

# Differentiated Integration in Europe After Brexit: An Institutional Analysis

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## Abstract

*It is self-evident that the European Union has evolved over time and so has the relationship between unity and differentiation. Understanding the nature of this evolution is more difficult. This essay seeks to explicate this development, not by a temporal analysis, but by delineating two opposite political visions of the European construction. The first is the vision that is centred on the idea, or ideal, of an “ever closer union among the peoples of Europe”. The other vision of Europe postulates a wide and loose union, a sort of ‘club’ where the members do not necessarily wish to change the current state of things. The differing solutions provided by these visions are examined with regard, first, to some mechanisms of differentiated integration, which are considered against the twin criteria of clarity and coherence and, second, with regard to other legal mechanisms, which imply an interaction between EU members and third countries. This can be useful for a better understanding of the institutional and legal options that are available for the relations between the UK and the EU in the post-Brexit period.*

## I. Introduction

The outcome of the referendum that has been held in the United Kingdom about leaving the European Union (*Brexit*) has fuelled the debate, in political and academic circles, about the future of the EU, in particular from the perspective of differentiated integration.<sup>1</sup> This essay seeks to contribute to the debate, by arguing that it should be made clear that the differing solutions that are proposed for the challenges with which the Union

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1 For a discussion of the theories of European integration, see FG Snyder, *European Integration*, Encyclopedia of Law and Society (Sage, 2004); A. Stone Sweet, Integration and the Europeanization of the Law, in P Craig & R Rawlings (eds), *Law and Administration: Essays in Honour of Carol Harlow* (Oxford University Press, 2003), 197.

is confronted are based not only on different legal foundations, but also on distinct visions of the European construction. For analytical purposes, two opposite political visions can be delineated. At this stage, it suffices to characterize each of them in the briefest terms. There is, first, the vision that is centred on the idea, or ideal, of an 'ever closer union among the peoples of Europe', as provided by the Treaty of Rome's preamble. The other vision of Europe postulates a wide and loose union, a sort of 'club' where the members agree only on a few fundamental principles and do not necessarily wish to change the current state of things.

It is precisely because these are political visions that they provoke passionate debates. But, for all their importance in social and political life,<sup>2</sup> passions do not help analytical clarity and coherence.<sup>3</sup> My intent is, first, to show the distinctive traits of each vision and to argue that the differences between them are so profound that the significance of some central elements of European integration will differ depending upon the framework within which they are considered. This applies, in particular, to the various mechanisms of differentiated integration. The ensuing analysis will make this patently clear, but the idea can be briefly exemplified here. The vision of unified Europe that is based on the idea of the 'ever closer union', whilst recognizing the diversity of European peoples not only, descriptively, as an element of the real, but also, prescriptively, as an element that must be preserved, aims at strengthening the ties between them. The other vision, which aims at achieving a wider and looser union, pays less attention to those ties and favours greater flexibility. Secondly, after showing the different background of these political visions, we shall see that both pose particular problems, legally and institutionally.

The essay is divided into four parts. The first two parts will illustrate the vision of the European construction that purports the achievement of the 'ever closer union' and that of a wide union, with less intense ties and obligations for its members, respectively. Next, some mechanisms of differentiated integration will be considered against the twin criteria of clarity and coherence. Finally, there will be a discussion of other legal mechanisms, which imply an interaction between EU members and third countries. This might be helpful for a better understanding of how the issues arising from Brexit can be dealt with.

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2 See AO Hirschman, *The Passions and the Interests: Political Arguments for Capitalism before Its Triumph* (Princeton, Princeton University Press, 1977).

3 P Craig, *Constitutions, Constitutionalism and the European Union*, 7 Eur. L. J. (2001) 125.

## *II. Two Visions of Europe (I): An “Ever Closer Union”*

With regard to the first political vision of Europe, three are the main themes underlying it: first, the meaning and relevance of the “ever closer union”; second, the emergence of a ‘community of destiny’; third, a set of institutional and legal mechanisms, with specific regard to the principle of loyal cooperation – governing the action (and inaction) of both common institutions and national authorities. Adequate attention must be paid to some elements of flexibility too.

### *A. A Union of Peoples*

The first vision is well grounded in the genetic act of modern European integration, the Declaration of 9 May 1950 as well as by the founding treaties. The Declaration was premised on the necessity to eliminate the ‘age-old opposition of France and Germany’. However, its drafters were fully aware of the importance, for a polity, of the cultural and social construction of the sense of belonging. They thus proposed the creation of a community, viewed as a ‘first step in the federation of Europe’, through the achievement of a ‘*de facto* solidarity’ between the Member States. The Treaty of Paris establishing the European Coal and Steel Community was based on the same strategy, but with an important linguistic shift. It did no longer refer only to the States, but aimed at laying the foundations of a community of peoples (a ‘*communauté plus large et plus profonde entre des peuples longtemps opposés*’). The Treaty of Rome sought to achieve the same goal. According to its preamble, this Community was created ‘*among peoples* long divided by bloody conflicts’. An adequate awareness of such conflicts was not, however, an obstacle to the choice of those peoples to give, through the institutions thus created, ‘*direction to their future common destiny*’. The Community was thus the first step towards ‘an ever closer union among the peoples of Europe’. This formulation was explicitly teleological, in the sense that it sets out the *telos* of European integration.<sup>4</sup>

The thesis that not only the founding States, but also their peoples, are constitutionally relevant is of remarkable importance in helping us to understand the nature of the legal order of the Community. The ECJ, for ex-

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<sup>4</sup> For this terminology, see JHH Weiler, *The Constitution of Europe* (Cambridge University Press, 1999) and *id*, Europe in Crisis – On ‘PoliticalMessianism’, ‘Legitimacy’ and the ‘Rule of Law’, 53 Singapore J. Leg. St. 248 (2012).

ample, referred to it in its famous ruling in *Van Gend en Loos*, when it argued that the EEC constituted a ‘new legal order of international law’ and established the direct applicability of the Treaty of Rome.<sup>5</sup> This is not to say, however, that the Treaty was based on strong democratic mechanisms in the sense that all public power was channelled through Parliaments.<sup>6</sup> Quite the contrary, it simply set up a Common Assembly, certainly not an all-powerful body, though its institutional connection with national Parliaments could be viewed in a different light today, in a period in which new attempts are being made to strengthen the ties between representative institutions.

That said, the shift from States to peoples has had a number of important repercussions, the first of which is the pluralist conception of the social element. The Community was not simply premised on the recognition of the existence of a plurality of peoples but, precisely because its *telos* was to give rise to an ‘ever closer union’ between those peoples, on the common understanding that no step would be taken to forge a single people or *demos*. Put differently, the ties existing between the peoples of Europe that accepted to forge a ‘future common destiny’ were to be progressively intensified and strengthened, but without eliminating their distinctiveness.<sup>7</sup> Similarly, the preamble of the Charter of Fundamental Rights, which under Article 6 TEU has the same legal value of the treaties, provides that ‘The peoples of Europe, in creating an ever closer union among them, are resolved to share a peaceful future based on common values’. The underlying philosophy thus differs from that which underlies the US Constitution, which begins with the identification of its unitary author, ‘We the People of the US’.<sup>8</sup> This conclusion, which attenuates the possible tension between the recognition of a pluralistic Europe and the aspiration to

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5 ECJ, Case 26/62, *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, holding that the ‘Treaty is more than an agreement which merely creates mutual obligations between the contracting states. This view is confirmed by the preamble to the Treaty which refers not only to governments but to peoples’.

6 See P Craig, The Community Political Order, 10 Indiana J. Global L. Studies (2003), 79, 84.

7 For further analysis, see R. Dehousse (ed), *Europe after Maastricht: an Ever Closer Union?* (Springer, 1994); J.L. Quermonne, Trois lectures du Traité de Maastricht: essai d’une analyse comparative, 42 Revue fr. sc. pol. (1992) 802, 813 (arguing that a federal vision was not incompatible with the Treaty of Maastricht, though with important adjustments).

8 See B Ackerman, *We the People: Foundations* (Harvard University Press, 1991), for an analysis of the foundations of the US Constitution; C Nicolaïdis, We, the Peoples of Europe, 83 Foreign Affairs (2004) 97, and M Zuleeg, What Holds a Nation

strengthen the ties between its various parts,<sup>9</sup> is coherent with the emphasis that the TEU's preamble has placed more recently on the ambition to 'reinforce' the 'European identity'. From the wording of the Treaty this is clearly something that pre-existed in the Union.

### *B. A Community of Destiny*

There is another fundamental consequence of the shift from States to peoples, which concerns the social element. The founding Treaties clearly rejected the idea of a community of origin and embraced that of a community of destiny ('*a destin partage*'). There is a striking difference between this conception of the social element and that of the German *Volk*, with its strong sense of identity and belonging.<sup>10</sup>

Precisely because the goal to achieve an 'ever closer union' is connected with the creation of a community of destiny, it implies a dynamic conception of integration, as opposed to a static conception.<sup>11</sup> This means that the Member States have not simply joined a club and agreed on a set of obligations. Rather, they have created a community aiming at strengthening the ties among their peoples.<sup>12</sup> More recent political and legal documents have confirmed this, including the Solemn Declaration of 1983<sup>13</sup> and the TEU, according to whose first provision 'this Treaty marks a *new stage in the process of creating an ever closer union among the peoples of Europe*, in which decisions are taken as closely as possible to the citizen'. European integration is

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Together? Cohesion and Democracy in the United States and in the European Union, 45 Am. J. Comp. L. (1997), 505, 506, pointing out the difference between the philosophies underlying the US Constitution and the EC Treaty.

9 See, however, the report published by the LSE, *Ever Closer Union. Report of the Hearing of 15th April 2015* (2016), 6, holding that a tension does exist.

10 See JHH Weiler, *The Constitution of Europe*, cit., 295, tracing the roots of the overemphasis on the organic understanding of peoplehood to Carl Schmitt.

11 See LJ Constantinesco, La nature juridique des Communautés européennes, in Ann. Fac. dr. Liège (1979), 179-180, emphasizing the dynamic character of European integration.

12 See W Hallstein, *The European Economic Community*, 78 Pol. Sc. Quart. (1963) 161, holding that the Community was 'not 'static...., it is a process of continuous creation'.

13 The Solemn Declaration on European Union of June 1983 reiterated the 'awareness of a common destiny' and their 'commitment to progress towards an ever closer union among the peoples' of the EC and their Member States, thus introducing a new element.

thus viewed as a process. As a result of this, we may wonder whether the refusal of either one partner or a group of partners to proceed in the path of the ‘closer union’ is in irreducible contrast with this dynamic conception, with the further consequence that it could be regarded as an infringement of the *foedus*.

This is not without practical consequences. Consider, for example, the deal that the UK and the other members of the EU concluded a few months before the referendum of June 2016, a deal that would exempt the UK from being involved in the achievement of the “ever closer union”.<sup>14</sup> Politically, while David Cameron’s intent was not to have his “country bound up in an ever closer political union in Europe”,<sup>15</sup> his predecessor John Major accepted to keep the reference to the ‘ever closer union’, in order to avoid any reference to a federal Europe. Whatever the intrinsic soundness of the deal for the rest of the EU, all its members accepted it. On constitutional grounds, however, the remarks just made suggest that the deal was in contrast with the Treaties.

The ideal of the ‘ever closer union’ is important also for understanding the criteria for membership. Since its early decades, the Community has been much more than a free market area. Without question, if we look back to the Treaty of Paris, it provided no less than making the key industries (coal and steel), that are indispensable to make war, subject to a common supranational control, in the logic of a federation of States, which would have been completed by a common defence.<sup>16</sup> Without question, too, the Treaty of Rome was regarded by its founders as being much more than a common market. They saw it as a community of liberal democracies. This was clear in the 1950’s and was equally clear in the following decades. An illuminating example is the denial to include Spain in the 1960’s, when it broadly accepted market economy but was still governed by Franco’s authoritarian regime. Such denial was based on a doctrine of

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14 The deal provided that: ‘It is recognised that the United Kingdom, in the light of the specific situation it has under the Treaties, is not committed to further political integration into the European Union. The substance of this will be incorporated into the Treaties at the time of their next revision in accordance with the relevant provisions of the Treaties and the respective constitutional requirements of the Member States, so as to make it clear that the references to ever closer union do not apply to the United Kingdom’.

15 See David Cameron’s statement to the House of Commons on 3 February 2016.

16 A treaty establishing the European Defence Community was signed in 1952, but it was not ratified by the French Parliament.

membership that underlined the importance of the political values that are common to liberal democracies.

More recently, the members of the EU have clarified the type of societies in which the peoples that wish to forge a ‘common destiny’ must live. The European Council in Copenhagen, in 1993, took the first step, when it sets out some criteria. Such criteria included: i) stable institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities; ii) a functioning market economy and the capacity to cope with competition and market forces in the EU; iii) the ability to take on and implement effectively the obligations of membership, including adherence to the aims of political, economic and monetary union. These criteria have been enshrined into the treaties. Their repercussions can be appreciated from a twofold point of view. On the one hand, only a State that respects those principles and is committed to promoting them may thus apply for membership. On the other hand, the States that have obtained membership are no longer free. They have renounced to their freedom to adopt an authoritarian regime. In this sense, the reference to the Rule of Law and to fundamental rights, as well as to liberty and democracy has effects similar to those of national constitutions that prevent any departure from a set of principles concerning the form of government.<sup>17</sup> Unless a State chooses to leave the Union, it must respect those principles, even though there is a variety of opinion about their meaning and significance.

### *C. A Unitary Institutional Framework*

Under the present political vision of Europe, there is a necessity to ensure that the action of the members is coherent with their determination to achieve an ‘ever closer union’ and this has two principal implications for the constitutional framework. First, it requires an institutional framework that permits them to elaborate and manage common policies. Second, it postulates the adoption of legal mechanisms that serve to ensure the unity of the legal order and the equality of the Member States therein. These mechanisms, including the infringement procedure and the preliminary reference procedure, will be considered later. Meanwhile, it is helpful to consider the implications of the model of the ‘ever closer union’ from the

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<sup>17</sup> JL Quermonne, *Trois lectures du Traité de Maastricht: essai d'une analyse comparative*, cit., 814.

first point of view, which concerns the organization and functioning of common institutions.

As far as the institutional framework is concerned, despite the initial distinction between the three communities created between 1952 and 1957 (the ECSC, the EEC, and the Euratom), the Brussels Treaty of 1965 ensured the unity of the institutional framework, by ‘fusing’ their executives. There were thus a single Commission and a Council of Ministers, together with the Court of Justice and the European Parliament. Almost thirty years later, the Treaty of Maastricht (1992) distinguished between the EC and the two areas of cooperation between the Member States (external security and justice and home affairs). The risk of fragmentation thus emerged.<sup>18</sup> Given that the Union’s actions and policies were increasingly differentiated, institutions were the unifying element. The Treaty thus stressed the existence of a ‘single institutional framework’, having the goal of enhancing the ‘efficient functioning of the institutions’<sup>19</sup> or, in a slightly different terminology, of ensuring the ‘consistency, effectiveness and continuity’ of such policies and actions.<sup>20</sup> The Lisbon Treaty eventually abolished the distinction between those forms of integration and cooperation. It established that ‘the Union shall replace and succeed to the’ EC,<sup>21</sup> thus confirming the continuity between the Community and the Union. All public power was thus channelled through the EU.<sup>22</sup>

Another implication of the vision of the ‘ever closer union’ concerns decision-making processes. The precise implications are, however, disputed, because of a tension between the provisions of the Treaties and their implementation. On the one hand, it has been pointed that, unlike most international organizations, in many cases the EC was enabled to reach its decisions by way of majority voting. This strengthened the Commission’s agenda-setting power and, more importantly, the conception of the ‘common’ interest as something distinct from the interests of the members. On the other hand, there is a more cautionary note in the literature that em-

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18 D Curtin, The Constitutional Structure of the Union: A Europe of Bits and Pieces, 30 Common Mkt L. Rev (1993), 19.

19 Preamble of the TEU, emphasis added.

20 Article 13 (1) TEU. For further analysis, see R. Dehoussé, *From Community to Union*, in R. Dehoussé (ed.), *Europe After Maastricht* (Beck, 1994).

21 Article 1 (3) TEU.

22 A von Bogdandy & M Nettlesheim, Ex Pluribus Unum: Fusion of the European Communities into the European Union, 2 Eur. L. J. (1996), 267. See also HP Ipsen, *Europäisches Gemeinschaftsrecht* (Mohr Siebeck, 1972), 1050, for the thesis that the unity of the legal structure of the EC derived from the rationale of its construction and its tasks.

phasizes the reluctance, if not the refusal, by national governments to use majority voting. This becomes clear when considering not only the long period during which the so-called 'Luxembourg compromise' produced its effects, weakening 'normative supranationalism',<sup>23</sup> but also the persistence of the requirement of unanimity for decisions affecting certain areas, such as taxation.

There is still another salient implication of the present model. It is the principle of loyal cooperation between supranational and national institutions. This principle has been laid down by Article 5 TEC with a broad scope of application and the ECJ has clarified its contents.<sup>24</sup> On the one hand, the Court has applied it to the relationship between common institutions, and in this guise it has been used, in particular, to strengthen the role of the European Parliament. On the other hand, it has been applied to the relationship between EC and national institutions. The Court has used it not only as a negative norm, that is to say a prohibition to perform policies and issue acts or measures in contrast with the obligation to cooperate, but also as a positive norm, thus condemning the inaction of national authorities. This is just an example of the power of judicial review that the ECJ has exercised. In exercising this power, the Court has had to decide what the language of the constitution means and it has decided that the principle of loyal cooperation precludes States from operating against the common interest of the Community and now of the Union.<sup>25</sup>

Once the action of common institutions is justified, the question that arises is how its results can be achieved if a State is unwilling to respect it or is unable to do so, for example due to its internal organization. In the language used by the ECJ this necessity has been conceptualized in terms of 'coherence' of the legal order. Practically, it has been ensured by several mechanisms, including the higher legal status of the norms laid down by the treaties, the system of centralized enforcement centred on the Commis-

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23 JHH Weiler, *The Community System: The Dual Character of Supranationalism*, 1 Ybk Eur. L. (1981), 267.

24 See, for example, the ECJ's ruling in Case C-246/07, *Commission v. Sweden* and, for further analysis, J Temple Lang, Article 5 of the EEC Treaty: the Emergence of Constitutional Principles in the Case Law of the Court of Justice, 10 Fordham Int'l. L. J. (1986), 503, showing that, though this general principle had largely been underestimated, it was very important.

25 What is considered in the text is the internal action of common institutions. As far as their external action is concerned, loyal cooperation must be kept distinct from pre-emption, as observed by M Cremona, Defending the Community Interest: the Duties of Cooperation and Compliance, in M Cremona & B De Witte (eds.), *EU Foreign Relations Law. Constitutional Fundamentals* (Hart 2008), 168.

sion, and the jurisdiction of the ECJ. The first element was implicit in the Court's mandate to ensure that the law was observed in the interpretation and application of the Treaty of Rome, and more particularly in the provision concerning the infringement of any provision of the Treaty itself.<sup>26</sup> But it owed much to the jurisprudence of the Court on the primacy and direct effect of the Treaty, which were eventually accepted by the higher courts of the Member States. EC law was to be either valid or invalid for all the Member States, as well as to business and citizens within their borders.

Another salient element is the system of centralized enforcement centered on the Commission, as provided by Article 169 TEC, according to which the Commission could bring 'disobedient' States before the ECJ.<sup>27</sup> This marked a profound difference with other mechanisms that are still used today by international organizations such as the WTO. However, since this mechanism places the entire burden of supervising national compliance on the shoulders of the Commission, it does not only entail a considerable administrative workload, but also a huge amount of discretion. The Commission may not know that a breach of the Treaty or implementing legislation has occurred or it may prefer to postpone its intervention. This could give rise to a prejudice for citizens and business whose rights are affected by delayed or partial compliance.

For this reason, the Court's doctrine of direct effect has had fundamental importance. It was by giving weight to their rights that the ECJ established the fundamental principle of direct effect, thus empowering individuals to enforce EC norms before national courts.<sup>28</sup> This was a salient step not only in the transformation of the Community from a compact between States to a legal order of a new kind, but also in the achievement of the 'closer union among the peoples of Europe'.<sup>29</sup> At the same time, this doctrine had a practical advantage, because EC norms could be enforced without any need for the Commission to sue the States by way of the infringement procedure. Action brought by interested individuals before national courts would suffice, if necessary by giving the Court of Justice the possibility to interpret EC law in the context of the preliminary reference

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26 See Articles 164 and 173 EC Treaty.

27 This is the 'standard' procedure: A Gil Ibanez, *The 'Standard' Administrative Procedure for Supervising and Enforcing EC Law: EC Treaty Article 226 and 228*, 68, Law & Cont. Probl. 135 (2004). Other mechanisms concern, for example, the surveillance on excessive government deficits, under Article 126 TFEU.

28 ECJ, Case 26/62, *Van Genden Loos v. Nederlandse Administratie der Belastingen*.

29 P Craig, *Administrative Law* (Sweet & Maxwell, 2003), 311.

procedure. The margin of discretion left to national authorities was even more limited by the Court's rulings that awarded damages in case of non-compliance with directives.<sup>30</sup>

#### *D. Flexibility Within Unity*

For all its concern for ensuring coherence, this vision of Europe does not neglect the necessity of flexibility and of the differentiation that it can allow. Since the beginning, the legal order of the EC has been characterized by the existence of legal mechanisms allowing some form of flexibility. They can be justified in a simple manner: without some degree of flexibility the execution of legislation in very different areas of the same legal system can be very hard, if not impossible.

The Treaty of Rome provided for both, a transitional period and for special arrangements. The transitional period was provided in order to give all the Member States enough time to adjust their internal institutional and legal arrangements to cope with the obligations stemming from their membership. Special legal arrangements were laid down either for some policies, by way of specific derogations, or for some parts of the territory of the Member States that were outside Europe. Interestingly, the Treaty of Rome expressed the partners' will to 'to associate with the Community, the non-European countries and territories which have special relations with Belgium, France, Italy, and the Netherlands'.<sup>31</sup> It also specified that nothing precluded the existence of a regional union between Belgium, Luxembourg and the Netherlands, which stipulated an agreement in 1958. After the accession of Denmark, Ireland and the UK, other norms gave the latter some opt-out clauses and specified that the EC Treaty applied only partially to the Isle of Man and did not apply as such to the Faroe Islands, though it could have been extended to them subsequently. However, these were very limited and specific areas, which could justify limited exceptions without undermining the postulates of the other conception of the constitutional framework of the Community.

An important element of differentiation also emerged from the famous ruling of the ECJ in *Cassis de Dijon*. Confronted with a measure having

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<sup>30</sup> ECJ, Joined Cases 6 & 9/90, Francovich, Bonifaci et al. v. Italy.

<sup>31</sup> Article 131 (1), TEC. For further analysis, see D Hanf, *Flexibility Clauses in the Founding Treaties: From Rome to Nice*, in B De Witte, D Hanf & E Vos (eds.), *The Many Faces of Differentiation in EU Law* (Antwerpen, Intersentia, 2001), 4.

equivalent effect to a quantitative restriction, the Court found that a product lawfully marketable in a Member State could be freely marketable in another.<sup>32</sup> It established, therefore, a sort of functional equivalence of national standards. The Commission endorsed this functional equivalence, or mutual recognition as many began to call it and it became part of the *acquis*. It provided EC institutions with a viable alternative to the harmonization of national legislative, regulatory and administrative rules. It should not be forgotten, however, that the Court recognized several exceptions, in the guise of 'overriding reasons of public interest', including public health and the protection of consumers, thus legitimizing national political preferences.

#### *E. The Difficulties of this Vision of Europe*

As observed earlier, this vision of Europe shaped the pace and form of integration for decades. However, it was not unchallenged. First of all, it was based upon a mistrust of the Nation-State, which was not unjustified after World War II (WW2). However, retrospectively, some observers argued that, far from ceding the centre stage to the institutions, the Member States were rescued by European integration.<sup>33</sup>

Secondly, some lawyers criticized the exercise of the Union's power to harmonize national legislative and administrative rules, on grounds that it would unnecessarily reduce the autonomy of national legal orders.<sup>34</sup> Similarly, some commentators observed that the Court did not show its willingness to defer to such national preferences.<sup>35</sup> There are certainly some elements of truth in these remarks. The overall force of this critique is, however, attenuated by a fact that is not disputed and which has an undeniable importance, politically and legally; that is, not only national governments accepted harmonization within the Union's decision-making processes,

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32 ECJ, Joined Cases 6 & 9/90, Francovich, Bonifaci et al. v. Italy.

33 A. Milward, *The European Rescue of the Nation-State* (Routledge 1992).

34 On such autonomy, there is a wide literature: see, in particular, DU Galetta, *Procedural Autonomy of EU MemberStates: Paradise Lost? A Study on the "Functionalized Procedural Competence" of EU Member States* (Springer, 2010).

35 See AW Green, *Political Integration by Jurisprudence* (Sijthoff, 1969) and H Rasmussen, *On Law and Policy in the European Court of Justice. A Comparative Study in Judicial Policy-making* (Nijhoff, 1986). But see also the opposite views of M Cappelletti, *Is the European Court of Justice 'Running Wild'?*, 12 *Eur. L. Rev.* (1987), 3, and JHH Weiler, *The Court of Justice on Trial*, 24 *Common Mkt. L. Rev.* (1987), 555.

but also their Parliaments constantly ratified all treaties providing it, including the Lisbon Treaty. Moreover, every enlargement was decided under the condition that the union between European peoples should be deepened. The initial constitutional clause was confirmed by all the treaties that amended the Treaty of Rome, as well as by all accession treaties, including that concerning the UK.<sup>36</sup>

Thirdly, since the end of the 1980's there was a growing awareness that, though the Member States could and did keep a key role, European integration did not leave their structures and processes unchanged, in terms of both centralization and perceived disempowerment of citizens. This provoked a cultural and political reaction. It was no longer taken for granted that European integration was a good thing in itself, because it undermined the sense of belonging and identity, which was allegedly rooted in national constituencies. This explains, in part, the emergence of a different vision of Europe, which is based on the idea of a wider and less demanding or looser union which will be examined in the next section.

There is a final element of the picture, which should not be neglected; that is, the perceived failure of the neo-functional approach that was associated with the idea of an ever closer union. Some of those who advocate greater flexibility do so because they think that European integration has simply gone too far and must, therefore, be reconsidered.<sup>37</sup> Others point out that what is increasingly controversial is precisely the dream of a better future, based on peace and prosperity.<sup>38</sup>

### *III. Two Visions of Europe (II): A Wider and Looser Union*

#### *A. A Broad Community of Nation-States*

It is important to say at the outset that the other vision of Europe, going ideally from the Atlantic Ocean to the Urals is not new, though it has gained consent in the last two decades.

Some elements of this vision can be traced in the Treaty of Paris. Its Preamble emphasized the intent to create a 'broad' community. Accord-

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36 I am grateful to Ingolf Pernice for drawing my attention of this important issue.

37 See, for example, G Majone, *Rethinking the Union of Europe Post-Crisis: Has Integration Gone Too Far?* (Cambridge University Press, 2014).

38 JHH Weiler, *Europe in Crisis – On 'Political Messianism', 'Legitimacy' and the 'Rule of Law'*, cit, 258.

ingly, the Treaty established that ‘[a]ny European State may request to accede to the present Treaty’.<sup>39</sup> However, as observed earlier, it should not be forgotten that membership would inevitably be common supranational control of the key industries for both peace and war, coherently with a federalist approach.

The Treaty of Rome used slightly different words. It established that ‘any European State may apply to become a member of the Community’.<sup>40</sup> It added a new element; that is, the Community’s capacity not only to conclude treaties with third countries and international organizations, but also to ‘establish an association’ involving reciprocal rights and obligations.<sup>41</sup> It was precisely when dealing with the failure of the first series of negotiations for the UK entry into the Common Market (as it was then called) and with the Uruguay round of GATT that Walter Hallstein reiterated that the Community was, and had to be, an ‘open Community’.<sup>42</sup>

This political vision of the Community was converted into reality during the following decades. While membership has remained unchanged until 1973 and has changed by way of limited accessions during the following three decades,<sup>43</sup> it has changed more radically after 2000, when ten new members have acceded the EU, followed by another three in the following years. An important step has thus been made towards the ‘broad’ union envisaged fifty years earlier and a new policy has replaced that of gradual and limited extension of membership, with the consequence that the number of Member States was almost doubled<sup>44</sup>.

This was not without institutional consequences. If the 1990’s had seen the rise of subsidiarity, which appeared both as a rationale and an operating tool for resolving the practical problems raised by the widening scope of Community policies, the following decade has been characterized by discourses about flexibility and differentiation. Many have argued that new and more flexible policy methods were necessary,<sup>45</sup> including various forms of differentiated integration. Others have underlined the necessity to

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39 Article 98 (1), Treaty of Paris.

40 Article 237 (1), TEC.

41 Article 238 (1), TEC.

42 W Hallstein, *The European Economic Community*, cit, 174.

43 Denmark, Ireland and the UK in 1973; Greece in 1980; Portugal and Spain in 1985; Austria, Finland and Sweden in 1995.

44 See C Lequesne, *Les perspectives institutionnelles d’une union élargie*, 69 Pouvoirs (2004), 129.

45 See H Wallace, *Flexibility: A Tool of Integration or a Restraint on Disintegration?* (Oxford, Oxford University Press, 2000).

respect of national constitutional identities. Both arguments can be better understood in the context of an analysis of the values upon which the Union is founded.

### *B. A 'Community of Interests'*

Like other legal orders that of the EC/EU has laid down certain gateways, methods for allowing interests to be recognized and weighed within the system. Initially, these gateways were centred on individual interests, as opposed from collective interests, which are promoted by social groups, such as trade unions and environmental associations.

Only at a later stage, have such collective interests gained recognition and protection, for example, through the 'dialogue with civil society'.<sup>46</sup>

There is another sense in which interests are of central importance for understanding the role of the EU; that is, the problematic relationship between the 'common' interest and national interests. This relationship can be considered both conceptually and institutionally. Conceptually, as observed earlier, at the heart of the first vision of unified Europe there is a conception of the 'common' interest, which is truly distinct from the interests of the individual States and which, within certain limits, must prevail on them. Within the other vision of unified Europe, that of a broad and loose union, there is a very different conception of the common interest. If the EC/EU is a community of Nation-States, so the reasoning goes, it is also a community of interests, where the common interest is nothing more than the aggregation of national interests.<sup>47</sup> It is perhaps no exaggeration to say that, if the main function of the EU is to ensure that the market is not distorted, the political arena functions similarly to the market.

This conception of the common interest has three principal implications. First, the role of the Union within this vision of a broad community is not regarded as a challenge to the Nation-State, but as a mechanism for

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<sup>46</sup> See Articles 10 (1) and 11 (2), TEU.

<sup>47</sup> See C Harlow, *A Community of Interests? Making the Most of European Law*, 55 *Modern L. Rev.* (1992), 331. But see also D Mueller, *Federalism and the European Union: A Constitutional Perspective*, 90 *Public Choice* (1997), 255, 267 (qualifying the UK Government's threat to veto the accession of new members in 1994 as an "illustration ... of an essentially constitutional choice only in terms of its impact on the narrow geographic interests ... represented").

preserving it.<sup>48</sup> EU institutions are considered instrumentally, as means for achieving policy goals, what no Member State could obtain alone. Second, EU legislation must be narrowly confined for two related reasons. On the one hand, there is the objective of limiting the Union's legislative action.<sup>49</sup> There has been concern for 'creeping competence',<sup>50</sup> as it was often said before the Treaty of Lisbon confirmed that the Union is founded on the principle of conferred powers. On the other hand, even when common action is in principle legitimate, it is argued that in many instances the States are in a much better position for understanding and maximizing their interests than is the EU. The principles of subsidiarity and proportionality impose a rigorous scrutiny of any intervention by the EU.

Third, because every government operates so as to maximize its own individual interest within the decision-making processes of the EU, the central institutions are those that are composed by national representatives. Legislation is seen as a product that will be 'produced' by the legislature, in particular by the Council of Ministers, in response to the demand from the members of the club, that is to say the States. Accordingly, the role of the Commission is that of implementing the balance of interests determined by the Council. Even within the European Parliament, which is no longer an assembly composed of delegates of national Parliaments, the choices to be made are sometimes regarded in a national perspective.<sup>51</sup> However, on one hand, the internal organization of the EP does not reflect national boundaries. On the other hand, there are several examples of parliamentary debates that do not reflect national boundaries, for example, when MPs discuss about the rules concerning the reduction of the tariffs paid by consumers for roaming services. Nor is it the case when parliamentary groups are called to discuss about agreements with third countries. The preceding description is even less suitable to explain the choices that are made by other institutions, in particular by the European Central Bank.

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48 For a historic approach, see A. Milward, *The European Rescue of the Nation-State* (University of California Press, 1992).

49 J. Temple Lang, EC Constitutional Law: the Division of Powers between the Community and the Member States, 39 N. Ireland Legal Q (1988), 209.

50 This expression became popular after the 1980s: see M. Pollack, *Creeping Competence and the Agenda of the European Community*, 14 J. Public Policy, (1994), 95.

51 S. Mazey & J. Richardson, Interest Groups and EU Policy Making: Organizational Logic and Venue Shopping, in J. Richardson (ed.), *European Union: Power and Policy Making* (Routledge, 2001), 217.

### *C. The Shift from Principles to ‘Values’*

For an adequate understanding of the importance of national constituencies within this vision of unified Europe, it would be wrong to consider only the ‘prosaic’ interplay of interests. At least two other elements ought to be taken into account: the weight accorded to national constitutional identity and the shift from common principles to ‘values’.

The term ‘national constitutional identity’ has been introduced by the Maastricht treaty. This is not at all a very clear legal concept. Perhaps the underlying idea can be understood as a temperament of the emphasis that the other vision of Europe has placed initially on the general principles of law common to the legal systems of the Member States and subsequently on ‘common constitutional traditions’. At the heart of this idea there is a concern for the preservation of the sense of identity and belonging that in the last centuries has been forged within the Nation-States. Coherently with this concern, whilst confirming the importance of ‘common constitutional traditions’ under Article 6 TEU, the drafters of the recent Treaties, from Maastricht to Lisbon, have referred to national traditions. National traditions, in a generic sense, are mentioned by the TEU’s preamble, together with history and culture, though in an indent which begins with the desire to deepen the solidarity between European peoples. Interestingly, the TFEU recognizes national ‘legal traditions’ in a particular, but fundamental area, that of freedom, security and justice. It does so with the intent of balancing the ‘respect for fundamental rights’ with the guarantee of the ‘different legal systems and traditions of the Member States’.<sup>52</sup>

This shows a difficulty concerning fundamental rights, which becomes more evident when considering an ambiguity of the Lisbon Treaty that has been seldom noticed and that is under-theorized. Since the early 1950’s it has been settled case-law of the ECJ that not only the institutions and bodies created by the treaties, but also national authorities must respect the general principles of law common to the legal orders of the Member States, including legal certainty, proportionality and due process of law<sup>53</sup>. Since the late 1960’s the Court has also ensured the respect of fundamental rights, as they are listed by the European Convention of Human Rights. The Preamble of the Maastricht Treaty confirmed the Member States ‘at-

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<sup>52</sup> Article 67 (1), TFEU.

<sup>53</sup> See JA Usher, *General Principles of EC Law* (Longman, 1998) and T Tridimas, *The General Principles of EU Law* (Oxford, Oxford University Press, 2015, 2<sup>nd</sup> ed.), both highlighting the role of the ECJ.

tachment to the principles of liberty, democracy and respect for the fundamental freedoms and the rule of law'. This choice was confirmed by Article F TEU, according to which the Union had to respect the national identities of the Member States 'whose systems of government are founded on the principles of democracy', as well as fundamental rights. The language used by the Treaty thus was the same of the Court and was the language of 'principles'. There was only one provision which used a different concept, that of 'values', but it was a sector-specific provision, that did so with regard to the common foreign and security policy and significantly, referred to the necessity to safeguard "the common values" and fundamental interests of the EU.

The Lisbon Treaty has reiterated the 'attachment to the principles of liberty, democracy and respect for the fundamental freedoms and the rule of law'. But, after so doing, it has shifted from the concept of 'principles' to the concept of 'values'. According to Article 3 TUE, the Union's aim is 'to promote peace, its values and the wellbeing of its peoples'. The question that thus arises is which are the Union's values. The answer is provided by Article 2, which lists such 'values', including 'respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights'. There is not only, therefore, a longer list, but also a shift of concepts, although there is a certain overlapping between them, for example, with regard to fundamental rights and the rule of law, even though Article 7 TEU sets out a political mechanism for their enforcement. More recently, the Rome Declaration of 25 March 2017 has reiterated the emphasis on 'common' and strong values.<sup>54</sup>

Three comments can be made on the preceding textual analysis. The first is conceptual. Some legal theorists have stressed the distinction between general principles and values,<sup>55</sup> in the sense that the latter is susceptible of emphasizing divisions within the social body.<sup>56</sup> The second is institutional and concerns judicial bodies. Viewed in conjunction with the emphasis placed on national identities, the reference to values may lead national constitutional courts or other judicial institutions to affirm their

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54 See *infra*, Part 5.

55 For further discussion, see G della Cananea, *Due Process of Law Beyond the State. Requirements of Administrative Procedure* (Oxford, Oxford University Press, 2016), arguing that general principles have a foundational value.

56 See C Schmitt, *Die Tyrannie der Werte* (1964)..

role as defenders of such identities.<sup>57</sup> The third concerns the role of the Union's political institutions. Under Article 7 TUE, there are two mechanisms: there is the action by the Council, acting by a qualified majority, when it is requested to determine whether there is a serious breach of those values by a Member State; there is the action by the European Council, acting by unanimity when it is called to determine the existence of a serious and persistent breach by a Member State. Clearly, the objective is to protect common values and there is an obligation, for common institutions, to attempt to reach this goal. However, there may be no certainty that this objective will always be attained in fact, because the various peoples may well disagree as to the content of those values, as well as to the best way to reach the goal of protecting them. National rulers may not only disagree on both aspects, but also use their voting powers instrumentally or tactically, in order to prevent a negative assessment of their conduct.

#### *D. From Transitional to Permanent Differences*

As observed earlier, some elements of flexibility have been laid down since the early period of European integration and are perfectly compatible with the first vision of Europe, that centred on the idea of an 'ever closer union'. What characterizes the other vision of Europe, therefore, is not the recognition that some form of flexibility and differentiation is simply necessary. It is rather the use of normative and functional arguments in favour of institutional mechanisms that allow the Member States to follow different rules and paths, not just for a limited period of time, but for a longer period or forever.

Normatively, two main arguments might be used to support an increased differentiation of EU institutional and legal mechanisms. Firstly, it is coherent with the increasing internal differentiation of the EU. Secondly, it accords a prominent role to pluralism.<sup>58</sup> The consequences of this change in attitude are important. There is the provision according to

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<sup>57</sup> See E Cloots, National Identity, Constitutional Identity, and Sovereignty in the EU, 45 *Netherlands J. Leg. Phil.* 82 (2016) and B Guastaferro, Beyond the Exceptionalism of Constitutional Conflicts: The Ordinary Functions of the Identity Clause, 32 *Ybk. Eur. L.* (2012), 263.

<sup>58</sup> For this perspective, see C Harlow, Voices of Difference in a Plural Community, 50 *Am. J. Int'l. L.* (2002), 339. See also P Manin – JV Louis (eds.) *Vers une Europe différenciée? Possibilité et limites* (Paris, A Pedone, 1996).

which the Union ‘respects the national identities’ of its Member States.<sup>59</sup> Other provisions aim at protecting cultural diversity. Interestingly, there is a shift between the Charter of Fundamental Rights and the Lisbon Treaty. While the former imposed on the Union the obligation to respect ‘cultural, religious, and linguistic diversity’,<sup>60</sup> the latter provides that the EU shall respect its ‘rich cultural and linguistic diversity’.<sup>61</sup>

Functionally, it might be argued that a Union of almost thirty members, with very different political cultures and policy processes, requires a much greater degree of flexibility and differentiation. This is not necessarily an obstacle to the traditional functional or neo-functional strategy of creating *de facto* solidarity between the peoples of Europe on concrete issues. Rather, an approach that leaves much room for different national choices may preserve the dynamic of integration. In this sense, some observers have pointed out that without the distinction between the various phases of the Economic and Monetary Union and the opt-out clauses for Denmark and the UK, it would not have been possible for the other Member States to proceed in this path. This is an important point to which we shall return in the next section. Meanwhile, it is important to observe that, for all its appeal, the increasing recourse to differentiation is not without difficulties. In particular, it raises serious issues from the point of view of accountability, which is always more difficult in non-unitary frameworks than in unitary ones.<sup>62</sup>

#### *E. The Difficulties of this Vision of Europe*

Certain of the problems raised by the second political vision of Europe have been touched on in the preceding discussion. A more structured survey of these and other difficulties is however warranted.

First and foremost, for all the appeal of a broad and loose union, every enlargement of the Community was decided under the condition that the union between European peoples should be deepened. The initial constitu-

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59 Article 4 (2) TEU, according to which national identities are ‘inherent in the fundamental structures, political and constitutional, inclusive of regional and local self-government’ of each country.

60 Article 22, Charter of Fundamental Rights.

61 Article 2 TEU (emphasis added).

62 For this remark, see P Craig, European Governance: Executive and administrative powers under the new constitutional settlement, 3 J. Int’l. Const. L. (2005), 407, 436.

tional clause was confirmed by all the treaties that amended the Treaty of Rome, as well as by all accession treaties, including those concerning the UK and more recently various countries from Central and Eastern Europe.<sup>63</sup> It can be understood that politicians and electors in some of these countries are reluctant to accept what has been described as ‘integration by stealth’.<sup>64</sup> However, constitutionally, their accession has been premised, among other things, on the acceptance of the initial clause, even though there was not full awareness of the ramifications of this.

Secondly, functionally, there are clearly more problems in managing a Union with 28 or 27 Member States than there would be if membership were still limited to six or twelve countries.<sup>65</sup> This puts a burden of proof on the shoulders of those who argue for a more flexible and differentiated Europe.

For all its importance, decision making is not the only element that really matters. A constitutional framework that recognizes and protects rights provides expectations and determines constraints that it is unwise for politicians to ignore. Within liberal democracies an assertion that a certain course of action is contrary to constitutional requirements or to some goals set out by the constitution or to a procedure that it sets, is a potent argument for invoking some kind of correction either by the courts<sup>66</sup> or by other public agencies. We may surely ask ourselves whether the mechanism set out by Article 7 TEU is the right solution for the problem of noncompliance with the values upon which the EU is founded. However, one thing should be clear; that is, treating such values as generic ideas, from which no meaningful answer can be deduced for the problems that emerge and, *a fortiori*, an instrumental use of voting mechanisms under Article 7 would seriously undermine mutual trust between partners and, in the end, the Union itself.

This debate about fundamental rights is very significant also historically and comparatively. In the US, in the ratification debate the Anti-Federalists opposed to the Constitution on grounds that the new system would lead to excessive centralization and would thus fail to protect individual

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63 I am grateful to Ingolf Pernice for drawing my attention of this important issue.

64 G Majone, *Dilemmas of European Integration. The Ambiguities and Pitfalls of Integration by Stealth* (Oxford, Oxford University Press, 2009).

65 As observed almost thirty years ago by L Dubouis, *Peut-on gouverner à Douze?*, 48 *Pouvoirs* 105 (1989).

66 For a pioneer comparison between judicial institutions, see H Kelsen, *Judicial review of Legislation. A Comparative Study of the Austrian and the American Constitution*, 4 *Journ. of Politics* (1942), 183.

rights, while Madison and others argued that only a wide republic could limit factions, though Madison himself later presented the Bill of Rights to Congress. In today's Europe, instead, those who oppose to a new centralized government that would allegedly have the characteristics of despotism do not use the argument of rights. Quite the contrary, they do not seem to be concerned with the dangers or unrestrained national government. The arguments of rights is, instead, used by those who fear that, if the EU is weakened and the ties between European peoples are loosened it is only a matter of time before several fundamental rights are jeopardised and this explains why the debate about judicial independence is so important.

#### *IV. The Institutional Mechanisms of Differentiated Integration within the EU*

##### *A. Clarity and Coherence*

Thus far, we have seen that there is a tension inherent between two visions of Europe, with important consequences about the goals of the Union, the conception of its peoplehood and the legal tools for ensuring coherence and unity. We cannot, however, content ourselves with delineating this distinction. We must subject existing or proposed institutional mechanisms to careful scrutiny under the twin criteria of clarity and coherence. Intellectual clarity is traditionally regarded as a requisite for academic works, in the sense that any thought or statement must be sufficiently clear and must avoid contradictions. There can perhaps be a policy without intellectual clarity, but not a scientific argumentation. Even for a policy, however, coherence matters, at least in the sense of coherence between ends and means. From this point of view, if we value something intrinsically, in our case either an ever closer union between the peoples of Europe or a union with less intense ties between them, an increase of it, all else being equal (there might be side effects), can be assessed favourably, while what reduces it or is incompatible with it should be considered unfavourably. An attempt will thus be made to understand whether a certain existing or proposed institutional mechanism that can be said to be coherent with one vision of Europe is hardly compatible with the other, or not at all.

It can be helpful to begin by observing that the idea of differentiated integration is expressed by way of several terms, including enhanced cooperation, two-speed Europe, variable geometry, Europe *à la carte* and concentric circles. Even a quick look at official discourses and academic works show that these terms are increasingly important, both descriptively and prescriptively. Descriptively, the various terms just mentioned are used to

designate situations in which the members of the EU make policy choices with different effects for the different partners. The prescriptive side seeks to build an increasing legitimacy for these types of decision making processes.

As observed earlier, there is nothing wrong in this. However, legally, some distinctions are necessary, because there are various forms of differentiation.<sup>67</sup> Only some of those terms designate mechanisms that are provided by the treaties, such as enhanced cooperation. Moreover, and more importantly from the institutional perspective that is followed in this essay, the mechanisms that involve, at least potentially, only the Member States of the EU must be kept distinct from those that are susceptible of involving third countries. Last but not least, the terms just mentioned are not simply different, but mean different things, in the sense that a closer look reveals that they support contrasting strategies of integration.<sup>68</sup> There is thus the need to ensure coherence between ends and means. Keeping this in mind, our discussion will continue with an analysis of what has been probably the single most important achievement after Maastricht; that is, EMU. As a second step, enhanced cooperation procedures will be considered. Next, we will look at a recent and controversial treaty between most EU members, but not all; that is, the Fiscal Compact.

### *B. No 'Ever Closer' Monetary Integration within the EMU*

Given the object and purposes of this essay, no attempt will be made here to synthesize the complex legal and institutional arrangements on which the EMU is based.<sup>69</sup> Suffice it to mention few legal norms and facts that

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67 See B De Witte, D Hanf & E Vos (eds.), *The Many Faces of Differentiation in EU Law* (Intersentia, 2001).

68 See, however, JA Usher, *Variable Geometry of Concentric Circles: Patterns for the European Union*, 46, 243 at 253 (1997), putting on an equal basis 'variable geometry' and 'two speeds'.

69 On the road to the EMU, see N Thygesen, The Delors Report and European Economic and Monetary Union, in 65 International Affairs 637 (1989). For an outline of the main issues, see JV Louis, The Economic and Monetary Union: Law and Institutions, 41 Common Mkt. L. Rev. (2004), 575, and FG Snyder, EMU – integration and differentiation: metaphor for European Union, in P Craig & G de Búrca (eds), *The Evolution of EU Law* (Oxford, Oxford University Press, 2011), 687. But see also G Majone, *Rethinking the Union of Europe Post-Crisis: Has Integration Gone Too Far?* (Cambridge, Cambridge University Press, 2014), 20, referring to the EMU as an example of the more general crisis of the EU.

are substantially undisputed. First of all, the EMU is the main innovation from the viewpoint of the transfer of sovereign powers from the Member States to the EU, which is particularly visible in the adoption of a single currency. Secondly, and as a specification of this, institutionally the EMU consists of three distinct though related parts. There is the economic part, which rests in the hands of national government, though under a set of common rules, while national budgetary policies are constrained by common targets, standards and checks, within the procedure of multilateral surveillance. There is, finally, monetary policy making, which is conferred to the ECB. Thirdly, institutional differentiation has been increased by the different choices made by the Member States. Three phases or stages were envisaged and while all the States that were members of the EU were included in the first one and could move to the next, the norms governing the EMU did not impose on them to ask to be included in the third stage, as it will soon be explained. A differentiated membership has thus emerged. Last but not least, unlike traditional common policies, EMU is characterized by a complex variety of rules, including guidelines and technical opinions, and by the exemption from the ordinary mechanisms for ensuring compliance. All the rest is controversial, to say the least. In particular, it is disputed whether the policies followed by the ECB have saved the euro, and with it the EU itself, or has just dissipated resources that should have been used otherwise.

The main question that arises is, however, another; that is, how the first and the third aspects mentioned earlier – that is, the fundamental importance of the EMU and its differentiated membership – can be reconciled. Jean-Victor Louis has suggested a twofold explanation, pragmatic and normative. Pragmatically, granting to Denmark and the UK an ‘opt-out’ clause was the only way to obtain their consent to the revision of the treaties, in view of the unanimity that was required. Normatively, he acknowledged that the special status granted to these members was ‘singular’. But he argued that, although such status appeared to be of indefinite duration, it was *‘de facto’* only temporarily if the objective of an ever closer union is to be safeguarded’. He added that it was with this idea in mind that such status was conceded.<sup>70</sup> This is a very helpful contribution to the understanding of the complex decisions taken by the European Council. The normative argument that he has advanced is however problematic in some respects, in particular with regard to the potential dismissal of the

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70 J.V. Louis, *Differentiation and the EMU*, cit. at 45, 43-44.

goal of the ‘ever closer union’. A distinct but related question is whether the course of events made such goal unattainable.

Let us begin by clarifying a preliminary issue. It is often asserted that Denmark and the UK were granted an opt-out clause from EMU, but this is not wholly correct. In fact, they were included in EMU, but were not required to participate in its third stage, with the further caveat that Denmark obtained the acknowledgement of its right to take part in the third phase, after a positive assessment by the Council.<sup>71</sup> As regards to the UK, all EU countries ‘recognized’ that it ‘shall not be obliged or committed to move to the third stage’ of EMU without a decision of its representative institutions,<sup>72</sup> which according to the standard account means that it was granted an opt-in clause.

That said, normatively, the fact that the concession of a specific status to the UK and Denmark was *‘de facto’* only temporary because of the necessity to safeguard the goal of the ‘ever closer union’ is a weak counter to the literal argument that such status was conceded without any explicit deadline. There is a strong argument that runs in the contrary direction. As the Protocol on EMU specified unequivocally, the UK ‘shall retain its powers in the field of monetary policy according to national law’.<sup>73</sup> As a consequence of this, a different law was to be, and was, applied.

Moreover, and as a variant of the preceding argument, the Maastricht Treaty was an agreement between sovereign States and conventional international law is based, though not exclusively, on their explicit consent. As a result, it is hard to see how the fact that the specific status was conceded to the UK with the idea in mind that this situation would not last for a long time could influence the exercise of rights and duties under the Treaty. Even if it could be said that all partners agreed on this, this would not be conclusive against the ordinary criteria of interpretation.

Finally, the argument advanced by Louis with regard to the necessity to safeguard the goal of the ‘ever closer union’ is ambiguous, in the sense that it can be read in two distinct ways. It is one thing to say that the treaties and the other parts of the constitutional framework of the EU must be interpreted systematically, with the consequence that the specific status conceded to Denmark and the UK had to be used in the light of their commitment to contribute to the achievement of the ‘ever closer union’. It is an-

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71 Protocol on certain provisions relating to Denmark, Article 1 (1).

72 Protocol on certain provisions relating to the United Kingdom, Articles 1 and 9, last indent.

73 Protocol on certain provisions relating to the United Kingdom, Article 4.

other thing to say that, in the light of this commitment, their specific status *de facto* has a limited duration. We must be very careful when deducing particular consequences from a very general clause of the Treaty's preamble. It is hard to see how it would be possible to convert a permanent clause into a temporary one.

These findings support the conclusion that the solution envisaged by the drafters of the provisions governing the EMU, whilst allowing Denmark and the UK to join the Euro when they meet the requisite prescribed by the Treaties, at least potentially, deviated from the goal of the 'ever closer union'. It remains to be seen how this potentiality was converted into reality and in this respect that the explanation provided by Louis is particularly helpful. Even a quick look at the course of the events shows, on the one hand, that both British and Danish officers participated in a variety of decision-making processes concerning the EMU and on the other hand soon after 1992 several measures were taken by national policy makers in particular within the UK in order to make full membership possible.<sup>74</sup> For example, between 1993 and 1999, the Bank of England constantly monitored the preparation for the adoption of the single currency. Some years later, Gordon Brown, then Chancellor of the Exchequer, set out the economic conditions that had to be fulfilled so that this could occur.<sup>75</sup> This was not the case, however, though the adoption of the single currency was still supported by some economists when the crisis began.<sup>76</sup> A different choice has been made and its consequences are so well known that few hints will suffice for our purposes here. The UK has kept its money and has remained relatively insulated from the effects of the policies carried out by the European Central Bank. Institutionally, this implies that the Governor of the Bank of England takes part only in the meeting of the General Council, a body with limited powers, but is not involved in decisions concerning the fixing of rates or to refer to the most salient decision taken by the ECB in the last year, in the purchase of national bonds. More concretely, the consequence of all this for citizens is that, unlike in other EU coun-

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74 See, however, T Prosser, *The Economic Constitution* (OUP, 2014), 142, noting the 'partial acceptance by the UK' of the objectives set out by the ECB.

75 See the statement by Gordon Brown on *UK Membership of the Single Currency*, HM Treasury (2003).

76 See W Buiter, Why the United Kingdom Should Join the Eurozone, 11 International Finance 269 (2008). For a survey of the literature, see T Sadeh & A Verdun, Explaining Europe's Monetary Union, 11 International Studies Rev. 277 (2009).

tries, in the UK a visitor needs to change currency.<sup>77</sup> In sum, the provisions of the Treaty determined a potential breach with the ideal of the ‘ever closer union’, though they left the door open.

Looking at the course of the events has a further advantage. It reveals that there is not simply a two-tier legal regime, whereby all EU countries are within the third stage except those who either cannot join it or do not wish to do so. Indeed, there is a more complex situation, with: a) nineteen countries within the Eurozone; b) other EU countries that are obliged to meet convergence criteria and do so with some difficulties (with the exception of Sweden); c) Denmark and the UK (until the end of negotiations for its exit from the EU) that have a specific status; d) some smaller European States (Andorra, Monaco, San Marino and Vatican City) that are using the euro on the basis of a specific agreement; e) two Balkan countries that are unilaterally using the Euro (Kosovo and Montenegro). This last element shows the existence of asymmetric relationships between legal orders, which is not unknown to legal theorists<sup>78</sup> and that raises interesting issues from the viewpoint of both effectiveness and accountability.

### *C. Enhanced Cooperation: Nature, Rationale and Impact*

As a second step, it is interesting to examine enhanced cooperation. There is a brief overview of the provisions on enhanced cooperation that have been laid down since the Treaty of Amsterdam (1997). On this basis, the rationale for enhanced cooperation is examined. Finally, we must consider some difficulties that have emerged in institutional practice.

Although some consider the provisions enacted by the Treaty of Amsterdam as a generalization of previous experiments in flexibility that had been agreed within the Treaty of Maastricht, institutional mechanisms differed, particularly with regard to the role of EU institutions.<sup>79</sup> Moreover, those provisions initially excluded common foreign and security policies. A

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<sup>77</sup> G Dinan, *Ever Closer Union. An Introduction to European Integration* (Palgrave MacMillan, 2005, 3<sup>rd</sup> ed.), 1.

<sup>78</sup> From the viewpoint of general theory of law, see S Romano, *L'ordinamento giuridico* (Sansoni, 1946, 2<sup>nd</sup> ed.), Engl. transl. *The Legal Order* (Routledge, 2017).

<sup>79</sup> See JHH Weiler, *Editorial*: Amsterdam, Amsterdam, 3 Eur. L. J. (1997), 309, for the claim that the Treaty was important not only for its existence, but also for its institutional contents; for further details on enhanced cooperation, H Kortenberg, Closer Cooperation in the Treaty of Amsterdam, 35 Common Mkt. L. rev. (1998), 833.

change occurred with the Treaty of Nice, though it still excluded all ‘matters having military or defence implications’. It has been the Treaty of Lisbon, therefore, that has generalized enhanced cooperation, though within the substantive limits and procedural constraints that will now be clarified.

The essence of enhanced cooperation is that some Member States, not all, ‘may make use’ of the Union’s institutions. It is, therefore, a mechanism that is ‘constituted’ and regulated by the Treaty and which takes place within the institutional framework of the EU, unlike those of purely intergovernmental nature that will be examined earlier. The justification for the use of EU institutions is that the goal of enhanced cooperation is to ‘further the objectives of the Union, protect its interests and reinforce its integration process’.<sup>80</sup> However, its scope is limited to the areas for which the Union has non-exclusive legislative competence. Moreover, it is only if the Council has ‘established that the objectives of such cooperation cannot be attained within a reasonable period by the Union as a whole’ that an enhanced cooperation may take place. The Treaty also sets out a requisite concerning the minimum number of EU members (nine) that must be involved<sup>81</sup> and specifies that the procedure laid down in Article 329 TFEU shall be used. This requires the authorization issued by the Council, acting on a proposal made by the Commission and with the assent of the European Parliament. Participation in an enhanced cooperation has relevant legal consequences, in the sense that, though all members of the Council are enabled to participate in its deliberations, only those that represent the Member States participating in it ‘shall take part in the vote’.<sup>82</sup> On the other hand, their decisions will neither be binding on the other members of the EU nor will be regarded as part of the *acquis communautaire*.

Three comments can be made on the preceding textual analysis. They concern the nature, the rationale and the impact of enhanced cooperation. Functionally, there is an analogy between enhanced cooperation and treaty revisions, because they both seek to adjust the process of European integration to the varying necessities and to the difficulties that inevitably arise in a Union of twenty-seven (or twenty-eight) Member States.<sup>83</sup> However, there is also a fundamental difference. Unlike treaty revision, enhanced cooperation leaves the existing constitutional framework unaltered and is,

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<sup>80</sup> Article 20 (1) TEU.

<sup>81</sup> Article 20 (2) TEU.

<sup>82</sup> Article 20 (1) TEU.

<sup>83</sup> On this linkage, see P Craig, *The Lisbon Treaty* (Oxford, OUP, 2013, 3<sup>rd</sup> ed.).

therefore, not subject to ratification processes within national legal systems.

The rationale of enhanced cooperation becomes clear when considering that, according to the Treaty, enhanced cooperation is viewed as a 'last resort', when it has become undisputed that the members of the EU either cannot or do not wish to proceed in the same direction and with the same pace, though all members can join at a later stage, if they wish to do so. It is, therefore, an institutionalized differentiated integration, in the sense that it differs from the closer integration that can be achieved by the members that choose to sign an agreement outside EU treaties, as it happened with the Schengen Agreement (1985) and more recently with the Prüm Convention (2005). To the extent to which enhanced cooperation can work as an instrument of the 'ever closer union', without obliging all the Member States to accept the same ties simultaneously, it can be said to be a flexible tool, which is compatible with both visions of the Union. Precisely for this reason, however, it has a certain ambiguity.<sup>84</sup>

Moreover, despite its flexibility, enhanced cooperation has been less relevant and significant than expected by its proponents. Soon after the entry into force of the Treaty of Amsterdam, EU institutions expressed concern about the development of enhanced cooperation outside the treaties, as a consequence of enlargement<sup>85</sup>. After the big enlargement, few steps have been taken by national governments to use enhanced cooperation, even when they intended to 'reinforce the process of integration' in the area of the EMU. They have preferred to stipulate international treaties, as they did in 2012 for the 'Fiscal Compact'. It is interesting, therefore, to take it into consideration.

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84 For this remark, see H Bribosia, *Les coopérations renforcées*, in G Amato, H Bribosia & B De Witte (eds), *Commentaire du traité établissant une Constitution pour l'Europe à la lumière des travaux préparatoires et perspectives d'avenir* (Bruxelles, Bruylants, 2007). See also D Thym, *The Political Character of Supranational Differentiation*, 31 *Eur. L. Rev.* (2006), 781, seeing in this the emergence of an 'asymmetric constitutionalism'.

85 See B De Witte, *Chameleonic Member States: Differentiation by Means of Partial and Parallel Agreements*, in D Hanf & E Vos (eds), *The Many Faces of Differentiation in EU Law* (Intersentia, 2001), 236, 239, noting that the Amsterdam rules were too rigid.

#### D. 'Internal' International Agreements: the Fiscal Compact

In addition to enhanced cooperation, there is another instrument that can be regarded as an alternative to the revision of the treaties; that is, the conclusion of international agreements between either all Member States or only some of them. These are international treaties. They are, therefore, subject to the principles and rules of public international law, including the Vienna Convention on the Law of Treaties, in addition to the limits stemming from EU law,<sup>86</sup> for example with regard to the relations with third countries, under the doctrine of pre-emption. However, this 'parallel track' has always existed, as was observed earlier with regard to the Treaty establishing the Benelux. It had become increasingly important during the economic and financial crisis. An interesting example is the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (TSCG), which is better known as the 'Fiscal Compact'. An analysis of its process, rationale and relationship with EU law can help us to understand the distinctive features of this form of differentiated integration.

When the crisis burst out, most political leaders affirmed that the existing legal framework needed to be adjusted. On the one hand, it was adjusted for all the Member States, through a further change of the Stability and Growth Pact, enacted in 1996 and already modified in 2005. On the other hand, it was adjusted by way of an international agreement negotiated by most members, but not by all. Initially, there was a Franco-German proposal to amend the treaties in order to tighten the framework of budgetary rules for the Member States. That proposal was vetoed by the UK, on the grounds that its representatives had not managed to obtain adequate safeguard against the undesired impact of those tightened rules on the UK's financial services industry, an aspect that certainly has not lost its relevance in the context of Brexit. The negotiation process that followed was not easy for some members, who were afraid of meeting strong opposition during their ratification processes. In particular, the Czech Republic, decided that it was not in a position to sign the treaty. Quite the contrary, Italy used that process instrumentally, in order to secure an amendment of the national constitution. Eventually, on 30 January 2012, twenty-five Member States agreed to the TSCG or 'Fiscal Compact'.

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86 See B De Witte, *Chameleonic Member States: Differentiation by Means of Partial and Parallel Agreements*, cit., 232, distinguishing partial agreements, concluded between some Member States within the institutional framework of the EU, from parallel agreements, involving all of them, and placing less emphasis on the involvement of third countries.

At its roots there is not only the fact that, even when action by a group of Member States is regarded as justified from the viewpoint of the Union's goals and processes, national politicians often show a strong preference for cooperating outside the treaties. There are also two important factors, greater flexibility and time. If the decisions to be taken are left to be determined through unconstrained political processes, then an even greater flexibility can be attained. Accordingly, decisions will be reached on shorter time horizons than for comparable behavior regulated by EU rules. But there can be another justification for doing so: the opposition by one or more members to the proposed innovation, as it happened with the Fiscal Compact.

It is precisely because the TSCG is not an EU treaty that it has a complex relationship with EU law. The preamble clearly reveals that the intent of the contracting parties is to proceed on the path of integration. They regard their economic policies 'as a matter of common concern' and express their desire to 'develop ever closer coordination of economic policies within the euro area'.<sup>87</sup> This intent is confirmed by Article 2, which refers to the parties' will to 'foster budgetary discipline through a fiscal compact'. However, the Fiscal Compact has but a limited impact on existing EU rules for two reasons that are related but distinct. Firstly, the general basis of the rules set out by EU treaties is the prior consent of the States. It is this consensus that performs the basic legitimizing function. Without their consent, the two EU members that have not signed the TSCG, are not bound to respect the canons of conduct that it lays down, in particular the 'rule' that 'the budgetary position of the general government ... shall be balanced on in surplus'.<sup>88</sup> Secondly, and consequently, several provisions of the Fiscal Compact clarify that the new treaty entails no change of the obligations stemming from existing EU treaties. While Article 2 does so in a general way, by ensuring that the Fiscal Compact will be interpreted and applied consistently ('in conformity') with EU treaties,<sup>89</sup> Article 3 does so with regard to the more innovative and controversial rule about budget

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<sup>87</sup> See the first two indents of the TSCG's Preamble.

<sup>88</sup> TSCG, Article 3 (1) b).

<sup>89</sup> TSCG, Article 2 (1), which refers to both 'the Treaties on which the European Union is founded' and to 'European Union law, including procedural law'. The following indent puts even more emphasis on the necessity of consistency, by affirming that compatibility is requisite for applying the TSCG. See, however, P Craig, *The Stability, Coordination and Governance Treaty: Principle, Politics and Pragmatism*, 37 Eur. L. Rev. 231 (2012), arguing that the TSCG raises the question concerning the extent to which a treaty outside the confines of the Lis-

deficits, which will be applied by the contracting parties 'in addition and without prejudice to their obligations under' EU law. In addition to these limits, the new rules have a differentiated application. While they 'apply in full' to the Member States whose currency is the euro,<sup>90</sup> they apply to the other parties under the conditions set out in Article 14. Leaving aside the conditions that referred to the entry into force of the TSCG, it can be observed that it will apply to the States with a derogation or with an exemption, as in the case of Denmark, as from the date when the decision abrogating that derogation or exemption takes effect.<sup>91</sup> This, incidentally, confirms that the position of Denmark (and the UK) differs from that of the other members of the EU. There is, finally, a provision that is increasingly important in the political debates about the EMU; that is, Article 16 of the TSCG, which regulates the process of 'incorporation'. It establishes that 'within five years ..., the necessary steps will be taken ... with the aim of incorporating the substance of this Treaty' into the legal framework of the Union. But precisely with regard to the substantial part of the Fiscal Compact in some Member States there is much less consensus than there was five years ago concerning the soundness of the tighter rules on public debt and deficit. Tighter budgetary standards have been criticized on grounds that they codify debt-reduction policies with a huge and negative impact on social programs. What is controversial is moreover their imposition by a treaty, as opposed to a national constitution.<sup>92</sup>

In the light of these findings, the distinctive features of this form of differentiated integration, from an institutional point of view, can be viewed more clearly than hitherto. First, State consensus performs the usual basic normative function, in the sense that it is of central importance in shaping the interaction between the Member States. However, while in the case of

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bon framework can confer new powers on EU institutions; for further remarks, K Tuori, *The European Financial Crisis –Constitutional Aspects and Implications*, EUI Working Paper LAW 2012/28.

90 TSCG, Article 1 (2).

91 TSCG, Article 14 (5).

92 For critical remarks, see M Everson & C Joerges, Between Constitutional Command and Technocratic Rule: Post Crisis Governance and the Treaty on Stability, Coordination and Governance ('The Fiscal Compact'), in C Harlow, P Leino & G della Cananea (eds), *Research Handbook on EU Administrative Law* (Elgar, 2017), 351, but see also P Craig, *The Stability, Coordination and Governance Treaty: Principle, Politics and Pragmatism*, cit. at 87, 235, arguing that the TSCG 'does not advance matters much' with respect to existing EU rules. New changes have been envisaged by the 'five presidents' report': *Towards a Genuine Economic and Monetary Union* (Brussels, 2012).

the Maastricht clauses their consensus was expressed by all members and within the provisions of the treaties, in this case it concerns most members, but not all. As a further consequence, while the Maastricht Treaty distinguished between members with or without specific clauses, the TSCG makes EU membership more differentiated than before, with two categories of contracting parties, those within and outside the Eurozone, and the remaining two members of the EU that did not sign the new treaty. The question that thus arises is whether this type of agreement reinforces the perspective of a sort of Europe ‘à la carte’. This question will now be addressed.

#### *E. Two-speed Europe: Concept and Issues*

As observed initially, few topics have aroused as much controversy in the literature about the EU as differentiated integration. Opinions differ markedly both as to the justification for the existence of such form of integration and as to the shape that it should assume. It is, therefore, not surprising that different concepts are used in differing ways. However, if we move beyond nominalism, in an attempt to understand the nature of the interactions between the Union’s partners, it becomes evident that a juxtaposition of some forms of differentiated integration is unjustified. This is the case of two-speed Europe and Europe *à la carte*. While some observers, including Usher, put them on an equal basis,<sup>93</sup> they differ. The term ‘two-speed Europe’ designates processes that are used to reach more expedite decisions for some members of the EU, who sooner or later are joined by the others.<sup>94</sup> Quite the contrary, the term ‘Europe *à la carte*’<sup>95</sup> designates a scenario in which certain countries would join some policies while others would join other policies, with the consequence that there can only be a very low common denominator. For this reason, unlike the idea of two-speed, the idea of a Europe *à la carte* is hardly coherent with the first vision of a unified Europe, that which seeks to achieve an ‘ever closer union’ between the peoples of Europe.

This does not mean, however, that the other idea, that of a two-speed Europe, is without difficulties. These become evident when considering

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93 JA Usher, *Variable Geometry of Concentric Circles: Patterns for the European Union* (1997) 46, 243 at 253.

94 For further analysis, see JC Piris, *The Future of Europe: Towards a Two-Speed EU?* (Cambridge, Cambridge University Press, 1997).

95 See R Dahrendorf, *A Third Europe* (Florence, EUI, 1979).

the joint Declaration of 25 March 2017, in the sixtieth anniversary of the Treaty of Rome.<sup>96</sup> The Declaration has both a retrospective and a prospective, which deserve a detailed analysis.

The retrospective is a bit rhetoric, as it often happens in these types of documents. There is a strong emphasis on the decision ‘to bond together and rebuild our continent from its ashes’ and on the construction of a ‘community of peace, ... with unparalleled levels of social protection and welfare’. For sure, that of the EC/EU can rightfully be seen as a success story from the point of view of the achievement of the initial goals of peace and prosperity. The Declaration proudly states ‘we have built a unique Union with common institutions and strong values, a community of peace, freedom, democracy, human rights and the rule of law’. This statement is not unreasonable if we compare Europe and more particularly the EU with other regions of the world. However, as we shall argue later, there are some difficulties with it.

The prospective part of the Declaration seeks to combine unity and diversity. Its *incipit* underlines the importance of the ‘construction of European unity’. The importance of unity is reiterated by the second paragraph, according to which ‘today we are united and stronger’. There is still another paragraph (the fourth) that begins by affirming the ambitious goal of ‘even greater unity’ and continues with this challenging statement:

‘we will act together, at different paces and intensity where necessary, while moving in the same direction, as we have done in the past, in line with the Treaties and keeping the door open to those who want to join later’.

There is, again, a similarity with enhanced cooperation; that is, flexible integration. But there is also a distinctive trait, in the sense that a two-speed Europe can be achieved in more than one way. Its essence is that integration requires some ‘pioneers’; that is, some members of the club choose to be more closely integrated in a new policy field, on the assumption that, if it works, the others will join them. This idea can be appealing for several reasons. It appears to be susceptible to revitalize the functional method, by encouraging sector or issue-specific coalitions of partners willing to proceed with the same pace. From the viewpoint of economic theory, it can

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96 Declaration of the leaders of 27 Member States and of the European Council, the European Parliament and the European Commission, available at <http://www.consilium.europa.eu/en/press/press-releases/2017/03/25-rome-declaration/>.

make sense to say that, unlike other ‘clubs’ or organizations, the EU provides several ‘goods’, which may have different relevance or significance for its members.<sup>97</sup> This may foster competition between different policy approaches.<sup>98</sup>

There are, however, some difficulties with the strategy delineated by the Declaration. First, it rests on an unclear assumption. It is questionable whether in the past what was really allowed was the acceptance of ‘different paces and intensity where necessary’. Arguably, the mechanisms concerning EMU did much more than allowing different paces. They allowed some members of the club not to proceed on the path of monetary integration. This is of significance when thinking about a strategy aiming at achieving unity, whatever the veracity of the intent of the Declaration’s authors.

Secondly, the idea to ‘act together, at different paces and intensity where necessary’ may take different forms. Some are based on the treaties, such as enhanced cooperation. Other forms of cooperation between the Member States lie outside the treaties, as the ‘Fiscal Compact’, because not all EU countries agreed about it and its inclusion within the architecture of the EU requires a series of steps and of course the consensus of all partners. Those who think that it suffices to say that the EU will proceed ‘at different paces and intensity where necessary’ are therefore mistaken. To borrow a term used in one of the first studies on differentiated integration, this was but a ‘misleading simple idea’.<sup>99</sup>

Thirdly, it is not clear how the partners would move in the same direction. There is an inner tension between the desire to get all members of the EU involved and the role of the promoters or pioneers. For example, some political leaders who did not wish to join the Eurozone feared to be left behind. Their fear becomes more evident when, instead of multi-speed Europe, other terms are used, such multi-tier Europe, which has a hierarchical and pejorative connotation.

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97 See J Pisani-Ferry, *Intégration monétaire et géométrie variable*, 48 *Revue économique* 495 (1996), for the thesis, that preserving the single market and enhancing convergence are distinct objectives.

98 G Majone, *Europe as the Would-Be World Power: the EU at Fifty* (Cambridge University Press, 2009). On ‘pioneer groups’, see B de Witte, *Future Paths of Flexibility: Enhanced Cooperation, Partial Agreements and Pioneer Groups*, in in JW de Zwaan et al., *The European Union: An Ongoing Process of Integration – Liber Amicorum Alfred E Kellermann* (The Hague, T.M.C. Asser Instituut, 2004), 140.

99 F De La Serre & H. Wallace, *Flexibility and Enhanced Cooperation in the European Union: Placebo rather than Panacea*, Notre Europe, research and policy paper n. 2, (1997), 5.

#### *F. A Synthesis*

An analysis of differentiated integration within the EU confirms the claim made initially about the implications of the two contrasting visions of the European construction. Differentiated integration is often considered in a functional fashion; that is, with a focus on the opportunity to allow some members to proceed faster on the path of integration, without precluding the other members from joining them at a later stage. This type of explanation is helpful but incomplete.

There are four reasons why an exclusive concern with functional aspects fails to provide an adequate understanding of differentiated integration. First, even supposing that the arguments supporting differentiated integration are of functional nature, the question that arises is why there is a variety of forms, some within and some outside the provisions of the treaties. This explanation is therefore not sufficient.

More importantly, there is another side of the coin. The various forms of differentiated integration are susceptible of promoting different visions of the European construction. For example, whatever the original intent of the drafters of the EMU, it has allowed some members not to proceed towards the goal of the ‘ever closer union between the peoples of Europe’, though the rules they agreed are very different from those that would govern a more or less free trade area, that some British (but also Polish) politicians seem to wish.

Thirdly, an explanation that focuses only on functional or pragmatic considerations fails to devote adequate attention to the dynamics of power. It is not fortuitous, for example, that the UK has contrasted the idea that an enhanced cooperation could be launched without a unanimous decision. Nor is it fortuitous that some of the new members that are reluctant to engage in enhanced cooperation are afraid that, if they remain outside of it, they will be indirectly subject to the new rules without being able to influence their content, an aspect to which we shall return when considering the post-Brexit scenario.

Finally, paying attention to the functional features of differentiated integration can be helpful to understand whether integration may proceed, in a perspective that focuses on the conduct of the States. It will in no sense be sufficient from a perspective that instead focuses on individual and collective (as distinct from national) interests. Although the shift from general principles to values does not necessarily undermine the importance of the respect for the rule of law and fundamental rights, it can be observed that, by placing the focus on national traditions, some institutional safe-

guards have been weakened. This is the case, for example, of the independence of the judiciary in Poland.

## *V. Legal Mechanisms of Integration Beyond the EU*

With these *caveats* in mind, let us consider the forms of differentiated integration that involve other European countries. They include the treaties that are agreed by all the members of the EU with other groups of countries, such as the Treaty of Oporto establishing the EEA, or by some members with third countries, as it happens with the rules established under the Schengen Agreement. Space limits preclude an examination of other legal mechanisms, including those with the European countries that wish to become members of the EU, such as Serbia and Montenegro, and those with non-European countries that wish to establish a closer partnership with the EU, particularly in the Mediterranean area.<sup>100</sup>

### *A. A Single Market Beyond the Union: the European Economic Area*

What has been said earlier with regard to monetary policy raises the further question whether a similar asymmetry occurs with regard to the other main instrument of the EU, the single market. This question is interesting in itself, for an understanding of the legal mechanisms of integration beyond the EU and for its practical implications, because some observers suggest that the UK might be a member of the European Economic Area (EEA).

The standard account about the EEA highlights three main features: first, that the EEA is an area where persons, goods, services and capitals can circulate freely, which exists since 1 January 1994, upon entry into force of the Treaty of Oporto; second, that membership of EEA is open to EU countries as well as to the members of European Free Trade Area Association (Iceland, Liechtenstein and Norway); third, that EFTA members must adopt most EU legislation concerning the single market and, correspond-

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<sup>100</sup> See, for further analysis, R Wessel, Fragmentation in the Governance of EU External Relations: Legal Institutional Dilemmas and the New Constitution for Europe, in J.W. de Zwaan et al, *The European Union: An Ongoing Process of Integration – Liber Amicorum Alfred E Kellermann* (The Hague, T.M.C. Asser Instituut, 2004), 123.

ingly, are able to influence the content of such legislation by way of ‘decision-shaping’ processes at an early stage of EU legislation.

There is nothing basically wrong with this standard account. However, for an adequate understanding of the available options, at least two other aspects must be taken into consideration. On the one hand, while the forms of differentiation that were examined previously imply an institutional differentiation within the Union, the EEA is a regulatory regime for applying the rules governing the single market beyond its borders. Consequently, some non-EU countries have simply accepted large amounts of substantive EC/EU law. There is, therefore, an asymmetric relationship between their legal orders and that of the EU. On the other hand, within the other members of EEA, there is a difference between the paths followed by Norway and Switzerland. While Norway has negotiated through the EEA, Switzerland has not joined the EEA, but has entered into a series of bilateral agreements with the EU.

These findings support the following four conclusions: First, the EEA does not constitute a form of differentiated integration between the Member States of the EU. It is, rather, a form of cooperation between the EU and other European countries. Secondly and consequently, although it could be said that such cooperation might be beneficial to a further integration of non-EU members, this is just a potentiality. Meanwhile, it is a cooperation that is limited to the rules governing the Single Market and is, therefore, coherent also with the vision of a wide and loose union. Thirdly, such cooperation is based on a variety of legal sources, as it can be established either by accessing EFTA or by negotiating several bilateral agreements. Accordingly, referring to the EEA only provides a generic solution; that is, the devil is in the details. Finally, the asymmetry that has been noticed is relevant from a twofold viewpoint: theoretically, it confirms that relations between legal orders can be either symmetric or asymmetric; institutionally, it is problematic with regard to democratic standards.

### *B. Schengen’s Mixed Membership*

As observed initially, there are two distinct frames in the present analysis: one concerns the institutional mechanisms of differentiated integration within the EU and the other the legal mechanism of integration outside the Union. It might, therefore, come as a surprise that the rules of the Schenghen agreement are examined here, but this is not unjustified.

It can be helpful to begin by saying that, while the Maastricht Treaty allowed differentiated integration within a partially new area, that of mone-

tary policy, the Schengen Agreement of 1985 was more problematic, because its object was the regulation of free movement of persons, as distinct from citizens or workers. This was one of the pillars of the European Community, as it was envisaged by the Treaty of Rome in 1957; that is, a Community where the citizens of the Member States could freely travel. However, almost thirty years later, systematic controls of identity documents were still in place at the borders between most Member States, with the notable exception of the Benelux countries. It was precisely these countries, together with France and (West) Germany, which in 1985 signed the agreement aiming at progressively dismantling common border controls. The contracting parties agreed on the harmonization of their visa and asylum policies, allowing their nationals and other residents to cross borders without police controls.

This legal framework has been subsequently modified in three ways. First, in 1990 the Agreement was supplemented by the Schengen Convention, which established an area without border controls.

Secondly and more importantly, during the Intergovernmental Conference that drafted the Amsterdam Treaty (1997) all the Member States, except the UK and Ireland, agreed to incorporate the Schengen rules within the Union's legal framework. The Protocol annexed to the Treaty clarified that such incorporation was achieved with a view to developing more rapidly 'an area of freedom, security and justice'. It also noticed that Ireland and the UK had not signed the Schengen Agreement, though they could accept some of its provisions and could at any time request to take part in the entirety of the *acquis*.<sup>101</sup> Conversely, the Protocol mentioned the intent of Iceland and Norway to become bound by the Schengen rules. The form of 'cooperation'<sup>102</sup> that thus emerged was based on a 'mixed' membership. This feature has been confirmed by later agreements, for example with Switzerland. In brief, the enhanced cooperation that initially was promoted only by some members of the EU has been opened to other European countries.

Thirdly, the incorporation of the Schengen *acquis* allowed EU institutions to step in. In particular, the Council replaced the Executive Committee and the Court of Justice was enabled to exercise judicial review within

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101 Protocol integrating the Schengen *acquis* into the framework of the European Union, Article 4.

102 Protocol integrating the Schengen *acquis* into the framework of the European Union, Article 1.

certain limits,<sup>103</sup> which have mainly been eliminated by the Lisbon Treaty, together with the ‘three-pillars’ structure of the EU.<sup>104</sup> For example, the ECJ has found that the application of a rule set out by the Schengen Convention is incompatible with the right of free movement that stem from Community law for third country nationals who are family members of EU citizens.<sup>105</sup>

Once again, when considering differentiated integration, it is clear that the voluntary consensus of the State, of each State, is of central importance. Two elements are crucial in determining the nature of the voluntary consensus. First, the voluntary nature of the agreement is not vitiated by inequality in the bargaining power of the parties, because the rules that are incorporated have been set out only by some of them. On the one hand, as noticed by the Protocol’s Preamble, those rules ‘aimed at enhancing European integration’. Their goal was thus a deeper integration. On the other hand, though the *acquis* must be preserved, EU institutions can develop it. For example, they have established a European Border Surveillance System.<sup>106</sup> Second, with the Treaty of Amsterdam it has become clear that even with regard to one of the central elements of the EC, the free movement of persons, where Union’s action would have been justified, a deepened integration remains subject to the voluntary consensus of each State. It is in this sense and within these limits that the Schengen agreement has been considered as a sort of *interim* arrangement, in view of a communautarization of its rules.<sup>107</sup>

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103 Protocol integrating the Schengen *acquis* into the framework of the European Union, Article 2. For further analysis, see H Wallace, *Flexibility: A Tool for Integration or a Restraint on Disintegration?*, in K Neunreither & A Wiener (eds), *European Integration after Amsterdam: Institutional Dynamics and Prospects for Democracy* (Oxford, OUP, 2000) 175.

104 Article 276 TFEU keeps some limits, on which see P Craig, The Treaty of Lisbon: Process, architecture and substance, 33 Eur. L. Rev. (2008), 137, at 144.

105 ECJ, Case C-503/03, *Commission v Spain*, §§ 33-35. On the issues concerning non-EU nationals, see C Harlow & E Guild (eds), *Implementing Amsterdam: Immigration and Asylum* (Oxford, Hart, 2001) and GI Wolf, Efforts toward ‘An Ever Closer’ European Union Confront Immigration Barriers, 4 Indiana J. Global Leg. Stud. 223, 228 (1996), noting the increased perception of a ‘fortress Europe’.

106 See Regulation No 1052/2013 and the ruling of the ECJ in Case C-44/14, *Spain v. European Parliament and Council* (rejecting the action brought by Spain against the possibility that the UK is involved in the new regime).

107 See B De Witte, Chameleonic Member States: Differentiation by Means of Partial and Parallel Agreements, cit., 241.

### *C. A Europe of Concentric Circles: a 'Misleading Simple Idea'*

In the light of the remarks that have made thus far, another interesting and important question arises; that is, whether the various forms of interaction within and beyond the EU can be summarized by the referring to the idea of a 'Europe of concentric circles'.

As it has been observed for other terms, this metaphor has both a descriptive and a prescriptive side. Descriptively, it is noticed that some non-EU countries have accepted to apply the principles and rules of the single market, an aspect to which we will return later. Likewise, Turkey has accepted certain parts of EU law in the framework of the custom union that it agreed with the EU. Other Balkan countries have accepted part of the *acquis communautaire* and in particular the general principles of law developed by the ECJ, as is normally requested to the States that wish to become members of the EU. Conversely, the UK is not involved in the border-free Schengen area, which is so strategic for the freedoms of EU citizens to travel without visas or passports, and other five members of the EU followed it, including Ireland, which does not wish to take part in common actions in the field of defence. The general conclusion that is drawn from all this is that there is a greater differentiation of EU law than there was in the past. The description turns into a prescription, when it is observed that this is the inevitable price to pay for the construction of a larger area of peaceful cooperation in Europe.

There are, however, some difficulties with this irenic view of a Europe of concentric circles. First of all, the outer circle, that of non-EU countries, is far from being homogeneous, because some of them joined the EEA, while another have only agreed on a custom union.

Secondly, the inner circle – the EU – is itself differentiated not only with regard to monetary and fiscal issues. On the one hand, within the EU there are different views about the construction of the area of freedom, security and justice, as we have seen with regard to the Schengen *acquis*. Moreover, only fourteen Members have ratified the Convention of Prüm, which aims at strengthening police cooperation through exchange of information and, thus, security. On the other hand, there are very different views with regard to one of the main values upon which the EU is founded; that is, the respect for fundamental rights. When the last IGC discussed about the incorporation of the Charter of Fundamental Rights, some Member States dissented. A protocol added to the Lisbon Treaty now affirms that the Charter does not extend to Poland and the UK the 'ability' of the ECJ to 'find' that their 'laws, regulations or administrative provi-

sions, practice or actions' are inconsistent with the Charter.<sup>108</sup> Legal scholarship has expressed strong reservations concerning the legal value and effects of this Protocol, which on other hand reaffirms the obligations stemming from EU law, including its general principles and thus fundamental rights as they stem from the ECHR and common constitutional traditions.<sup>109</sup> A more critical remark might be that any attempt to limit the scope and effectiveness of individual rights, even indirectly, for example through a limitation of judicial independence, might lead to the destruction of the moral foundations on which the 'legal order of a new kind' has been built. Interestingly, this was precisely the point of attack of the Commission in respect of Polish legislation and the Court of Justice endorsed its argument. The Venice Commission, too, criticized certain measures taken by Polish policy-makers from the viewpoint of the Council of Europe's standards concerning the Rule of Law.<sup>110</sup>

For the sake of clarity, I am at present making no claim about the nature of this controversy and the measures that could be adopted in order to solve it. This is a complex question that must be considered on its own, not tangentially. The present aim is more limited. It is to enquire whether one can coherently construct a theory of differentiated integration that rests on the assumption that there is an inner and more integrated circle – the EU – and a an outer and less integrated circle. The conclusion that suggested here is that this is not plausible. Whatever its apparent appeal, the idea of a Europe of concentric circles is but another 'misleading simple idea'.<sup>111</sup>

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108 Protocol n. 30, Article 1 (1). See also Polish Declaration n. 61 on the Charter, affirming that the Charter does not affect in any way the Member States' capacity to legislate in the sphere of family law and public morality.

109 See J Ziller, *Les nouveaux traités européens: Lisbon et après* (La Découverte, 2005), 105; I Pernice, The Treaty of Lisbon and Fundamental Rights, in S Griller & J Ziller (eds), *The Lisbon Treaty. EU Constitutionalism without a Constitutional Treaty?* (Springer, 2008). See also P Craig, *The Treaty of Lisbon: Process, architecture and substance*, cit, 163 (observing the UK's insistence on the Protocol is 'problematic').

110 The Opinion was adopted by the Commission at its 113<sup>th</sup> session, on 8-9 December 2017.

111 F. De La Serre & H. Wallace, Flexibility and Enhanced Cooperation in the European Union: Placebo rather than Panacea, cit., 5.

### *E. Implications for the post-Brexit Scenario*

It is in the light of the various legal mechanisms just examined that the post-Brexit scenario will be considered. The Bill approved by the English Parliament to authorize the referendum (the European Union Referendum Act 2015), the referendum's outcome and the decision to trigger Article 50 TEU brought about major changes for the UK, 'a fundamental reorientation in ... law and policy',<sup>112</sup> as well as for the EU as a whole. Taken together with the magnitude of such changes, the evident lack of adequate awareness of the available institutional and legal options before the referendum took place, explain the difficulties with which policy makers are confronted.

Limits of space preclude treatment of several important issues concerning public policies in range of sectors including work and environment, security and trade with the rest of the world. The following discussion will focus on some issues concerning institutions and rights and will rest on an assumption, that is, it can rightfully be said that is 'axiomatic' that the future relations between the UK and the EU will be deeply affected by the content of the withdrawal agreement,<sup>113</sup> but at the same time the content of the agreement will be influenced by the nature of the relationship that can be envisaged. This applies even to the scenario characterized by the absence of an agreement (the 'no-deal'). That being the case, the UK would not leave just a wide range of policies, but also the Single Market, under which most of its trade in goods and services has taken place for almost fifty years. Absence of an agreement, at least about a transitional period, this would happen very quickly and would force the UK to use World Trade Organization rules. Whether such rules are more or less favourable to the UK is a question that requires specific treatment,<sup>114</sup> which is precluded by space limits. Suffice it to mention that WTO rules are by all means a vehicle of legal globalization, more than those of the EU.

The question that is more related with our previous analysis is another; that is, whether the UK may remain aligned with the EU, either within the Single Market or within the Custom Union (this scenario is often called

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112 M Dougan, Introduction, in Id (ed), *The UK after Brexit. Legal and Policy Challenges* (Intersentia, 2017), 1. For an account of the institutional consequences of Brexit, see P Craig, Brexit: A Drama in Six Acts, 41 Eur. Law Rev (2016), 447.

113 P Craig, Brexit and Relations Between the EU and the UK, in M. Dougan (ed.), *The UK after Brexit. Legal and Policy Challenges*, cit, 302.

114 See M Cremona, UK Trade Policy, in M Dougan (ed.), *The UK after Brexit. Legal and Policy Challenges*, cit, 247.

‘soft Brexit’, whatever the adequacy of this term). Some observers suggested that the UK might be involved in the single market as a member of the EEA.<sup>115</sup> There is no doubt that such a scenario could be economically beneficial for all, though in a different degree. It would also be beneficial to all individuals who have benefited of free movement and right of establishment.

However, it is not immune from difficulties. There is, first, the difficulty concerning the choice of legal instruments. As observed earlier, while Norway signed a single treaty with the EU, Switzerland chose to sign a set of agreements. Whatever the choice, the process of negotiation will tend to be long and cumbersome, as the experience of the last two years shows.

There is a further difficulty with this solution; that is, the close connection between the four freedoms of circulation of persons, goods, services and capitals. Of course, the UK may ask, as it did, to exclude the former, but the common position of the EU has been that those freedoms cannot be separated. For this reason, a scenario of a Europe ‘à la carte’ in this respect seems very unlikely. This might induce negotiators to consider a custom union. But this would severely limit the capacity of the UK to enter into relations with other countries. In other words, if this was the model to be followed, instead of bringing sovereignty home, as many supporters of the ‘Leave’ front argued during the political campaign, Britons would be subject to the rules established elsewhere, with a very limited influence on their contents.<sup>116</sup>

A further difficulty concerns enforcement mechanisms. Those who govern the UK constantly expressed their intent to be no longer subject to the jurisdiction of the Court of Justice. While this may be a politically legitimate purpose, institutionally it is not easy to understand how it could be achieved in the short run, because the EU Council’s negotiating policy is that the Court must have jurisdiction concerning the term of the agreement. Nor, in the medium term, is it easy to understand how a solution different from the one that exists in the context of the EEA could be meaningfully envisaged. It is true that the Council has not excluded an alternative mechanism of adjudication, provided that it offers equivalent guarantees of independence and impartiality. However, an elementary necessity of coherence within the EEA would run against anything – for example,

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115 This is a contentious political issue, as it is demonstrated by the fact that some shadow ministers of the Labour Party resigned after they joined the MPs who supported a rebel amendment to the Queen’s Speech calling for Britain to stay in the single market and customs union (*The Independent*, June 30, 2017).

116 P Craig, Brexit and Relations Between the EU and the UK, cit, 320-1.

arbitral procedures – that differs from the existing judicial mechanism, in its essence the Court of Justice integrated by judges coming from the other partners. Similarly, the interpretation given by the Court to the *acquis communautaire* would continue to have weight as a persuasive authority for national courts, when they elaborate their own interpretation of the nationalized *acquis*, in terms indicated by the Repeal Bill.

## VI. Conclusion

This essay has two major themes. The first is that there is a tension inherent between two political visions of Europe, one centred on the ‘ever closer union’ and the other on the achievement of a wide and loose union. Precisely because these are not simply different, but conflicting political visions of what the EU is and should be, it is necessary to be fully aware of their consequences, which is not always the case. A clear example is provided by the illusion, which emerges from the recent Declaration of Rome, that it is possible to live together harmoniously for a prolonged amount of time despite conflicting ideas about the ultimate ends of the European construction and, to some extent, about what its common values concretely mean. The second theme concerns differentiated integration. Although there is a variety of opinion about the desirability of those political visions of Europe, the institutional and legal mechanisms of integration that exist within and outside the EU must be considered in the light of the twin criteria of clarity and coherence. Such criteria are necessary requisites for a rigorous scientific analysis. They are also helpful for a better understanding of the institutional and legal options that are available for the relations between the UK and the EU in the post-Brexit period. Clarity and coherence, of course, do not replace passions and interests, which shape political preferences. They are nonetheless important.

