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Advocatus populi and advocatus diaboli – on law, arguments and strategies in BREXIT negotiations

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Babeş-Bolyai University, Cluj-Napoca, November 2nd, 2017



What did the people of Britain actually vote for?

- Deficits of the Brexit referendum
 - Clear Remain vs unclear Leave
 - Leave supporters as heterogeneous group
 - Case study: Australian republican referendum of 1999
- UK's red-lines:
 - immigration
 - jurisdictional sovereignty
 - independent trade policy
 - financial contributions to the EU budget)

→ „***Brexit means Brexit***”



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Why did the people of Britain actually vote for Brexit?

- Brexit was more of a vote driven by identity politics than it was a decision based on sober economic considerations
 - identity politics is a powerful tool to manage emotions
 - misconceptions, simplifications and demagoguery at its best
 - people willing to pay with their own money for the vision they like to come true



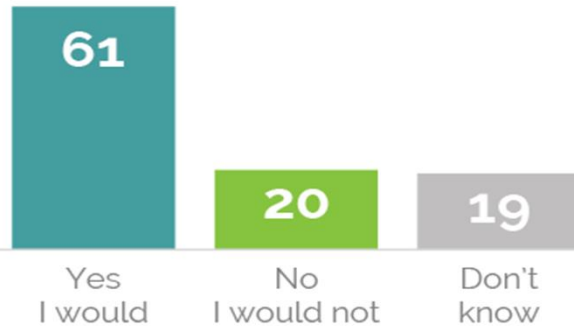


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Brexit extremism among Leave voters

Regardless of whether you think such an occurrence is likely, would you consider...

...significant damage to the British economy to be a price worth paying for bringing Britain out of the EU?
(% of 2,043 Leave voters)



...Brexit causing you or members of your family to lose their job to be a price worth paying for bringing Britain out of the EU?
(% of 2,043 Leave voters)



YouGov | yougov.com

July 12-19, 2017

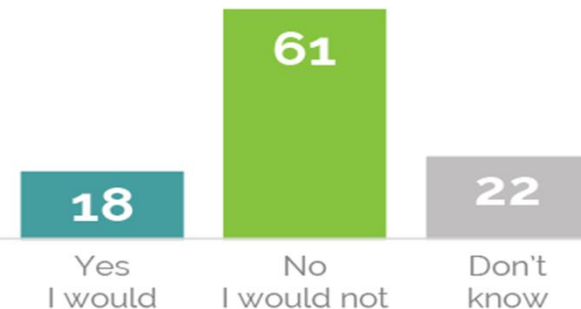
Brexit extremism among Remain voters (1)

Regardless of whether you think such an occurrence is likely, would you consider...

...significant damage to the British economy to be a price worth paying if it meant that Britain stayed in the EU?
(% of 2,248 Remain voters)



...yourself or members of your family losing their job to be a price worth paying if it meant that Britain stayed in the EU?
(% of 1,159 Remain voters)



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- but... are voters rational?
 - even if the voters now say, they would be willing to suffer damage to the economy, is it really so?
 - case study: immigration
 - does it come from the EU?
 - is it because of free movement of workers?
 - Blair' Government unilateral waiver of the transition periods after the 2004 EU enlargement



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UK's population

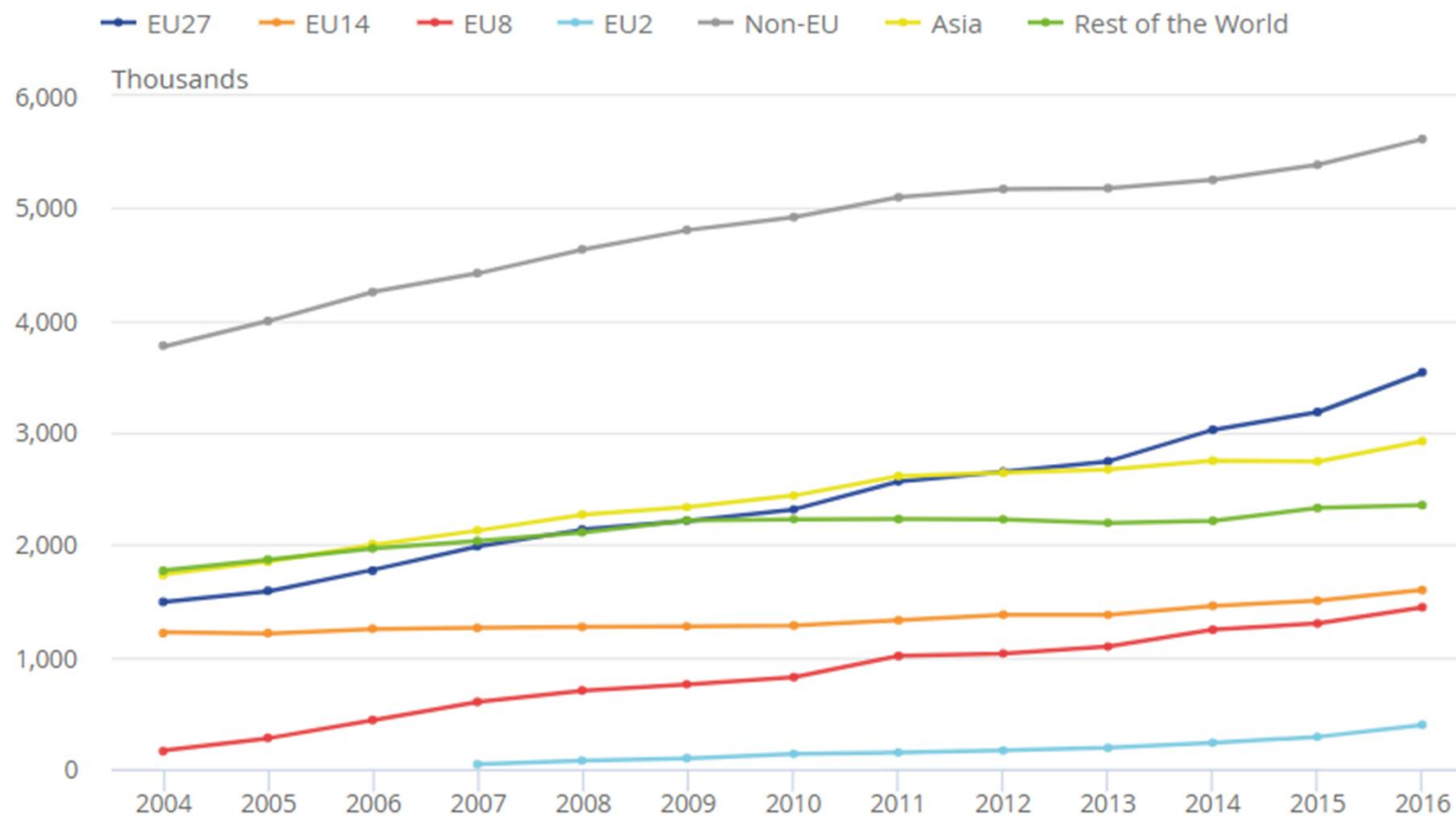
	Country of birth		Nationality	
	Estimate	Percentage	Estimate	Percentage
All residents	64,727	100	64,727	100
UK born/British National	55,554	86	58,710	91
Non-UK born/Non-British National	9,152	14	5,998	9
EU27	3,537	5	3,572	6
EU14	1,596	2	1,563	2
EU8	1,443	2	1,569	2
EU2	395	1	413	1
Non-EU	5,616	9	2,425	4
Asia	2,923	5	1,269	2
Rest of the World	2,353	4	988	2

Source: Annual Population Survey (APS), Office for National Statistics



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Figure 1: Estimates of the non-UK born resident population of the UK by country of birth, 2004 to 2016

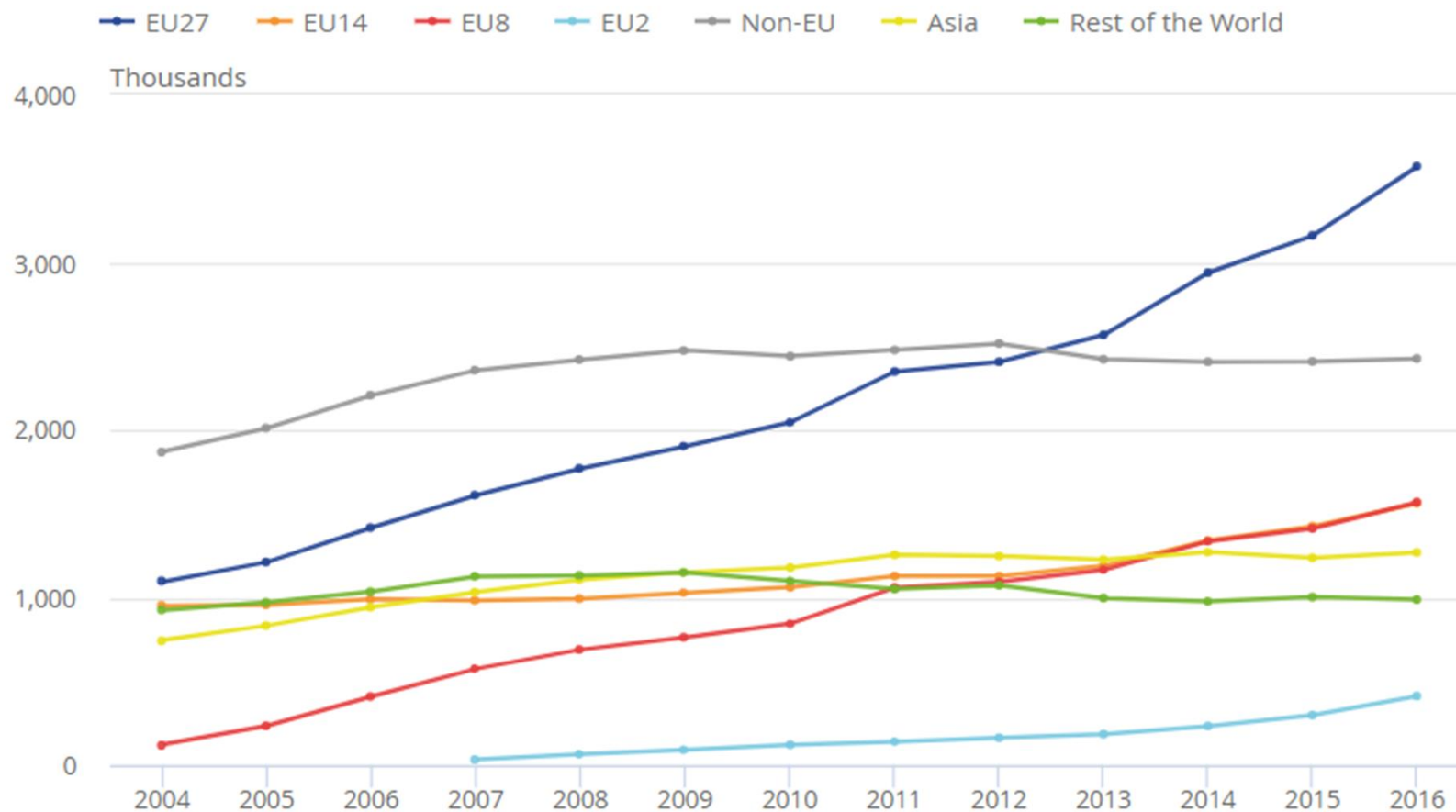


Source: Annual Population Survey (APS), Office for National Statistics



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Figure 2: Estimates of the non-British resident population of the UK by nationality, 2004 to 2016



Source: Annual Population Survey (APS), Office for National Statistics



- So even if the voters now say, they would be willing to suffer damage to the economy, is it really so?
 - No: the voters will expect the same as they always expect: economic growth, full employment, provision of public services
- The government will need to reconcile political demands of the voters with their economic aspirations. (The latter unlikely to be satisfied in a hard Brexit scenario).
- So how will the UK government handle these gloomy prospects if Theresa May keeps repeating: “**Brexit means Brexit**” ?



- PM May message from her speech during the conference of the Conservative Party in Birmingham (5 November 2016):
 - “***we want to make sure Britain is a country that works for everyone***”
- What is the **synthesis** of these two key messages by Theresa May?
 - “***Brexit that works for everyone***”.
- real and not merely declared determinant of London's negotiation position
- But...
 - what does it **mean**?
 - what are the **chances** for London to obtain what they want?
 - what will be the **price** to be paid for it?



- **Rules of the game:** legal framework for the withdrawal negotiations
- **Figures' weight:** stakes – economic arguments, which the parties may put on the negotiation table
- **Result of the game:** predictions about future form of relations between UK and EU



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Rules of the Game

Article 50 TEU

- (1) *Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.*
- (2) *A Member State which decides to withdraw shall notify the European Council of its intention [**withdrawal notice**]. In the light of the **guidelines provided by the European Council**, the **Union shall negotiate and conclude an agreement** with that State, setting out the **arrangements for its withdrawal**, taking account of the **framework for its future relationship** with the Union. [...]. It shall be **concluded on behalf of the Union by the Council**, acting by a **qualified majority**, after obtaining the **consent of the European Parliament**.*

Article 50 TEU

(3) *The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the MS concerned, **unanimously decides to extend this period.***



- (4) *For the purposes of paragraphs 2 and 3, the member of the European Council or of the Council representing the withdrawing Member State shall not participate in the discussions of the European Council or Council or in decisions concerning it. A qualified majority shall be defined in accordance with Article 238(3)(b) of the Treaty on the Functioning of the European Union [→ **72% of the MS, 65% of the Population**]***
- (5) *If a State which has withdrawn from the Union asks to rejoin, its request shall be subject to the procedure referred to in Article 49.***



- **European Referendum**

(23. June 2016: 48,1% – *Remain*, 51,0% – *Leave*)

- Meeting the **constitutional requirements** of the MS wishing to withdraw

- **Withdrawal notice**

(29. March 2017)

- **Withdrawal negotiations**

(Sunset-clause: 2 years)

- **Withdrawal agreement**

or withdrawal without any agreement

- **FTA [?]**

Withdrawal agreement

- **Orderly withdrawal of United Kingdom from the EU**
 - cases pending before the CJEU
 - the reallocation of UK-based EU institutions and agendas
 - the fate of British employees of EU institutions and agendas
 - legal status of EU-27 citizens and their families affected by Brexit, including the protection of acquired rights and social benefits for cross-border workers
 - UK's withdrawal from trade agreements concluded by the Union with international organizations and third countries
 - unspent financial means from structural funds
 - cessation of British transfer payments to the EU during the current budgetary perspective - **Brexit bill**
- **Future EU-UK trade relations**
 - In the withdrawal agreement or in a future FTA?
 - time
 - competence & legal basis (shared competences? mixed agreement?)
 - negotiation sequence: orderly withdrawal and future framework

Additional questions

- Can the withdrawal notice be **reversed**?
 - YES: Article 68 of the Vienna Convention: *A notification [...] may be revoked at any time before it takes effect.*
 - **NO**: Article 50 TEU – exhausting regulation
 - In case of a dispute → CJEU
- **Transitional** issues
 - Infringements and disputes
 - *Lame duck?*
 - Resignation of Lord Hill, British former European Commissioner for Financial Stability, Financial Services and Capital Markets Union
 - „EU minus UK” Summits
 - Skipping UK’s presidency in the Council (EU presidency)



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Figures' weight













Trade in goods

- WTO-Rules (GATT) – tariffs usually between 5% and 10%
- Export UK → EU approx. 50% of the overall UK's exports (12% GDP)
- Export EU → UK approx. 10% of the overall EU's exports (3% GDP)
- but... some of the large EU Economies more dependent on UK trade, than same other countries



HM Revenue
& Customs

Top partners trading with the UK - January 2017

Imports				Exports			
Partner	Value	Comparison to previous month		Partner	Value	Comparison to previous month	
	£5.1bn	▲	3.3%		£3.5bn	▼	-12.9%
	£3.7bn	▲	2.3%		£3.5bn	▼	-30.2%
	£3.0bn	▲	2.0%		£3.1bn	▲	19.7%
	£2.9bn	▼	-8.0%		£1.8bn	▲	1.6%
	£2.3bn	▲	52.7%		£1.7bn	▲	6.9%

Banking sector and financial services

- **London as a gateway to the EU-Market**
 - single bank licence / **passporting**
 - e.g. MiFID/MiFIR, CRD IV, Payment Service Directive II (PSD II), 2d E-Money Directive (2EMD), Insurance Distribution Directive (IDD), UCITS, Alternative Investment Fund Managers Directive (AIFMD)
- European Banking Authority (**EBA**)
- **clearing services**
- Paradigm change → facing competition from non-EU financial powerhouses: **New York, Hong Kong, Shanghai**
- **Value at stake:**
 - Financial services account for **approx. 10% of UK's GDP**
 - Much of the income is cross-border business (passporting)

Foreign Direct Investments (FDI)

- Estimated decline of FDI: **22%** (Quelle: LSE
<<http://cep.lse.ac.uk/pubs/download/brexit03.pdf>>)
- Example: (automobile industry):

Table 1: The predicted impact of Brexit on UK car production and prices

	Change in total number of cars produced	Percentage change in cars produced	Percentage increase in car prices
1. Increase in trade costs and headquarters co-ordination costs	-180,746	-12.0%	2.55%
2. Increase in headquarters co- ordination costs only	-35,728	-2.4%	0.003%

Source: Derived from Head and Mayer (2015).

Persons and Workers Mobility

- **1,3 million UK Citizens in the EU-27**
 - (in **Spain** – 309,000, in **Ireland** – 255,000, in **France** – 185,000, in **Germany** – 103,000, [...], in **Poland** 35,000)
 - some of them are retired
- **3,3 million EU-27 Citizens in the UK**
 - from **Poland** – 883,000, from **Ireland** – 411,000, from **Germany** – 297,000, from **Romania** – 229,000, from **Italy** – 204,000, from **France** – 176,000, from **Lithuania** – 147,000, from **Portugal** – 132,000, from **Spain** – 129,000

Other issues

- **Dispute resolution / international civil procedure**
(recognition and enforcement of judgements –
Brussels-Regulations)
- **Company Law**



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The impact of Centros- Überseering-Inspire Art case-law

(pseudo)foreign private limited liability company incorporations in the UK (number of companies incorporated in the UK, which had majority or all of the directors from outside the UK)

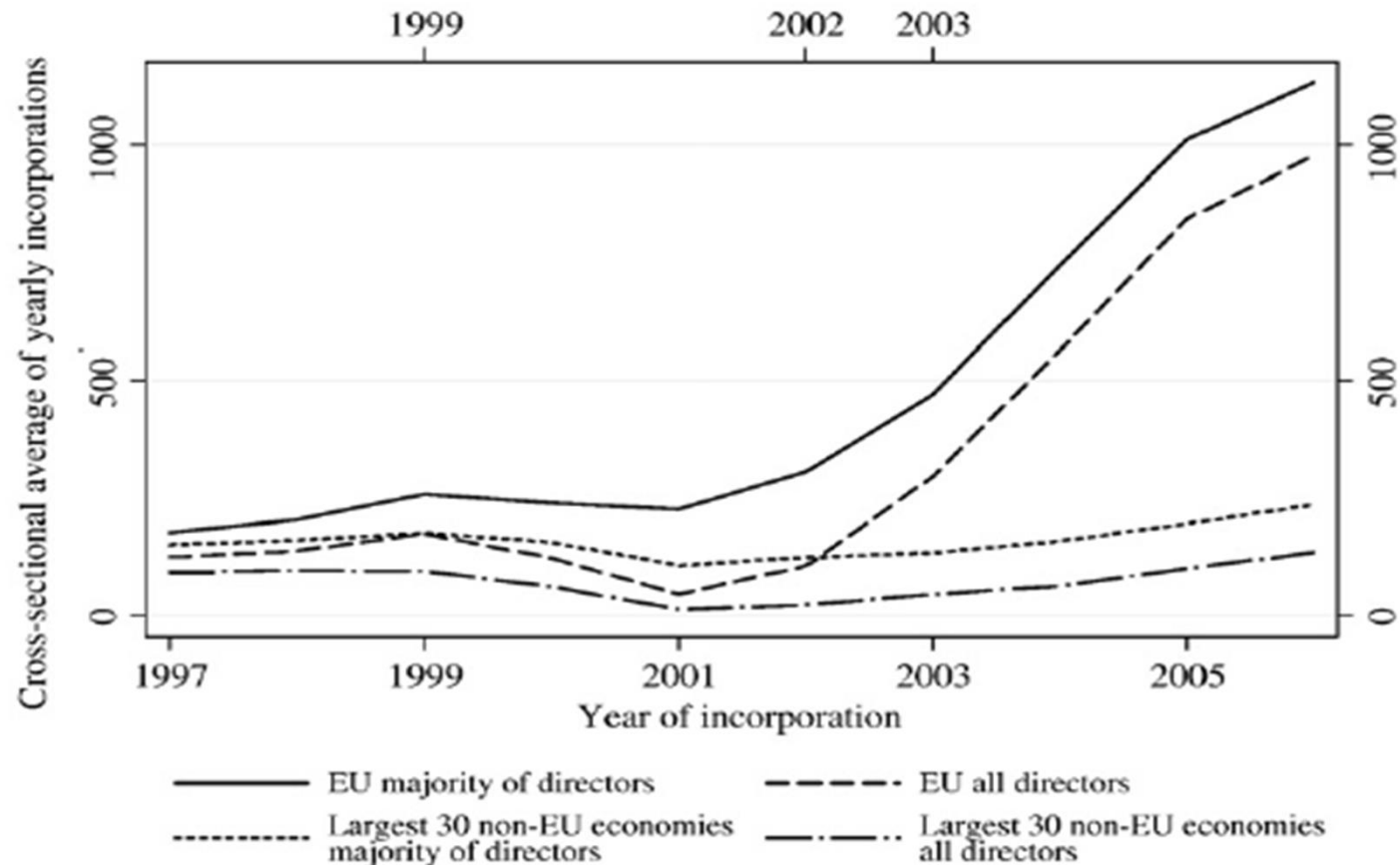


Fig. 1. Foreign private limited company incorporations in the U.K. 1997–2006.

Source: M. Becht, C. Mayer, H.F. Wagner, Where Do Firms Incorporate? Deregulation and the Cost of Entry, Journal of Corporate Finance, Vol. 14, No. 3 (2008)

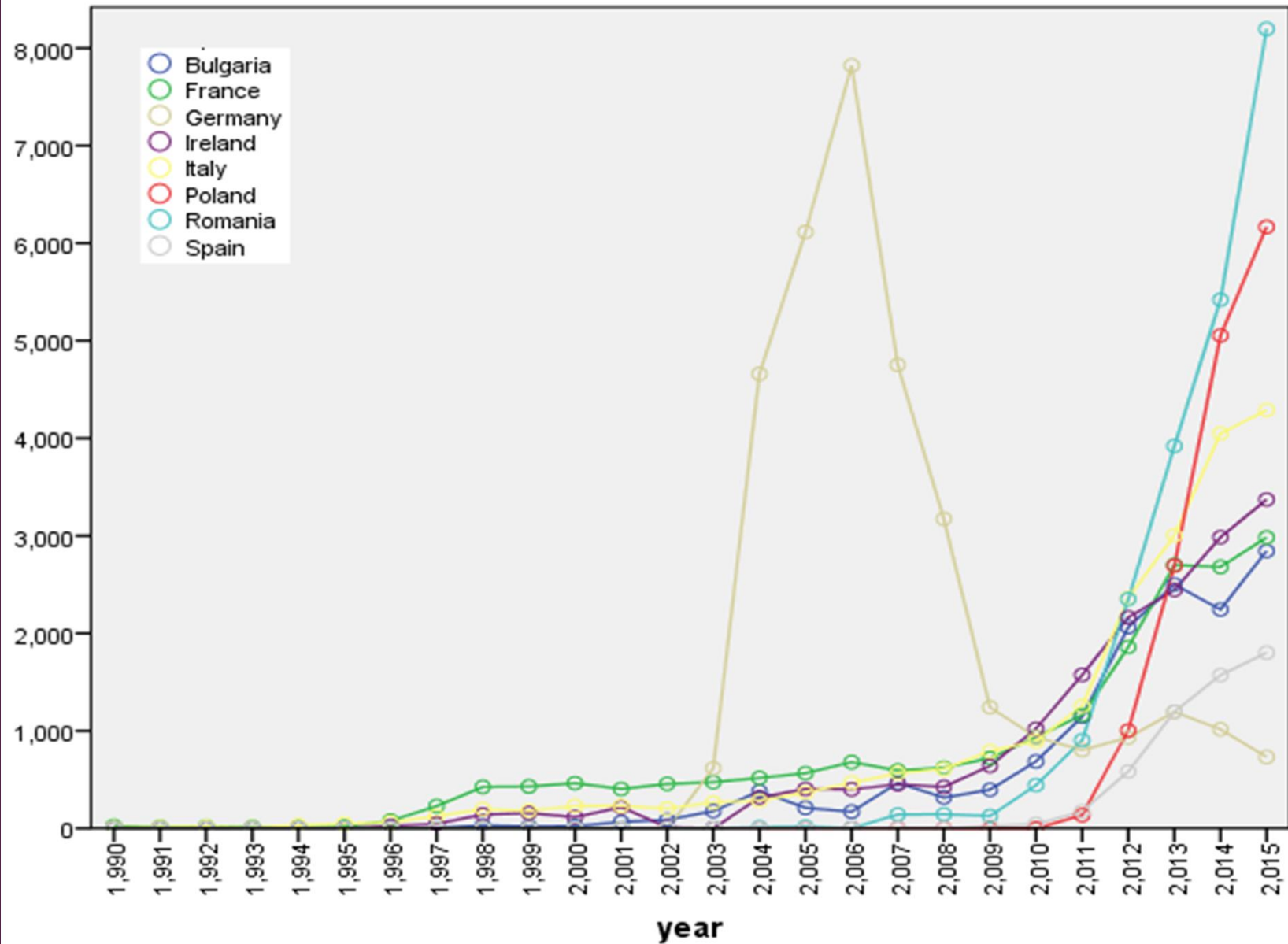


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Race for incorporations – UK (Ltd.)

Time series of newly incorporated foreign-based UK ltds

(source: Gerner-Beuerle & Mucciarelli & Schuster & Siems)



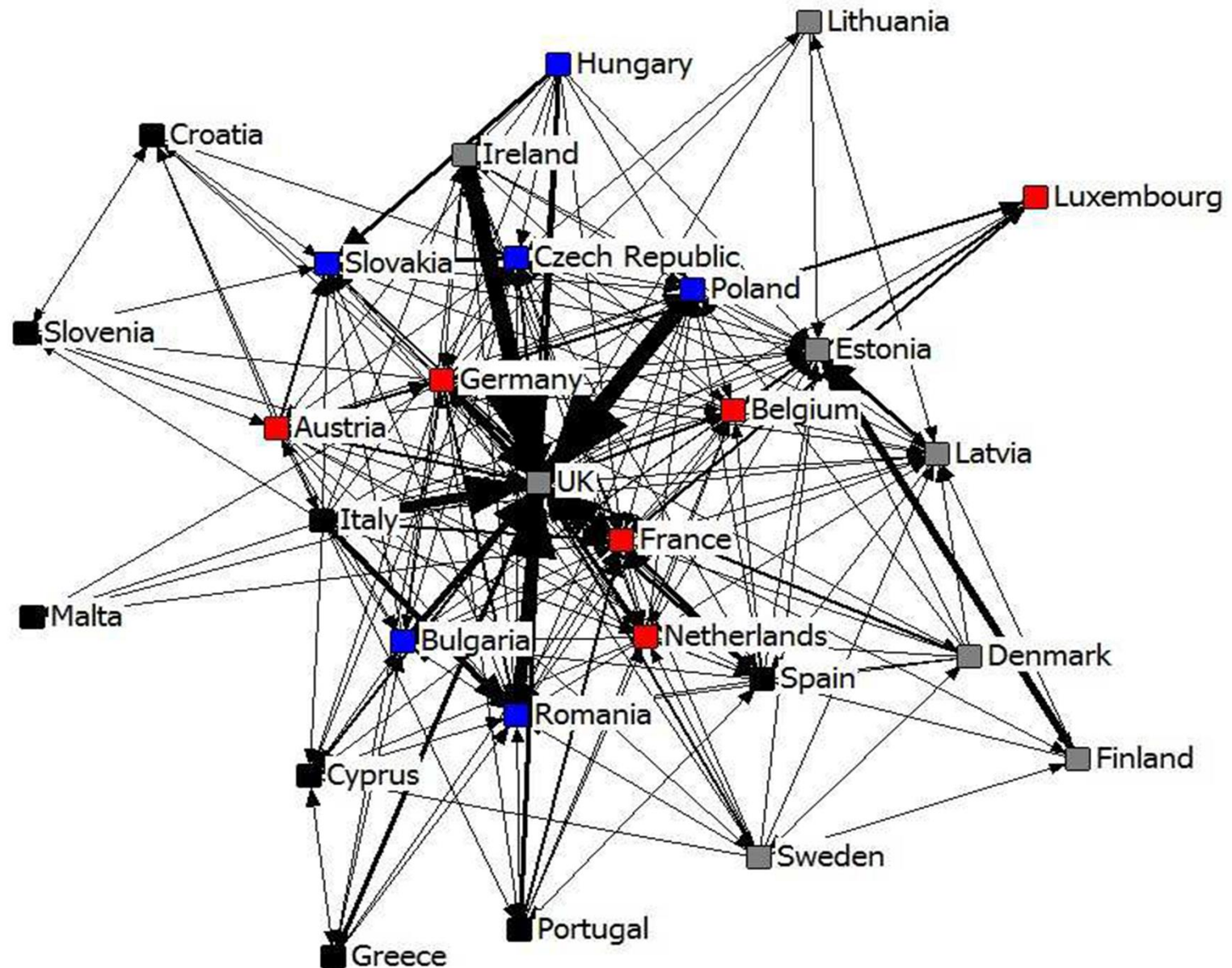


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Race for incorporations

Network of businesses incorporated in other Member States

(source: Gerner-Beuerle & Mucciarelli & Schuster & Siems)





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Models for future UK – EU relations

Models for future UK – EU relations

- Norwegian model
- Swiss model
- Canadian model (CETA)
- Turkish model
- WTO (GATT, GATS)
- Bespoke agreement (T. May: *„a comprehensive, bold and ambitious Free Trade Agreement“*)



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Withdrawal negotiations



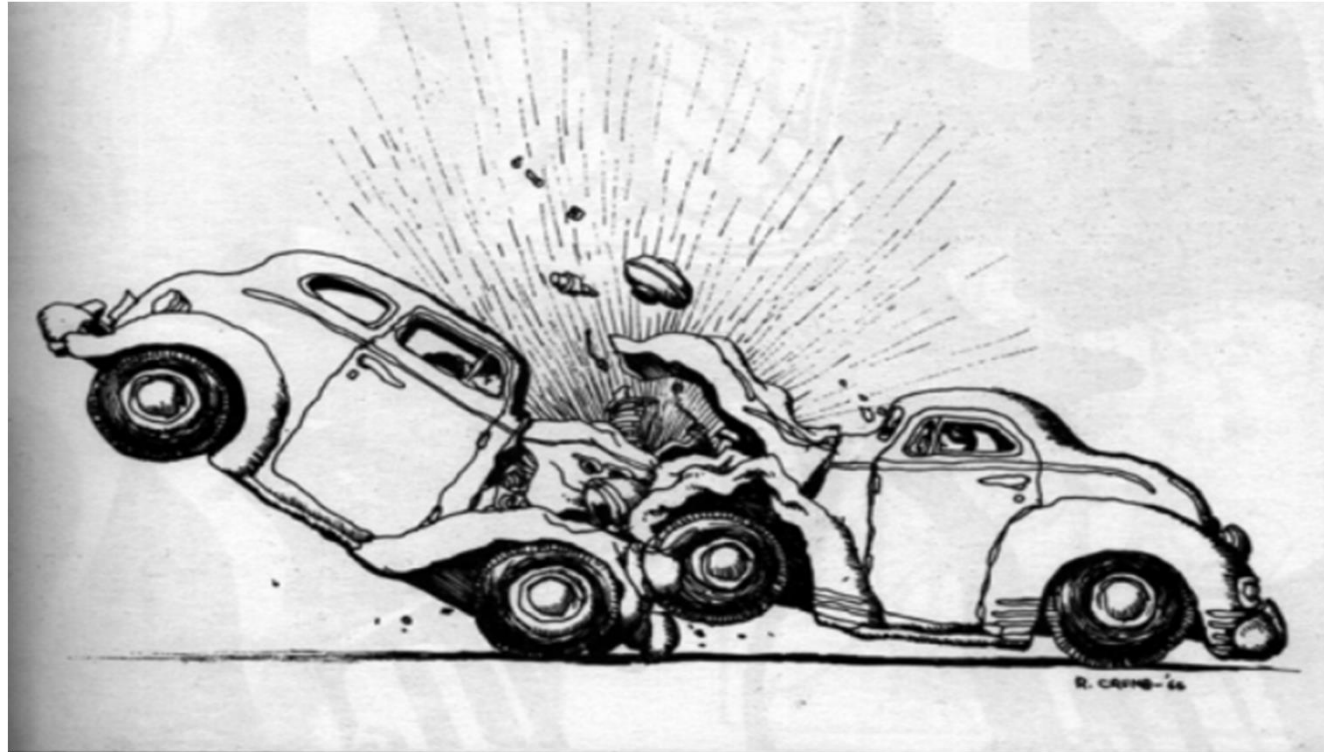
- Who will pay for key EU policies (combating financial crisis, refugee crisis, Ukraine crisis)?
- Repeated game setting – spill-overs of Brussels' a lenient stance:
 - D. Tusk: „*No internal market à la carte*”
 - No cherry-picking
 - J. Muscat: „*We want a fair deal for the United Kingdom, but that fair deal needs to be inferior to membership; Brexit deal must be inferior to EU membership*”
- Game of chicken





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Game of chicken



- **UK:**
 - red lines
 - „No deal is better than a bad deal”
- **EU-27:**
 - ease of building blocking coalitions
 - *divide et impera* strategy deemed to be counter-effective
 - cost of spill-overs (no better deal possible than EU Membership)

Who has a better hand in negotiations?

- **Brexit stakes:**
 - higher cost for London than for Brussels
- **Legal architecture** for negotiations
 - The clock ticking against London
 - 2 years are less than 24 months
 - 2019 EP Elections
 - Firm's reallocation schedules
- **Blocking minority**
 - every **7** out of 27 MS or
 - MS **>35%** EU-27 population (DE+FR+ one of the following: IT, ES, PL)
- **Diverging interests:**
 - **DE, FR, IT** – tackling crisis
 - **PL** – stabilisation in the Ukraine
 - **PL, LT, LV, EE** – interested in security of the Eastern border
 - **PL, RO, LT** – interested in safeguarding worker's rights
 - **EU11** – netto-beneficiaries of the EU funds



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Result of the game: predictions about future
form of relations between UK and EU



- The decision on leaving the EU, as made by the British people, was driven by identity politics rather than sober economic considerations
- The declared readiness of many voters to sacrifice their own economic well-being for the fulfilment of their political preferences should not be the basis for the government to rely on the rationality of the voters.
- Consequently, the British government will have to find a way to reconcile the immediate political expectations of the voters (red lines) with their long term economic aspirations (economic growth, employment, public services), as it will be accountable towards the electorate for delivering both.



- However, economic expectations of the British people are unlikely to be satisfied in the hard Brexit scenario, and the *Leave*-supporters may on average turn out to be the most affected by UK's uncushioned EU pullout.
- Avoiding hard Brexit will only be possible if a new model of future EU-UK trade relations will be worked out and adopted as an arrangement providing a complex or at least a sector-by-sector access to the market of the other contracting party. From among all possible alternatives, a bespoke EU-UK free trade agreement appears the most fitting option.



- Brussels has no interest in providing United Kingdom with access to the internal market without obtaining mutual benefits in form of an adequate consideration, including London's financial contributions to the common budget.
- Each of the negotiating parties will have to bear two types of costs: future, potential cost resulting from impediments in the access to the other party's market (severity of obstacles, as a cost factor, depending on the ultimate Brexit model) and the immediate, direct cost of the emergence of uncertainties associated with the timetable and further turn of events, including unknown withdrawal conditions and post-Brexit design. Both cost items, as identified above, are much higher in the spreadsheet of United Kingdom than of the EU-27, though the calculations by individual Member States may vary.



- The cost calculation for EU-27 cannot be limited to a “single game” (one-stage strife) but it has to take into account the influence of the negotiated outcome on future behavior of other players to the game, i.e. the remaining Member States.
- Two-year period may easy turn out way too short to negotiate a complex EU-UK FTA or actually even to work out a more modest framework for future economic relations between United Kingdom and the European Union.
- The state of uncertainty may be alleviated only by widening the two-year negotiation time-slot, that is postponing the effectiveness of the sunset clause, or by adopting transition period for selected, strategically essential industries.



- Both parties remain in a confrontational logic. They resort to entering a chicken game.
- A severe tension that exists between meeting voters' political expectations (red lines) on the one side, and safeguarding country's long-term economic prosperity on the other, makes any possible tradeoff hard to accept. A strategy capable of reconciling these conflicting premises would be for London to strive to prevail in political symbolism while at the same time accept far-going concessions in the real sphere by allowing the EU-UK economic integration to be upheld through UK continued Club's "membership in disguise" or some form of quasi-membership.

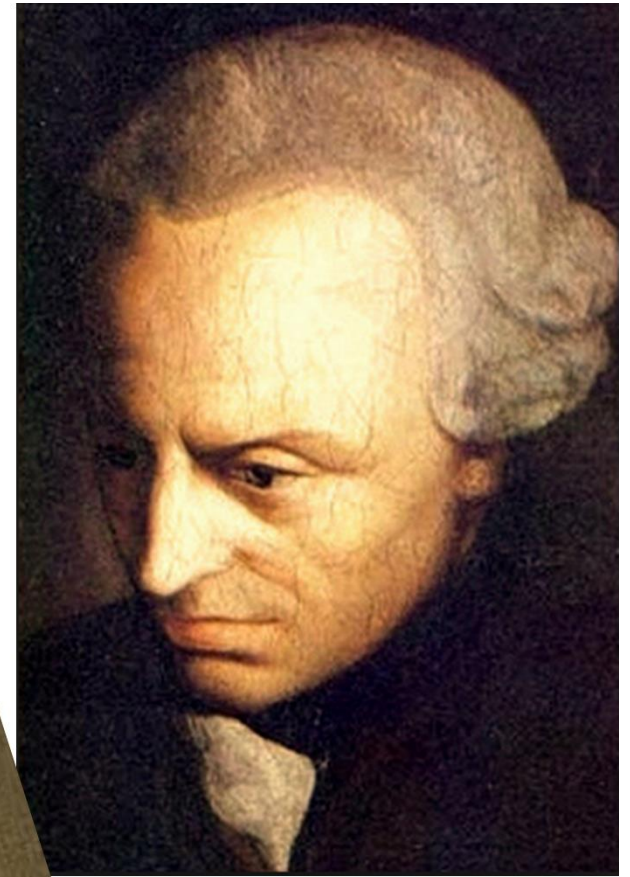


- The most probable outcome of the Brexit negotiation will be the adoption of a comprehensive free trade agreement to serve as a functional, yet incomplete substitute („Ersatz”) of the existing legal-institutional EU framework, including specifically a continued functioning of the European common market, at least for most of its sectors.
- It is unlikely for the withdrawal agreement and/or for the future EU-UK FTA, alleviating the adversity of Brexit for the British economy, to be concluded without London's readiness to rendering transfer payments (financial contributions) towards the EU, and without UK participation in at least some of the Union's key policies, especially the anti-crisis measures.



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Immanuel Kant



Jean-Jacques Rousseau



Jeremy Bentham



Thank you for your attention!

Vă mulțumim pentru atenție!

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