ARTICLES

DIFFERENTIATED GOVERNANCE IN A EUROPE IN CRISES
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THE EUROPEAN UNION IN CRISIS: WHAT SHOULD THE MEMBER STATES DO?

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ABSTRACT: The European Union has suffered for many years from long-standing crises (of competitiveness, the euro, and democracy) which have only been exacerbated by more recent crises (of foreign and security policy, migration, climate change, and the rule of law). When considering the EU's options for the future, it is difficult to see how it can maintain its unity. The essential problem is that the aims given to the EU by its Member States in the EU Treaties cannot be achieved with the means it was given, which are ill-adapted to its number of members. The problem can be dated back to the "original sin" of the Nice Treaty, in which the then-15 Member States, despite their legal commitment to do so, did not adequately reform the EU's governance to prepare for the accession of 10 new Member States in 2004. In particular, they did not reform the Council's decision-making procedures, which require common agreement or unanimity on all major decisions, effectively giving each Member State an individual veto. The author recommends amending the EU Treaties to vastly cut back the number of decisions and areas subject to common agreement or unanimity in favour of the introduction of a collective veto of three to five States representing 10 to 15 per cent of the EU population and different thresholds of qualified majority voting. While differentiation is not key to resolving the EU's core problems, different forms of differentiation should be introduced to permit flexibility within the EU's system of governance.

KEYWORDS: Brexit – Council of the EU – crisis – differentiation – EU treaties – qualified majority voting.

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I. Introduction

Despite what many people think, the EU does not aim at an ever closer union between the Member States, but "between the peoples of Europe", which does not have the same meaning (see the preambles of both the TEU and the TFEU and art. 1 TEU). The EU aims at helping its Member States to bring prosperity and liberty to their respective peoples, while respecting the attachment of these peoples to their nation-states.

In times of crisis, the temptation of retreating behind national borders comes back. Today, national borders are partly re-established, and the rules for Schengen, unfair competition and fiscal discipline are suspended, while the EU is hit by serious crises.

What should be done? Is it possible to strengthen the EU without dividing its members further? Could the division be resolved with an increased use of *differentiation* in certain policy areas, permitting some Member States to be exempt from the common rules? And finally, should and could the Member States change the EU Treaties?

II. The persistence of serious crises

Eight years ago, I gave a speech on "The Five Crises in Europe",[1] which were enumerated as follows: *1)* the economic structural crisis, characterized by declining competitiveness, offshoring, unemployment, and demographic decline; *2)* the crisis of the euro, which is made difficult to solve by the asymmetry between the two branches of the Economic and Monetary Union (EMU) ("the Maastricht original sin"); *3)* the political crisis in some Member States, featuring growing inequalities and a loss of trust in the government and the establishment, leading to populism(s); *4)* the democratic malaise *vis-à-vis* the EU, which loses support because Europeans find its results insufficient and do not know its final aims and borders; and *5)* the relations between the UK and the EU. Today, none of these crises is solved, except the last one – but in a sad way. Moreover, other crises have hit the EU since then. The economic crisis was only half-solved, when the Covid pandemic provoked yet another crisis.

It is the responsibility of each Member State to manage its economic growth, as well as its competitiveness. Some are successful, others less so. On the other hand, EMU, is the EU's responsibility, but the Treaties do not confer on it the power to solve its fundamental asymmetry. Measures taken since 2008, most recently the Next Generation EU and the Recovery Fund, are big improvements, but are subject to legal criticism and are not sufficient. Many economists suggest the mutualisation of national debts, while avoiding the problem of moral hazard. But an EU controlling, even partly, national budgets and economic policies of the euro area states would raise an issue of democratic legitimacy. The EU's political legitimacy is not sufficient for that, given, on the one hand, the half-success/half-failure of the European Parliament, which was unavoidable given its half-powers and the rules of electing its members which ignore the principle of *one citizen/one*

[1] The lecture was titled 'The Five Crises in Europe and the Future of the EU' and was delivered at the King's College London on 28 October 2013.

vote and, on the other hand, the dominant role given by the Treaties to individual vetoes in the Council's decision-making since the creation of the European Economic Community (EEC) by six countries in 1957.

Moreover, in the meantime at least four other crises have hit the EU.

First, there is a concerning division among the 27 on foreign policy and defence policy, while their security is at risk, both internally (terrorism) and externally (Russian aggressions in Ukraine). On foreign policy, several Treaty reforms, including the establishment of a High Representative and a European External Action Service, did not give significant results, as the divisions on relations with Russia show. Some see the enlargement of the EU as being a "foreign policy tool", but it makes its decision-making more and more difficult, the inefficiency increasing with each accession. The enlargement policy is of course far from being only a *foreign* policy, as it deeply transforms the EU itself. On defence, the 27 are also divided: even if *America First* has proven to be more than just words, NATO is still necessary for EU's security. Moreover, can one have a defence policy without a foreign policy?

Second, the migratory crisis, which peaked in 2015, has structural causes and is a long-term problem. The violence in many third countries is one cause, but small and rich Europe, with its declining population, needs immigrants to sustain its economic growth (400,000 a year for Germany alone), and is thus attractive for the poorest in Africa and Asia, where there is strong demographic growth but insufficient economic growth.

Third is climate change. The *Green Deal* and the EU's commitment to reduce sharply its carbon emissions by 2030 and to reach climate neutrality by 2050 will have a strong impact on energy and on all economic sectors, with the need for new sensitive EU legislation and massive investments. This is a major issue in the long term. But will all Member States do their share of the work? Will the EU be able to help those with serious problems, such as Poland?

Fourth and finally, there is the rule of law. The above crises have provoked or accelerated divisions between Member States: rich and poor, North and South, East and West. But one of these divisions, in itself, has now become the most sensitive crisis in the EU, when the governments of some Member States, especially Hungary and Poland, already "illiberal", have begun backsliding and putting into question the very foundations of the EU – its values and the principle of the rule of law – as shown by the recent judgment of the Polish Constitutional Court.[2]

The rule of law is a matter of deep concern, as this principle is the cornerstone of the EU legal and political order. The creation of the EU was accompanied by a legal revolution. For the first time, states decided that their mutual commitments would always be respected. The rule of law is the *sine qua non* condition of the existence and credibility of the level playing field, the internal market and the EU itself. Its application is monitored and sanctioned. Up to now, Member States have played by the rules: the fines decided

[2] See Constitutional Tribunal of Poland judgment of 7 October 2021 n. K3/21.

by the European Court of Justice (ECJ) have been paid and its interpretation of EU law has been respected. Tribunals must be independent and impartial.[3] Otherwise, the EU would not be able to work anymore. This is an existential question. The institutions must (I would dare to say "finally") use legal means to stop this backsliding. All our friends from Hungary, Poland and elsewhere must understand that.

One cannot refuse some articles of the EU Treaties, or the exclusive interpretation of EU law by the ECJ, while remaining an EU member. Moreover, the EU values are at the heart of the identity of Europe. We, Europeans, are different, because our values and our conception of life in society are different. The prohibition of carrying weapons and capital punishment, the right to abortion or to homosexual marriage, to an independent justice system (see art. 47 of the Charter of Fundamental Rights of the EU), to social security for all, to a better protection of the poorest, the fight against climate change or against racism: all these values are part of our identity.

III. The feasibility of three suggested options for the future of Europe

A *first option* would be to redistribute the share of competences between the EU and its members – centralizing powers over economic and fiscal policy, perhaps also on migration policy and other policies – based on the argument that this would be the only solution to solve all the crises. This would be the dream of Euro-Federalists. However, it is unrealistic. Even a Treaty revision limited to correcting the *imbalance of the EMU*, arguably the most urgent task given that 19 countries share the same currency, is not politically possible in the short term. The difficulties are twofold: budgetary solidarity and political legitimacy. The so-called *frugal states,* and even some of the other euro area states, are opposed to debt mutualisation. Supported by their tax-payers/voters, they refuse to share their powers in these sensitive areas. Besides, the democratic legitimacy of the decisions taken at an EU level would have to be guaranteed. No doubt the future of EMU – and the Stability and Growth Pact's rules, which are now suspended until 2023 – will be continue to be the subject of major debate in the 18 months to come.

A *second option*, to hope for a Franco-German initiative in the short term, appears improbable. The views of the two countries regarding budgetary and economic questions remain quite far apart. Now that their respective elections are out of the way, it is possible that their leaders (Olof Scholz at the head of the SPD/Greens/FDP coalition and the re-elected Emmanuel Macron) might propose some strengthening of links within the euro area. They might suggest, for example, that those willing could approximate a few modest aspects of their budget or tax policies. Such differentiation would be legally possible

[3] Art. 47 of the Charter of Fundamental Rights of the EU [2012]; art. 6 of the European Convention on Human Rights [1950].

through an inter-governmental agreement, as it concerns matters within Member States' powers. This remains possible – and it would be a good political sign – but it is not probable.

A *third option* would be to create a new EU, composed of a *basic core* based on the single market, customs union and trade policy, and optional clubs for other policies.[4] All members would participate in the basic EU, using current Treaties and Institutions. The optional clubs would be for EMU and the so-called former Second and Third Pillars. The composition of the Parliament and the Council would vary depending on participating states and the clubs could use various procedures. However, with such an architecture, the unity of the EU would disappear.

IV. Some comments on the current political reality

This reality is that most Member States refuse to review the Treaties. Their position during the Conference on the Future of Europe made it clear. The key question to ask is, how will they then fulfil their existing Treaty commitments, such as that the EU "*shall* establish an economic and monetary union…" (art. 3(4) TEU), "*shall* constitute an area of freedom, security and justice" (art. 67(1) TFEU), "*shall* frame a common policy on asylum, immigration and external border control" (art. 67(2) TFEU)?

The answer is that the EU is at present simply unable to meet these commitments. These goals will remain unrealistic so long as the Council continues to muddle through with its obsolete decision-making rules. According to these rules, the representative of any one of the 27 has an individual right of veto, which means the legal power to prevent the EU to meet any of these commitments, even if all others agree to do it. But why and how did such a discrepancy arise between the ambitions imposed by the Member States on the EU and the insufficient means they gave it to fulfil these aims?

Here it might be useful to explain the history of what I have called the "Second Original Sin" of the Nice Treaty (after the first one in Maastricht). In the past, discussions between 10, 12 or 15 partners took time, but generally led to a consensus, given that the participants were not too many and were fairly homogeneous. However, it was foreseen that 10 rather heterogeneous countries would be joining the EU all in one go, the 15 members at that time decided that Treaty changes, on both the composition and the functioning of the institutions, would have to be made before that huge enlargement. Thus, in Amsterdam, in 1997, seven years before the 2004 enlargement, they agreed to prepare for Treaty change, in conformity with one of the 1993 Copenhagen criteria referred to in art. 49 TEU ("the Union's capacity to absorb new members"). They committed themselves to do so, not with political words, but by adopting primary law, democratically ratified in each of the 15: the "Protocol on the Institutions with the project of enlargement of the EU", a part of the Amsterdam Treaty: "[a]t least one year before the membership of the EU exceeds twenty, an intergovernmental conference shall be convened in order

[4] See JC Piris, *The Future of Europe: Towards a Two-Speed EU?* (Cambridge University Press 2012).

to carry out a comprehensive review of the provisions of the Treaties on the composition and functioning of the institutions".

This commitment represented a compromise between two schools, the first one wanting an immediate enlargement (with the UK as its preeminent champion), and the more cautious second school favouring a pre-enlargement deepening of the EU by adapting its decision-making rules. The compromise was founded on a powerful trade-off: "yes" to the enlargement, but with the obligation to adapt the decision-making beforehand. The 15 agreed that a 25-member club could not work with the rules of a club of 15.

And then came the "Sin of Nice", in December 2000. After four days and three nights of negotiations, the 15 leaders failed to agree on the necessary reforms. Legally, in order to respect primary law, the sanction of this incapacity would have been to declare that their final decision on that enlargement would be taken as soon as the necessary reforms had been adopted. This might have made these reforms possible, given the strong leverage imposed by the impending enlargement, which was seen as a historic unification between Western and Central and Eastern Europe. But the 15, under pressure from the USA, decided that it was politically difficult for them to appear to be delaying that enlargement.

It was in this way that the 15 gave up the idea of reforming the EU's decision-making rules before the big enlargement. They adopted this weighty decision together with a beautiful and non-binding *Declaration on the future of the Union*, followed one year later by another Declaration adopted in Laeken. The Convention on the Future of Europe followed, chaired by Valery Giscard d'Estaing, which later produced a draft Treaty establishing a so-called *Constitution for Europe*.[5] The substance of this still-born treaty (killed by referendums in France and the Netherlands) was seen as largely containing unnecessary *window-dressing* by some, and on the contrary by others as being an unacceptable step towards a European federal state.

But the important fact is that this still-born Treaty still did not contain the operationally effective reforms which the EU would badly need in the future, especially regarding the possibility for any EU member (among 25 instead of 15) to veto any major decision in the Council. The same was true of the Lisbon Treaty that replaced the Constitution for Europe and entered into force in 2009.[6]

Politically, both the Nice and the Lisbon Treaties show that the utopian dream, that one day the EU could be transformed into a federal state, is either dead or to say the least in a long-term coma. But the problem goes further than that. Given the "Sin of Nice", even many of the aims of the current EU Treaties cannot be reached under its current decision-making rules.

Today, to modify one word of the Treaties, or to take any major decision, you need the agreement of 27 countries. The consequences of this are manifest. There is no

[5] JC Piris, *The Constitution for Europe: A Legal Analysis* (Cambridge University Press 2006).
[6] JC Piris, *The Lisbon Treaty: A Legal and Political Analysis* (Cambridge University Press 2010).

leverage on the Member States to agree on any change to the Treaties, even while the EU is hit by several serious crises, none of which can be solved.

V. My personal suggestions

Which reforms would be needed? It is my conviction that the EU needs Treaty changes: it is unable, with its current decision-making rules, to fulfil its essential tasks. I know that Member States are not ready to open that discussion. I understand and respect that position and the reasons why they take it. Thus, this will not happen in the short term. However, one must not have illusions about the consequences.

Another EU enlargement might, one day, cover the six Balkan countries that are now candidates or potential candidates for accession. The current Slovenian Presidency of the Council even stated an aspiration that these countries could be admitted by 2030. This will of course not happen. The democratic and judicial structures of these states are weak and unstable. Their efforts to respect the rule of law and to fight corruption and criminality are not serious enough. But, if, and when, their situation improves, their accession would add further heterogeneity and *six new padlocks to the 27 existing ones* to any change to the EU Treaties.

For now, the EU must in any case exercise its five essential responsibilities. First, it must get its members, most urgently Hungary and Poland, to respect the rule of law.[7] Second, it must reform the economic side of the EMU[8], given that it is now clear that the NGEU, while welcome, was not the EU's "Hamiltonian moment". Third, it must exercise more effort and solidarity in the fight against climate warming, taking into account the results of the November 2021 Glasgow COP26. Fourth, it must surmount the divergences on migration policy, on the basis of the Pact on Migration and Asylum proposed by the Commission.[9] Fifth and finally, it must become a more credible actor on the international political scene, making better use of its trade and economic leverage.

For each of these five issues, the Treaties require unanimity or at least common agreement. Is differentiated governance the key?[10] Would the EU fulfil its tasks by adapting its decisions to each Member State, by using differentiation on economic union, on Schengen, on migration, on foreign policy, etc.? This cannot work. Up to now, the 20 year-old procedure allowing enhanced cooperation on a case-by-case basis was used just a handful of

[7] See also R Uitz, 'The Rule of Law in the EU: Crisis, Differentiation, Conditionality' (2022) European Papers www.europeanpapers.eu 929.

[8] See also S Baroncelli, 'Differentiated Governance in European Economic and Monetary Union: From Maastricht to Next Generation EU' (2022) European Papers www.europeanpapers.eu 867; see also CA Petit, 'Differentiated Governance in the Banking Union: Single Mechanisms, Joint Teams, and Opting-ins' (2022) European Papers www.europeanpapers.eu 889.

[9] See also J Silga, 'Differentiation in the EU Migration Policy: The "Fractured" Values of the EU' (2022) European Papers www.europeanpapers.eu 909.

[10] See also S Baroncelli, I Cooper, F Fabbrini, H Krunke and R Uitz, 'Introduction to the *Special Section*: Differentiated Governance in a Europe in Crises' (2022) European Papers www.europeanpapers.eu 857.

times, and never on major issues. For many Member States the fear of being relegated to a second-class status is still greater than of seeing the EU becoming less relevant. Moreover, no differentiation is conceivable for European values and the rule of law.

The number of cases where unanimity, common agreement or consensus are required in the two EU Treaties and their 37 Protocols is much bigger than people think. These include the following (and this is not even an exhaustive list): any change of the Treaties; citizens' rights; any decision or declaration on any issue concerning foreign and defence policies; the EU's multi-annual budget; EU own resources; any tax matter; a number of issues concerning EMU; the flexibility clause of art. 352; a number of aspects concerning health, protection of the environment and climate change, social policy, family law, and even the internal market; the area of freedom, security and justice, including particularly judicial cooperation, criminal matters and police cooperation; the EU's languages, seats, composition and nomination of the members of the EU institutions, and the status of the European Central Bank and of the ECJ, etc. Moreover, one should also add to this list two oft-used horizontal provisions that favour unanimous decision-making: art. 15(4) TEU states that, "[e]xcept when the Treaties provide otherwise, decisions of the European Council shall be taken by consensus." And art. 293(1) TFEU states that "[w]here, pursuant to the Treaties, the Council acts on a proposal from the Commission, it may amend the proposal only by acting unanimously".

Now that I have set out just how pervasive a problem this is, I will make seven suggestions of how to change decision-making in the Council.

First, given the current number of members, keeping an individual veto for each of them should be reserved for a short list of actual vital decisions, because an individual veto is neither democratic, nor efficient. It legally allows representatives of a minority of less than 1 per cent of EU citizens to prevent representatives of a majority of 99 per cent or of one member out of 27, from taking any major decision. There are eight Member States which have each less than 1 per cent of the population of the EU and 13 with less than 2 per cent. Even some aspects of policies affecting the single market must be decided unanimously, as is the case for taxation, protection of the environment, energy policy, and social protection. It is true that there is a legal principle of "one state, one vote" in some classic international organisations, but the EU is not one of these. Its *raison d'être* is to adopt laws affecting the life of EU citizens. Thus, its citizens must be represented by a more democratic decision-making procedure. On the other hand, it is understandable that because the EU is still an international organisation, Member States may wish to keep the individual veto on a few decisions, for example: the composition of the Council, official languages, and decisions which might affect the heart of their vital sovereignty, such as on foreign and defence policies. I would add to that list the use of art. 352 TFEU (the "flexibility clause"), the revisions of the Treaties which would affect the issues just enumerated, and maybe a few other decisions, but all the while keeping the list short.

Second, for cases other than these vital decisions, the individual veto should be replaced by a collective veto, with a minimum of three to five Member States representing at least five to 10 per cent of the EU citizens. While short of unanimity, this would be a kind of "super-super qualified majority voting (QMV)" which would be a higher voting threshold than "super QMV" (art. 238(2) TFEU), discussed below. I know that many Member States would give a negative reaction to this suggestion. But the truth is that, on top of actual vital issues, on which individual vetoes are justified, there are dozens of cases, not vital for any Member State, that still allow individual vetoes. These are undemocratic, create cases of paralysis and opportunities for blackmail (as has happened in the past). They push the Commission to self-censure and introduce proposals which are too weak. They prevent the EU from attaining its tasks and objectives (see, on the legal aspect of this political issue, the Member States' obligations in art. 4(3) TEU).

Third, direct powers should be conferred on EU institutions in matters concerning the euro area, on the condition they are subject to legitimate democratic control. The EU is responsible for the EMU, not the Member States. The institutions should be accountable and under democratic control. This control could be exercised by a Euro Parliamentary Organ, composed both of representatives of the European Parliament and of the national parliaments of the euro area members.[11]

Fourth, precise obligations should be imposed on Member States to respect the EU's fundamental values as set out in art. 2 TEU, including the rule of law. It is incredible that candidates states must demonstrate that their respect for art. 2 TEU, which is a prerequisite to be a candidate country (see art. 49 TEU: "[a]ny European State which respects the values referred to in art. 2 and is committed to promoting them may apply to become a member of the Union") but the same obligation is not imposed on a permanent basis for existing Member States. This is already legally the case, but it should be made more precise. Such a reform of art. 2 TEU should be prepared and its ratification be made a *sine qua non* condition of remaining an EU Member State. If necessary, similar commitments might be made in another form by an intergovernmental agreement with appropriate EU links and follow-up.

Fifth, some of the *passerelles* of the Lisbon Treaty should be used. The Lisbon intergovernmental conference considered several cases in which it could be justifiable to pass from unanimity to QMV. Accordingly, the Treaty provides that the decision to use the *passerelles* is taken by a simplified procedure: unanimity, but no ratification. Except for two *passerelles* related to foreign policy or defence, the others concern the following policy areas: the protection of the environment and of human health (art. 192(2) TFEU, totally or partially), social policy (art. 153(2) TFEU, in particular the social protection of workers), family law with cross-border implications (art. 81(3) TFEU), the Multiannual Financial Framework (art. 312(2) TFEU), and rules on enhanced cooperation (art. 333 TFEU). After 14 years, these *passerelles* should be used.

[11] JC Piris, *The Future of Europe* cit. 127.

Sixth, the procedure of unanimity required in three articles of the TFEU which concern, directly or indirectly, the single market and the level playing field should be modified. For one, there is art. 115 TFEU on "issuing Directives for the approximation of such laws, regulations or administrative provisions of the Member States that directly (sic!) affect the establishment or functioning of the internal market". The two other cases concern the necessity to legislate on social security and social protection in order to permit the free movement of persons (art. 21(3) TFEU) and measures for family law with cross-border implications (art. 81(3) TFEU). A super QMV with the possibility of differentiation (see below) might be used in these cases, with the Commission agreement on a case-to-case basis.

Seventh, three articles which allow the European Council to intervene by consensus in legislative procedures should be modified. According to art. 15(1) TEU, the European Council "shall not exercise legislative functions". Despite that, these three TFEU provisions provide for such an exercise, creating thus an individual right of veto for all, whereas the normal legislative procedure requires QMV in the Council. These special procedures are nicknamed the *brakes procedures* (art. 48, art. 82(3) and art. 83(3) TFEU). It would be logical to eliminate the necessity of a consensus in the European Council in these cases, because it is contrary to the EU constitutional architecture.

Above, I stated my belief that differentiated governance is not the key to resolving the fundamental problems facing the EU. However, on the margin differentiation is an acceptable mechanism to allow diversity within the governance of the EU. Here are four suggestions of ways to encourage more differentiation between EU Member States.

First, one should examine the possibility of enlarging the use of a constructive abstention, on the model of the Common Foreign and Security Policy (CFSP) (art. 31(1) TEU). In cases of possible veto, a member abstaining may decide not to apply the decision, while accepting that others go ahead. One might consider cases in the field of the Area of freedom, security and justice and maybe even a few cases concerning the single market, among those dealing with social, energy or environment policies. However, the consent of the Commission should always be required, on a case-by-case basis, in order for the level playing field to be respected in the single market.

Second, consideration should be given to the use, in a few TFEU articles, of the procedure of "super QMV" in the Council, on the model of art. 238(2) TFEU. In some existing Treaty provisions, the voting threshold is defined as "representing Member States comprising at least 65 per cent of the population of the Union" – which is the same as ordinary QMV (art. 16(4) TEU) – but also requiring that it include "at least 72 per cent of the members of the Council". In EU-27, this threshold requires the agreement of 20 states rather than the 15 required under ordinary QMV. One should consider to which articles the use of that procedure could be extended. When used, it should open the right for members voting against the act to be allowed not to be bound by it, on a case-by-case basis, in the absence of the opposition of the Commission.

Third, encouragement should be given to use of the procedure of agreeing intergovernmental treaties between some Member States, in cases where they want to deepen their cooperation beyond EU powers. This is legally possible and may even add objectives to those of the EU Treaties, if compatible with them. Precedents exist, like Schengen, Prüm, and, more recently, several instruments strengthening the EMU.

Fourth, the Commission should be encouraged to be more flexible in its legislative proposals, and to propose temporary or even permanent opt outs to Member States having difficulties. In order to do that, the Commission should take account of the actual level of impact on the single market and not a theoretical or dogmatic one. This would be particularly helpful for the smallest Member States, when opt-outs offered to them would not significantly distort the level playing field in the EU single market.

The above four points concern internal differentiation, but what about external differentiation? Is the EU too strict when negotiating with third countries? Perhaps. But one should realise that it will never be easy for non-EU members to get flexibility where the single market is concerned. Agreements with third countries must respect EU primary law. Third countries cannot expect to get identical EU single market benefits without having similar obligations as EU members. Derogations from EU law must, also for them, be justified, temporary and proportional, in accordance with the case-law of the ECJ. The Commission follows these rules when negotiating with third countries, while trying not to impose unnecessary uniformity. In principle, it takes into account particularities, realities and size. Besides, the teleological jurisprudential interpretation of the Treaties by the ECJ differentiates between the effects of accession treaties and association treaties.

VI. Conclusion

Given the differences of wishes and needs between the 27 EU Member States, various ways to differentiate among them should be encouraged, through derogations, enhanced cooperation or intergovernmental treaties, as long as the level playing field in the single market is respected. It is true that differentiation is not a panacea, but, as Pierre Vimont wrote in 2018, "the merit of debating flexibility could well be in the end to underline that the usual way of handling European affairs may have reached its limits and that a new process for defining and implementing genuine reforms is necessary."[12] I have argued here that marginal differentiation is an acceptable mechanism to allow diversity within the governance of the EU. However, I have also stated my opinion that differentiated governance is not the key to resolving the fundamental problems facing the EU.

Well, the time for "a new process for defining and implementing genuine reforms" has come. The EU was given ambitious aims by its Member States, without being given the necessary means to achieve those aims. This is not fair, while the EU is sometimes

[12] P Vimont, 'Flexibility Is Not the Miracle Solution' (15 August 2018) Carnegie Europe carnegieeurope.eu.

criticised for its insufficient results. We have reached the end of this road. The Council's decision-making is obsolete. A radical reduction of the number of cases allowing individual vetoes, which are undemocratic and prevent the EU from acting, is necessary. Apart from vital issues, individual vetoes should be replaced by a collective vetoes, requiring the opposition of at least a few Member States and a minimal fraction of citizens. Such an option would be more realistic and less drastic than a division of the EU.

The Member States know how difficult it is for the EU to take decisions, with a governance ill-adapted to its membership. Of course, they know even better how difficult it would be, in the present political climate, to get the support of their countries' citizens to a significant EU reform. However, muddling through is not eternally durable. Insufficient EU results will unavoidably lead to a loss of support.