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## Regardless of a leave or stay vote the EU has tougher questions to address than Brexit June 22, 2016



The first challenge on the day after the UK referendum will be to arrange the EU's and the 27 Member States' relationship with the UK, irrespective of the outcome. A victory of the leave campaign would be impossible to ignore. This referendum is in this regard different from the Danish, Irish, French and Dutch referenda of the past, in which the majority of the population said clearly and loudly 'no' to the ever closer Union, but in response to which the EU found means and ways to press on. Leave would hence lead us into unknown territory. Article 50 TEU providing for the legal possibility to withdraw from the EU was never meant to be used. A stay vote however would equally require arranging and detailing Cameron's new deal agreed in February 2016. As a result the UK would be in an even more special position than it is now, where it

is already somewhat removed from the integrating centre of the EU because it is not part of two of the three big integration projects: the Schengen area and the Eurozone.

### **What the referendum really is about, at least for the EU**

However for the EU the main challenge is not arranging its relationship with the UK. Its challenge is to deal with the broadest political disenchantment with the European integration project. Large and growing parts of the populations of numerous Member States do not feel sufficient ownership of the European integration project. A referendum about Brexit – in fact the second one after the referendum of UK membership in the European Economic Community in 1975 – could only happen because national governments and the EU have not found an adequate response to the growing public feeling of lack of ownership of the ever closer Union. The EU and national governments need to find a constructive response regardless of the outcome.

### **The most important lesson is that the referendum is not a UK particularity**

Citizens challenge the European integration project with unprecedented vigour across Europe. National publics and governments voice sovereignty-driven anti-European sentiments. Challenges to the European integration project are numerous, including the rise of anti-European parties in numerous Member States, debates about FrExit (France), PExit (Poland) and NExit (Netherlands). Elections of anti-European parties to national parliaments, e.g. in Hungary, and the European Parliament (EP) have become old news.

### **The dilemma: problem-solving without automatic further integration**

At the same time, the political and security crisis in Ukraine illustrates rising public expectations that the EU acts as a guarantor of peace and security. Similarly, citizens expect the EU to offer solutions to the ongoing economic and financial crisis and the immigration crisis. The dilemma is

that where the EU does not offer the expected solutions to contemporary problems, this is likely to result in further public resentment towards the European integration project. The Vote Leave campaign in fact built much of its momentum on the deep dissatisfaction of large parts of the population with the dealing of the Greek debt crisis and immigration crisis. The large influx of refugees over the past year has bolstered the support for the Vote Leave campaign.

Similarly, the EU's traditional way of strengthening its capacity to act through further integration increases public opposition. The EU's traditional way of addressing crises with a supposedly apolitical logic of legal integration hence aggravates the dilemma. For many decades this has allowed the EU to successfully promote the circumvention of a sovereignty-driven logic and of political struggle, while straight-forwardly assuming political power in areas that are central to national sovereignty. The EU's crisis management is a pertinent current example: the Commission not only monitors (*ex post*) budgetary compliance with the EU's debt and deficit criteria. It also provides recommendations for the reform of national budgets prior to their adoption. The EU's strategy of taking decisions of a political nature, e.g. redistributive decisions, under the disguise of regulatory and expert decisions, leaves national publics with a growing feeling of impotence over their own fate. They see newly imposed rules as concerned with enforcement and obligation rather than an expression of sovereignty or collective governance.

Creating ownership without losing capacity to act is therefore the real challenge for the EU.

### **Law needs to be part of the answer, not the problem**

EU integration is built on and driven by law. As a result, only law itself can control the *legal* dynamics that quasi-automatically further integration. It is high time, that the EU finds legal ways of functioning and of offering needed problem-solving capacity beyond the nation state that do not automatically trigger further integration.

*Legal limits of integration* already exist under EU law. Yet they have been marginalised by mainstream EU legal culture, both in the institutional practice and in academia. These legal limits need to be systematically identified and connected into a coherent understanding of EU law that respects and interprets EU law as creating an ever-lasting Union rather than an ever-closer one. This does not require a reinvention of the existing legal framework, but rather an essential reinterpretation. The current Treaties allow for ensuring controlled influence and outlet of political forces, including avenues of politicization, flexibilization, as well as partial divergence or even controlled disintegration. This is not limited to differentiated integration negotiated by some Member States, including the UK.

Developing a reading of EU law that is better able to accommodate political will of individual groups, including parts of national populations, is not only the task of the EU institutions, including the Court of Justice of the European Union, but also the task of legal scholars. Brexit is not a reason, but a trigger motivating a constructive approach seeking comprehensive *legal* answers, making specific constructive suggestions of how legal integration can successfully be contained across the whole range of EU policies.

Hence, the real question for the EU now and after 24 June 2016 is: How can the EU create political ownership without undermining the EU's capacity to act? The UK referendum is a painful reminder of this long lingering question. As a first step EU law needs to be essentially reinterpreted to strive for an equilibrium of integration rather than triggering an automatism of legal integration every time it is adopted, applied or interpreted.

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Member States

No comments

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