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**BREXIT OR NO BREXIT? POLITICAL AND INSTITUTIONAL
IMPLICATIONS OF AN EU WITHOUT THE UK**



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ABSTRACT

The United Kingdom will vote on its fate within the European Union on 23 June 2016. Currently, there is still time to influence the outcome of this referendum – both from the UK and the EU side. The effects of a Brexit need to be closely assessed and communicated. This paper sets out to analyse the implications of different scenarios for Britain’s European future both in institutional and political terms. The main argument is that one way or the other the UK will be inclined to give up on its full membership, and then the EU will have to find the best possible ways to accommodate. Against this backdrop, this paper discusses the implications of differentiated integration, the UK’s role within the EU, British demands for renegotiating its EU membership, and the costs of keeping the UK within the EU or letting it go. The paper recommends agreeing on as much compromise as possible within the existing treaty framework. A Brexit cannot and will not solve current pressing problems of European integration.

Keywords: UK | Public opinion | European Union | EU institutions | Euroscepticism

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Introduction

The outcome of the United Kingdom’s (UK) general elections on 7 May 2015 was, as unpredicted as it was, rather clear. The Conservatives won 36.9 percent of the votes and, with 330 seats in the House of Commons, is by 12 seats the ruling majority. This means that according to the plans of Prime Minister David Cameron the British population will vote in a referendum on the UK’s fate in the European Union (EU) no later than 2017.¹ So far, so clear – but the arithmetic for the future of EU-UK relations includes several unknown variables:

What will the people vote on? The referendum’s question will ask whether the UK should “remain a member of the European Union or leave the European Union.”² However, the British population will not vote on the status quo of EU-UK relations. Cameron announced in his EU Speech at Bloomberg in 2013 that it would be wrong to ask people whether to stay or go before the UK had had a chance to put the relationship right.³ His strategy in the referendum campaign was therefore to renegotiate a new settlement for British membership in the EU before calling the referendum. At the European Council meeting on 18-19 February, the Heads of State or Government of the EU Member States adopted such “A new settlement for the UK in the EU.”⁴ This authorised David Cameron to schedule the referendum for 23 June 2016. This agreement still does not answer all questions regarding the implications for the EU or for the UK and hence is worth analysing. What would a “Yes” or “No” outcome imply? If the majority of people voted in favour of EU membership, its conditions would be different from today’s, extending the UK’s right to pick and choose its scope of participation in EU policies. A negative outcome of the referendum would mandate the Prime Minister to notify the European Council of the UK’s intention to exit the EU according to the procedure of Article 50 of the Treaty on European Union (TEU). This would mark only the beginning of lengthy negotiations for an association agreement between the EU and the UK. This procedure would belong to a “plan B,” which the other EU

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

² “The UK’s EU referendum: All you need to know”, in *BBC News*, 17 February 2016, <http://www.bbc.com/news/uk-politics-32810887>.

³ David Cameron, *EU speech at Bloomberg*, cit.

⁴ In the following referred to as “new settlement.” See European Council, *European Council conclusions, 18-19 February 2016* (EUCO 1/16), 19 February 2016, <http://www.consilium.europa.eu/en/press/press-releases/2016/02/19-euco-conclusions>.

Member States and the Commission do not officially recognise, yet.⁵ There are different possible scenarios for such a “plan B,” i.e. for associating the UK with the EU – in all of them the UK will have to accept losing its say in the EU and its decision-making procedures.

The EU has been in a crises-management modus for several years. In summer 2015 at last the Eurozone crises seemed to have found a preliminary end by preventing Greece from falling out of the common currency (Grexit). At the same time, the enormous refugee migrations from the Middle East and North Africa reached the entire EU, not only the countries at the outer Schengen borders. Ever since, the refugee crisis is perceived as a litmus test for Schengen and the EU. This means that the question of whether the UK will remain a part of the EU hits the continent in times of strained solidarity. Additionally, regarding the numerous derogations from EU primary law and legislation that the UK has been able to negotiate so far, the other EU Member States could run out of patience and prefer to proceed with European integration without bothering with the UK’s willingness to join. At the moment at least, there seem to be bigger problems to solve. Nevertheless, the so-called Brexit⁶ is a crucial issue because it will impact European integration, one way or the other.

Along these lines, this paper will tackle the question of what implications a Brexit or non-Brexit would have on the EU in both political and institutional terms. The main argument will be that one way or the other the UK is inclined to give up on its full membership, and then the EU will have to find the best possible ways to accommodate.

1. Differentiation as a trademark of European integration – Is Brexit a big deal?

One of the main challenges of European integration is the reconciliation of the heterogeneity of EU Member States’ objective ability and/or political willingness as regards the scope and content of the integration process. Finding a compromise was presumably easier within the EU of six than within today’s EU of 28. However, this does not imply that tools for managing this heterogeneity have not facilitated the European integration process since the very beginning. In light of the continuously-growing EU both in terms of complexity and number of Member States, those tools have only become more prominent. This means that differentiated integration already existed in the early days of the European Communities. Today, it represents one of the trademarks of European integration.

A multitude of concepts of differentiated integration exists.⁷ A detailed elaboration of them would exceed the framework of this paper, but a general definition identifies differentiated integration as whenever “one group of EU Member States is not subject to the same Union rules as [others].”⁸ In other words the principle of a “single set of policies and obligations that would

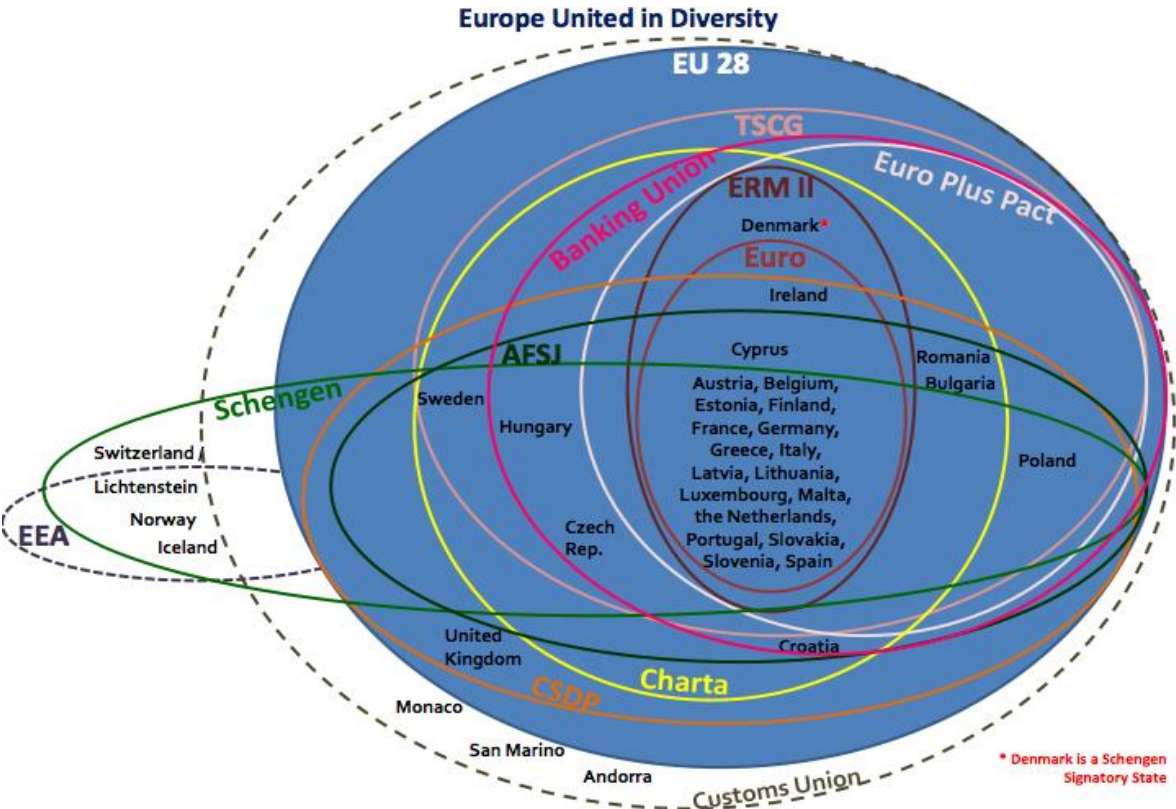
⁵ See “Jean-Claude Juncker: ‘Britain leaving the EU? There’s no plan B’”, in *The Telegraph*, 16 February 2016, <http://www.telegraph.co.uk/news/newstoppers/eureferendum/12159718/Jean-Claude-Juncker-Britain-leaving-the-EU-Theres-no-plan-B.html>.

⁶ The term “Brexit” is a combination of the words “British” and “exit”.

⁷ For a general overview, see Alexander C.-G. Stubb, “A Categorization of Differentiated Integration”, in *Journal of Common Market Studies*, Vol. 34, No. 2 (June 1996), p. 283-295.

⁸ Funda Tekin and Wolfgang Wessels, “Flexibility within the Lisbon Treaty: Trademark or Empty Promise?”, in *EIPAScope*, No. 2008/1 (June 2008), p. 25, <http://publications.eipa.eu/en/eipascope/downloadarticle/&tid=1736>.

more or less apply in the same way to all Member States at the same time”⁹ is diffused. The proclaimed aim is to make “different paths of integration for different Member States [possible], allowing those that want to deepen integration to move ahead, whilst respecting the rights of those which do not want to take such a course.”¹⁰ Thereby, differentiated integration can be of short-, medium- or long-term nature. So-called “opt-outs” represent the most prominent form of such long-term differentiated integration within the EU. The Single Market, the Customs Union and the Schengen Area reach beyond the EU’s borders by associating non-Member States. The picture of the EU “united in diversity” is hence highly differentiated, affecting some of the core policies of European integration (see Figure 1).¹¹



Source: Tekin, Funda 2012, updated by Tekin, 2015.

Considering the Economic and Monetary Union (EMU), including the latest crisis management in the Eurozone or the Schengen Area, this high degree of differentiated integration has not hampered but rather accelerated the European integration process. If we start from this basic assumption, a Brexit, although extending the scope of differentiation, might not seriously affect the EU. This would be too short-sighted, however, both in institutional as well as political terms. Academic and political debate on differentiated integration has also always considered the question of whether and to what extent differentiation is threatening cohesion within the EU.

⁹ Benjamin Leruth and Christopher Lord, “Differentiated Integration in the European Union: A Concept, a Process, a System or a Theory?”, in *Journal of European Public Policy*, Vol. 22, No. 6 (March 2015), p. 755.

¹⁰ European Council, *European Council conclusions, 18-19 February 2016*, cit., p. 9.

¹¹ For another comprehensive overview, see Steve Peers, *Trends in Differentiation of EU Law and Lessons for the Future*, Brussels, European Parliament, 2015, http://www.europarl.europa.eu/thinktank/it/document.html?reference=IPOL_IDA%282015%29510007.

In this context, analysis of the implications of a Brexit must include questions of policy-making legitimacy in the EU and the political momentum that such a scenario would present to the Member States inclined to enhance the level of integration within the EU, as well as to the EU as foreign-policy actor. Hence, two dilemmas of differentiation are relevant. According to the principle of legitimacy of policy-making, Member State representatives should have the right to vote if their constituencies will be affected by the respective matter. Such a distinction is hardly possible in the European Parliament (EP), where national elected representatives are grouped along party-lines instead of national identities. In the Council of Ministers, usually only representatives from participating EU Member States have the right to vote. Regarding questions of EMU, Member States whose currency is the euro deliberate and prepare decisions in the Eurogroup (Ministers of Finance) and in the Euro Summit (Heads of State or Government). However, they deliberate on issues that are key to future European integration and that will also affect those Member States who have not joined the single currency. Thus the legitimacy dilemma of differentiation is twofold: either representatives from Member States vote on issues not relevant to their constituencies, or they are excluded from deliberations that will affect them sooner or later.

Although differentiated integration is one tool for managing the heterogeneity of EU Member States within the integration process, it might at the same time trigger disintegration tendencies. This is the second relevant dilemma of differentiation – that of political momentum. The growing scope of differentiation in the EU might risk eventually reaching a state of loose pick-and-choose options. In history it was repeatedly the UK that promoted this so-called “*l’Europe à la carte*” as the optimal model for future European integration.¹² The Brexit question adds another dimension to the debate on potential dissolution of the EU. So far, differentiated integration has always moved upwards on the integration ladder by granting opting-out in exchange for abstention from vetoing the next integration step. As motor of integration it was hence politically legitimized. However, a Brexit, just like a Grexit, would mean that individual Member States for the first time stepped down the integration ladder or out of the EU entirely.

2. The United Kingdom in the EU – Troublemaker in the classroom?

2.1 The traditionally tricky “British question”

The UK joined the European Economic Community in 1973, and relations between the UK and the EU have been particular ever since. Only two years after accession, in 1975, the British people were asked to vote on UK membership in a referendum. In 1984, Margaret Thatcher negotiated the UK rebate on the EU budget. With the UK strongly opposing to steps of institutional deepening within the EU, it has always strived to protect national sovereignty; the latest examples are the European Act (2011), which requires a referendum on any sovereignty transfer from the national to the European level, and Cameron’s veto of the Fiscal Compact in December 2011.

¹² E.g. John Major, *Europe: A Future That Works*, speech at the William and Mary Lecture, Leiden, 7 September 1994, <http://www.johnmajor.co.uk/page1123.html>.

Some claim the long tradition of “Europe-bashing” in the British media represents a driving force in difficult UK-EU relations.¹³ This is contested, however, because the “British media reflects rather than creates popular attitudes although it does so through the distorting prism of a massive magnifying glass.”¹⁴ Therefore, one main driving force is rather the British conviction that one should aim for getting “the best of both worlds.”¹⁵ This means that the political elites clearly see the benefits of the common market and of being a major player in the EU’s foreign policy, but are not prepared to fully participate in European integration. Red lines have always been defended in Brussels. The UK is the only country that has actually conducted five economic tests in 1997 to assess the UK’s readiness to join the EMU, and so adopt the euro as its official currency. After Cameron’s Bloomberg speech in 2013 the government asked for tests on the potential for and scope of possible repatriation of competences – although without any remarkable result.

Main points of contention between the UK and the European continent find their expression in the British focus on the economic benefits of European integration, the aim to promote intergovernmental cooperation to the detriment of supranational policy-making, and the promotion of EU enlargement with the objective of composing a large and rather loosely-integrated European Union. So far this British attitude has generated substantial negotiation efforts – in the 1980s on the British rebate and the Single European Act, in the 1990s on the Economic and Monetary Union and Schengen and since the Millennium on the Constitutional Treaty, and lately on the crisis management in the Eurozone – but has not severely impaired the progress of European integration. Rather, the solution has been, time and again, to grant the UK opt-outs from European integration.

2.2 The champion or lone wolf of differentiated integration?

In order to comprehensively assess the implications of a Brexit or non-Brexit, it is helpful to recapture where the UK finds its place today, not only in the EU but also in the differentiated EU. To this end Figure 1 needs further interpretation and explanation. For starters, there is hardly any other country that has negotiated as much derogation from European integration as the UK.

In EMU the UK has an opt-out from the single currency, just like Denmark, while the other countries currently outside the Eurozone have the obligation to eventually join this inner core. The UK is exceptional because other than its fellow non-Eurozone countries it has no intention of joining the common currency, not even for pragmatic reasons, and it does not participate in any of the new measures strengthening the economic, fiscal and banking union. Regardless of the difficulties of predicting the future of European integration, the single currency represents without a doubt the “core Europe” that will drive integration forward. Thus, the UK is excluded from the current core of European integration.

The UK also benefits from special treatment in the AFSJ and in the Schengen Area. In order to allow for an unobstructed functioning of the Schengen Area without internal border controls, new EU Member States can join only after defined transitory periods. That is the reason why

¹³ Peter Ludlow, “Das Gefangenendilemma”, in *Frankfurter Allgemeine Zeitung*, 10 February 2013, <http://www.faz.net/-gpf-76g3m>.

¹⁴ John Palmer, “The British Press and Euroscepticism: Mirror or Magnifying Glass?”, in *ECFR Blog*, 11 April 2013, http://www.ecfr.eu/blog/entry/the_british_press_and_europe_mirror_or_magnifying_glass303.

¹⁵ See David Cameron, *The Future of Britain’s Relationship with the EU*, speech at Chatham House, London, 10 November 2015, <https://www.chathamhouse.org/node/19083>.

Croatia, Cyprus, Bulgaria and Romania are not yet fully part of Schengen. They do participate, however, in the policies of the AFSJ.

Three countries have a special status regarding the AFSJ and Schengen. The UK and Ireland are not required to participate in either the AFSJ nor the Schengen Area, but they have the right to pick and choose on an ad-hoc basis the policies and legislative acts in which they would like to join in (Protocols No. 19, 21). Denmark belongs to the Schengen signatory states but applies the Schengen acquis only based on international law arrangements. The provisions of the Lisbon Treaty exclude Denmark from the AFSJ entirely unless Denmark decides to change or abolish its opt-out rules (Protocol No. 22). On 3 December 2015 the Danish population rejected such a change in a referendum. This system of rules has allowed the UK and Denmark, for example, to opt out of the temporary relocation mechanisms for refugees that the Justice and Home Affairs Council adopted in June and September 2015.

Compared to Denmark and Ireland, the UK has even been able to extend its pick-and-choose rights substantially. Regarding the pre-Lisbon Treaty third-pillar acquis of police and judicial cooperation in criminal matters, the UK negotiated the right to opt-out of this acquis entirely in 2014 – only to be able to opt-in to the parts of the legislation that are still of vital interest to the UK right afterwards. Thus, in the AFSJ and Schengen Area the UK represents a case of benefitting from the right to cherry-pick, but at the price of political weight in both AFSJ and Schengen matters.

For the sake of completeness the Charter of Fundamental Rights needs mentioning. Here, just like Poland, the UK demanded special provisions for the implementation of the Charter in their domestic orders (Protocol 30).

This overview on British exemptions of treaty-based differentiation does not include flexibility measures within the EU's secondary law. Still, it is already rather impressive and highlights the fact that the UK is the champion of differentiation in the EU. However, this award comes at the price of being rather sidelined within the EU. This is particularly the case in EMU, where the UK is excluded from the core bodies of decision-making such as the Eurogroup and the Euro Summit. In light of a Brexit this raises two interrelated questions: If the UK has been able to define its scope of participation in European integration individually so far, why bother leaving? And what implications, both in political and institutional terms, would we need to consider? Answering these questions will help us to define different scenarios for a Brexit or non-Brexit.

3. Brexit or non-Brexit – in any case the end of business as usual

Both a Brexit and a non-Brexit scenario can take on different designs. Considering the British preferences for intergovernmental cooperation on a low level of integration, there is no doubt, however, that both scenarios will not imply business as usual.

3.1 Non-Brexit: new conditions for British membership in the EU

Even if the outcome of a referendum was positive and the UK did not exit the EU, the UK would remain an exceptional Member State that does not aspire to further integration in all EU policy areas. Interestingly enough, the British population seems to be less Eurosceptic than the

country's elites. The population is evenly split on the question of whether the UK could better face the future outside the EU: in early 2015 43 percent of the population supported as well as objected to this statement.¹⁶ Generally, polls fluctuate and since the “new settlement” they change practically on a daily basis. A poll that displays the average of the six most recent polls predicts a very tight outcome with currently 51 percent against and 49 percent in favour of a Brexit. However, a large share of the population is still undecided.¹⁷ The outcome of the referendum on 23 June 2016 will depend on the campaigning of the two camps. The campaign promoting the Brexit has just gained political weight, because Boris Johnson, the mayor of London, decided to join the “Out” camp. On the other side, the conditions for a “non-Brexit” scenario were negotiated at the European Council on 18-19 February 2016. From the very beginning the Prime Minister has left no doubt that he does not want to call a referendum on the status quo of UK-EU relations, but that he aspires to a new and more flexible model for EU membership.¹⁸ Thereby the Single Market continues to be the principle justification for membership. The “new settlement” allows Cameron to openly and decisively campaign for the UK's continued EU membership.

The problem, however, is that the successful renegotiation of membership conditions would be most visible if they were constituted within EU treaty reform. The “new settlement” does not constitute a treaty change, and proposes to transfer only two of its parts into the EU's primary law at the occasion of the next treaty revisions. A comprehensive revision of the EU treaties before the referendum was a highly unlikely scenario to begin with. For one thing treaty reforms take time – particularly if you apply the ordinary revision procedure (Art. 48 (2)-(5) TEU) including a European convention. Cameron announced in 2015 that the referendum was scheduled to take place no later than 2017 and for political reasons preferably at the end of 2016. This is too short a period for successfully concluding the ordinary revision procedure. The second obstruction to treaty reforms is the lack of political will in the EU. To most of the European leaders the Lisbon Treaty represents a Pandora's Box that they do not want to open. In light of the rise of Eurosceptic movements in the EU, treaty negotiations could trigger substantial dissolution tendencies in Europe.

For a long time, renegotiating the terms of British EU-membership has been hampered by the lack of an official clear catalogue of UK demands. Urged by the irritation of his European counterparts, Cameron finally sent a letter to Donald Tusk, President of the European Council, listing and explaining the issues that he would like to put on the negotiation table.¹⁹ However, although this letter represented a written reference document, it did not explicitly define additional or concrete points apart from what had already been broadly communicated before. In general, five main areas in which the UK aims for new terms will determine a “non-Brexit”-scenario.

¹⁶ European Commission, “Public Opinion in the European Union. Spring 2015”, *Standard Eurobarometer* No. 83 (July 2015), p. 99, http://ec.europa.eu/public_opinion/archives/eb/eb83/eb83_en.htm.

¹⁷ “EU Referendum Poll of Polls”, in *What UK Thinks*, updated 3 March 2016, <http://whatukthinks.org/eu/?p=895>.

¹⁸ See also David Cameron, *The Future of Britain's Relationship with the EU*, cit.

¹⁹ David Cameron, *PM letter to President of the European Council Donald Tusk*, 10 November 2015, <https://www.gov.uk/government/publications/eu-reform-pms-letter-to-president-of-the-european-council-donald-tusk>.

The UK

1. Objects to the principle of an “ever closer union.”
2. Asks for increasing the EU’s competitiveness and strengthening the Single Market.
3. Aims, in line with the principle of “Europe where necessary, national where possible,”²⁰ for enhancing the subsidiarity watch by extending the right of national parliaments to object to the Commission’s initiatives for legislation (yellow cards) by adding the right to veto such initiatives (red card).
4. Wants to safeguard the interests of the City of London by abstaining from closer economic governance measures, while at the same time preserving its say in the respective decision-making.
5. Demands the right to restrict internal EU immigration by cutting benefits and access to the social system.

The British Prime Minister did not meet with a “wall of love” during his tour of Europe to present his negotiation agenda in 2015.²¹ Although the general consensus in the EU seemed to be that they would do as much as possible to avoid a Brexit, there was little willingness to accept any British demands.²² In concrete terms the negotiation framework was comprised of the following issues: the European Council had already settled the first question by stating that “the concept of ever closer union allows for different paths of integration for different countries, allowing those that want to deepen integration to move ahead, while respecting the wish of those who do not want to deepen any further.”²³ Regarding the second issue of strengthening the Single Market, the UK actually preaches to the converted. The introduction of a red card into the early warning system of national parliaments, on the other hand, required further deliberation because the crucial question will be whether a single national parliament should be able to pull a red card, which would represent a very strong veto position. The questions of participation in EMU and restriction of EU internal immigration represented the most crucial and contested issues because they affect policy areas that have been severely strained in recent years, as well as core EU principles such as non-discrimination and solidarity among Member States.

After an intense period of deliberation the chosen approach for dealing with these British demands is similar to the so-called Danish model, i.e. a “British Protocol” representing an intergovernmental agreement, like the Edinburgh Agreement of 1992, that would be transferred into the EU treaties once the EU is ready for substantial reforms. There are a couple of peculiarities worth mentioning. The “new settlement” is not one single protocol but consists of

²⁰ Peter Hammond, “We Need to Make EU More Democratic and Able to Deliver Jobs”, in *The Irish Times*, 10 June 2015, <http://www.irishtimes.com/opinion/philip-hammond-we-need-to-make-eu-more-democratic-and-able-to-deliver-jobs-1.2243250>.

²¹ Alex Barker, “No ‘Wall of Love’ for Cameron at EU Summit”, in *Financial Times*, 22 May 2015, <http://on.ft.com/IPBwrks>.

²² Katya Adler, “What Does Cameron Want?”, in *BBC News*, 25 June 2015, <http://www.bbc.com/news/world-europe-33253209>.

²³ European Council, *Conclusions of the European Council 26/27 June 2014* (EUCO 79/14), 27 June 2014, par. 27, http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/ec/143478.pdf.

one Decision by the Heads of State or Government, one Statement of the Heads of State or Government on a Council Decision, one Declaration by the European Council on competitiveness and four Declarations by the Commission including the commitment to legislative proposals. Only the provisions on the interpretation of the principle of “ever closer Union” and on the euro-governance shall be eventually transferred into the EU Treaties. The fact that none of the provisions of the “new settlement” apply only to the UK represents another difference to the so-called Danish model. If the settlement will take effect – the condition being that the British population votes for the UK remaining in the EU – all EU Member States will have the right to apply the new provisions. Last but not least, the final and actual scope of the deal is not conclusively settled with the decisions of 18/19 February 2016. The Heads of State or Government can adopt declarations but they cannot change secondary legislation. Therefore, it will depend on the Commission to table the promised legislative proposals, and on the Council and the European Parliament to adopt them within the ordinary legislative procedure. Therefore, some uncertainty remains.²⁴

3.2 Brexit: Goodbye to yesterday

A Brexit scenario, on the other hand, is rather clear-cut from a legal perspective. The Lisbon Treaty constitutes for the first time a procedure for exiting the EU (Art. 50 TEU). If the outcome of the British referendum demands a Brexit, the UK will withdraw from the EU and negotiate the terms of the future UK-EU relationship. Different models for this relationship seem possible. Given the UK’s main interest in European integration, all of them focus on the UK’s relations with and access to the Single Market.

If the UK opted for the so-called Norwegian model, it would be associated with the EU within a framework resembling the European Economic Area. This would imply that the UK remained fully part of the Single Market and would also pay into the EU budget. The UK could also choose to negotiate bilateral agreements that would determine the scope of the relationship with the EU. The reference for this option would be Switzerland, which has negotiated more than 100 such bilateral agreements with the EU. The least-close relations would be a Free Trade Agreement between the UK and the EU that would mean that the UK would be completely outside the EU and the Single Market. In 2013 former British MeP Andrew Duff promoted the idea of a so-called “associate membership” that could represent either a “spring board for full accession”, a “long stay parking place” or a “decent alternative to leaving the Union altogether.”²⁵ However, this scenario would require the introduction of an additional article into the Treaty on European Union and hence represents rather “Zukunftsmusik.”

Most of the studies on a Brexit deal with the effects of the different models on the UK mainly in economic terms.²⁶ Also, the questions of how a Brexit might come about, including

²⁴ For an extensive analysis of the legal nature of the new settlement, see Steve Peers, “The final UK/EU renegotiation deal: legal status and legal effect”, in *EU Law Analysis*, 21 February 2016, <http://eulawanalysis.blogspot.de/2016/02/the-final-ukeu-renegotiation-deal-legal.html>.

²⁵ Andrew Duff, “The Case for an Associate Membership of the European Union”, in *EUROPP Blog*, 3 June 2013, <http://wp.me/p2MmSR-3dQ>.

²⁶ Stephen Booth et al., “What if...? The Consequences, Challenges & Opportunities facing Britain outside the EU”, in *Open Europe Reports*, No. 03/2015 (March 2015), <http://openeurope.org.uk/intelligence/britain-and-the-eu/what-if-there-were-a-brexite>; Fresh Start Project, *Manifesto for Change. A New Vision for the UK in Europe*, London, January 2013,

considerations of a so-called “Brexpulsion” in terms of a “constructive dismissal,” seem to gain relevance.²⁷ What seems to be more relevant to our purposes is the question of to what extent the UK would remain an active part in EU decision-making or become a decision-taker. In this context the Swiss model might be more attractive than the Norwegian model, because in the latter the UK would still have to implement the *acquis* of the Single Market without having the opportunity to influence the respective legislation. The Swiss model, on the other hand, would allow the UK to determine the scope and content of participation on an ad-hoc basis. This model, however, seems to be the most laborious. The idea of an associate membership would allow the UK access to EU institutions in those policy areas that it still participates in, and hence would safeguard some of its say.

Regardless of the individual models, a Brexit will be highly costly both in political and institutional terms.

4. There is no such thing as a free exit: scenarios and their implications

Although political leaders in Europe try to reassure the sceptics by stating that a Brexit or non-Brexit will not make any difference, they can be proved wrong. Both a Brexit and non-Brexit will have institutional as well as political effects. The analysis of the institutional implications will mainly look into the math of the effects of differentiated policy-making within unified institutions. It will be difficult, however, to assess the political implications by simply looking at figures. Instead, the current state of European integration deserves a closer look in order to assess what kind of EU the UK would actually leave or remain a part of, and what role the British position can play in the future integration process.

4.1 Brexit or non-Brexit: institutional implications

In institutional terms two questions are relevant. Will a Brexit affect the functioning of EU institutions and the proportional representation of EU Member States? And, based on the assumption that differentiated integration will increase if the UK remains part of the EU, will a non-Brexit increase the difficulties of effective and legitimate decision-making in the EU?

If the UK withdrew from the EU, one of the simplest effects would be the fact that British officials and representatives in EU institutions would have to leave. Considering that the UK has been a member of the EU for more than four decades, this will not only affect the institutions in terms of numbers but also in terms of spirit. The British share in Commission officials is 3.5 percent,²⁸ which could be balanced rather easily. However, the experience of the officials as well as the British approach to policy-making will be more difficult to replace.

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/278507/Fresh_Start__full_.pdf; Ralph Buckle et al., *BREXIT: Directions for Britain Outside the EU*, London, The Institute of Economic Affairs, 2015, <http://www.iea.org.uk/publications/research/brexit-directions-for-britain-outside-the-eu>.

²⁷ See Iain Begg, “Could it be ‘Brexpulsion’ rather than ‘Brexit’?”, in *SIEPS European Policy Analysis*, No. 18/2015 (July 2015), <http://www.sieps.se/en/node/3135>.

²⁸ “Brexit in numbers - What would Europe look like without the UK?”, in *viEUws*, 3 May 2015, <http://www.vieuws.eu/?p=38182>.

Regarding the European Parliament (EP), a non-Brexit might actually pose greater difficulties than a Brexit – at least in terms of the legitimacy of policy-making. Looking at the numbers and balance of party groups in the EP, a Brexit would not make any big difference. Put differently: British influence in the EP is already rather limited today. Although the UK sends 9 percent of Members of Parliament (MePs), which is the third-largest representation after Germany (almost 13 percent) and France (almost 10 percent), the British MePs do not play a major role in terms of party groups in the EP. Even though the United Kingdom Independence Party (UKIP) has come out the strongest in the European elections in the UK, their Europe of Freedom and Direct Democracy Group (EFDD) has very little say against the grand coalition of the Socialist & Democrats Group and the European Peoples Party Group, which tend to align with Alliance of Liberals and Democrats for Europe Group in the EP. In the event of a Brexit the EFDD will be diminished by half and will lose even more influence.

If the UK remained part of the EU and hence the EP, the legitimacy of decision-making question would become increasingly relevant. The UK is not the only EU Member State with opt-out rights. But particularly in light of closer governance in the economic, fiscal and banking union, possibilities for differentiating decision-making and voting-procedures in the EP will get greater attention. Since the UK does not object to closer economic governance among its fellow EU Member States but wants to safeguard its say in the respective decisions, differentiation of the EP is not an option that the UK would support. To be fair to the UK, it is not the only country expressing doubts regarding the idea of a Eurogroup-Parliament or differentiated voting in the EP. The MePs, although elected by their national constituencies, are expected to vote within this supranational institution along their party-lines rather than based on their nationalities. Therefore, there is only little consensus in Europe regarding the need to differentiate the EP.

Compared to the EP, the Council of Ministers is already more differentiated. The Ministers of Finance, representing the countries whose currency is the euro, meet in the framework of the Eurogroup for deliberation. They also have the exclusive right to vote on matters strengthening the coordination and surveillance of their budgetary discipline as well as setting out economic guidelines (Art. 136 TFEU). This means that the UK, just like the other non-Eurozone countries, is excluded from decisions on the strengthening of the economic union. Furthermore, the dominance of the Eurogroup can spill-over into other policy-areas, such as the Single Market, either through decisions under Art. 136 TFEU or through majority-building when qualitative majority voting (QMV) applies. The new rules applicable since 1 November 2014 require a double majority of at least 16 Member States representing at least 65 percent of the EU's population (Art. 16(4) TEU). There are currently 19 Member States in the Eurozone with a share of 66.6 percent in population, which suffices in order to build a QMV.²⁹ The Member States outside the Eurozone could build a blocking minority of at least four Member States with a share of at least 35 percent in the EU's population, if they were able to coordinate their positions. The UK represents the largest non-Eurozone country with more than 64 million inhabitants. So, one could conclude that being sidelined in the Council by the Eurozone – potentially on vital decisions affecting the Single Market – might motivate the UK to exit the EU. At the same time such a Brexit would weaken the position of the non-Eurozone countries substantially.

²⁹ Calculations based on Eurostat data, "Population on 1 January", updated 28 September 2015, <http://ec.europa.eu/eurostat/tgm/table.do?tab=table&init=1&language=en&pcode=tps00001>.

The British debate has produced two concepts of how to safeguard the British “say” in EMU decisions. One idea is to lower the threshold for a blocking-minority in QMV in terms of either the minimum numbers of Member States – three instead of four – or the share in population, if decisions concern the core principles of the EU or the Single Market. Another option is the introduction of a so-called “emergency brake” that is currently already applicable to police and judicial cooperation in criminal matters (Art. 82-83 TFEU).

The “new settlement” chose the second option. It does not change any thresholds within QMV. Instead, the decision by the Heads of State and Government underlines the principle of mutual respect between the Member States for EMU decision-making. This spirit of safeguarding the rights and competences of non-participating Member States is supported by a proposal for a mechanism to pull an “emergency brake.” This means that one Member State that is not part of the Banking Union, based on a reasoned opinion, can ask for continued discussion in the Council or, if necessary, in the European Council. One difference to the procedure within police and judicial cooperation in criminal matters is the missing link to an accelerator mechanism. While Articles 82 and 83 TFEU grant permission to proceed within the framework of enhanced cooperation in case the European Council cannot find consensus the procedure within EMU would require a decision by all Member States in the Council. This cannot result in a situation that would amount to allowing a Member State a veto.

4.2 Brexit or non-Brexit: political implications

The question of a Brexit hits Europe in rather unsteady times. After long years of crises in the Eurozone, the five presidents of EU institutions called for completing the Economic and Monetary Union.³⁰ At the same time EU Member States disagreed about the right approach to managing the sovereign debt crisis of Member States. This clash of economic philosophies culminated in Greece almost exiting the single currency in July 2015. The EU Member States prevented such a Grexit at the very last minute only by agreeing to set up a third programme for Greece under strict conditions. Since re-elections in Greece in September 2015 did not bring about a change in government, it is very likely that a Grexit is not off the table and has only been postponed.

The refugee surges from Syria and North Africa have pushed Europe in general and the Schengen Area in particular into deep crisis. In 2015 more than 1.2 million applications for asylum were registered in the EU. In reaction to this pressure, several Member States have started to reintroduce border controls and Hungary has decided to draw a fence at its Balkan-borders. This refugee crisis highlights the shortfalls of a desperately-needed functioning and fair Common European Asylum System that apparently so far only exists on paper.³¹

The general principle of solidarity among the EU Member States (Art. 2 TEU) has suffered from both the Grexit debate as well as the refugee crisis.

Ever since the financial crisis of 2008 highlighted the shortfalls of EMU reform, Member States have debated initiatives for constituting a political union. It is also clear, however, that not all EU

³⁰ Jean-Claude Juncker et al., *The Five Presidents' Report: Completing Europe's Economic and Monetary Union*, June 2015, <http://europa.eu/!cY66kX>.

³¹ See Jean-Claude Juncker, *State of the Union 2015: Time for Honesty, Unity and Solidarity*, Strasbourg, 9 September 2015, http://europa.eu/rapid/press-release_SPEECH-15-5614_en.htm.

Member States will join on to such profound reforms. Therefore the idea of a “core Europe” constituted by the “Euro-Core” seems to be one of the more realistic scenarios for future European integration.³²

How does the British referendum on the UK’s membership in the EU feature in this picture of a deeply shaken European integration process? The following analysis will discuss this question first in light of the “new settlement,” i.e. political implications of a non-Brexit scenario, and second in consideration of future prospects of European integration in case of both a Brexit and a non-Brexit.

The ground for extensive British unilateral negotiation in preparation for the referendum seemed to be rather thin in light of the crises stricken EU. Nevertheless, or perhaps because of this, the “new settlement” contains provisions that might develop certain political implications for the scenario of the UK remaining within the EU. The “new settlement” extends the redefinition of the EU’s principle of an “ever closer union” in the European Council Decisions of June 2014 by explicitly granting the UK an exemption. In consideration of political implications, this is rather remarkable for several reasons. The adherence to this principle forms part of the UK’s accession treaty with the EU. Additionally, it touches upon the core principles of the Union as defined in Article 2 TEU.³³ The Heads of State or Government declare in their statement that “the references to an ever closer union among the peoples are [...] compatible with different paths of integration being available for different Member States and do not compel all Member States to aim for a common destination.”³⁴ Although this confirms differentiated integration as a viable and accepted principle of European integration, it also loosens the common integration framework. This does not only represent a peculiar situation that some call “surreal”³⁵ it also could provide grounds for a loose “Europe à la carte” integration in the future. Such a clear exemption might trigger a contagion effect and particularly nationality-conscious Member States like Hungary and Poland might seize this opportunity to draw out of future integration projects.

Another crucial issue is the UK’s demand to get the right to curb EU internal immigration. The UK is not the only country in which the population fears that people from other EU Member States benefit unjustly from their welfare systems; it would be dangerous to foster this debate throughout the EU. The four freedoms of the Single Market as core values of European integration grant that no EU citizen is discriminated against based on his or her nationality. Therefore, a unilateral derogation granting the UK the right to allow immigrants access to the British social welfare system only after a period of four years of working in the UK seemed to be a rather bold demand. However, the “new settlement” includes a compromise of establishing a so-called “emergency brake” for all EU Member States. The proposal to amend Regulation (EU) No 492/2011 of the European Parliament and of the Council on the free movement for workers within

³² Glienicker Group, *Towards a Euro Union*, 17 October 2013, <http://www.glienickergruppe.eu/english.html>; Eiffel Group, *For a Euro Community*, 14 February 2014, <http://bruegel.org/2014/08/for-a-euro-community>; Spinelli Group and Bertelsmann Stiftung, *A Fundamental Law of the European Union*, Gütersloh, Bertelsmann Stiftung, 2013.

³³ Andrew Duff, “Coping with the British: here’s how”, in *On Governing Europe* blog, 7 September 2015, <https://andrewduff.blogactiv.eu/?p=266>.

³⁴ European Council, *European Council conclusions, 18-19 February 2016*, cit, p. 17.

³⁵ Guy Verhofstadt quoted in Andrew Duff, “Facilitating Coexistence: The endgame for Brexit”, in *On Governing Europe* blog, 4 February 2016, <https://andrewduff.blogactiv.eu/?p=302>.

the Union envisages that a Member State could ask to pull the “emergency brake” if the social welfare system was under excessive strain due to immigration. The Council would then have to vote on granting the Member State the right to restrict in-work benefits to migrants for four years.³⁶ In light of the current different interpretations of the emergency clauses of the Dublin-Regulation by EU Member States, the EU would be well advised to clearly define the conditions for such an “emergency brake.” As Steve Peers explains in great detail, the proposal of amendment still lacks this clarity.³⁷ Additionally, the UK will have to accept that this mechanism can also be used against British nationals that live abroad, because all EU Member States have the right to pull the “emergency brake.” At the same time, the political implications for the EU link up to the question of violation of the anti-discrimination principle. The envisaged amendment would at least introduce the possibility of temporary discrimination and therefore it is indeed possible that the final word has not been spoken.

In light of the sovereignty issue, national parliaments have their say within the early warning system established by the Lisbon Treaty. Admittedly, so far national parliaments have only successfully filed a yellow card twice and hence the system might need revision. But at the same time national parliaments are getting involved and might simply need time to adapt to the new system. Whether a veto right of national parliaments would improve the system is one of the points that EU Member States have discussed and will continue to discuss. The “new settlement” offers national parliaments a “red card” based on a reasoned opinion on non-compliance of a draft Union legislative act with the principle of subsidiarity by stipulating that “members of the Council will discontinue the consideration of the draft legislative act in question unless the draft is amended to accommodate the concerns expressed in the reasoned opinion.”³⁸ However, this reasoned opinion needs to be supported by 55 percent of the votes allocated to the national Parliaments and sent within 12 weeks from the transmission of the draft. This means that a single parliament will not be able to block a decision. This is not quite what David Cameron has demanded but one should keep in mind that the UK established its very own subsidiarity check with the European Union Act of 2011. It requires a referendum in the UK whenever EU decisions imply some sort of sovereignty transfer. Thus, strictly-speaking the British population would have to approve whenever a passarelle clause is applied that, for instance, allows decision-making to switch from unanimity to QMV. Another consequence that might have been rather unintended from the British perspective is the fact that the UK will have to accept that other EU Member States might pull the “red card” against legislative proposals that are in the British interest.

In addition to the political implications of the “new settlement” that will enter into force if the outcome of the referendum is in favour of the UK’s EU membership, the bigger picture of the political momentum resulting from a Brexit or non-Brexit also deserves analysis. The following argumentation focuses on the issues of future integration, secession tendencies, and power considerations.

³⁶ See “Cameron meldet Durchbruch bei Gesprächen über EU-Reform”, in *Süddeutsche Zeitung*, 1 February 2016, <http://www.sueddeutsche.de/politik/-1.2843576>; “Donald Tusk to publish UK-EU, settlement”, in *BBC News*, 1 February 2016, <http://www.bbc.com/news/uk-politics-eu-referendum-35456633>.

³⁷ Steve Peers, “The final UK renegotiation deal: immigration issues”, in *EU Law Analysis*, 20 February 2016, <http://eulawanalysis.blogspot.de/2016/02/the-final-uk-renegotiation-deal.html>.

³⁸ European Council, *European Council conclusions, 18-19 February 2016*, cit, p. 17.

If the UK remained within the EU, future reforms for further European integration will become less likely, since the UK would need to approve of it just like any other EU Member State. This would also include future treaty reforms. One solution would be an increase in differentiated integration, allowing the UK to opt-out, as well as a proliferation of intergovernmental arrangements outside the EU's legal framework like the TSCG. It is seldom the UK alone that asks for derogations. Therefore, this would add to the complexity of the "EU united in diversity" as displayed in Figure 1.

All this being said, it would be false to assume that a Brexit would represent the solution to all of the problems in European integration. It is true that the UK represents a special case regarding the number and scope of its opt-out rights. However, the UK is neither the only hurdle to deeper integration of the EU nor exceptional in terms of Eurosceptic positions.

The so-called motor of integration, France and Germany, has almost come to a halt. Both the French Minister of Economic Affairs, Emmanuel Macron, as well as his German counterpart, Sigmar Gabriel, outlines different plans for strengthening European integration. They were able to agree on plans for establishing an economic government with a strong European Minister of Finance who has the competence to coordinate the 19 Eurozone countries' economic, fiscal and social policies. But, their positions differ regarding bail-out questions. Macron promotes a fiscal equalization scheme, whereas Germany strongly opposes any form of a "transfer union." Thus, there is general consensus that the EU needs reforms, but there is no consensus regarding the scope and design of such a "reborn" EU. One could say that the road to a political as well as fiscal union is bumpy regardless of whether the UK exits the EU or not. The same applies to the current refugee crisis in which Germany finds itself from within an increasingly isolated position. The UK cannot be expected to substantially contribute to solving this crisis because it is not part of the Schengen Area. Furthermore, it is entitled to a complex derogation system of opt-out and opt-ins in the Area of Freedom, Security and Justice, which allows the UK to pick-and-choose its preferred policies.

These crises are enhanced by the fact that Euroscepticism has been on the rise in Europe throughout the past years. Both national and European elections are proof of this. In May 2014 Eurosceptic parties came out strongest in the European Parliament elections in France (Le Front National), the UK (UKIP) and Denmark (Danish People's Party). In several other Member States like Austria (Freedom Party of Austria), Finland (True Finns) and the Netherlands (Party for Freedom), they represent the third-largest groups. In Poland the Law and Justice Party won the parliamentary elections in October 2015. And in Germany, the Alternative for Germany, an anti-Euro party, reached 7 percent of the votes and hence would have been able to enter the EP even if the Constitutional Court had not abolished the 3 percent limit. The latest national elections also seem to confirm this picture. The Finns Party entered the coalition government in Finland in May 2015, the left-wing party Syriza won national elections in Greece twice, the Danish People's Party became the second-strongest force in Denmark, and prospects in Spanish elections are good for the rather Eurosceptic Podemos.

Against this backdrop the most crucial question in relation to a Brexit is what kind of political momentum would result from it. Two scenarios are possible. A Brexit could abolish one of the strongest veto positions in the EU regarding further European integration. Needless to say, the

future integration path would remain highly differentiated. The most likely scenario is the further development of a “core Europe” that nonetheless remains open to all EU Member States for joining whenever they are able and willing to do so. Another possibility would be that a Brexit further enhances Eurosceptic tendencies in the EU and motivates other EU Member States to follow down the British alley. The Hungarian Prime Minister Victor Orban already felt “inspired” by the British referendum and announced a referendum on the Council decision on the temporary relocation mechanism from the frontline member states Italy and Greece to other member states.³⁹ Ireland – which is not a Eurosceptic country per se but is tightly connected to the British position, at least as far as economic relations and Schengen and hence the free movement of capital and persons is concerned – is very likely to call a referendum on their EU membership if the British should vote no. So far European disintegration has not been part of the picture of the European integration project. Therefore, consideration of a Brexit has only recently entered the political and academic debate. This might spark a rethinking on the European integration process, and both scenarios for the future of Europe, that of differentiated integration and that of differentiated disintegration, will require further elaboration – and even more so in the actual event of a Brexit.

The question of the political momentum also contains a national component. The Scottish people just voted to remain part of the United Kingdom. The outcome of this referendum was rather close, with 55.3 percent voting against and 47.3 percent in favour of Scottish independence. A recent poll by The Sunday Times highlights that while 53 percent of English people would like the UK to exit the EU, 65 percent of Scots would want the UK to remain a part of the EU.⁴⁰ This creates the odd situation that Scotland, which has just struggled to remain part of the UK and hence in the EU, could face the necessity of exiting the EU against its will only shortly afterwards. There is little doubt that this would imply a second referendum on Scottish independence so that Scotland could find a way to protect its EU membership. This could also affect other EU Member States that face secession tendencies, like Spain, for example.

Last but not least, a Brexit or non-Brexit must be considered in terms of the foreign policy dimension. A Brexit will affect both the UK and the EU in this respect. The EU has always been an important channel through which the UK has fostered its say in crucial questions of international policy.⁴¹ Thus, a Brexit would affect the UK’s position and influence on the global stage. The UK has always represented a major player in building up the EU’s Common Foreign and Security Policy. This policy would not falter if the UK exited the EU. But it could lose some of its momentum.

Additionally, a Brexit would affect the power balance within the EU. The French-German motor of European integration is driven mainly by Germany these days. There is the debate on whether Germany has been a hegemon within the EU – whether reluctant or not. Some claim Germany has been going it alone in the latest crises that the EU has undergone, be it the Grexit-crisis and the austerity policy or the German “Willkommenskultur” in the refugee crisis. And other EU Member

³⁹ Andrew Byrne and Duncan Robinson, “Hungary referendum throws Brussels migrants plan into disarray”, in *Financial Times*, 24 February 2016, <http://on.ft.com/1R1b4Ez>.

⁴⁰ Jason Allardyce, “Scottish Voters Warn Cameron: No EU, No UK”, in *The Sunday Times*, 17 January 2016; John Curtis, “Might Scotland Vote to Leave the UK if the UK Votes to Leave the EU?”, in *What Scotland Thinks*, 17 January 2016, <http://blog.whatscotlandthinks.org/?p=2326>.

⁴¹ David Cameron, *The Future of Britain’s Relationship with the EU*, cit.

States do not exclusively perceive this with goodwill. Also, in external policies this country has played a major role – not least in dealing with the Ukrainian crisis but also regarding the review of the European Neighbourhood Policy. The EU is far from developing a German-European foreign policy, but a Brexit might generate the impression that Germany's influence is further increased in this policy realm. This will affect the political momentum of European integration as well, particularly in unstable times, with regards to the future of the European integration project.

Conclusions

Unlike Hamlet the Shakespearean question “To Brexit or not to Brexit” should not plunge the EU into deep despair. At the same time EU Member States should avoid underestimating the relevance of this question.

The UK will remain an exceptional and at times difficult partner in the EU. This alone does not lead to the conclusion that the EU would be better off in the case of a Brexit. Quite the contrary: EU Member States will be well-advised to find ways to accommodate the UK's position. In light of the rising Euroscepticism in Europe, the strained solidarity of EU Member States in EMU and the Schengen Area, and the EU's need for substantial reforms regarding political and fiscal union, a Brexit might only add oil to the fire that would spark tendencies of dissolution in the EU. Therefore, retaining the UK in the EU would come at the price of increased differentiated integration, whereas the EU could have to pay the price of differentiated disintegration in the case of a Brexit.

At the same time, no one should retain a country in the EU against their expressed will. This would neither be beneficial for the UK nor for the EU. The UK has the power to veto further European integration and has given sufficient proof of its willingness to use this power in the past. However, one cannot recommend that the other EU Member States accept any British demand and hence potentially get blackmailed in the course of the process.

In consideration of these conclusions, the EU Member States should in the short term take the British question seriously. Furthermore, the aim should be to examine what compromises are possible within the existing treaty framework. At the same time, attention should be paid to the fact that David Cameron would need to be able to sell the negotiation results as “real achievements” back home; otherwise chances are high that the “no”-voters would succeed in the end. The “New Settlement for the UK in the EU” might represent the missing piece in this jigsaw.

In the long-term, substantial reforms of European integration, including treaty changes, will be unavoidable. Differentiated integration will form one of the main constituting principles for this future scenario. Although the UK will continue to represent the champion of opt-outs, and in this context the concept of an “associate membership” might re-emerge on the agenda, great caution will have to be paid to involve the UK to the greatest extent possible. The aim in this scenario should however be to prevent the EU from developing into a loose form of “à la carte” integration.

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