.4 % and 24.8 % respectively;  
-imports of services: 4.2 % and 20.1 % respectively.

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difficult domestic political questions and would be time consuming. As all EU Regulations would probably be abrogated at the date of the UK's withdrawal, this would require swift adoption of new legislation. A review of all national legislation adopted for the application of EU Directives would have to be made, in order to choose: either to abrogate them, or to keep them unchanged, or to modify them.

**-ii) Consequences regarding external trade:**

As described above in Option Five, the EU and its member States would become third countries vis-à-vis the UK, and vice-versa. For trade with the EU, as well as with all other third countries in the world, the UK, being a member of the World Trade Organisation, would benefit from its rules. However, 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.

One should also take into account that, in order to be able to continue to be exported to the EU, British products and services would still have to comply with some EU standards. This would oblige the UK to adopt a significant number of national laws and regulations in order for these goods and services to be in conformity with EU law, and to fill the legal void left by the inapplicability of the EU Regulations. Borders to control the flows of goods would have to be re-established with EU Member States. They might even have to be "established" with the Republic of Ireland, if no special agreement were to be concluded before the date of the UK's withdrawal.

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 right* of many of these agreements, when they are *mixed agreements*[43]. However, commitments on trade taken in these agreements must be regarded as having been taken solely by the EU[44], because

the EU signed and concluded them on the basis of its exclusive competence on commercial policy[45]. 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 setting 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.

Thus, for a few years to say the least, the UK's external trade would be negatively affected. A long period of uncertainty would weigh on the British economy.

**-iii) Consequences for individuals:**

According to the press, there are more than two million British nationals, benefiting currently from the EU citizenship, who live, study, work, or are retired in other EU member States, and about the same number of other EU citizens, nationals of the other 27 EU Member States, studying, living and working in the UK.

At the date of Brexit, and in the absence of any agreement between the UK and the EU, the British nationals would lose their EU citizenship. It is not legally possible to build a theory according to which British nationals would keep as "acquired rights" some of the rights attached to the EU citizenship. UK nationals, having lost their EU citizenship, would not keep its advantages[46]. Article 20 TFEU is clear. There is no provision in the EU Treaties which could be used to support the existence of "acquired rights" in that case. By the way, this would also lead to absurd consequences, since this would include the right of movement from and to all EU Member States, as well as the right to vote and to be a candidate in the European Parliament.

43. 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.  
44. On the basis of Article 207 TFEU.  
45. See Article 3 (1b) TFEU.  
46. 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 ECJ 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, i.e. nationals of a Member State of the EU" ! ).

Thus, individuals from EU Member States, who are established or permanent residents in the UK (and *vice versa*), would no longer be EU citizens in an EU State and would therefore lose benefits. Those who had a right to permanent residence would keep it, as a right derived from the European Convention on Human Rights. They would continue to exercise their rights, but their rights would be based on their particular contracts and on applicable local law. Those who had no right to permanent residence, and especially the unemployed, could, in theory, be forced to leave, according to applicable national rules on immigration. This would in all likelihood lead to difficult human situations and to legal disputes. Therefore, it is most probable that solutions, at least ad interim, would be looked for rapidly. Any agreement would have to be based on classic international law and in particular on reciprocity. The 27 EU member States, bound together by EU law, would not have the power to negotiate unilaterally with the UK. This means that agreements would have to be concluded by the UK with the EU as such. Thus, all rights obtained in favour of British citizens residing in the 27 member States would have to be granted to nationals of these 27 residing in the UK.

Some EU laws would certainly continue to apply to British nationals, because these laws grant nationals of third countries certain rights and benefits. This is the case for the right of residence or the right to work: there are EU Directives on family reunification, on long term residents, on students, etc.

However, EU citizens coming to the UK for a long period, in order to study or work, or to join their family might be requested to have a visa, and to meet financial and accommodation requirements. The same would then be the case for British nationals going to all EU Member States, because the EU will play as a single entity. Some EU member States might even demand language requirements (i.e. to be able to speak the language of the country of destination). As

it has been stressed: "*The price will be the loss of innumerable business, educational and cultural opportunities as movement from Europe becomes more difficult and likely increased difficulties for UK citizens who may no longer take for granted their own privileged access to Europe for work, education, holidays or retirement*"[47].

The situation of some individuals could rapidly become difficult. In the medium term, it could get worse. This could of course be changed through appropriate agreements, including on transitional measures applicable for a certain duration and in specific situations.

This is an additional reason why a withdrawal of the UK from the EU should be accompanied by the establishment of a new comprehensive and structured relationship with the EU, via the conclusion of an international bilateral agreement. The absence of such an agreement would certainly have serious negative effects, especially on the British economy, and to a lesser extent for the rest of the EU.[48]"

***The conclusion is clear: none of the seven options available to the UK, if it were to decide to withdraw from the EU, is attractive. Brexit would be negative for the UK.***

There is no other option which, from a British point of view, might reconcile the economic viability of a deal and its political acceptability. Any option would take the UK in one of the following two directions:

- the first would actually be for the UK to accept being a kind of "satellite" of the EU, with the obligation to transpose into its domestic law EU Regulations and Directives for the single market;
- the second one would seriously affect its economy, by cutting it from its main market (more than half of British trade is done with the rest of the EU) thereby obliging its Government to start trade negotiations from scratch, both with the EU and with all the other countries in the world, without having much bargaining power.

47. Helena Wray: "What would happen to EU nationals living or planning to visit or live in the UK after a UK exit from the EU?", *EU Law Analysis*, 17 July 2014. See also Steve Peers: "What happens to British expatriates if the UK leaves the EU?", *EU Law Analysis*, 9 May 2014.

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

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**What would be the best way to go towards a BRITIN and to avoid a BREXIT?**

Therefore, 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 impossible. This should include the adoption of some of the reforms which are currently suggested by the British authorities. Actually, a number of European leaders would consider some of these measures as appropriate.

**A revision of the EU Treaties?**

One cannot say so about all suggestions made in the recent past by some British personalities. Thus, in the domaine of freedom of movement of people, some suggestions would aim at allowing discriminations between citizens of the EU working in the UK, according to their nationality[49]. This would not be accepted by the other twenty seven EU Member States, and would not be compatible with the current EU Treaties. Moreover, given the current political climate, any reform should avoid being based on a revision of the EU Treaties, as this will probably be politically unfeasible, at least over the next few years[50]. But the British Government has declared that political promises to change the EU Treaties in the future would not be sufficient.

**Are there means to by-pass this obstacle by making "legally binding promises" to change the EU Treaties in the future?**

In order to by-pass this obstacle, some, such as Professor S.Peers, suggest that the EU and the UK accept "*promises of future Treaty change*", transforming the "*promise*" into a legally binding commitment[51]. The problem with this idea is precisely that point: making it a "*promise*" legally binding would actually transform it into an actual Treaty change: only the date of entry into force would remain to be decided. Such a Treaty change could not, therefore, be adopted in violation of the procedure set out in Article 48 TEU as well as of requirements of the national Constitutions of the member States.

The 1992 Decision "*on Denmark and the EU*" and the 2009 Decision "*on Ireland*" have been wrongly mentioned as being precedents of such an illegal "trick". This is not true. They are indeed texts which have a legal value, but they contain no "promise" to change the Treaties. They just clarify the meaning of already existing Treaty provisions. The absolute and sine qua non condition to use such legal texts is that they must be 100% in conformity with the Treaties as drafted at the time of their adoption. The paper of Professor Peers does not provide any demonstration at all on such a conformity. On the contrary, a number of Sections of his draft Protocol are obviously in contradiction with the EU Treaties, as they would aim at adding or at modifying them (see Sections A, C, partly D, partly E, F if accompanied by commitments).

This principle has been recalled by the Court of Justice of the EU in its 2nd March 2010 judgment C-135/08 Rottmann, in paragraph 40: one may illuminate the meaning of an existing provision of the Treaty, or clarify it. This means that it could not modify it, including by adding anything of substance.

The texts of 1992 and 2009 did not add anything to the EU Treaties, nor change their meaning. This is the reason why the European Council could indicate, in its 2009 Conclusions, that the Decision on Ireland could later be transformed into a Protocol to the Treaties. This was possible only at the strict condition that that Decision was 100% in conformity with the Treaties as they were in force at that time. Otherwise, this would have constituted a violation of Article 48 TEU (on the procedure for the revision of the Treaties), as well as a violation of the Constitutions of all member States, which, according to Article 48, have to be respected in such a case. Admitting that any revision of the EU Treaties could be done in "a two-stage procedure" would effectively violate the rights of national Parliaments. The first stage would already constitute a legally binding decision, which would thus "by-pass" the constitutional powers of national Parliaments, as it cannot be adopted by the sole Executive Power.

49. See Article 18, first subparagraph, TFEU: "Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited".

50. See the opinion of Wolfgang Munchau in the Financial Times dated 1st June 2015: "Why Britain has no chance of European treaty change".

51. Professor Steve Peers: "The Pro-European case for a renegotiation of and referendum on the UK's membership of the EU", EU Law Analysis, 28 May 2014.

Thus, the above suggestions would not be feasible, as they would actually imply changes to the EU Treaties.

### ***A repatriation of powers from the EU back to the Member States?***

Actually, the main option which was suggested in 2013 by the British Government was based on the idea of a "repatriation of powers" from the EU back to the Member States, which necessarily implied a revision of the EU Treaties. In careful preparation of this scenario, the British Government requested all pertinent services in Whitehall, as well as independent individuals and organisations, analyse in detail, from an economic and legal point of view, the current share of powers between the EU and its member States. The working hypothesis was that the Member States (including the UK of course) had been transferring too many powers to the EU, in too many sectors, in the successive EU Treaties.

As written by Michael Emerson[52]: *"The British government has assembled the most comprehensive-ever assessment of the workings of the European Union, called the 'Balance of Competences Review'. This is based on 32 volumes and 3,000 pages of evidence submitted by 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"*.

This Report was "written at a time when British authorities were (plausibly) convinced that the situation in the euro area would necessarily lead to a revision of the EU Treaties, in order to strengthen the euro area's governance. They thought that this would allow them to ask, at the same time, for amendments either on "repatriation of powers", or on a status of "EU semi-membership" for the UK. However, the euro area did not go to a revision of the EU Treaties. It chose instead to limit itself to the conclusion of several "intergovernmental agreements", concluded only among its members and which are compatible with the EU Treaties. The situation was, and still is, that, whatever the legal needs, and the leaders of most member countries of the euro area are not ready to launch a politically risky new revision of the EU Treaties.

**Consequently, the adoption of reforms by the EU, which would not require a revision of the EU Treaties, appears to be the only realistic and politically and legally acceptable solution.**

These reforms should however give appropriate answers to the seven or eight "key-issues" listed by Prime Minister Cameron in his *Bloomberg Speech* in January 2013 and in his *Telegraph* article in March 2014[53]. In fact, many things could be done, without changing the Treaties: change are more about political will of the member States and of culture in the EU Institutions.

#### ***-a) Measures which could be favourable to a better economic competitiveness:***

This might include substantive policy measures, such as a calendar in view of completing the internal market, especially in services[54], to launch new optional cooperation policies, for example on energy, and on industrial cooperation in defence equipment programmes. This might also include measures aimed at improving the functioning of the institutions, by streamlining the Commission, organising it in teams presided by 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[55], in conformity with the Treaties' provisions[56], and to concentrate on important subjects, respecting the principles of conferral, subsidiarity and proportionality[57].

#### ***-b) "Ever closer union":***

One must stress that the often incomplete quotation of this EU Treaties' formula is twice misleading. In fact, the Treaties refer to a "union" (without capital "U", as this does not refer to the EU) and "among the peoples of Europe", and not between the States of the EU. How could one argue that the reference to a closer union between peoples means aiming at a merger of the EU member States, while the Treaties gives to the EU the legally binding obligation to respect the national identity of its member States ? This being said, this formulation has created real misunderstandings in British public opinion, which would deserve to be dissipated

52. "Britain's future in Europe: Reform, renegotiation, repatriation or secession?" CEPS, 2015, Brussels, 192 pages).

53. See David Cameron's "Bloomberg Speech", 23rd January 2013. See his article in *The Telegraph*, 15th May 2014, as well as my comments on this article, published in *The Financial Times*, London, 6th May 2014, page 3. : "Cameron can skip Treaty change, says lawyer".

54. Services represent an important part of the UK's exports.

55. This last point is not as natural as it sounds: a March 2014 paper published by CEPS (a serious and appreciated think tank, established in Brussels) pleads to confer new powers upon the European Parliament. This proposal does not take into account that these powers are not conferred on it in the Treaties, and does not suggest changing those Treaties. The European Parliament would for example be conferred some powers to control the European Council, the power to control the Commission in its task of checking the implementation of EU law by the Member States, and competences in those euro area issues, all powers and competences which have not been conferred on the EU institutions in the EU Treaties, and which therefore belong to the powers of the national parliaments and governments of the 19 euro area members ("Shifting EU Institutional Reform into High Gear: Report of the CEPS High Level Group").

56. See Article 13(2) TEU: "Each institution shall act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them. The institutions shall practice mutual sincere cooperation."

57. Article 5 TEU gives a definition of these three principles.

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The European Council began to do it, 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 for the member States. In the same vein, one could recall that the EU Treaties give the EU a goal which is "to deepen the solidarity between their peoples while respecting their history, their culture and their traditions" (Preamble TEU). They also request the EU to "respect its rich and linguistic diversity" (Article 3(3) TEU) and "to respect (...) their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security" (Article 4(2) TEU).

It might be worth reminding the public of this, perhaps via some kind of Solemn Declaration.

### **-c) To cut red tape and to respect subsidiarity better:**

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. Frans Timmermans has certainly 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 kinds of red tape) and enables the single market to function. In fact, preventing EU legislation from creating unnecessary and cumbersome obstacles to economic life is taken more seriously today, both by the Member States and by the EU Institutions (see for example the Programme "REFIT"[58]), than was the case in the past.

However, there is no simple legal option available to avoid red tape: this cannot be decided by a Treaty. It is day-to-day work. A closer scrutiny of the Commission's legislative proposals by national authorities than this is the case now would be the pre-requisite. Other non-legal mechanisms might also be suggested, such as:

- seriously reforming the current Impact Assessment system, which could be conferred on an independent agency and serve all three legislative institutions, the

Commission, the Council and the Parliament;

- developing performance indicators, and
- regularly assessing the actual effects of some EU Regulations or Directives, after a few years of implementation.

### **-d) Encouraging national Parliaments to participate in the EU's functioning:**

Article 12 TEU and Protocols n°1 and 2, texts which have been added to the Treaties by the Lisbon Treaty, confer interesting new powers on national Parliaments (NP). Depending on the domain concerned, either one third or one quarter of NPs 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 NPs, their cooperation is not organised in an optimal way and their opinions are not binding ("yellow cards", not "red cards"). This might be improved in practice, without changing the Treaties:

- by offering practical facilities to NPs (secretariat, translation services),

- by interpreting and applying with flexibility the (very short) delays that they have been given to react, and

- by inviting the Commission to agree on a political commitment that, as a matter of principle, it will follow the NP opinions given at the required majority, any exception having to be justified in the European Council.

### **-e) Protecting the rights of the non-euro EU Member States:**

More and more people think that, in the medium term, the euro area might be forced to integrate further, either through an EU Treaty revision, or through a "Eurozone Treaty", outside the EU Treaties but linked to them. In this case, non-euro area EU members fear that the euro area might adopt decisions that will affect them negatively, especially regarding the single market. In order to reassure them, the euro area, or more exactly its members and some other EU members (the so-called "pre-in" euro area members), could state that any new "euro area treaty" would confirm their legal obligations, under the control of the EU Court of Justice:

- to guarantee the rights of non-euro area countries, including the integrity of the single market,

- to respect the "acquis communautaire" and the exclusive

58. 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.

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 euro area treaty,  
- to accept guaranteeing openness of their activities, and  
- to give the right to participate in meetings for those willing to join the euro within a given delay.

Implementing such measures would mean tackling real problems.

It would be wise to concentrate on those problems, rather than to proclaim that immigration of EU workers in the UK is the essential question to solve in order to decide if the UK should remain a member of the EU or leave the EU. On that particular issue, it is sufficient to refer to the economic studies made in the UK, which demonstrate that this is beneficial to the UK, and to recall that the current EU legislation authorises member States to adopt measures against abuses in that domain. The EU Court of Justice has reminded us of that in a recent judgment<sup>[59]</sup>. If need be, that legislation could even be made more precise.

However, some of the suggestions which are currently being discussed in London would affect the basic principles of the free movement of people and of equality between the EU citizens.

One might think that such requests would not be conducive to a short and positive negotiation with the EU.

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*59. Judgment of 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".*

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