

The hidden dimension of Brexit: Brexiting Europe

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Introduction: Brexit is *not* just about Britain

Depressing news about the effect of the Brexit vote to date and the things to come post Brexit have become a matter of routine since the vote to leave on the 23rd of June took place.² This is even before the terms of Brexit have been agreed, let alone negotiated. All signs are that it is going to be a long, complicated and hazardous road before the UK leaves the EU, if at all.³ Whatever the final format of negotiations is and regardless of what course of action is eventually followed by the UK political circle, one missing element in the discussion is that of the EU. Yes, the EU. Brexit itself seems to be a very 'British' affair, in terms of what has been debated on this side of the English Channel. The word 'Brexit' itself connotes an exit from the EU, yet the 'EU' is absent from it. That said, any exit, let alone a successful one, has to be about the EU as well. Questions like what has been the effect of the vote on Brexit on EU countries, and more specifically on its people and the EU psyche are alarmingly absent from the discussion in the UK. However, understanding these questions and trying to reflect

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² The Institute of Fiscal Studies (IFS) has calculated the cost of leaving the single market could cost Britain a £70 billion a year. Not being a member, which is still a possible scenario, could see the UK lose out on an additional 4% of GDP by 2030, the IFS has said. That 4% is equivalent of two years' worth of growth, and equates to around £70 billion in today's money – or £2,900 for each household. It said that the loss would outweigh the benefit of no longer paying in a net £9bn a year into the European Union budget. See, <http://www.independent.co.uk/news/business/news/brexit-economists-put-cost-of-uk-losing-european-union-single-market-membership-at-75bn-a7181376.html>, 9 August 2016; and the full report: <https://www.ifs.org.uk/publications/8411>, 10 August 2016.

Similarly, it is reported that confidence among manufacturers has slumped since the UK's vote to leave the European Union. Manufacturers' average confidence score dropped to 5.24 after the referendum from 6.37 before the vote, the report from EEF <https://www.eef.org.uk/>, a manufacturing lobby group, and accountancy firm BDO indicated. The biggest fall in confidence was in London and the South East. See <http://www.bbc.co.uk/news/business-36912676> 29 July 2016.

³ D. Green, 'Brexit means Brexit — but in reality it's a long time away' Evening Standard <http://www.standard.co.uk/comment/comment/david-allen-green-brexit-means-brexit-but-in-reality-it-s-a-long-time-away-a3314616.html>, 9 August 2016 ("What's only just being realised is how deeply conjoined Britain is with the EU through laws in a host of areas" and "Those wanting the UK to leave the European Union have won the referendum battle but it is still far from certain that they will win the Brexit war. The task before the UK is huge, and it may be that Article 50 is never invoked. If there is a Brexit, or a radical new basis for UK membership, this may have to be by an entirely new treaty."); J. Jones, 'Britain fails to understand the nature of globalisation at its peril' <http://theconversation.com/britain-fails-to-understand-the-nature-of-globalisation-at-its-peril-61392>, 5 August 2016 ("There remains great uncertainty in the aftermath of the UK vote to leave the European Union. Few seem to have a plan for what Brexit will look like and how the UK's relationship with the outside world will take shape."); J. Fittchen, 'Commercial disputes that cross borders will be a major headache after Brexit' The Conversation <http://theconversation.com/commercial-disputes-that-cross-borders-will-be-a-major-headache-after-brexit-63623>, 8 August 2016; P. Ungphakorn, 'Nothing simple about UK regaining WTO status post-Brexit' <http://www.ictsd.org/opinion/nothing-simple-about-uk-regaining-wto-status-post-brexit> 27 June 2016. In the first Cabinet meeting after the summer break, Theresa May reassured the country, however, that there would be "no attempts to stay in the EU by the back door". See A. Asthana, 'Restricting immigration will be at heart of Brexit deal, Theresa May says', The Guardian, 31 August 2016, <http://www.theguardian.com/politics/2016/aug/31/restricting-immigration-will-be-at-heart-of-brexit-deal-theresa-may-says>. The mere fact that the PM needed to provide such reassurances reveals the level of division and uncertainty about the way forward and Brexit taking effect.

on them, it is argued, are a crucial factor in any future negotiation and whether, ultimately, Brexit is a success story as the Prime Minister is repeatedly arguing it will be.⁴ The discussion cannot solely be about the various options open to the UK, their merits and pitfalls, how the UK economy is going to be impacted and so on and so forth, unless the UK is still under the illusion that it can unilaterally decide these matters and simply expect the EU to meet the UK demands. This ‘take back control’, ‘independence day’, UK exceptionalism-rhetoric may have proved successful in (marginally) winning the hearts of the electorate in the referendum, but it is difficult to see how it can carry any force in the real world of international politics, if the UK is expecting to get anything of substance from the Brexit negotiations. That is all the more the case if one takes into account the inherently complex nature of the EU political arena, continuously shaped as it is by the often conflicting geopolitical and economic interests of its member states.

A thorough and meaningful analysis of the effect the vote has had across the EU, therefore, needs to be conducted and be brought onto the pre-negotiation table. Put another way: we need to talk about Europe. And we need to talk about it now.

Why do we need to talk about Europe?

The reason for this can be stated quite bluntly: the June 23 vote has not changed the simple fact that the UK and Europe are (still) highly intertwined. Perhaps in the minds of the Brexit electorate, and in the minds of those on the Brexit camp who shaped its expectations, June 24 would be a ‘brave new world’; Britain would throw ‘off the shackles of the EU’ and thrive.⁵ Britain may very well ‘thrive’ – there is indeed some evidence that Brexit has, in some respects, benefited the economy in the immediate aftermath of the Referendum⁶ – but to disentangle itself from the Union, in pragmatic terms, it faces a very long road ahead.

We cannot even begin to enumerate the areas of activity in the UK affected by EU law, for instance. It is very hard to think of an area where EU law has not exercised at least some influence, and there are, of course, domains entirely regulated by EU law (the law of extradition within the EU is a characteristic example). But it is not just EU influences upon the UK that naturally complicate the process of extricating ourselves from the EU. From the economy, to law, to free movement and culture, Britain has itself contributed hugely to what Europe represents today. It is among the countries with the highest number of citizens living in another EU country (the government estimate is approximately 2 million people).⁷ The City of London is the economic centre of Europe.⁸ British corporate law rules and practice

⁴ World News, Reuters, ‘Britain’s May tells ministers to work for Brexit success’

<http://www.reuters.com/article/us-britain-eu-may-idUSKCN0ZY2RI> 20 July 2016.

⁵ P. Cruddas, ‘Britain will thrive after it throws off the shackles of the EU’, The Telegraph, 5 January 2016, <http://www.telegraph.co.uk/finance/economics/12083593/Peter-Cruddas-Britain-will-thrive-after-it-throws-off-the-shackles-of-the-EU.html>

⁶ See, for example, S. Sjölin, ‘What Brexit? UK recession cancelled after surprisingly strong data’ <https://brexit.efinancialnews.com/what-brex-it-uk-recession-cancelled-after-surprisingly-strong-data-d9ea177387b9#.f2nxw136b> 18 August 2016

⁷ HM Government, ‘The process for withdrawing from the European Union’, February 2016, Cm 9216, at p. 17, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/503908/54538_EU_Series_No2_Accessible.pdf

⁸ City of London, ‘London: Europe and the world’s financial centre’, https://www.cityoflondon.gov.uk/business/eu-and-regulation/publications/Documents/london_europe_and_the_world's_financial_centre.pdf

have influenced the shape of EU regulatory regimes for the protection of shareholders⁹ and the prevention of market abuse.¹⁰ Many protections for EU citizens as consumers have been modelled on British legislation.¹¹ Legal aid, fair trial guarantees and protections for defendants when they are arrested provide inspiration for EU legislation.¹² British intelligence agencies are highly relied upon in the common fight against terrorism and organised crime in Europe. British universities attract some of the best talent from Europe and produce a critically important volume of research, being among the largest recipients of research funding in the EU.¹³

In other words, the UK has been an integral part, and a major player, of the EU for nearly 40 years now.¹⁴ It has adopted European elements – of law, culture, the economy – as its very own, while seeing many of the elements that define its identity adopted by Europe. Even a political earthquake of the magnitude of the June 23 referendum cannot bring down this common history, legacy and existence, not immediately at least. But June 23 has changed the rules of the game and set in motion a chain of events that will change the shape of the UK relationship with Europe, and that may, in turn, change the EU itself.

Post 23 June: What has changed and why does it matter

First, words like ‘trauma’ and sentiments along the lines of ‘we are not to blame’ illustrate the depth and the level of shock the unexpected UK vote has caused in various EU countries.¹⁵ The result was ‘a watershed moment for the process of European unification, and one that I personally regret’, said Angela Merkel in a brief statement that she made in the

⁹ The EU Shareholders’ Rights Directive <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP/TEXT+TA+P8-TA-2015-0257+0+DOC+XML+V0//EN> appears to be similar, or as some argue even derived from, the UK Stewardship Code (introduced in the UK in July 2010) which is the first of its kind in the world. This shows the influence of the UK from ‘within’. This Code seeks to encourage better dialogue between institutional shareholders and company boards. Given the UK market’s role as a governance paragon, the code principles will be critical to practices of good stewardship taking root globally. See A. Reisberg (2015) ‘The UK stewardship code: On the road to nowhere?’ *Journal of Corporate Law Studies*, 15 (2), 217 and A. Reisberg, (2011) ‘The notion of stewardship from a company law perspective: Re-defined and re-assessed in light of the recent financial crisis?’ *Journal of Financial Crime*, 18 (2) 126.

¹⁰ The Market abuse regime which has developed in the UK- and has longer history than in the EU, has influenced the shape, the form and substance of the new MAR which came into force on 3 July 2016. See, for example, <https://www.slaughterandmay.com/media/2535170/the-new-eu-market-abuse-regulation-an-overview-for-uk-issuers.pdf> January 2016 (“It bears many similarities to the UK’s existing regime”, hence suggesting the wide influence the UK had in shaping it).

¹¹ D. Rosen, ‘Europe in or out? A legal perspective’, <http://www.brineurope.com/single-post/2016/06/02/Europe-In-or-Out-A-legal-perspective> 2 June 2016

¹² Britain in Europe, ‘European human rights network urges EU institutions to continue to work towards legal aid directive’, <http://www.brineurope.com/single-post/2016/05/06/European-human-rights-network-urges-EU-institutions-to-continue-to-work-towards-strong-legal-aid-directive> 6 May 2016

¹³ The Royal Society, ‘UK research and the European Union – The role of the EU in funding UK research’, December 2015, Britain in Europe, ‘European human rights network urges EU institutions to continue to work towards legal aid directive’, <http://www.brineurope.com/single-post/2016/05/06/European-human-rights-network-urges-EU-institutions-to-continue-to-work-towards-strong-legal-aid-directive> 6 May 2016

¹⁴ See generally D. Giannouloupoulos, ‘A powerful vision for Britain as a European leader – thank Gordon Brown for that’, *The Conversation*, 14 June 2016, <https://theconversation.com/a-powerful-vision-of-britain-as-a-european-leader-thank-gordon-brown-for-that-61040>

¹⁵ One Spanish newspaper *XLsemanal* put the following headline to an interview with Juncker and Schulz: “Juncker and Schulz “Nosotros no somos culpables del ‘Brexit’” see <http://www.xlsemanal.com/actualidad/20160731/juncker-and-schulz-no-somos-culpables-del-brexit.html> 31 July 2016.

early hours of June 24.¹⁶ In Belgium, federalists saw Brexit as ‘a new window of opportunity for deeper and faster integration within Europe without the UK dragging its heels’.¹⁷ In Greece, member of the political mainstream, burdened with (and still incapable of) handling the euro-crisis, saw in Brexit an opportunity for a new vision for Europe, one in which Brussels and Berlin would empathise more with the suffering of the people in the traumatised South. Alarming, their rhetoric echoed that of the extreme right; a spokesperson for Greece’s right-wing fascist Golden Dawn party, congratulated the British people for saying no to the “German rulers of Europe” and “Brussels’ scavengers”,¹⁸ and so did Marine Le Pen in France for that matter.¹⁹

But reactions have not been limited to the high political level. Brexit has affected all walks of life, and has stirred discussion across Europe and the world. If you live in Britain, and travelled to Europe this summer, there is a very good chance you have been asked about Brexit. People in Europe are concerned about the effect of Brexit, others are enthusiastic about its power to bring about change in Europe. Some have seen British common sense in it. Others feel the British have lost their path. Some have reacted violently to it. The FT reported that a 16-country poll by Ipsos Mori showed that almost half i.e. 48% of respondents from Sweden said they were dismayed by the UK’s decision, whereas in France only a quarter of respondents said they were sad about Brexit.²⁰ Interestingly, the survey also pointed out to divergent views on how to proceed with talks on a British exit: while 56% of Britons surveyed believe the UK should receive favourable exit terms, this was more than twice as many as in Germany, Belgium and France where the majority sought “unfavourable” terms for the UK to dissuade any other country from following the British out the door.²¹ A bit bizarrely, but perhaps unsurprisingly, in a possible act of defiance, or perhaps of insult, British symbols are expected to be excluded from display post Brexit in certain European places.²² On the business side, while the ECB have warned before the UK vote on 23rd of June that the shock from Brexit to the Eurozone economy could be ‘significant’ and ‘difficult to anticipate’, it subsequently made a more gloomy forecast at their July meeting warning that Britain’s vote to leave the EU created what they coined “fresh headwinds” for the Eurozone and could affect the world economy.²³ Clearly then, Whitehall needs to analyse these responses and, more important, understand what they mean for the negotiations ahead.

Secondly, like any negotiation, fundamentally, understanding what the other side wants to achieve, but crucially, how it is affected by the actual negotiation is as important as knowing

¹⁶ I. Hertner, ‘Germany’ in ‘Brexit: global reaction to Britain’s vote to leave the EU’, The Conversation, 24 June 2016, <https://theconversation.com/brexit-global-reaction-to-britains-vote-to-leave-the-eu-61399>

¹⁷ C. Jadot, ‘Belgium’ in ‘Brexit: global reaction to Britain’s vote to leave the EU’, *ibid.*

¹⁸ D. Giannouloupoulos, ‘Greece’ in ‘Brexit: global reaction to Britain’s vote to leave the EU’, *ibid.*

¹⁹ ‘« Victoire », « leçon », « choc » : les politiques français réagissent au « Brexit » », Le Monde, 24 June 2016, http://www.lemonde.fr/referendum-sur-le-brexit/article/2016/06/24/victoire-lecon-choc-les-politiques-francais-reagissent-au-brexit_4957342_4872498.html#YmMmu00fhVd7bmaQ.99

²⁰ R Mertens, ‘From gloomy to glad, Europeans respond to Brexit vote’ Financial Times, 4 August 2016

²¹ *Ibid.* The Same survey found that non-EU countries are more lenient, with 39 per cent saying favourable conditions should be offered.

²² It was reported that the Palace of Westminster and a pub may be expelled from a Brussels theme park of miniature landmarks from every EU state. See, B. Goyder, ‘Mini-Europe faces Mini-Brexit’ <https://brexit.efinancialnews.com/mini-brexit-threatens-uks-position-in-mini-europe-fb37ab4f9a3b#iwssk8y14> 22 August 2016.

²³ T. Fairless, ‘ECB Minutes Flag Brexit and Banking Sector Concerns’ The Wall Street Journal <http://www.wsj.com/articles/brexit-vote-could-affect-global-economy-in-unpredictable-ways-ecb-says-1471522218> 18 August 2016.

one's own position and bottom lines.²⁴ 'Listen more than you talk' is one prudent advice given by Chaffee who goes on to remind us, what any beginner negotiator would have been advised to follow: "The best negotiators in my life had an innate talent of reading what was most important to the other side. Tactically, if you appreciate things from their perspective, you can decide whether to trade on big points early, or hold what you have identified as their hidden deal point. By holding, this hidden point becomes a lever to extract more at the end."²⁵ Nothing that has happened so far suggests that this is the occurring. If anything, anecdotal reports in the media suggests that the opposite is happening.²⁶ Likewise, one need to appreciate that Brexit is not the only worry or uncertainty facing the EU at this point in time. For example, while the UK's vote for Brexit has meant a new era of uncertainty for European banks, as a recent research note from Deutsche Bank highlights, it is far from the only problem the industry faces.²⁷

Thirdly, as was rightly pointed out recently, choosing the best trading relationship with the EU depends on how the rest of the world responds to the UK demands.²⁸ This response, however, will remain "unknowable until the UK formally launches the exit process by invoking Article 50 of the Lisbon Treaty. All that is certain is that if the UK is to make a success of Brexit, it will need to draw on vast reserves of global goodwill."²⁹

Fourthly, it has been suggested that the mere possibility that the UK engages in fiscal and regulatory competition with the EU once it is out "is a powerful argument for the remaining EU member states to insist on either of two uncompromising outcomes following any triggering of Article 50: (a) the "Norwegian" one, ie membership of the EEA, which requires acceptance of the four EU freedoms and all EU rules without a say on their contents, or (b) no agreement at all."³⁰ Clearly, this is not in Britain's best interests.

Finally, there is a practical side to thinking about the EU now. If and/or when the UK leaves the EU, it will still have many interests in the EU, but would most likely lose its voice in

²⁴ T. Chaffee, '5 Tips That Will Help You Negotiate on Just About Anything Fortune Insiders' http://fortune.com/2016/03/29/tips-help-negotiate/?xid=soc_socialflow_twitter_FORTUNE 29 March 2016.

²⁵ *Ibid.*

²⁶ See, for example, reports in the press that the new Department for International Trade, headed by Liam Fox, withdrew a press release after making some unexpected Brexit admission: <https://politicalscrapbook.net/2016/08/incompetent-liam-foxs-dept-deletes-press-release-after-making-big-brexit-eu-admission/> 13 August 2016.

²⁷ T. Burke, 'European banks have more to worry about than just Brexit' <https://brexit.efinancialnews.com/european-banks-have-more-to-worry-about-than-just-brexit-89c20b749670#.u104clh3q> 22 August 2016. The brief note 'European banks: Recovery running out of steam?' is available at: https://www.dbresearch.de/PROD/DBR_INTERNET_DE-PROD/PROD0000000000419199/European_banks%3A_Recovery_running_out_of_steam%3F.PDF 18 August 2016 ("The large European banks are increasingly struggling with an adverse external market environment and in their efforts to mitigate these negative effects. It is also becoming clear that weak results may not only be due to financial market turmoil at the beginning of the year or the Brexit referendum in the UK, but the outcome of other, more fundamental problems.")

²⁸ S. Nixon, 'Brexit Success Hinges on Global Goodwill' The Wall Street Journal <http://www.wsj.com/articles/brexit-success-hinges-on-global-goodwill-1470879250> 10 August 2016.

²⁹ *Ibid.*

³⁰ L Enriques, 'Why the UK has Little Chance to Become a Successful Tax or Regulatory Haven' in Legal Aspects of Withdrawal from the EU: A Briefing Note Oxford Legal Studies Research Paper No. 47/2016, 29. Available at SSRN: <http://ssrn.com/abstract=2809285> 14 July 2016. (This was triggered by a speculation that "a likely outcome of Brexit is that, after withdrawing, the UK will lower corporate taxes and deregulate its economy to attract relocations from the Continent and elsewhere").

making or influencing these rules and regulations.³¹ This means it would need to find new channels of influencing European policy and/or count on friends instead to represent its interests. But who might speak for it?³² According to analysis conducted by VoteWatch Europe of voting patterns in the EU institutions over the years, the Swedes, Danes and Dutch are the member states that have most steadfastly stood with the British in the Council of Europe.³³ More important, Sweden, the Netherlands and Denmark are also “the main promoters of decreasing the regulatory burden for EU businesses and for having stronger protection of copyrights. These pro-business member states will lose a key ally upon Brexit.”³⁴ This has a number of ramifications. First, there will be a shift in the power balance within the EU decision making framework with the vacuum left by the UK departure. Secondly, as illustrated by the latest VoteWatch Europe’s report on the future equilibrium of powers in the Council: “these three countries are not the strongest coalition builders in the Council, ie. they find themselves in minority more often than other member states (especially the Netherlands). This means that, depending on the policy area considered, UK-reliant stakeholders will need to target also other countries in the Council in order to ensure a positive outcome for their advocacy activity.”³⁵ Finally, if these three countries are to be receptive to the claims and concerns of British interests then a lot of work needs to be done now to foster such a representative role. Friendships and alliances are built over years. They can be lost, however, rather quickly, in particular, if these EU members feel they have been betrayed by the British vote in losing a key ally.

More or less the same can be said about a potential post-Brexit alliance of the non-euro countries, where the UK might be able to capitalise on the non-euro countries’ fear of Britain’s departure from the EU, which will deprive them of a powerful ally and make them more vulnerable to potential pressures to adopt the euro, especially if further political and economic integration is seen as the best response to Brexit.³⁶

This leads to one final important point, that we can only briefly discuss here: we should not underestimate the extent to which the EU is divided about the way forward with Brexit (and the EU project), at this crucial juncture in modern European history. To quote the Guardian, “the EU 27 do not share a vision of how to move forwards: some favour a tighter, more integrated EU, others a looser “variable geometry”; some want more investment to kickstart flagging economies, others greater competitiveness and tougher fiscal discipline”.³⁷ This means that ‘what the UK decides it wants from Brexit may not be what it gets’, as ‘EU leaders have their own red lines and [their own] timetable’.³⁸ Similar levels of uncertainty

³¹ Unless the UK manages somehow to retain some influence over regulation of financial affairs, at least, after it left.

³² W. Hemmens, ‘Once the Brits’ seat at the EU is empty ...’ <https://brexit.efinancialnews.com/once-the-brits-seat-at-the-eu-is-empty-9263dd11b39f#i0gug7c21> 17 August 2016.

³³ A. Goldis and D. Frantescu, ‘After Brexit, Britain’s empty seat at the decision-making table will be a blow to its interests’ <http://blogs.lse.ac.uk/brexit/2016/08/16/after-brexit-britains-empty-seat-at-the-decision-making-table-will-deliver-a-significant-blow-to-british-interests/> 16 August 2016.

³⁴ A. Goldis and D. Frantescu, ‘After Brexit, Britain’s empty seat at the decision-making table will be a blow to its interests’ <http://blogs.lse.ac.uk/brexit/2016/08/16/after-brexit-britains-empty-seat-at-the-decision-making-table-will-deliver-a-significant-blow-to-british-interests/> 16 August 2016.

³⁵ *Ibid.*

³⁶ T. Barber, ‘Europe’s non-euro 8 fear consequences of Brexit vote’, Financial Times, 21 July 2016.

³⁷ J. Henley, ‘What the UK decides it wants from Brexit may not be what it gets’, The Guardian, 31 August 2016. See also P. Papakonstantinou, ‘Uncertainty on both sides of the Channel’, Kathimerini, 28 August 2016.

³⁸ *Ibid.* See also Reuters, ‘UK must pay for Brexit or EU is in “deep trouble”, says German minister’, The Guardian, 29 August 2016, <http://www.theguardian.com/politics/2016/aug/29/uk-must-pay-for-brexit-or-eu-is-in-deep-trouble-says-german-minister>

exist within the UK government itself about the kind of relationship it wants from Europe. The lack of a pre-referendum master plan for Brexit, coupled with a Remain PM and a divided cabinet now handling this major operation, mean that despite the Referendum we are none the wiser about the future of Britain in Europe.³⁹

Concluding thoughts

The irony of the foregoing discussion is, of course, that, as a result of the Brexit vote, the UK must now work more closely with Europe rather than on its own. That is if we take as a starting point that there is much to be gained from negotiating and establishing a good working relationship with Europe. One thing is clear: as much as the Brexit vote was a unilateral one, a one sided affair decided solely by the British people, making Brexit work is nothing but. For Brexit to be a success it has to be as much about the EU and its future shape and state, as it is about Britain post-Brexit. It is no longer a one-sided affair. Britain depends on regional and global goodwill. It is time the debate takes stock of this. It is time to listen to the EU developing narrative(s) post the Brexit vote.

³⁹ See e.g. A. Asthana, 'Theresa May calls Brexit meeting amid reports of single market split, The Guardian, 28 August 2016, <http://www.theguardian.com/politics/2016/aug/28/theresa-may-brexit-meeting-single-market>