

Differentiated Integration and Disintegration in the EU: Brexit, the Eurozone Crisis, and Other Troubles

Menelaos Markakis*

ABSTRACT

This article looks at theories of differentiated integration and disintegration in the wake of the Eurozone crisis and the Brexit referendum. It advances four distinct, albeit inter-related, arguments with respect to these proposals. First, it could be contested whether certain policy areas should be pushed to the ‘outer core’ of European integration. Second, it would be very difficult to disentangle those areas to be pushed to the ‘outer core’ from those areas remaining in the ‘inner core’. Third, the legal and institutional arrangements for organizing differentiated integration are equally important. Fourth, even if the problems adumbrated above could be addressed satisfactorily, the emerging arrangements for differentiated integration would differ little from the degree of flexibility or variation that already exists within some of those areas. Brexit may be viewed as an opportunity for reform to ‘fix’ those issues that are regarded as problematic in the design or functioning of the EU. Should it appear desirable to pursue differentiated integration, the better course of action would be to build on those opportunities for differentiated integration that are offered by the EU Treaties. Any forthcoming Treaty revision to take stock of Brexit could be used to give added impetus to differentiated integration.

INTRODUCTION

Debates about differentiated integration are said to be ‘among the rituals of European integration.’¹ ‘Whenever the EU enters a critical stage, politicians and academic observers evoke the option of “multiple speeds”, “concentric circles” or related terminology and call upon some Member States to proceed towards closer integration without participation of others.’²

* Assistant Professor of International and European Union Law at Erasmus University Rotterdam & University of Oxford. The author is the recipient of the EUR fellowship by Erasmus University Rotterdam. I am grateful to Federica Violi, Francesco Montanaro, the anonymous reviewers, and the participants of the conference on ‘The Era of Disintegration: Taking Stock of the Dynamics of International Economic Governance in the First Two Decades of the 21st Century’ held at Erasmus University Rotterdam for their helpful comments. The usual disclaimer applies.

1 Daniel Thym, ‘Competing Models of Understanding Differentiated Integration’, in Bruno De Witte, Andrea Ott and Ellen Vos (eds), *Between Flexibility and Disintegration: The Trajectory of Differentiation in EU Law* (Cheltenham, UK; Northampton, MA: Elgar Publishing, 2017), 9–27, at 28.

2 *Ibid.*, at 28.

The EU's response to the financial and public debt crisis and the prospect of the UK's departure from the EU have once again sparked a debate on the desirability of differentiated integration in the EU.³ They have further prompted a much broader question regarding the future of European integration more generally.⁴ There is a plethora of calls in the relevant literature for differentiated integration, multi-speed integration, or even disintegration. Depending on the model one subscribes to, this would mean that the Member States would not participate in all policy areas or projects; or that they would approach the commonly agreed target at a different speed; or even that certain powers conferred on the EU in the treaties would be returned to the Member States. A combination of these models also appears possible. It should be noted from the outset that the terminology used varies widely from one study to another, and that differentiated integration as a field of study is, in fact, itself fragmented.⁵ The nomenclature invariably differs, but the core premise of those papers forming the focus of this article may be summarized as follows: the emerging patterns of geographical fragmentation and/or the (socio-) economic heterogeneity within the EU (or the Eurozone) are such that they warrant variable geometry or integration *à la carte* in the EU.⁶

Surveying the history of European integration, Daniel Thym distinguishes between three models or ideal types underlying the debate on differentiated integration: 'multiple speeds'; 'federal core Europe'; and 'flexibility *à la carte*'.⁷ From the perspective of this paper, these are helpful for analytical purposes, as well as in order to demonstrate that different authors may disagree over the course of European integration and the finality of the European project.⁸ These models or ideal types are not mutually exclusive, and different articles or studies often combine elements of more than one approach.⁹

More specifically, the 'multiple speeds' model connotes that 'all Member States will be bound by the final objective, whose realisation is phased in gradually'.¹⁰ 'It is a characteristic feature of "multiple speeds" to conceive differentiation as a transitional phenomenon in response to allegedly objective distinctions.'¹¹ 'Economic discrepancies, not political will, are meant to guide the distinction among Member States.'¹²

3 For the history of differentiated integration in the EU, see among many others Bruno De Witte, 'Variable Geometry and Differentiation as Structural Features of the EU Legal Order', in Bruno De Witte, Andrea Ott and Ellen Vos (eds), *Between Flexibility and Disintegration: The Trajectory of Differentiation in EU Law* (Cheltenham, UK; Northampton, MA: Elgar Publishing, 2017), 9–27; Daniel Thym, above n 1, 28–75.

4 European Commission, 'White Paper on the Future of Europe: Reflections and Scenarios for the EU27 by 2025', COM(2017) 2025, 1 March 2017, ec.europa.eu/commission/sites/beta-political/files/white_paper_on_the_future_of_europe_en.pdf (visited 31 December 2019).

5 For an extensive review of the relevant literature, see Benjamin Leruth, Stefan Gänzle and Jarle Trondal, 'Exploring Differentiated Disintegration in a Post-Brexit European Union' (2019) 57 *Journal of Common Market Studies* 1013.

6 Menelaos Markakis, *Accountability in the Economic and Monetary Union: Foundations, Policy, and Governance* (OUP, 2020) 135.

7 Daniel Thym, above n 1, at 29.

8 *Ibid.*, at 29.

9 *Ibid.*, at 29.

10 *Ibid.*, at 30.

11 *Ibid.*, at 30.

12 *Ibid.*, at 30.

Instead, the rationale underpinning treaties on ‘federal core Europe’ is ‘to retain the momentum in support of closer integration and to forge ahead with those who are willing to do so.’¹³ ‘Proposals on how to implement the “federal core Europe” idea . . . usually either focus upon an activation of the general mechanism for enhanced cooperation, support Treaty change in order to deepen integration (in combination with opt-outs for reticent Member States) or call for the adoption of international satellite treaties outside the EU framework.’¹⁴ ‘The principled idea to move towards an (often vague) vision of federal Europe distinguishes the “federal core Europe” model ideal typically from “flexibility à la carte”.’¹⁵ In this connection, it is explained by Thym that:

Advocates of ‘federal core Europe’ and ‘flexibility à la carte’ may agree on the way forward (differentiation), but they disagree fundamentally in their understanding of the driving forces and the ultimate objective of the European project. While the ‘core Europe’ camp pursues an (often vague) vision of a *finalité fédérale*, supporters of ‘flexibility à la carte’ want to orientate European integration at the national interest. . . . Their core impetus is to reject the federal vision and to emphasise a principled freedom of the Member States to decide upon the degree of participation in the EU, mirroring intergovernmental international relations theory. The Union appears as a forum of international cooperation, in which Member States may participate if it suits their mutual interests or from which they may abstain if that is not the case.¹⁶

In keeping with the themes of this special issue, insofar as it could be said to be true that there is a widespread feeling that the regulatory and institutional architecture governing international economic relations is not working well, the same ‘feeling’ is evident in regional economic integration organizations (*in casu*, the EU and notably the Eurozone). The root cause, in this case, is divergence, but also the recent financial and public debt crisis, the legacy of which is very much felt to this day. The EU is simultaneously facing multiple—one would say existential—crises, which—taken together—may aggravate dissatisfaction with EU affairs. What is more, the dominant perception is that the legal and institutional design of the EU (or, as the case may be, the Eurozone) may impede the EU from effectively addressing the said problems and making its voice heard in the world.

Seen in this light, the reasons for the resurgence of interest in differentiated integration or variable geometry are not hard to divine. They are rooted in the features of differentiation which have rendered it attractive throughout the history of the EU. Bruno De Witte helpfully explains that:

The functional reason is that variable geometry has proved essential for allowing European integration to proceed. Widening, deepening and uniformity could not go together. The choice for widening-with-deepening of the integration process, a choice that was repeatedly made in the past 25 years of the EU’s existence, led to sacrificing the aspiration

13 Ibid, at 32.

14 Ibid, at 34.

15 Ibid, at 34.

16 Ibid, at 34–35.

to a uniform legal order. But differentiation is also normatively attractive since it allows for the diverse preferences of national governments and national public opinions to be accommodated. Some countries can decide to move ahead with the European integration process in a given field without being stopped by the more reluctant countries, but also without forcing the latter to participate in new cooperation ventures.¹⁷

This article focuses on theories of differentiated integration as well as disintegration in the wake of the Eurozone crisis and the Brexit referendum. There is a rich and diverse literature on differentiated integration in the EU.¹⁸ Differentiated integration may be seen as a means to avoid disintegration; or, somewhat more pessimistically, as potentially paving the way for disintegration. This article is not a literature review. It instead advances the current author's own view on these issues, albeit one that is informed by existing scholarship. More specifically, this article uses Brexit and the Eurozone crisis as a springboard to discuss theories of differentiated integration and/or disintegration in the EU. Accordingly, the focus is on proposals that were made in the wake of the Euro crisis and the Brexit referendum regarding differentiated integration or disintegration in the EU. 'What is new about recent developments . . . is the pertinence and visibility of differentiated integration as a result of the euro crisis. It is no longer a peripheral occurrence, but it takes centre stage in legal and political debates.'¹⁹

This article is structured as follows. The discussion begins with the proposals for differentiated integration and/or disintegration that were made in the relevant literature in the wake of the Eurozone crisis and the Brexit referendum. The focus then shifts to the current author's own views regarding the problems (or issues) that these theories or proposals give rise to. Moving beyond the obvious problems in terms of 'the cohesion of the EU' and 'the principle of uniform rights and duties of states',²⁰ it highlights four key issues with respect to these theories. First, it could be contested whether certain policy areas should be pushed to the 'outer core' of European integration. Second, it is argued that it would be very difficult to disentangle those areas to be pushed to the 'outer core' from those areas remaining in the 'inner core'. Third, the legal and institutional arrangements for organizing differentiated integration are equally important. Fourth, it is argued that even if the problems adumbrated above could be addressed satisfactorily, the emerging arrangements for differentiated integration would differ little from the

17 Bruno De Witte, above n 3, at 10.

18 See, just in terms of monographs and edited collections, Filip Tuytschaever, *Differentiation in European Union Law* (Oxford: Hart Publishing, 1999); Gráinne de Búrca and Joanne Scott (eds), *Constitutional Change in the EU: From Uniformity to Flexibility* (Oxford; Portland, Or.: Hart Publishing, 2000); Bruno De Witte, Dominik Hanf and Ellen Vos (eds), *The Many Faces of Differentiation in EU Law* (Antwerpen; Oxford: Intersentia, 2001); Kenneth Dyson and Angelos Sepos (eds), *Which Europe? The Politics of Differentiated Integration* (Basingstoke: Palgrave Macmillan, 2010); Dirk Leuffen, Berthold Rittberger and Frank Schimmelfennig, *Differentiated Integration: Explaining Variation in the European Union* (Basingstoke: Palgrave Macmillan, 2013); Bruno De Witte, Andrea Ott and Ellen Vos (eds), *Between Flexibility and Disintegration: The Trajectory of Differentiation in EU Law* (Cheltenham, UK; Northampton, MA: Elgar Publishing, 2017); Christian Schweiger and Jose Magone (eds), *The Effects of the Eurozone Sovereign Debt Crisis: Differentiated Integration between the Centre and the New Peripheries of the EU* (Routledge, 2017); Stefan Gänzle, Benjamin Leruth and Jarle Trondal (eds), *Differentiated Integration and Disintegration in a Post-Brexit Era* (Routledge, 2019).

19 Daniel Thym, above n 1, at 28.

20 Bruno De Witte, above n 3, at 16.

degree of flexibility or variation that already exists within some of those areas. The final section will argue that Brexit may be viewed as an opportunity for reform so as to ‘fix’ some of those issues that are regarded as problematic in the design or functioning of the EU. It will be concluded that, should it appear desirable to pursue differentiated integration, the better course of action would be to build on those opportunities for differentiated integration that are already offered by the EU Treaties. Moreover, any forthcoming treaty revision to take stock of Brexit could be used to give added impetus to differentiated integration.

I. THE EUROZONE CRISIS, BREXIT, AND THE DEBATE ON DIFFERENTIATED INTEGRATION IN THE EU

A. The Eurozone crisis and the revamped interest in differentiated integration

The Economic and Monetary Union (EMU) is one of those policy fields of the EU that are marked by significant differentiation. First of all, it is well known that not all the EU Member States have adopted the single currency, the euro. Only 19 of the 28 EU Member States are part of the single monetary policy. Of those nine non-Eurozone Member States, the UK and Denmark have an opt-out from EMU, meaning that they are under no legal obligation to adopt the euro.²¹ Sweden has what is known as a *de facto* opt-out, following a negative referendum on membership of the currency union in 2003. The other non-Eurozone Member States (in treaty lingo: ‘Member States with a derogation’) have simply not (yet) met the conditions for joining the Eurozone.²²

What are the legal and institutional implications of being outside the Eurozone?²³ Take the position of the UK for example. A whole raft of EU primary law provisions on EMU do not apply to the UK, and the UK’s voting rights are suspended in a number of procedures that strictly concern Euro area Member States.²⁴ The UK has kept its own currency, and the Bank of England has retained its powers in the field of monetary policy.²⁵ As regards economic and fiscal policy, the UK indeed participates in economic policy coordination²⁶ and can also be subject to an Excessive Deficit Procedure if its deficit and debt figures shoot through the roof.²⁷ However, the EU institutions do not have the power to impose sanctions in order to compel the UK

21 Protocol (No 15) on certain provisions relating to the United Kingdom of Great Britain and Northern Ireland; Protocol (No 16) on certain provisions relating to Denmark.

22 See further Article 140 TFEU; and Protocol (No 13) on the convergence criteria.

23 See generally Stefaan Van den Bogaert and Vestert Borger, ‘Differentiated Integration in EMU’, in Bruno De Witte, Andrea Ott and Ellen Vos (eds), *Between Flexibility and Disintegration: The Trajectory of Differentiation in EU Law* (Cheltenham, UK; Northampton, MA: Elgar Publishing, 2017), 209–36; Michelle Chang, ‘Brexit and the EU Economic & Monetary Union: From EMU Outsider to Instigator’, in Federico Fabbrini (ed), *The Law & Politics of Brexit* (Oxford: OUP, 2017), 163–82.

24 Protocol (No 15) on certain provisions relating to the United Kingdom of Great Britain and Northern Ireland, paras 4–10.

25 *Ibid.*, para 3.

26 This is with the exception of ‘the adoption of the parts of the broad economic policy guidelines which concern the euro area generally’: *ibid.*, para 4.

27 See generally European Commission, ‘United Kingdom’, <https://ec.europa.eu/info/business-economy-euro/economic-and-fiscal-policy-coordination/eu-economic-governance-monitoring-prevention-correcti>

authorities to follow their suggestions. Various EU secondary law measures (or non-EU legal measures adopted by a subset of Member States) do not apply to the UK either: parts of ‘six-pack’²⁸ and the whole of ‘two-pack’ legislation,²⁹ which reformed the EU economic governance framework in response to the crisis, are only addressed to Euro area Member States.³⁰ The UK did not sign the Fiscal Compact, which complements the EU’s fiscal rules,³¹ and it is not part of the EU’s permanent crisis fund (the European Stability Mechanism).³² Furthermore, it does not participate in the Banking Union, which has centralized the arrangements for the supervision and resolution of banks.³³ It did not sign the intergovernmental agreement on the transfer and mutualization of

on/stability-and-growth-pact/corrective-arm-excessive-deficit-procedure/closed-excessive-deficit-procedures/united-kingdom_en (visited 25 October 2018).

- 28 Council Directive 2011/85/EU of 8 November 2011 on requirements for budgetary frameworks of the Member States [2011] OJ L306/41, Article 8, provides that the obligation to have in place numerical fiscal rules that effectively promote compliance with the specific reference values for the excessive deficit, and the related obligation for the multiannual objectives in medium-term budgetary frameworks to be consistent with such rules, shall not apply to the United Kingdom. Regulation (EU) 1173/2011 of the European Parliament and of the Council of 16 November 2011 on the effective enforcement of budgetary surveillance in the euro area [2011] OJ L306/1 and Regulation (EU) 1174/2011 of the European Parliament and of the Council of 16 November 2011 on enforcement measures to correct excessive macroeconomic imbalances in the euro area [2011] OJ L306/8 only apply to Euro area Member States. Furthermore, Beukers and van der Sluis rightly note that different Stability and Growth Pact rules apply to Member States with a derogation: see Thomas Beukers and Marijn van der Sluis, ‘The Variable Geometry of the Euro Crisis: A Look at the Non-Euro Area Member States’, 12 June 2015, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2616717 (visited 14 November 2018), at 4.
- 29 Regulation (EU) 472/2013 of the European Parliament and of the Council of 21 May 2013 on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability [2013] OJ L140/1; Regulation (EU) 473/2013 of the European Parliament and of the Council of 21 May 2013 on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States in the euro area [2013] OJ L140/11.
- 30 See generally Menelaos Markakis, above n 6, chs 2–3.
- 31 Treaty on Stability, Coordination and Governance in the Economic and Monetary Union between the Kingdom of Belgium, the Republic of Bulgaria, the Kingdom of Denmark, the Federal Republic of Germany, the Republic of Estonia, Ireland, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Italian Republic, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Grand Duchy of Luxembourg, Hungary, Malta, the Kingdom of the Netherlands, the Republic of Austria, the Republic of Poland, the Portuguese Republic, Romania, the Republic of Slovenia, the Slovak Republic, the Republic of Finland and the Kingdom of Sweden, https://www.consilium.europa.eu/media/20399/st00tscg26_en12.pdf (visited 31 October 2018).
- 32 Treaty establishing the European Stability Mechanism between the Kingdom of Belgium, the Federal Republic of Germany, the Republic of Estonia, Ireland, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Italian Republic, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Grand Duchy of Luxembourg, Malta, the Kingdom of the Netherlands, the Republic of Austria, the Portuguese Republic, the Republic of Slovenia, the Slovak Republic and the Republic of Finland, https://www.esm.europa.eu/sites/default/files/20150203_-_esm_treaty_-_en.pdf (visited 31 October 2018).
- 33 Council Regulation (EU) 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions [2013] OJ L287/63 (SSM Regulation); Regulation (EU) 806/2014 of the European Parliament and of the Council establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010 [2014] OJ L225/1 (SRM Regulation).

contributions to the Single Resolution Fund either, which is put in place to fund the resolution of failing banks.³⁴

The EU's response to the financial crisis has sparked a debate on the desirability of differentiated integration in the EU-28. One of the most prominent writers on European integration in the aftermath of the crisis is Giandomenico Majone. His paper, which was published in 2012 and has now evolved into a fully fledged book,³⁵ argues that '... an important lesson [from the crisis] concerns the limits of the one-size-fits-all approach to integration', with monetary union being 'the most significant application of this approach.'³⁶ He highlights 'the level of socioeconomic heterogeneity in the enlarged Union' and argues that 'if countries have significantly different needs and hence different national priorities, the policies that maximize aggregate welfare ought to be different rather than harmonized.'³⁷ With regard to the ambitious plans to reform the EMU,³⁸ Majone believes that:

Effectively, the defenders of EMU in its present form assume that the debt crisis can be solved only by enlarging the democratic deficit of the EU to a point where, given the state of public opinion today, it becomes politically unsustainable: a democratic default. They refuse to admit the need of more flexible patterns of integration.³⁹

His argument is premised on the assumption that:

Actually, monetary union has split the EU into several camps—perhaps permanently. . . . [W]e now have a Union divided into three groups: the members of the euro zone; the de jure (UK, Denmark) and de facto (Sweden) opt-outs; and the member states waiting (with less and less enthusiasm) to be admitted to the euro zone. A fourth group may emerge in the near future . . . the future drop-outs of the euro zone—countries with a large public debt which in the next five to ten years may have to give up the euro. . . . But even fiscally sound members of the Eurozone could in the future decide to give up the common currency. The reason is that a one-size-fits-all monetary policy may entail costs

- 34 Agreement between the Kingdom of Belgium, the Republic of Bulgaria, the Czech Republic, the Kingdom of Denmark, the Federal Republic of Germany, the Republic of Estonia, Ireland, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Republic of Croatia, the Italian Republic, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Grand Duchy of Luxembourg, Hungary, the Republic of Malta, the Kingdom of the Netherlands, the Republic of Austria, the Republic of Poland, the Portuguese Republic, Romania, the Republic of Slovenia, the Slovak Republic and the Republic of Finland on the transfer and mutualisation of contributions to the Single Resolution fund, <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%208457%202014%20INIT> (visited 10 December 2019).
- 35 Giandomenico Majone, *Rethinking the Union of Europe Post-Crisis: Has Integration Gone Too Far?* (Cambridge; New York: CUP, 2014).
- 36 Giandomenico Majone, 'Rethinking European Integration after the Debt Crisis', UCL European Institute Working Paper 3/2012, https://www.ucl.ac.uk/drupal/site_european-institute/sites/european-institute/files/working-paper-debt-crisis.pdf (visited 2 November 2018), at 7.
- 37 *Ibid.*, at 8–9.
- 38 See generally Paul Craig and Menelaos Markakis, 'EMU Reform', in Fabian Amtenbrink and Christoph Herrmann (eds), *The EU Law of Economic and Monetary Union* (forthcoming, OUP, 2020), ch 42, also available at: <https://papers.ssrn.com/abstract=3239190> (visited 15 December 2019).
- 39 Giandomenico Majone, above n 36, at 21.

too high to make monetary union acceptable in terms of an economic calculus of benefits and costs.⁴⁰

As such, ‘. . . instead of accelerating the movement towards political union, EMU has made differentiated integration, of one type or another, practically unavoidable.’⁴¹

Drawing on the economic theory of clubs, Majone makes the case for variable geometry or integration *à la carte* in the EU.⁴² This model of integration connotes, in Majone’s own words, that ‘no one must participate in everything.’⁴³ As such, it is argued that ‘there would be common European policies in areas where the member states have a common interest, but not otherwise.’⁴⁴

Also writing at the height of the Euro crisis, Jean-Claude Piris (2011) argues that if the existing possibilities of differentiated integration prove inadequate to solve the problems facing the EU, ‘then the option of a “Two-speed Europe” should be considered, with a group of Member States playing the role of an “avant-garde”.’⁴⁵ This could be achieved in a ‘softer’ or a ‘bolder’ form, the principal default line between these two forms of differentiated integration being the existence of a legal instrument establishing a ‘group’ or ‘avant-garde’ of Member States in the latter case.⁴⁶ Such a treaty would include ‘very wide potential areas of cooperation’, such as the economic component of EMU; security and defence policy; former third pillar matters; social policy; taxation policy; and so on.⁴⁷

Piris offers a number of arguments as to why a ‘two-speed Europe’ is the best way forward. These echo the reasons provided in the introduction to this article for the resurgence of interest in theories of differentiated integration. First, ‘the two branches of EMU must be rebalanced’ and ‘in order to do that, it would be necessary to harmonize somewhat the budgetary and economic policies of those states that have the euro as their currency.’⁴⁸ Second, ‘the fact remains that an EU composed of twenty-seven heterogeneous Member States has proven that it is not able to function efficiently within its present legal framework and that it is not able to answer the needs, interests and wishes of all its Member States at the same time.’⁴⁹ Third, ‘[a] two-speed Europe might also help to try and regain the support of European citizens by presenting them with a bold and coherent political project.’⁵⁰

B. Brexit and differentiated integration

It being a real-life example of disintegration in the EU-28, Brexit has sparked a renewed interest in theories of differentiated integration, the assumption again being that not all

40 Ibid, at 21–22.

41 Ibid, at 22.

42 Ibid, at 23–30.

43 Ibid, at 22.

44 Ibid, at 22. See further Giandomenico Majone, above n 35.

45 Jean-Claude Piris, *The Future of Europe: Towards a Two-Speed EU?* (Cambridge: CUP, 2011) at 52.

46 Ibid, at 104–05.

47 Ibid, at 122–26.

48 Ibid, at 102.

49 Ibid, at 103.

50 Ibid, at 103.

Member States are willing to participate in all EU policy areas and/or to pursue deeper integration within those or additional areas.⁵¹ After all, it will be recalled that the UK initially sought to renegotiate its relationship with the EU, an effort which led to former Prime Minister David Cameron's ill-fated New Settlement Agreement.⁵² Demertzis, Pisani-Ferry, Sapir, Wieser and Wolff (2018) argue that a reform of EU governance is 'urgent' in order 'to better deal with politically-sensitive topics, to manage greater external challenges and because future EU enlargement will increase the diversity of the bloc's membership'.⁵³ Their blueprint for the EU-27 is as follows:

Two options would be a Europe of concentric circles and a Europe of 'clubs', but the former would cement tensions between the inner and the outer circles, while the latter would lead to unclear structures and an end to cohesion. However, a governance model could combine the two approaches. The model would be based on a strong 'bare-bones EU' formed by the single market, trade and accompanying policies, the European institutions, treaties, rule of law and a commitment to fundamental EU values. Three policy areas would be completely moved into 'clubs' while remaining based on the bare-bones legal and institutional structure: economic and monetary union; Schengen and asylum policy; and foreign and security policy and neighbourhood policy. Club membership would be optional but once in, countries would have to accept the rules and there would be high hurdles to leaving. Finally, a ring of friends would surround the bare-bones EU, based on very close economic relationships and some multilateral discussion elements, but no formal votes.⁵⁴

Also writing after the Brexit fallout, Vivien Schmidt (2019) boldly claims that: 'The future of Europe will be one of differentiated integration. The question is not whether but how that differentiation will develop, since the EU is already differentiated.'⁵⁵ She outlines the challenges posed by the many crises the EU is currently facing (viz. 'the

- 51 It is further possible, from a theoretical standpoint, for a Member State to remain in the EU whilst exiting from certain policies, according to what may be termed as 'differentiated disintegration': see Benjamin Leruth, Stefan Gänzle and Jarle Trondal, above n 5, at 1021, building on theories from Dirk Leuffen, Berthold Rittberger and Frank Schimmelfennig, above n 18; Frank Schimmelfennig, 'Brexit: Differentiated Disintegration in the European Union' (2018) 25 *Journal of European Public Policy* 1154.
- 52 A New Settlement for the United Kingdom within the European Union [2016] OJ C691/1. See generally Fabian Amtenbrink, Anastasia Karatzia and René Repasi, 'Renegotiation by the United Kingdom of its Constitutional Relationship with the European Union: Issues Related to the Economic Governance', Study for the AFCO Committee (Brussels: European Parliament, 2016), [http://www.europarl.europa.eu/RegData/etudes/STUD/2016/556959/IPOL_STU\(2016\)556959_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/556959/IPOL_STU(2016)556959_EN.pdf) (visited 9 December 2019); Paul Craig, 'Brexit: A Drama in Six Acts' (2016) 41 *European Law Review* 447.
- 53 Maria Demertzis, Jean Pisani-Ferry, André Sapir, Thomas Wieser and Guntram Wolff, 'One Size Does Not Fit All: European Integration by Differentiation', 3 September 2018, <http://bruegel.org/2018/09/one-size-does-not-fit-all/> (visited 6 November 2018), at 1.
- 54 *Ibid.*, at 1. It should be noted that the 'rule of law crisis' in Hungary and Poland goes to show that current Member States may even disagree on the values on which the European project is founded. See most recently the Polish judges cases: ECJ, Case C-619/18 (Grand Chamber) *European Commission v Republic of Poland* ECLI:EU:C:2019:531; ECJ, Case C-192/18 (Grand Chamber) *European Commission v Republic of Poland* ECLI:EU:C:2019:924; ECJ, Joined Cases C-585/18, C-624/18 and C-625/18 (Grand Chamber) *A. K. and Others v Sqd Najwyższy* ECLI:EU:C:2019:982.
- 55 Vivien Schmidt, 'The Future of Differentiated Integration: A 'Soft-Core,' Multi-Clustered Europe of Overlapping Policy Communities' (2019) 17 *Comparative European Politics* 294, at 294.

Eurozone crisis, the refugee crisis, and Brexit, not to mention security crises after terrorist attacks or new conflicts on the borders'), as well as 'the political challenges resulting from the increasing politicization of the EU at the bottom, in national politics, from the bottom-up, as political pressures on EU actors, and at the top, in the interrelationships among EU actors'.⁵⁶ In her opinion, 'The problem with a *two-speed* Europe is that it doesn't reflect the realities of what is already a *multi-speed* Europe, with different member-states participating in different policy communities. The problem with a hard-core Europe is that it might be difficult to make it work, given diverging ideas and interests among the main countries expected to coalesce.'⁵⁷ Her blueprint for the EU is as follows:

Rather than a small *hard-core* of member-states engaged together in deepening across policy areas or member-states going forward in many different directions, it is possible to think about the EU's future organization in terms of a *soft-core* Europe. This is a Europe made up of overlapping clusters of member-states participating in the EU's many different policy communities, all administered by a single set of EU institutions, with most member-states being involved in most areas (beyond the Single Market, to which all belong by definition), even if some will have more limited involvement. Within this soft-core Europe, some policy areas still require deeper integration, such as security and defense policy as well as migration and refugee policy, while others arguably require less. The Eurozone . . . demands greater deconcentration and decentralization, to give back to the member-states control over their economic policies, which alone could combat the deteriorating politics 'at the bottom' in which citizens vote for populists out of frustration for their lack of voice and choice. Thinking of the future of the EU in this way is best adapted to the already high level of EU differentiation. It is also perhaps the only way to improve the EU's problems with regard to democratic legitimacy while dealing with the EU's many faceted politicizations.⁵⁸

Juxtaposing her model with the proposals by Demertzis, Pisani-Ferry, Sapir, Wieser and Wolff (2018), Schmidt argues that:

Such a 'soft-core' vision of the EU is not far from the conceptualization of the EU as made up of 'clubs' . . . The main difference is that my soft-core vision sees members of all such policy communities involved in ongoing processes of interaction and sees differential possibilities for 'club' integration with regard to EMU.⁵⁹

C. How to decide on the 'optimal' way forward?

These theoretical perspectives offer a plethora of valuable suggestions for the EU moving forward and have added a great deal to our understanding of differentiated integration overall. There are nevertheless at least four key questions or issues that merit to be highlighted with respect to those (as well as other) contributions that are making the case for differentiated integration. These will now be addressed in turn.

56 Ibid, at 296–301.

57 Ibid, at 306.

58 Ibid, at 306.

59 Ibid, at 307–08.

First of all, it could be contested whether certain areas should be pushed to the ‘outer core’ of European integration. In setting out this argument, it may be helpful to focus initially on foundational matters and shift the attention to more detailed issues thereafter. What is the rationale for conferring powers on the EU in those areas that are currently included in the EU Treaties? It is rightly argued by Weatherill that:

The EU is a place to manage the interdependence of States in Europe. This mission is underpinned by a democratic understanding, in the sense that the EU restrains States from taking decisions that impose costs on nationals of other States who have no political voice in the first State’s decision-making process, as well as a more crude sense that Europe operating collectively is able to exert influence and power that exceeds the sum of its parts.⁶⁰

‘This agenda of “taming” States to prevent them harming their neighbours, allied to a capacity for collective problem-solving, counsels for the European Union’s role to be limited to matters where it is able to fulfil those expectations.’⁶¹ Equally, the democratic case for the EU should not be overstated, as the EU too ‘suffers from serious – though different – flaws when judged from the perspective of democratic legitimacy.’⁶²

What is commonly missing from most insights on differentiated integration or disintegration is an acknowledgment that the rules or policy areas that scholars wish to push on the outer circle of European cooperation either prevent States from inflicting harm on one another or encapsulate the need to act in common in order to solve those problems that may only be (better) solved on the international plane.⁶³ It is not clear why it is that areas such as migration or elements of security and foreign policy should be pushed onto the outer core of European integration, such that these issues remain inadequately addressed. If anything, a weakened capacity to address these as well as other such issues collectively would further weaken the EU’s legitimacy. This is so notwithstanding the argument that policy preferences between the EU Member States may diverge considerably regarding the optimal solution to these matters. In this connection, it should further be noted that (certain) Member States are granted opt-outs from these areas,⁶⁴ and/or the option not to participate at all.⁶⁵

60 Stephen Weatherill, *Law and Values in the European Union* (Oxford: OUP, 2016) 20.

61 *Ibid.*, at 8.

62 *Ibid.*, at 8.

63 *Ibid.*, at 13.

64 See, for example, the Schengen regime and the complex opt-outs for the United Kingdom and Ireland; and Denmark respectively: Protocol (No 19) on the Schengen *acquis* integrated into the framework of the European Union; Protocol (No 21) on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice; Protocol (No 22) on the position of Denmark.

65 See, for example, the Permanent Structured Cooperation in the field of Common Security and Defense Policy: Article 42 TEU; and Protocol (No 10) on permanent structured cooperation established by Article 42 of the Treaty on European Union. See also Council Decision (CFSP) 2017/2315 of 11 December 2017 establishing permanent structured cooperation (PESCO) and determining the list of participating Member States [2017] OJ L331/57. The Member States participating in PESCO are: Belgium, Bulgaria, the Czech Republic, Germany, Estonia, Ireland, Greece, Spain, France, Croatia, Italy, Cyprus, Latvia, Lithuania, Luxembourg, Hungary, the Netherlands, Austria, Poland, Portugal, Romania, Slovenia, Slovakia, Finland, and Sweden. The United Kingdom, Denmark and Malta are not participating.

Moreover, as regards specifically the Eurozone, it is a common feature of writings on differentiated integration and/or disintegration in the EU to argue in favour of removing the EMU from those core policy areas that every Member State should—eventually—be a part of. However, one ought to ask when it is that countries should form a single currency area. It is well known that forming a currency area entails benefits as well as costs. Optimum currency area (OCA) theories seek to explain when it is that countries should share the same currency.⁶⁶ It is important to remember that the OCA theory ‘does not really deal with optimality (what is best?)’, and that it ‘does not even provide yes or no answers to the central question’, as the criteria employed ‘are never black or white.’⁶⁷ ‘[T]hey are more or less fulfilled’, depending on the currency area concerned.⁶⁸ As is also the case with the conferral of other competences on the EU from the Member States,⁶⁹ there is a complex calculus of benefits and costs, and the two should be balanced against one another. However, this type of nuanced analysis is sometimes missing from writings on disintegration in EMU, which tend to rely heavily on the current political climate as well as on what they perceive popular opinion (in different countries?) to demand. Seen in this light, assuming that one were in favour of returning some powers in this area to the Member States, it would perhaps be more preferable to suggest that ‘[i]t would also be necessary to present plausible scenarios of how the economic over-integration of the monetary union could be reduced, and national macroeconomic control could be restored without incurring prohibitive costs of disintegration.’⁷⁰

Second, assuming that the case could be made that certain areas should be pushed onto the ‘outer core’ of European integration, it is argued that it would be very difficult to disentangle those policy areas from those fields remaining at the ‘core’ or the ‘bare-bones EU’ (which includes the single market, the common commercial policy, core EU values, and so on). For one, the preceding discussion on OCA theory serves to highlight the proximate connection between the internal market and the single currency. Several of the criteria for OCAs point to this direction: labour mobility, product diversification, openness to trade. The success of EMU goes through the success of the single market. For example, in case of an asymmetric shock leading to high levels of unemployment in

66 See generally Robert Mundell, ‘A Theory of Optimum Currency Areas’ (1961) 51 *American Economic Review* 657; Ronald McKinnon, ‘Optimum Currency Areas’ (1963) 53 *American Economic Review* 717; Peter Kenen, ‘The Theory of Optimum Currency Areas’, in Robert Mundell and Alexander Swoboda (eds), *Monetary Problems of the International Economy* (Chicago; London: Chicago University Press, 1969).

67 Richard Baldwin and Charles Wyplosz, *The Economics of European Integration*, 5th ed. (London: McGraw-Hill Education, 2015) 361.

68 *Ibid.*, at 361.

69 The theory of fiscal federalism would entail a complex calculus of benefits and costs from European cooperation on those matters. See generally Richard Baldwin and Charles Wyplosz, above n 67, 93–100; Wallace Oates, ‘An Essay on Fiscal Federalism’ (1999) 37 *Journal of Economic Literature* 1120; Jacques Pelkmans, *European Integration: Methods and Economic Analysis*, 3rd ed. (Harlow: Financial Times/Prentice Hall, 2006), ch 3.

70 Fritz Scharpf, ‘The Costs of Non-Disintegration: The Case of the European Monetary Union’, in Damian Chalmers, Markus Jachtenfuchs and Christian Joerges (eds), *The End of the Eurocrats’ Dream: Adjusting to European Diversity* (Cambridge: CUP, 2016), 29–49, at 48. To be sure, the assumption that there is ‘economic over-integration’ in EMU (which is also evident, for example, in Vivien Schmidt’s work, above n 55, at 303) is both contested and contestable.

one Member State, workers from that country may seek employment in other Member States. In which case, the free movement of workers becomes crucial.⁷¹ The opposite is also true: sharing a currency presents many benefits that are important for the single market, such as reducing transaction costs, enhancing price transparency, eliminating the exchange rate risk, boosting trade, and so on. Though diffuse and often difficult to calculate, these benefits can be very substantial.⁷² Moreover, it is rightly argued that ‘financial markets do not operate in a vacuum’ and that ‘flourishing and resilient financial markets depend on a stable macroeconomic environment.’⁷³ The EMU clearly aims at attaining the latter objective.

To be sure, a single currency area also entails costs for the participating members, such as losing control over the exchange rate.⁷⁴ Monetary integration may lead to more asymmetric shocks (assuming that symmetry would decline) or such shocks could perhaps spread more easily to other Eurozone Member States through various channels. What is more, such shocks may be more severe when the framework of the monetary union is incomplete, as is the case for EMU.⁷⁵ The calculus of benefits and costs is incredibly complex and may vary between different countries or blocs thereof.⁷⁶

A further example showing that the success of EMU goes through the success of the single market is furnished by the Capital Markets Union (CMU). It will be recalled that the CMU is a project to build a truly single market for capital in the EU, which would also provide, as will be explained below, a crucial element of ‘private risk-sharing’ to make EMU more resilient to shocks. More specifically, the CMU is ‘a plan of the European Commission to mobilise capital in Europe. It will channel it to all companies, including SMEs, and infrastructure projects that need it to expand and create jobs.’⁷⁷ It is noted that—in stark contrast to the US—‘investment in Europe remains heavily reliant on banks’, and that ‘there are significant differences in funding conditions between EU countries’ and ‘differing rules and market practices for [financial] products.’⁷⁸ What is more, it is noted that ‘shareholders and buyers of corporate debt rarely go beyond their

71 Article 45 TFEU.

72 Richard Baldwin and Charles Wyplosz, above n 67, at 352–56. For the sake of completeness, it should be noted that economic scholarship is sometimes skeptical of the currency union effect on trade: see e.g. Reuven Glick and Andrew K. Rose, ‘Currency Unions and Trade: A Post-EMU Mea Culpa’, NBER Working Paper No. 21535, September 2015, <https://www.nber.org/papers/w21535> (visited 25 February 2020). I am grateful to Francesco Montanaro and Federica Violi for the latter comment.

73 ‘Promoting the Stability and Efficiency of EU Financial Markets beyond Brexit’, Speech by Luis de Guindos, Vice-President of the ECB, at the Deutsche Bundesbank reception on the occasion of Euro Finance Week, Frankfurt, 13 November 2018, https://www.ecb.europa.eu/press/key/date/2018/html/ecb.sp181113_2.en.html (visited 10 December 2019).

74 Richard Baldwin and Charles Wyplosz, above n 67, at 356–61.

75 See generally, Kaarlo Tuori and Klaus Tuori, *The Eurozone Crisis: A Constitutional Analysis* (Cambridge: CUP, 2014); Alicia Hinarejos, *The Euro Area Crisis in Constitutional Perspective* (Oxford: OUP, 2015).

76 See further Paul De Grauwe, *Economics of Monetary Union*, 11th ed. (Oxford: OUP, 2016), chs 1, 3–4.

77 European Commission, ‘What Is the Capital Markets Union?’, https://ec.europa.eu/info/business-economy-euro/growth-and-investment/capital-markets-union/what-capital-markets-union_en (visited 29 October 2018).

78 Ibid.

national borders when they invest' and that 'many SMEs still have limited access to finance'.⁷⁹

It is hoped that the creation of CMU will 'provide businesses with a greater choice of funding at lower costs'; 'offer new opportunities for savers and investors'; and 'make the financial system more resilient'.⁸⁰ The linkage between the EMU and CMU is that the latter 'will offer benefits for all Member States, while also strengthening (Economic and Monetary Union [EMU]) by supporting economic and social convergence and helping absorb economic shocks in the euro area'.⁸¹ The current institutional thinking is that: 'For all economies to be permanently better off inside the euro area, they also need to be able to share the impact of shocks through risk-sharing within the EMU. In the short term, this risk-sharing can be achieved through integrated financial and capital markets (private risk-sharing) combined with the necessary common backstops . . .'.⁸²

This linkage between different policy areas is very important. Even if it were to be assumed that certain areas should form part of an outer core or concentric circle of policies, comprising only those Member States that would be willing to adopt those policies, it should be acknowledged that 'areas of EU law are not hermetically sealed, they do not come in watertight compartments'.⁸³ It would be very difficult, if not impossible, to disentangle certain policy areas from one another, so that the EMU could form part of an 'outer circle' of EU policies destined for those Member States that would be able and willing to participate therein. There is a considerable 'grey zone' between EMU and the internal market, precisely because, as noted above, the success of EMU goes through the success of the internal market and vice versa.⁸⁴

The example of the Banking Union is instructive. Even though it formally constitutes a single market project,⁸⁵ there is no denying that the Banking Union is an integral part of EMU. It will be recalled that the SSM/SRM Regulations centralized the arrangements for the supervision and resolution of banks.⁸⁶ The 'key rationale' for transferring supervisory and resolution powers to the EU level was 'to strengthen an unbiased,

79 Ibid. For the action plan on CMU and the accompanying documents, see European Commission, 'Capital Markets Union Action Plan', https://ec.europa.eu/info/business-economy-euro/growth-and-investment/capital-markets-union/capital-markets-union-action-plan_en (visited 16 December 2019).

80 European Commission, above n 77.

81 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the Mid-Term Review of the Capital Markets Union Action Plan (Brussels, 8 June 2017) COM(2017) 292 final, https://ec.europa.eu/info/sites/info/files/communication-cmu-mid-term-review-june2017_en.pdf (visited 30 October 2018), at 2.

82 Jean-Claude Juncker in close cooperation with Donald Tusk, Jeroen Dijsselbloem, Mario Draghi and Martin Schulz, 'Completing Europe's Economic and Monetary Union', 22 June 2015, https://ec.europa.eu/commission/sites/beta-political/files/5-presidents-report_en.pdf (visited 31 October 2018), at 4.

83 Paul Craig, 'Two-Speed, Multi-Speed and Europe's Future: A Review of Jean-Claude Piris on the Future of Europe' (2012) 37 *European Law Review* 800, at 810. The same may be true with regard to measures forming part of one and the same area: Stephen Weatherill, above n 60, at 290 notes, with respect to the Area of Freedom, Security and Justice, that ' . . . in any event the *acquis* is not a set of isolated measures but rather a package marked by a high level of interconnection'.

84 See above n 6, ch 137.

85 The SRM Regulation, above n 33, was based on Article 114 TFEU. And so was the Bank Recovery and Resolution Directive, as well as many other key measures from the single rulebook for financial actors and products.

86 See above n 33.

neutral approach to bank oversight and resolution, thus mitigating forbearance and moral hazard, and to break the fatal link between sovereigns and their banks.⁸⁷ This fatal link, or ‘doom loop’, played out multiple times during the Euro crisis. A weakening of the banks led to successive rounds of bailouts, which in turn weakened state finances, thereby ultimately leading to a further weakening of the banks. It being a single market project which is central to the success of EMU, the Banking Union would presumably not be a candidate for the outer core of EU policies that the Euro area Member States could voluntarily subscribe to. If anything, the current legal position is that countries which become members of the Eurozone also have to join the Banking Union. However, this goes to show that policy areas—in *casu*, EMU and the single market—are indeed not so easy to disentangle from one another.

The argument against this is that the Banking Union legislation (viz., the SSM/SRM Regulations) was principally addressed to the Euro area Member States. Non-Euro area Member States were under no legal obligation to join, but they could if they wished to.⁸⁸ As such, the Banking Union could be more easily ostracized, together with EMU, to the outer core of Union policies. There is force in this argument. However, it should not be forgotten that not all internal market policies have to concern the totality of the single market and/or all EU Member States. There are internal market measures which concern only a small part of the internal market (in some cases, even located within a single Member State).⁸⁹ In the case of the Banking Union, there is yet a further complication: one pillar of the Banking Union (the SSM) could be said to rest on an ‘EMU competence basis’ (Article 127(6) TFEU), whereas the other pillar (the SRM) is a harmonization measure (Article 114 TFEU). If adopted, the Regulation on the European Deposit Insurance Scheme would also be based on Article 114 TFEU.⁹⁰ This goes to show that different elements of a single policy regime could be based on various competence bases, thereby evading neat classification within an ‘inner’ or ‘outer core’ of EU policies. Even if one were to assume that Banking Union *as a whole* could be moved to the outer core, which would be reserved for an ‘avant-garde’ of Member States, the existing legal possibility for non-Euro area Member States to participate in the scheme would create a messy reality that would differ little from the already existing variable geometry within the EU (and within the EMU).⁹¹

Third, one would have to devise the precise legal and institutional arrangements that would obtain in (each of) those areas that would be moved to the ‘outer core’ of European integration. This would be no small feat. There is a host of questions regarding the composition and tasks of the EU/Euro area institutions, agencies and

87 Jeffrey Gordon and Wolf-Georg Ringe, ‘Bank Resolution in the European Banking Union: A Transatlantic Perspective on What It Would Take’ (2015) 115 *Columbia Law Review* 1297, at 1306.

88 See SSM Regulation, above n 33, Article 7; SRM Regulation, above n 33, preamble recital 15 and Article 4.

89 See, for example, ECJ, Case C-67/97 *Criminal proceedings against Ditlev Bluhme* ECLI:EU:C:1998:584 concerning Danish legislation prohibiting the keeping on the island of Læsø of bees other than the Læsø brown bee.

90 Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 806/2014 in order to establish a European Deposit Insurance Scheme, COM(2015) 586 final.

91 Bulgaria and Croatia, which are both not yet part of the Eurozone, have applied to join the Banking Union.

bodies in an EU based on differentiation.⁹² Moreover, the degree of one's reform ambitions and the proposed mode of delivery for those reforms would determine whether an amendment of the EU Treaties would be required or whether the reforms could 'simply' be implemented by means of various amendments to EU secondary law and/or new intergovernmental *inter se* agreements. What is more, one should not underestimate the difficulties that would be involved in administering those overlapping policy communities or clusters for the EU and national institutions alike.

Fourth, insofar as the concern is to accommodate the diverse policy preferences of the EU or Euro area Member States, one should not neglect or understate the degree of flexibility that already exists within some of those areas. Take Majone's hypothesis about EMU by way of example. As regards the economic pillar of EMU, what would Majone's call for more flexibility add to the *country-specific* medium-term budgetary objectives, the country-specific recommendations, and the different fiscal rules (in the Stability and Growth Pact and the Fiscal Compact) applying to countries with sound public finances, as opposed to countries with more pronounced risks in terms of the sustainability of their public finances? Moreover, the vast discretion bestowed on the Commission in the EU's fiscal rules is undeniable and, if anything, it has rendered it the target of attacks by national governments and interest groups that believe that it ought to exercise its powers more forcefully. Indeed, depending on one's perspective, there are further calls on the Commission to treat the Member States more 'fairly'—especially from the Member States that are on the receiving end of those policies.⁹³ The salient point for present purposes is that, overall, there is already a considerable degree of variable geometry within the economic pillar of EMU.⁹⁴ A similar argument could be made with respect to Piri's thesis: 'The reality is that there may well be variation/differentiation/flexibility *within* an area that is subject to the two-speed European Union.'⁹⁵

What is more, as regards the monetary pillar of EMU, Majone's argument would inevitably lead to the *demise* of the single currency. It is indeed the case that the Eurozone does not (yet) constitute an OCA. It would be virtually impossible to adjust monetary policy to the perceived needs of each of the 19 Euro area Member States or of different blocs of them. According to the argument, some States would have to leave the Euro area and switch back to their national currencies. For those that would choose to stay, the existence of parallel currencies may be legally impossible. Even the limited capacity of the ECB to use the instruments at its disposal—for example, bond-buying

92 See, among many others, Deirdre Curtin and Cristina Fasone, 'Differentiated Representation: Is a Flexible European Parliament Desirable?', in Bruno De Witte, Andrea Ott and Ellen Vos (eds), *Between Flexibility and Disintegration: The Trajectory of Differentiation in EU Law* (Cheltenham, UK; Northampton, MA: Elgar Publishing, 2017), 118–45; Cristina Fasone and Diane Fromage, 'The European Commission and the Member States Facing Differentiated (Dis)integration: The Challenges of Brexit', in Stefan Gänzle, Benjamin Leruth and Jarle Trondal (eds), *Differentiated Integration and Disintegration in a Post-Brexit Era* (Routledge, 2019); Cristina Fasone, 'Democratic Legitimacy and Parliamentary Accountability of the European Economic, Monetary and Fiscal Governance' (Staatsrechtconferentie 2019 conference, University of Amsterdam, 13 December 2019).

93 I am grateful to Francesco Montanaro and Federica Violi for this observation.

94 Menelaos Markakakis, above n 6, at 139.

95 Paul Craig, above n 83, at 806.

programmes or the Emergency Liquidity Assistance—⁹⁶ in a differentiated manner is largely constrained by the legal requirements laid down in the EU Treaties, whose meaning has been fiercely debated before the Court of Justice of the EU and the German Federal Constitutional Court (*Bundesverfassungsgericht*).⁹⁷ This is not to say that we should not discuss the possibility of differentiated integration or disintegration with respect to the EMU. The point that the present author seeks to make is that certain ideas on differentiated integration would lead, if pursued, to the end of the single currency as we know it. That is why we have to be cognisant, as noted above, of the benefits and costs of sharing (or not sharing) a single currency.⁹⁸

II. BREXIT AS AN OPPORTUNITY FOR (TREATY) REFORM

In light of the above, the present author is rather skeptical about the promises made by the theories of differentiated and/or multi-speed integration. They of course remain part of the policy toolkit, and it may be deemed appropriate that such a course be taken in the future with respect to a certain policy area or project. However, at the time of writing, it is respectfully submitted that they need not be used for EU/EMU in the bold form that was advocated for in the writings that were discussed above.

It is instead submitted that the EU's 'troubles', notably Brexit, should perhaps be viewed—rather more optimistically—as an opportunity to reform the EU. Take the EMU for example. There is near consensus that the Eurozone ought to be reformed. The only disagreement is on the direction of travel. Any proposed fix could not of course concern the structural conditions for an OCA—these are either there (to a greater or lesser degree) or they are not.⁹⁹ A reform package could however change the policies of EMU in order to make it more sustainable as well as more democratically legitimate. The EU institutions have indeed presented various roadmaps: the Four Presidents' Report,¹⁰⁰ the Five Presidents' Report,¹⁰¹ the Commission's Reflection

96 Insofar of course as the ECB has control over the Emergency Liquidity Assistance: see Protocol (No 4) on the Statute of the European System of Central Banks and of the European Central Bank, Article 14.4.

97 On the legality of Outright Monetary Transactions, see BVerfG, Order of the Second Senate of 14 January 2014–2 BvR 2728/13–, ECLI:DE:BVerfG:2014:rs20140114.2bvr272813; ECJ, Case C-62/14, *Peter Gauweiler and Others v Deutscher Bundestag* ECLI:EU:C:2015:400; BVerfG, Judgment of the Second Senate of 21 June 2016–2 BvR 2728/13–, ECLI:DE:BVerfG:2016:rs20160621.2bvr272813. On the legality of the public sector asset purchase programme, see BVerfG, Order of the Second Senate of 18 July 2017–2 BvR 859/15–, ECLI:DE:BVerfG:2017:rs20170718.2bvr085915; ECJ, Case C-493/17 (Grand Chamber) *Proceedings brought by Heinrich Weiss and Others* ECLI:EU:C:2018:1000.

98 See also Menelaos Markakis, above n 6, at 140.

99 This is so notwithstanding the argument that a currency area may gradually become an OCA by reason of its members sharing the same currency: Richard Baldwin and Charles Wyplosz, above n 67, at 376–78. The proposed package of measures to reform EMU (see Paul Craig and Menelaos Markakis, above n 38) adds force to this argument. I am grateful to Francesco Montanaro and Federica Violi for the latter comment.

100 Herman Van Rompuy, in close collaboration with José Manuel Barroso, Jean-Claude Juncker and Mario Draghi, 'Towards a Genuine Economic and Monetary Union', 5 December 2012, http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/134069.pdf (visited 10 December 2019). See also, A Blue Print for a Deep and Genuine EMU, Launching A European Debate, COM(2012) 777 final.

101 Jean-Claude Juncker, in close cooperation with Donald Tusk, Jeroen Dijsselbloem, Mario Draghi and Martin Schulz, above n 82.

Paper,¹⁰² and its 2017 Roadmap for completion of EMU.¹⁰³ Space precludes a detailed analysis of these proposals.¹⁰⁴ Suffice it to say for present purposes that, insofar as Brexit would lead to or necessitate various amendments of EU primary and/or secondary law, it would present the EU institutions and Member States with an opportunity to provide for a ‘deeper’ or ‘more genuine’ EMU.¹⁰⁵ In so far as EU primary law is specifically concerned, it is well known that several hurdles or restrictions on the road to a ‘more perfect’ EMU are hardwired into the Treaties, such that a Treaty revision to take stock of Brexit could be used to remove those bottlenecks and clear the legal space for an EMU that would make more economic sense, and that would be more sustainable and democratically legitimate.¹⁰⁶ The same is true for other policy areas.

III. CONCLUSIONS

There will be no attempt to summarize the preceding argument in its entirety. Instead, this section will highlight certain features that are of particular importance. The discussion above has highlighted the problems or issues that proposals for differentiated integration may give rise to, in terms of the rationale for conferring powers on the EU, the benefits and costs of sharing a currency, the proximate connection between different policy areas, the legal and institutional complexity that would obtain in those areas pushed to the ‘outer core’ of European integration, and the degree of flexibility or variation that already exists within some of those areas. In other words, the case for ostracizing certain policy areas to the ‘outer core’ would have to be made convincingly, in light of the costs and complexities that would be involved in doing so, as well as the fact that the new arrangements would differ little from the already existing degree of flexibility and differentiation. In light of those issues, it is argued that the better course of action would be to build on those opportunities for differentiated integration that are already offered by the EU Treaties (namely, the Treaty provisions on enhanced cooperation in Articles 20 TEU and 326–334 TFEU, but also Article 136 TFEU for the Eurozone, and so on), whenever it is deemed normatively and/or indeed functionally desirable to do so. Their potential is to a great extent yet untapped. Should a Treaty revision appear necessary in order to take stock of Brexit, it would also offer the

102 Reflection Paper on the Deepening of the Economic and Monetary Union, COM(2017) 291.

103 Further Steps towards Completing Europe’s Economic and Monetary Union: A Roadmap, COM(2017) 821 final.

104 See generally Paul Craig and Menelaos Markakis, above n 38.

105 This point is also made by, among others, Luis de Guindos, above n 73; Federico Fabbrini, ‘Brexit and the Reform of Economic and Monetary Union’, in Nazaré da Costa Cabral, José Renato Gonçalves and Nuno Cunha Rodrigues (eds), *After Brexit: Consequences for the European Union* (Basingstoke: Palgrave MacMillan, 2017).

106 Concrete examples abound in this respect. As regards the legal and institutional framework of the European Central Bank, which is primarily laid down in the EU Treaties, see for example the proposals made by Fabian Amtenbrink and Menelaos Markakis, ‘Towards a Meaningful Prudential Supervision Dialogue in the Euro Area? A Study of the Interaction between the European Parliament and the European Central Bank in the Single Supervisory Mechanism’ (2019) 44 *European Law Review* 3; Menelaos Markakis, above n 6, chs 5 and 9.

opportunity to the Member States to give added impetus to differentiated integration. Pending such a Treaty revision, however, there is much that could be done within the existing Treaties in order to present the citizens with a more 'bold and coherent political project'.¹⁰⁷

107 The language is borrowed from Jean-Claude Piris, above n 45, at 103.