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# The UK wants Brexit.

## And what kind of Europe does the EU want?

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*A realpolitik analysis of the room for manoeuvre with regard to the future status of the United Kingdom in the wake of the referendum on 23 June 2016.*

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# Introduction

In the referendum on 23 June the British electorate came out in favour of leaving the EU. However, this certainly does not mark the end of the debate. Nor does it constitute a definitive verdict on the future status of the United Kingdom in the EU. In point of fact the shape of future cooperation between the EU and the United Kingdom is only just beginning to emerge. Both parties are obviously interested in some kind of partnership, though there are not going to be negotiations as such. As stipulated in Article 50 the country will notify the European Council of its intention to withdraw, and this will have to be implemented in legal terms. The United Kingdom would have a great deal to lose if the separation process were to be implemented in a rigorous manner. For this reason the British will try to transform the withdrawal talks into negotiations on some kind of associate membership. The EU 27 will have to decide in the very near future on how it intends to handle such a scenario.

It is worth examining the legal framework and the room for manoeuvre for a new or revised relationship between the EU and the United Kingdom before we proceed to draw political conclusions from the outcome of the referendum. Would it be possible, from a purely legal point of view, to offer the United Kingdom a special status somewhere between full membership and non-EU state status? And how easy would it be to create a status of this kind?

## 1 Withdrawal as specified in Article 50

In the wake of the Brexit referendum in the United Kingdom the two sides will follow the procedure specified in Article 50 TEU.

The United Kingdom will submit to the Council an application to withdraw from the EU. This application must receive the assent of the House of Commons before it is submitted to the EU. As a result of the internal political situation in the United Kingdom, the announcement that the prime minister intends to resign in October 2016 and the dissolution of the cabinet and/or of Parliament, the procedure specified in Article 50 TEU can be triggered at the earliest in the late autumn and winter of 2016. The day on which the Council receives the British withdrawal application marks the start of a two-year period, in the course of which there will be negotiations on the future status of the United Kingdom. This time limit makes it impossible for protracted negotiations to delay the withdrawal (the so-called sunset clause). The negotiations are designed to reach an agreement “setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union.” To what extent and for how long the treaties continue to be in force for the state which intends to withdraw is not stipulated in Article 50 TEU. The withdrawal agreement can defer the point in time when the EU treaties cease to apply to the member state beyond the envisaged 2 years, and this would give the United Kingdom an opportunity to prepare for the time after EU membership in legal and economic terms. Whether the withdrawal agreement can determine for how long and to what extent the treaties will continue to be in force is not specified in Article 50 TEU. Once the negotiations have been completed there will be a qualified majority vote in the Council, and this will enable it to give its assent to the withdrawal agreement.

The treaties do not explicitly specify whether the United Kingdom, after it has submitted the withdrawal application, can reverse the decision and remain in the EU after all. But it is certainly possible that the United Kingdom will decide to remain in the EU if the political situation in the country changes. If Scotland and/or Northern Ireland decided to secede, the United Kingdom might come to the conclusion that changed circumstances make it imperative to reassess the application based on the specifications of Article 50.

However, at the moment this contingency is not on the agenda. Initially it will be of some importance for the United Kingdom to find an interim solution which enables the country to be a privileged partner with restricted participation rights, though without the whole range of rights and duties of a normal member state. In legal terms this undertaking is going to come up against some serious pitfalls.

However, what might seem to be clear-cut in legal terms is often a question of political interpretation in the context of the European integration process. For this reason we will first describe the precise legal situation and then move on to consider the various ways of interpreting it in political terms.

## 2 The treaties do not envisage half or partial membership<sup>1</sup>

In legal terms it is possible to make a distinction between two kinds of status, i.e. “member state” and “non-EU state.” The EU treaties specify that there can be no half membership or partial membership of the European Union.<sup>2</sup>

Union law makes a linguistic distinction between “member state” and “non-EU state.” This aspect of positive law makes it impossible to negotiate a status between the two without subjecting the treaties as a whole to fundamental revision. Moreover, the classification system adopted in Article 49 TEU (accession) and Article 217 TFEU (agreements with non-EU countries, association)<sup>3</sup> and the wording of Article 49 TEU, which envisages accession only as “a member of the Union,” and not, for example, as a member of certain areas of the Union,<sup>4</sup> exclude an intermediary status as half or partial member. In the case of a non-EU state that is converging with the EU, Article 217 TFEU does in fact envisage the possibility of concluding association agreements.<sup>5</sup> However, these can certainly be different both with regard to form and content, and in point of fact are largely undefined. They go further than the kind of trading partnership specified in Article 207 TFEU.

Now and then one comes across the idea that a withdrawal agreement negotiated on the basis of Article 50 TEU can create a “partial membership.”<sup>6</sup> However, it is doubtful whether such a status can be instigated on a long-term basis and as a legal category with the help of Article 50 TEU. A withdrawal which is designed to shake off EU legal constraints, whilst at the same time insisting on the same level of participation, can be seen as a contravention of the general ban on malpractice.<sup>7</sup> However, there is an incontrovertible difference between the

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<sup>1</sup> We are grateful to Laura Wolfstädter, an associate fellow of the Jacques Delors Institut – Berlin, for elucidating the legal background.

<sup>2</sup> See inter alia Thym in Grabitz, Hilf and Nettesheim, *Das Recht der Europäischen Union*, 41. EL (July 2010), EUV Art. 8, Rn. 29.

<sup>3</sup> Schmalenbach in Calliess and Ruffert, *EUV/AEUV*, 4. Aufl. (2011), AEUV Art. 217, Rn. 7.

<sup>4</sup> Cremer in Calliess and Ruffert, *EUV/AEUV*, 4. Aufl. (2011), EUV Art. 49, Rn. 8.

<sup>5</sup> Although in frequent use, terms such as “associate membership” or “associate member” are misleading.

<sup>6</sup> Dörr in Grabitz/Hilf/Nettesheim, 45 EL (August 2011), EUV Art. 50 Rn. 29 ff.

<sup>7</sup> Dörr, Rn. 30.

commitment to international law by a non-EU state and the acceptance by an EU member state of the autonomous legislation of the EU. This is also clarified in Paragraph 3 of Article 50 TEU, which expressly states that the EU treaties cease to apply from the day on which the withdrawal agreement enters into force.

Thus from a legal point of view there are, going by the current treaty provisions, only a limited number of ways in which a status can be created for the United Kingdom that does not encompass all the rights and duties of a member state, and does not go beyond the handful of rights enjoyed by non-EU states, especially when it comes to participation.

Once the United Kingdom has formally withdrawn from the EU, any attempt to regain membership will be subject to the rules and regulations that apply to other non-EU states.

## 2.1. Association agreement as specified in Article 217 TFEU

Non-members (non-EU states) can maintain relations of various kinds with the EU. The EU can conclude trade agreements (Article 207 TFEU) or association agreements (Art. 217 TFEU), can negotiate agreements with neighbouring states as specified in Article 8 TEU (neighbourhood clause), or conclude other agreements under international law which are in its area of competence.

States which wish to maintain a close partnership with the EU normally conclude an association agreement. The area of contractual association (Article 217 TFEU) is to all intents and purposes an open one and is normally dependent on the objectives of the association agreement. Thus the objective of accession associations is to enable the associate member to move ever closer to the Union, and at some point along the line to become a member of the Union.

In legal terms “association” has hitherto been taken to mean that a state is moving closer to the integration process of the Union even though it is neither a member of the EU nor a member of one of its entities. Thus on the basis of Article 217 TFEU it is not possible to create a “lower EU membership.” It is merely possible to instigate a contractual relationship, albeit a very close one, between the Union and a non-EU state.<sup>8</sup> The difference between member state and non-EU state should not be negated by the idea of associate membership. The retention of this categorical distinction is monitored by the ECJ. Thus a non-EU state can participate in legislation and legal harmonization within the Union, but only to a small extent.<sup>9</sup>

Furthermore, Article 217 TFEU specifies that the agreement must bring about an association with “common action and special procedure,” i.e. in addition to normal trade relations certain entities (association councils, committees, parliamentary assemblies) will be instituted which can steer the development of the association with the help of binding decisions, and can act on the basis of predetermined procedures. However, the international agreements between the Union and the non-EU state must attain critical mass in qualitative and quantitative terms in order to reach the level of an associated partnership.<sup>10</sup>

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<sup>8</sup> Bungenberg in von der Groeben, Schwarze and Hatje, *Europäisches Unionsrecht*, 7. Aufl. (2015), AEUV Art. 217, Rn. 1.

<sup>9</sup> Thym in Grabitz, Hilf and Nettesheim, *Das Recht der Europäischen Union*, 41. EL (July 2010), Rn. 29.

<sup>10</sup> Mögele in Streinz, *EUV/AEUV*, 2. Aufl. (2012), AEUV Art. 217, Rn. 15; Vöneky an Beylage-Haarmann in Grabitz, Hilf and Nettesheim, *Das Recht der Europäischen Union*, 56 EL (April 2015), AEUV Art. 217, Rn.13.

## 2.2. The limits of cooperation. No institutional participation for non-EU states

The current treaty framework states that in the EU institutions associated partners cannot be given the same participatory rights as a member state. This would go beyond the limits of associate membership and make it difficult to define the nature of EU membership.<sup>11</sup> The EU treaties make a conceptual distinction between “member state” and “non-EU state.”

Moreover, these are inescapable conclusions when it comes to the European Parliament and the question of who is entitled to vote. According to Article 22 TFEU only citizens of the Union are entitled to vote. However, EU citizenship is part and parcel of citizenship of a member state. It cannot be accorded by the EU, and certainly not to citizens of non-EU states. In terms of democratic theory the notion that citizens of an associated non-EU state can vote at elections for the European Parliament is inconceivable.

The situation is the same when it comes to participation in the European Commission. According to Article 17 paragraph 1 line 1 TEU the Commission is duty-bound to promote the general interest of the Union. Its members are selected “on the ground of their general competence and European commitment” (Article 17 paragraph 3 subsection 2 TEU). It would be self-defeating to appoint a candidate who, as a representative of an associated state, does not in fact have the objectives of the EU uppermost in his or her mind. The Council and the European Council as EU entities could perhaps make it possible for associated non-EU countries to participate in certain subject areas. Yet here again, in the final analysis the difference between an associated non-EU state which is committed to international law and a supranational acceptance of the EU’s autonomous legislation will make participation impossible. The equal status of the member states that is guaranteed in Article 4 paragraph 2 TEU could be in jeopardy if non-EU states in legislative entities or with policymaking powers, even if it is only in certain subject areas, have the same participatory rights as member states, although they are bound by the various decisions merely in terms of international law on account of their fundamental rejection of the Union’s autonomous legislation. This would in fact put the associated non-EU countries, when one compares them to the member states, in a privileged position.

Thus when it comes to the institutional participation of associated non-EU states in EU entities, the only conceivable option would be participation without voting rights – in other words, no more than an observer status or the right to submit a position statement.

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<sup>11</sup> Vöneky and Beylage-Haarmann in Grabitz, Hilf and Nettesheim, *Das Recht der Europäischen Union*, 56 EL (April 2015), AEUV Art. 217, Rn. 14; Bungenberg in von der Groeben, Schwarze and Hatje, *Europäisches Unionsrecht*, 7. Aufl. (2015), AEUV Art. 217, Rn. 23; Mögele in Streinz, *EUV/AEUV*, 2. Aufl. (2012), AEUV Art. 217, Rn. 15.

## 3 Political room for manoeuvre in the negotiating process

Even if the legal framework is narrowly defined, in the past political room for manoeuvre has been created on numerous occasions, and a creative interpretation of the treaties has made it possible to deviate from seemingly immutable principles.

Many of the steps leading to greater integration were made in this way. Since such room for manoeuvre was created as a result of a wish to achieve greater integration, there may well be a political desire for “differentiated disintegration.”

In the weeks and months that lie ahead the willingness of the EU 27 states to be cooperative will indicate more than anything else to what extent creative compromises with regard to the future shape of British membership can be hammered out. On the one hand the question arises of what kind of cooperation with the EU the United Kingdom would consider to be preferable. And on the other hand, and this is of far greater importance in the months that lie ahead, the question arises of how the EU 27 will approach the negotiations.

### 3.1. The United Kingdom is interested in close association

Since the British electorate has decided to leave the European Union, the United Kingdom’s intention to withdraw will be submitted in accordance with Article 50 TEU. The receipt of this statement, a unilateral declaration of intent, will be confirmed by the European Council, and trigger a two-year period after which, if it proves impossible to reach an agreement, withdrawal will come into effect automatically. However, the United Kingdom can apply to the EU for an extension, though this requires the unanimous assent of the European Council.

The United Kingdom would no doubt be interested in obtaining an extension, which would give it enough time to clarify the modalities of transition and to issue all the necessary legal texts in the national legal system. Article 50 paragraph 3 TEU stipulates that from the day the withdrawal agreement comes into force (or at the latest after two years) the EU treaties will cease to apply. At this point all EU legal acts will also cease to be legally binding. In the case of directives this is not an insurmountable problem, for they were incorporated into national legislation via national implementation acts. However, the abolition of EU regulations, which have sometimes overlapped national law for many decades, will reveal a yawning legal gap which at most will be filled with completely antiquated national regulations. Legislation, especially in the area of economic regulations, which have accumulated for more than 50 years, would have to be rethought and rewritten.

A clear-cut and immediate break with the EU would not be in the interests of the United Kingdom or of Europe. The opponents of Brexit have been describing the catastrophic consequences of the withdrawal of the United Kingdom for weeks and months. One thing is certain. The British economy in general and the services sector in particular are very much dependent on access to the European Economic Area (EEA) and its favourable trading system, for the European Union is far and away the United Kingdom’s most important trading partner. More than 50% of British exports go to the European Union, whereas imports from the EEA currently amount to about 50%.<sup>12</sup> The withdrawal of the United

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<sup>12</sup> Dhingra, Ottaviano and Sampson, Should We Stay or Should We Go? The economic consequences of leaving the EU, Paper EA022 (2015), Center for Economic Performance, London School of Economics, p. 2.

Kingdom from the EU will probably lead to a reduction in the volume of trade and increased prices for goods and services from abroad.

Thus the United Kingdom will no doubt be interested in having the same kind of access to the Single Market. In addition to the advantages of deepened trade with its European partners, the United Kingdom would continue to benefit from trade agreements with non-EU states which it would otherwise have to renegotiate itself.

However, in addition to a common desire to minimize short-term economic costs and to play down divisive issues, both the United Kingdom and the EU have a long-term political interest in maintaining close and friendly relations.

The best scenario as far as the United Kingdom is concerned would probably be to conclude a withdrawal agreement within the framework of Article 50 TEU, since this is the equivalent of the kind of association agreement with its far-reaching and tangible possibilities that is specified in Article 217 TFEU. It is conceivable that the government will try, as an associated non-EU state, to maintain a close relationship of this kind with the Union and to perform important duties in order to make it seem that its status, at least from a political and economic point of view, approximates closely to that of a member state. However, as we have seen, it would be difficult to create a special status for legal reasons, and thus this would probably require a treaty amendment and concessions from the EU 27 countries.

## **3.2. The EU 27 and the negotiating process**

In the run-up to the referendum it seemed for a long time that the United Kingdom was in a good position to retain and to increase its special status within the EU. In November 2015 David Cameron, the British prime minister, in a letter to Donald Tusk, the President of the Council, listed certain demands which would have to be met in order to enable the United Kingdom to remain in the EU. Thus the United Kingdom has played an active role with the referendum and the campaigns leading up to it. It seemed that the country was the master of its fate, and that it could make an active contribution to the future shape of the EU. But from now on the EU 27, the negotiating partner of the United Kingdom, will dictate the rules of the game. The interpretation of Article 50 TEU and the future status of the United Kingdom are to a large extent dependent on the negotiating style that will be adopted by the 27 remaining member states.

### **3.2.1. A hard-nosed negotiating position. Take it or leave it.**

The EU adopted a rather hard-nosed attitude towards the United Kingdom in the run-up to the referendum. Jean-Claude Juncker, the President of the Commission, and Wolfgang Schäuble, the German Minister of Finance, made it clear that the United Kingdom would have to live with the consequences of Brexit, and that it could not expect clemency or special treatment from the EU. The message to the United Kingdom was unequivocal. Article 50 TEU does not imply that there will be negotiations. It simply implies that there is going to be a “process of separation” in which the United Kingdom will have to accept the decisions of the EU relating to its future status. It is doubtful whether the EU has a legal duty to demonstrate that it has made an effort to negotiate. This was of course a political ploy designed to make the United Kingdom aware of the possible costs of withdrawal and to encourage it to remain. But there is more to it than that. A hard-nosed negotiating stance

towards the United Kingdom cannot be ruled out. In the final analysis the EU will want to make an example of the United Kingdom in order to highlight the cost of withdrawing from the EU. Otherwise other countries such as the Netherlands and Denmark will be tempted to follow the example of the United Kingdom and to turn their backs on the EU. And then they will try to obtain a kind of à la carte association agreement.

Furthermore, the negotiating position of the EU 27 is strengthened by the fact that Article 50 TEU states that if the EU is unable to reach agreement with the state that is leaving, the latter will automatically cease to be a member of the EU after a period of two years. A disorderly withdrawal by the United Kingdom without some concessions from the EU would be tantamount to economic and legal chaos. Thus in the Article 50 TEU talks the EU 27 has a way of exerting pressure up its sleeve. If the United Kingdom does not make concessions to the EU, the latter is not compelled to reach an agreement, and can cut its negotiating efforts down to a minimum until the end of the two-year period, when the United Kingdom, if of course it has not complied with the EU's demands, ceases to be a member of the EU.

### **3.2.2. Soft approach to the negotiations. Back in or back out.**

If the EU 27 pursues its negotiations with less severity, a new status for the United Kingdom which has been negotiated on a mutual basis could emerge at the end of the two-year period specified in Article 50 TEU. It is also possible that agreement can be reached with regard to an extension, and that the United Kingdom, after the end of the two-year period, will for certain length of time remain a member of the EU.

The status which the United Kingdom, by mutual agreement, might have after leaving the EU could take its bearings from two different models:

1. The United Kingdom agrees to become an associated member as defined in the treaties. However, if the United Kingdom is integrated into the single market, it will have to submit to the legal framework in force in this area and, for example, will have to continue to adhere to the principle of the freedom of movement of labour.
2. There is a comprehensive revision of the treaties in the course of which a new status is created for the United Kingdom that allows the state retroactively to withdraw from common policy areas. Thus a comprehensive revision of the treaties could lead to a reshaping of the EU entities. The European Parliament in particular could establish a National Parliaments Committee in which participation can be determined on the basis of policy areas. However, democratic theory rules out the participation of the United Kingdom in the European Parliament by MPs elected in the UK.

This solution cannot be ruled out, for although a treaty amendment may not be absolutely necessary in the context of the withdrawal negotiations, it is a distinct possibility. This is especially true in view of the fact that the new status of deepened association would also constitute a better institutional solution than the current arrangements for Turkey, Norway, Switzerland and perhaps, at some point in the future, Ukraine.

A treaty amendment would have to surmount sizeable political obstacles and would be difficult to introduce on account of the referendums in a number of countries. But it is possible that the United Kingdom and the EU 27 will consider this solution. For without a treaty amendment it is, as we have explained, difficult to see how the United Kingdom can be accorded participatory rights in EU policy areas after withdrawal from the EU.

# Conclusions

In the wake of the Brexit vote the remaining 27 EU member states will have to reach agreement on an unambiguous common approach to the style of the negotiations. The member states need to clarify their vision of the future of the European Union. Should it be more flexible? Should it emphasize the fact that an application for withdrawal will lead inexorably to withdrawal?

The realpolitik analysis suggests that the creation of a third and novel kind of status, which would need a seal of approval in the shape of a treaty amendment, could pave the way for differentiated disintegration in the EU. And this would set the stage for a multi-tier Europe.

It is clear that that a reversal of integration in the case of certain member states does not correspond to the nature and the goals of the Union, which in the preamble to the treaties states that it is committed to “progress towards an ever closer union among the peoples and Member States of the European Community” and that it is trying to achieve legal unity within Europe.

However, after the referendum in the United Kingdom the European Union will have to go in a different direction whether it likes it or not. It is now a question of trying to ascertain whether this direction has room for manoeuvre with regard to deepened associated membership.