ARTICLES

NEW OPTIONS FOR DIFFERENTIATED INTEGRATION IN THE EUROPEAN UNION

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BREXIT THE ULTIMATE OPT-OUT: LEARNING THE LESSONS ON DIFFERENTIATED INTEGRATION

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ABSTRACT: Historically, the use of differentiated integration mechanisms has been based on the idea of the widening and deepening of the European Union, necessitated by the enlargement of the bloc through the addition of Member State countries. The advent of Brexit means that we are in a rather different situation today, where the monodirectional march towards deeper, uniform integration between an ever increasing number of States is neither inevitable nor assured. The differences between all of the then 28 individual Member States in the pre-Brexit Union were multifarious. These differences have not disappeared along with the UK upon its exit from the Union. They still exist between the remaining 27 Member States and will likely increase in prominence as the European Union pursues its future path. Addressing those differences will require an alternative approach to uniform integration from the EU, it will require differentiated integration. This *Article* suggests that there are lessons to be learnt on differentiated integration from applying Brexit as a framework. The confusion surrounding differentiated integration as a concept, and the prominent role of the UK in availing itself of opportunities to utilise differentiated integration mechanisms, has led differentiated integration to be attributed to the UK as a form of British exceptionalism. Brexit is not just an opt-out but the ultimate opt-out, a form of flexibility sought from outside the European Union, consequent on a lack of wider acceptance of differentiated integration in terms of both legal permissiveness and extent as well as attitude within the Union. The maintenance of differences between the remaining Member States means that there needs to be increased open acceptance of the likely need for greater differentiated integration in the future.

KEYWORDS: Brexit – differentiated integration – concept – opt-out – disintegration – integration.

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I. Introduction

Historically, the use of differentiated integration mechanisms has been based on the idea of the widening and deepening of the European Union,[1] necessitated by the enlargement of the bloc through the addition of Member State countries.[2] The advent of Brexit means that we are in a rather different situation today, where the monodirectional march towards deeper, uniform integration between an ever increasing number of States is neither inevitable nor assured.

The differences between all of the then twenty eight individual Member States in the pre-Brexit Union were multifarious. These differences have not disappeared along with the UK upon its exit from the Union. They still exist between the remaining twenty seven Member States and will likely increase in prominence as the European Union pursues its future path. Addressing those differences will require an alternative approach to uniform integration from the EU, it will require differentiated integration.[3]

However, through using Brexit as a framework it becomes apparent how differentiated integration has been perceived in the EU, and as this *Article* will propound, this perception has not been all embracing. Whilst this *Article* does not make a comment on the multifarious complex factors which contributed to the choice of holding the referendum itself or the resultant vote.[4] The argument made by this *Article* is that throughout the EU's history, differentiated integration has been used to find solutions to problems as apparently intractable as this, but there is a concurrent reluctance to do so with an explicitly wider acceptance of differentiated integration in terms of both legal permissiveness and

[1] CD Ehlermann, 'How Flexible is Community Law? An Unusual Approach to the Concept of "Two-Speeds"' (1984) Michigan Law Review 1274; B Langeheine and U Weinstock, 'Graduated Integration: A Modest Path Towards Progress: A Contribution to the Debate About the Future Development of the European Community' (1985) JcomMarSt 185; E Grabitz and B Langeheine, 'Legal Problems Related to a Proposed "Two-tier System" of Integration Within the European Community' (1981) CMLRev 33; E Grabitz (ed.), *Abgestufte Integration: Ein Alternative zum Herkömmlichen Integrationskonzept?* (Kehl am Rhein 1984); and E Phillipart and G Edwards, 'The Provisions on Closer Cooperation in the Treaty of Amsterdam: The Politics of Flexibility in the EU' (1999) JcomMarSt 89.

[2] M Dougan, 'The Unfinished Business of Enhanced Cooperation: Some Institutional Questions and their Constitutional Implications' in A Ott and E Vos (eds), *Fifty Years of European Integration: Foundations and Perspectives* (T.M.C. Asser Press 2009) 157; D Thym, 'Competing Models for Understanding Differentiated Integration' in B De Witte, A Ott and E Vos (eds), *Between Flexibility and Disintegration: The Trajectory of Differentiation in EU Law* (Edward Elgar Publishing 2017) 29.

[3] M Kendrick, 'The Future of Differentiated Integration: The Tax Microcosm' (2020) Journal of International and Comparative Law 371; M Kendrick, 'A Question of Sovereignty: Tax and the Brexit Referendum' (2016) King's Law Journal 366; and M Kendrick, 'Differentiated Integration Amongst the EU27: Will Brexit Make the EU More Flexible?' in A Biondi, PJ Birkinshaw and M Kendrick (eds), *Brexit: The Legal Implications* (Kluwer Law International 2018).

[4] M Sobolewska and R Ford, *Brexitland* (Cambridge University Press 2020).

extent as well as attitude within the Union. The reality is that Brexit has actually highlighted issues with the perception of differentiated integration as a concept[5] and how it has been attributed to the United Kingdom as a form of British exceptionalism. The UK was the most noticeable Member State in availing itself of the opportunities for differentiation. Although the UK had never been the exclusive recipient or participant in the operation of differentiation mechanisms, indeed, it had sometimes been joined by founder Member States and had even been the participating Member State in an EU initiative while other States opted-out.[6] It is apparent as to how and why the UK received its reputation for being the "champion" of the opt-out,[7] as the UK's behaviour has been more widely publicised, sometimes by different UK governments themselves, which has had the unfortunate consequence of it attracting a reputation as a recalcitrant Member State, despite its strong support for the single market and relatively good EU law compliance rate. This *Article* would countenance against perceiving Brexit as a *sui generis* event, rather than acknowledging the reality of differentiated integration within the Union.

To acknowledge this reality, it is necessary to address firstly, the role arguably played by the confusion which surrounds the concept of differentiated integration itself. The confusing assortment of definitions,[8] which will be addressed in the next section, and indeed exceptions, to what the concept of differentiated integration means and what it does, or doesn't, incorporate does a disservice to the potential utility of the concept.[9] This has arguably facilitated rather than prevented Brexit being seen as sui generis as many, with the noblest of intentions, try to describe the concept as exceptional in the context of the UK and interpret it exceptionally further still in reference to Brexit. This *Article* will therefore use Brexit as a framework to address the issue of conceptual confusion (section II).

This *Article* will then proceed, on the basis of this framework, to discuss how Brexit has been seen as an example of British exceptionalism in the context of differentiated integration in section III where learning the lessons on differentiated integration will consider the advent of Brexit (section III.1) and the challenges for the future (section III.2) before concluding. It will suggest that with differentiated integration insufficiently embraced within the EU, the UK was, and still is, seeking a more flexible arrangement from outside the EU. There are therefore lessons to be learnt from the insufficient adoption of differentiated integration in the EU as seen by applying Brexit as a framework. Brexit is

[5] G Gaja, 'How Flexible is Flexibility Under the Amsterdam Treaty?' (1998) CMLRev 855.

[6] S Peers, 'Enhanced Cooperation: the Cinderella of Differentiated Integration' in B De Witte, A Ott and E Vos (eds), *Between Flexibility and Disintegration* cit. 76; M Kendrick, 'Judicial Protection and the UK's Opt-Outs: Is Britain Alone in the CJEU?' in P Birkinshaw and A Biondi (eds), *Britain Alone! The Implications and Consequences of United Kingdom Exit from the EU* (Kluwer Law International 2016) 166; M Kendrick, 'Differentiated Integration Amongst the EU27' cit.; and M Kendrick, *Differentiated Integration in the EU: Harmonising EU Tax Law* (Edward Elgar forthcoming 2023).

[7] R Adler-Nissen, *Opting Out of the European Union: Diplomacy, Sovereignty and European Integration* (Cambridge University Press 2014).

[8] ACG Stubb, 'A Categorization of Differentiated Integration' (1996) JComMarSt 283.

[9] M Kendrick, *Differentiated Integration in the EU* cit.

not just an opt-out, or as suggested from seeing the UK as an exception, just another UK opt-out, but rather the ultimate attempt to obtain flexibility. This *Article* propounds that Brexit actually mirrors what has been going on historically with regard to differentiated integration. The EU's concern that if it allowed the UK to achieve divergence it may essentially create a competitor, not a close neighbour, are seemingly evidence of a reversion to the desire to achieve the rigid adherence to the rules, in order, so the concerns of the EU appear to be, to ensure the single market and indeed the entire EU project will not be undermined. However, the possibility of Union action is more effectively served by permitting a Member State to differentiate the application of a particular measure, rather than having a requirement of uniformity leading to an inability to act. The main difficulty is that the EU itself has got to see the merit in increased flexibility, rather than let Brexit be seen as a continued exercise in British exceptionalism, and therefore once it is rid of its difficult member the goal of uniformity is reinvigorated.

Brexit is not just an opt-out but the ultimate opt-out, a form of flexibility sought from outside the European Union, consequent on a lack of wider acceptance of differentiated integration in terms of both legal permissiveness and extent as well as attitude within the Union. The maintenance of differences between the remaining Member States means that there needs to be increased open acceptance of the likely need for greater differentiated integration in the future. This *Article* suggests that the EU needs to recognise more openly that differentiated integration can be a principle to guide decisions about the development of the EU integration model and that differentiation should be capable of absorption into orthodoxy. Otherwise, viewing Brexit as an episode in British exceptionalism rather than the ultimate opt-out will mean that lessons on differentiated integration as a necessity for the future will not be learnt.

II. Conceptual confusion

There is considerable disagreement and confusion over the concept of differentiated integration.[10] Many of the excellent *Articles* to this *Special Section* demonstrate that the definitions and approaches to differentiated integration are extensive. A multiplicity of theories has been expounded within and between multiple disciplines.[11] Having surveyed the theories from a legal, historical, political, political sociology and political science perspective, all that becomes clear is that a confusing assortment of attempts to define the concept have served not to explain but to discourage what in essence means non-uniform integration.[12]

[10] ACG Stubb, 'A Categorization of Differentiated Integration' cit. 283.

[11] See, for example, B De Witte, D Hanf and E Vos (eds), *The Many Faces of Differentiation in EU Law* (Intersentia 2001); A Ott and E Vos (eds), *Fifty Years of European Integration* cit.; and G de Búrca and J Scott (eds), *Constitutional Change in the EU: From Uniformity to Flexibility?* (Hart Publishing 2000).

[12] Whilst space precludes a detailed discussion of these various approaches, see further M Kendrick, *Differentiated Integration in the EU* cit.

Conceptual disagreement is not just evident regarding the concept of differentiated integration itself, but also in relation to explaining Brexit in the context of differentiated integration. For example, Vollaard suggests differentiated integration as "partial exits", such as opt-outs,[13] for Webber it's a form of "(dis)integration",[14] for Schimmelfennig and Winzen it's "differentiated disintegration".[15] Just in relation to Brexit the confusion demonstrates the conceptual problem, which serves only to make it easier to try and conceive Brexit as an example of British exceptionalism, rather than understand and accept differentiated integration in the EU. A closer look reveals this is the case.

Webber conceives (dis)integration as a multidimensional phenomenon with many conceptual distinctions, of which at least two are most pertinent for the current discussion. The first is "sectoral (dis)integration" which comprises "the expansion or reduction of the range of issue areas in which the EU exercises policy-making competences and, within specific issue areas, an expansion or reduction of the scope of existing common policies"[16] and the second is "horizontal (dis)integration" being, "the expansion or reduction of the number of EU member states".[17] Brexit, he considers, is an example of horizontal (dis)integration.[18] Patel identifies what is not helping this conceptual disagreement, especially the dichotomy between integration and disintegration, which is that "despite decades of debate on European integration, conceptualisation of European disintegration remains rudimentary".[19]

In a valiant attempt to provide clarity, Patel provides an interesting observation as to how integration prompts disintegration, in fact he suggests that disintegration and dysfunctionality have characterised the history of integration.[20] That history he identifies as being part of the historical development of European integration itself, "[s]ince the 1940s pro-European elites have embedded concrete steps towards European integration within a narrative that member states were on the road to an ever-closer union. The unification process was posited to be unidirectional and irreversible, resting on the win motors of ever progressing deepening and enlargement".[21] Patel explains that history also teaches

[13] H Vollaard, 'Explaining European Disintegration' (2014) JComMarSt 1155.

[14] D Webber, *European Disintegration? The Politics of Crisis in the European Union* (The European Union Series Macmillan 2019).

[15] F Schimmelfennig and T Winzen, *Ever Looser Union? Differentiated European Integration* (Oxford University Press 2020).

[16] D Webber, *European Disintegration?* cit. 13-14.

[17] *Ibid*. 14.

[18] *Ibid*.

[19] K Patel, *Project Europe: A History* (Cambridge University Press 2020) 220, fn 49, endnote p. 318. See also: PC Schmitter and Z Lefkofridi, 'Neo-Functionalism as a Theory of Disintegration' (2016) Chinese Political Science Review 1-29; H Vollaard, 'Explaining European Disintegration' cit.; and D Weber, 'How Likely is it that Europe will *Dis*integrate? A Critical Analysis of Competing Theoretical Perspectives' (2014) European Journal of International Relations 341.

[20] K Patel, *Project Europe* cit. 226.

[21] *Ibid*. 228-229.

us that "disintegration and dysfunctionality are part of the political normality of the integration process", this is because "they are produced by the treatment (or non-treatment) of complex problems and knock-on effects of the integration process itself".[22] Patel demonstrates this theory through the example of the European Monetary System (EMS), being an attempt at integration, which became dysfunctional and failed therefore causing disintegration between the Member States in that policy area. As the EMS was replaced with the Euro, Patel suggests that the response is differentiated integration. This pattern of integration then dysfunctionality then disintegration followed by differentiated integration is the current trend we are witnessing in the EU but that is nothing new.[23] It is an inevitable consequence of the EU's development and increased competences. The EU's efforts to integrate highlight the differences between the Member States thereby revealing the lack of willingness and ableness of some states to pursue uniformity through participation in certain EU initiatives.[24] This causes an attempt to integrate to become dysfunctional, leading to disintegration between the states in relation to that initiative. The response is resort to utilising mechanisms of differentiated integration This is reinforced when applying the framework of Brexit, as Patel states, "[d]isintegration and dysfunctionality are part of the political normality of the integration process. [...] The same also applies to the withdrawal of member states, for example, in the form of Brexit".[25] This *Article* propounds that a more open approach to differentiated integration will prevent this process, where differentiated integration follows dusfunctionality and disintegration. As differentiated integration is not a new but an historic and current phenomenon, the existence and necessity of which is likely to become more inevitable as the EU pursues its future path, there needs to be a greater openness towards differentiated integration. Instead of being the final consequence of the actions and objections of a Member State viewed as reluctant invoked in circumstances of disintegration, greater clarity on the need for differentiated integration assisted by less conceptual confusion could lead to learning the lesson Patel identifies, "[p]aradoxical as it may sound, precisely because the EU now occupies a dominant position in relation to European cooperation, legal differentiation represents the most important means of moving forward".[26]

In contrast, Schimmelfennig and Winzen view Brexit as a "novel process" in the history of European differentiated integration, describing it as "differentiated disintegration".[27] They explain that:

[22] *Ibid*. 230.
[23] *Ibid*. 220, for an in-depth discussion see chapter 7 in the volume.
[24] *Ibid*. 44.
[25] *Ibid*. 230.
[26] *Ibid*. 272-273.
[27] F Schimmelfennig and T Winzen, *Ever Looser Union?* cit.137.

> "in a static perspective, differentiated integration and disintegration are the same. They result in a situation, in which a legal EU rule is not uniformly and exclusively valid across the EU member states. In a dynamic perspective, however, they differ. Differentiated integration refers to a situation, in which integration progresses overall but at least one state remains at the status quo or does not participate at the same level of integration as others. By contrast, differentiated disintegration is the selective reduction of a state's adherence to the integrated legal rules, which results in an overall lowering of the level and scope of integration".[28]

One can think of examples which test this characterisation, such as the authorising of the use of enhanced cooperation in the area of the creation of unitary patent protection including language provisions.[29] The Council's decision to authorise the use of the constitutionalised mechanism for differentiated integration in the Treaties[30] was challenged in the Court of Justice of the European Union (CJEU) by two Member States, Spain and Italy.[31] It was submitted on behalf of Spain and Italy, that all enhanced cooperation endeavours must contribute to the process of integration. In this case, however, they maintained that the true object of the contested decision was not to achieve integration but to exclude Spain and Italy from the negotiations on the issue of the language arrangements for the unitary patent. Whilst the Council unsurprisingly disagreed, arguing that if Spain and Italy did not play a part in the enhanced cooperation, it is because they have refused to do so and not because they have been kept out of negotiations, it is an interesting example to illustrate conceptual disagreement surrounding differentiated integration, and specifically here differentiated disintegration. This case is one example which demonstrates that these Member States felt excluded and therefore the integrated legal rules didn't apply to them which resulted in an overall lowering of the level and scope of integration for these states. The enhanced cooperation mechanism however is certainly not an example of differentiated disintegration but a legal mechanism provided in the primary law of the Treaty as a tool for differentiated integration.

From the initial Protocols that were part of the Treaty of Rome, to the enhanced cooperation mechanism in its Lisbon Treaty formulation, uniformity has never actually been the *status quo* in either the European Community or Union. However, this section has demonstrated, although admittedly barely scratching the surface, the distinct existence of conceptual disagreement and confusion surrounding differentiated integration. The fact that uniformity, although a goal of the European Union, has been more illusory than a practical reality, and that in actual fact differentiation, in one form or another has been alive and well in the Union since its conception, is difficult to detect because of the conceptual confusion and disagreement. The consequences of this have been twofold. First,

[28] *Ibid*.

[29] Decision 2011/167/EU of the European Council of 10 March 2011 authorising enhanced cooperation in the area of the creation of unitary patent protection.

[30] Art. 20 TEU and arts 326-334 TFEU.

[31] Joined cases C-274/11 and C-295/11 *Spain and Italy v Council* ECLI:EU:C:2013:240.

differentiation has been seen as the exception, difficult to obtain and subsequently discouraged. The extent to which it exists in the Union has not been explicitly advertised, which has compounded this problem. It has led to labels such as "second class" Member States being used to describe those which engage in differentiation, despite the fact that in one instance or another every single Member State in the Union engages in at least one instance of differentiated integration.[32] This is the genesis of the temptation for the EU to see Brexit itself, being the ultimate attempt to obtain flexibility, as an episode of British exceptionalism. Second, the rationale behind this reluctance to openly and explicitly advertise the extent of flexibility in the Union has led to mechanisms being too restrictive and ironically too inflexible to support what has actually fuelled the reluctance, which is the preservation of uniformity and the Union itself. Conceptual confusion and disagreement, whether a result, a cause, or both, is certainly not helpful. There is a tragic note to this situation, which is that, certainly in relation to the case of the UK, in attempting to prevent the disintegration of the Union, the lack of flexibility may in actual fact cause it. This demonstrates the lesson to be learnt on differentiated integration by applying the framework of Brexit, the UK is seeking a level of flexibility that is not available inside the EU, hence, Brexit is the ultimate opt-out.

III. Learning the lessons on differentiated integration

III.1. The advent of Brexit

The reality is that Brexit has actually highlighted issues with the perception of differentiated integration as a concept, and how it has been attributed to the UK as a form of British exceptionalism. This *Article* will now proceed to more explicitly apply Brexit as a framework, to discuss how Brexit has been seen as a *sui generis* event and an example of British exceptionalism in the context of differentiated integration. It will suggest that with differentiated integration insufficiently embraced within the EU, the UK was, and still is, seeking a more flexible arrangement from outside the EU. There are therefore lessons to be learnt from the insufficient adoption of differentiated integration in the EU as seen by applying Brexit as a framework. Brexit is not just an opt-out, or as suggested from seeing the UK as an exception, just another UK opt-out. But rather the ultimate attempt to obtain flexibility. This section of the *Article* will initially consider the advent of Brexit itself, including reference to the art. 50 TEU withdrawal process. It will then proceed to consider the challenge for the future of integration in the European Union, propounding the need for differentiated integration.

[32] D Chalmers and P Koutrakos, 'Editorial: Cut off from Europe: The Fog Surrounding Luxembourg' (2008) European Law Review 135, 136.

As a preliminary note it should be stated that this *Article* is not, however, predicated on the assumption that rules that apply equally to the Member States are a bad thing.[33] It does not seek to demolish the idea of a peaceful union or a trading market. It does not seek to call into question the concept of European union where laws, rules, values and principles exist.[34] A fair playing field in trade in Europe is a very positive idea which should be universally supported. In short, this *Article* is not arguing with the existence of rules and standards. The idea behind this *Article* is to promote, encourage and support differentiated integration in the EU.

This *Article* supports the existence of rules, and their fair application. However, rules should not be adhered to in a dogmatic fashion for their own sake. A staunch insistence on obedience to the EU's rules in order to try to prevent the Union from disintegrating is counter-productive, as it is evident since the Treaty of Rome, differentiated integration has always existed and has not brought about the destruction of the Union exercise. Furthermore, this *Article* would countenance against perceiving Brexit as a case of British exceptionalism. An attitude of exceptionalism treats those wanting flexibility in some areas as recalcitrant difficult Members whose commitment is questionable and are supposed to be "second class".[35] The UK is a pertinent example. Whilst (in)famous for "opting-out" of the social policy Protocol, European Monetary Union, and Schengen, to name but a few of the better-known examples, it has however been part of the "vanguard"[36] in the lesser known and advertised (admittedly sometimes because of the UK itself) instances of differentiated integration. One example of this we have already encountered is the enhanced cooperation regarding the unitary patent,[37] where there were twelve initial Member States, namely, Denmark, Germany, Estonia, France, Lithuania, Luxembourg, the Netherlands, Poland, Slovenia, Finland, Sweden and the United Kingdom, that wished to establish enhanced cooperation between themselves and asked the Commission to submit a proposal to the Council. It is consequently apparent that not only is the UK not always part of the "outs" but that it has jointly led the way in integration whilst other founder Member States have decided not to participate. It was therefore not always the exception.

It should also be recalled that the UK had a good record in compliance with its EU obligations.[38] It should be emphasised that differentiated integration was a seemingly preferable option to noncompliance, with the UK arguably wanting to opt-out of the areas

[33] On the reconciliation of the principle of equality among Member States and differentiated integration see LS Rossi, 'The Principle of Equality Among Member States of the European Union' in LS Rossi and F Casolari (eds), *The Principle of Equality in EU Law* (Springer 2017) 19-23.

[34] See T Tridimas, *The General Principles of EU Law* (Oxford University Press 2006 2nd ed.).

[35] R Adler-Nissen, *Opting Out of the European Union* cit. 32.

[36] W Schäuble and K Lamers, 'Reflections on European Policy' (1996) Bonn CDU/CSU Group in the Bundestag.

[37] Decision 2011/167/EU cit.

[38] Report COM/2017/370 final from the European Commission of 6 July 2017 on monitoring the application of European Union Law 2016 Annual Report.

of EU law it could not comply with, instead of failing to abide by its legal obligations. This demonstrates that castigating Member States, which seek to utilise differentiated integration with labels such as "recalcitrant", which have negative connotations,[39] is extremely unhelpful, as it needs to be borne in mind that there is no Member State to which the Treaties fully apply.[40] The main point of differentiated integration is that it enables integration, but the theories of integration, conceptual and terminological confusion and disagreements produce a reluctance to acknowledge, let alone use, the mechanisms that are available in a truly flexible manner. A more embracing attitude towards the use of differentiated integration is a significantly better approach, because there are differences between the Member States which are unlikely to disappear and therefore need to be accommodated. The sooner the need for an increased level of differentiated integration is recognised, rather than the existence of these mechanisms for differentiated integration marginalised, and their use treated as an exception awarded to the difficult State, the sooner the EU will confirm itself as having a firmer future.[41] The UK is, seen through applying Brexit as a framework, therefore trying to obtain a level of flexibility that was just not available in the Union, but this is not an exclusive UK phenomenon. The attempts that have been made by the EU to accommodate the differences between its members have been insufficient and consequently have provided neither uniformity nor proper flexibility for any, or all, of its Member States. Treating the UK as an exception as a way to excuse Brexit as a *sui generis* event,[42] rather than acknowledging the reality of the perception of differentiated integration within the Union, will only increase, rather than decrease, the likelihood of other Member States leaving the bloc.

The main difficulty is that the EU itself has got to see the merit in wider acceptance of differentiated integration in terms of both legal permissiveness and extent as well as attitude, rather than let Brexit be seen as an exercise in British exceptionalism, and therefore once rid of its difficult member the goal of uniformity is reinvigorated. As Gormley states, "a possibility of Union action is more effectively served by permitting a Member State to opt out of applying a particular decision than having a requirement of unanimity leading to an inability to act".[43] In essence, in order to avoid another Brexit incidence, it needs to recognise more openly that differentiated integration can be a principle to guide

[39] R Adler-Nissen, *Opting Out of the European Union* cit. 32.

[40] D Chalmers and P Koutrakos, 'Editorial: Cut off from Europe' cit. 135.

[41] For a brief summary of the political approaches of the Commission, France and Germany, see P Morillas, 'Juncker's State of the Union: Where now for Multispeed Europe?' (14 September 2017) EUROPP European Politics and Policy blogs.lse.ac.uk.

[42] The Economist, 'Britain's Planned Departure is already Changing Brussels: Free-traders and Atlanticists have much to Mourn' (2 November 2017) The Economist www.economist.com.

[43] L Gormley, 'Reflections on the Architecture of the European Union After the Treaty of Amsterdam' in Democracy' in D O'Keeffe and P Twomey (eds), *Legal Issues of the Treaty of Amsterdam* (Hart Publishing 1999) 61.

decisions about the development of the EU integration model[44] and that "flexibility is capable of absorption into orthodoxy".[45]

Furthermore, the advent of Brexit, is not an isolated exceptional incident dating back to just 2016. As was apparent with the UK even before the referendum was run on 23 June 2016,[46] and as highlighted by Walker, "[e]ven some of the Remain supporters in the referendum do not consider the existing multilateral framework of differentiated integration sufficient to meet Britain's needs and concerns; hence David Cameron's insistence in negotiating the February agreement on a future exemption from 'ever closer Union' as part of a new customized membership model".[47] Again, this is not just a British phenomenon, as Adler-Nissen suggests that there has been a trend towards an increased desire by Member States to secure their national sovereignty formally through the use of mechanisms of differentiation.[48] Consequently, and according to Hillion, "[t]he right to withdraw may thereby be interpreted as the ultimate elaboration of constitutional devices".[49] A more open acceptance of differentiated integration mechanisms, a greater willingness to use them, an end to treating the use of the mechanisms as an exception granted to "difficult" Member States, is possible. It needs, however, to be combined with an acknowledgement at EU level that unless differentiated integration is more accessible, available and obtainable, the consequence is that flexibility will be sought from outside the EU. As such, it is the argument of this article that ultimately what the UK is doing is

[44] H Wallace, 'Flexibility: A Tool of Integration or a Restraint on Disintegration?' in K Neunreither and A Wiener (eds), *European Integration After Amsterdam: Institutional Dynamics and Prospects for Democracy* (Oxford University Press 2000) 190-191.

[45] S Weatherill, '"If I'd Wanted You to Understand I Would have Explained it Better": What is the Purpose of the Provisions on Closer Co-operation Introduced by the Treaty of Amsterdam?' in D O'Keeffe and P Twomey (eds), *Legal Issues of the Treaty of Amsterdam* cit. 25.

[46] See also: European Council, *Consclusions of 18-19 February: A new settlement for the United Kingdom within the European Union* eur-lex.europa.eu. It met to provide the UK with a renegotiated status within the EU as regards to elements of the following areas: economic governance; competitiveness; sovereignty; and social benefits and free movement, which would have come into effect but for the referendum result producing a majority in favour of leaving the EU. The Conclusions state at para. 4 that "should the result of the referendum in the United Kingdom be for it to leave the European Union, the set of arrangements [...] will cease to exist".

[47] N Walker, 'The Brexit Vote: The Wrong Question for Britain and Europe' (16 June 2016) Verfassungsblog verfassungsblog.de. See also A Biondi, 'Common law, UE e CEDU: passato, presente ed un incerto futuro' (2018) Federalismi.it www.federalismi.it.

[48] R Adler-Nissen, *Opting Out of the European Union* cit. 1-2. Also, Wallace, Moravcsik and Risse generally interpret opt-outs and differentiated integration mechanisms as ways to preserve the sovereignty Member States, see W Wallace, 'The Sharing of Sovereignty: the European Paradox' (1999) Political Studies 503; A Moravcsik, 'Europe's Integration at Century's End' in A Moravcsik (ed.), *Centralization or Fragmentation? Europe Facing the Challenges of Deepening, Diversity and Democracy* (Council on Foreign Relations Press 1998); and T Risse, 'Nationalism and Collective Identities: Europe Versus the Nation-State?' in P Hayward, E Jones and M Rhodes (eds), *Developments in West European Politics* (Palgrave 2002) 77.

[49] C Hillion, 'Leaving the European Union, the Union Way: A legal analysis of Article 50 TEU' (2016) Swedish Institute for European Policy Studies 10.

trying to achieve a level of flexibility that is not available to EU Member States inside the EU, hence, Brexit is the ultimate opt-out.[50]

As to the lessons to be learnt from applying the Brexit framework in relation to the Article 50 TEU process,[51] it will be recalled that the renegotiation prior to the referendum saw the then Prime Minister, David Cameron, seek to adjust the legal and political basis on which the UK was a Member State. Whilst there have been numerous accounts of the renegotiation, including discussions of what was requested by both sides, and arguably more importantly what was not agreed, the aim of this *Article* is not to provide a re-evaluation of these factors but to try to take a more holistic perspective. In essence, it can be argued that the UK was seeking a modification to the differentiated integration structure which formed the foundation of its membership. Crucially, it sought to do so initially without leaving the EU. This was effectively confirmed by Donald Tusk, the (then) President of the European Council, in November 2015, when he opined that the proposed reforms effectively amounted to a general confirmation and moderate expansion of Britain's differentiated integration in the EU.[52]

The renegotiation was unsurprisingly not, despite what its title would suggest, a significantly "new settlement"[53] and therefore it did little to mitigate the situation which immediately preceded the referendum. In fact, it was quite noticeable by its absence in the UK referendum campaign, with the then Prime Minister, David Cameron, "abandon[ing] any effort at 'persuading people of its merit'".[54]

One well noted concession from the EU, which is pertinent to the current discussion, is the differentiated status the UK obtained within the renegotiation in relation to the commitment to creating an ever closer union.[55] The "New Settlement" provided that :

> "[i]t is recognised that the United Kingdom, in the light of the specific situation it has under the Treaties, is not committed to further political integration into the European Union. The substance of this will be incorporated into the Treaties at the time of their next revision in accordance with the relevant provisions of the Treaties and the respective constitutional requirements of the Member States, so as to make it clear that the references to ever closer union do not apply to the United Kingdom".[56]

[50] See M Kendrick, 'Differentiated Integration Amongst the EU27' cit.

[51] For a comprehensive discussion of the art. 50 TEU process see: T Tridimas, 'Article 50: An Endgame Without an End?' (2016) King's Law Journal 297-313.

[52] F Schimmelfennig and T Winzen, *Ever Looser Union?* cit. 146 and D Tusk, 'A New Settlement for the United Kingdom in a Reformed European Union' (10 November 2015) assets.publishing.service.gov.uk.

[53] European Council, *A New Settlement for the United Kingdom Within the European Union* cit.

[54] D Webber, *European Disintegration?* cit. 199 referring to D Korski, 'Why We Lost the Brexit Vote: Behind the Scenes of the Flawed Campaign to Keep the UK in the EU' (20 October 2016) Politico www.politico.eu.

[55] Art. 1 TEU.

[56] European Council, *A New Settlement for the United Kingdom Within the European Union* cit. section C, 'Sovereignty', para. 1.

Whilst it is suggested that all the EU offered here was to "merely acknowledged established practice",[57] it is hard to accept that a change to the UK's differentiated legal basis of membership, the nature of which requires altering the Treaty, is "merely" anything. It is easier to accept that this would have been a change, should it have come into force, rather than a restatement, and arguably of constitutional proportions. Perhaps this demonstrates how the perceptions of differentiated integration as a concept can impact on the ability of a State to utilise differentiated integration mechanisms. If so, this is not without serious consequence, as can be seen through applying the framework of Brexit. Webber shows insight into the attitude which was dominant at the time when he states that it was

> "feared that if the EU were to make too far-reaching concessions to the UK, this would provoke other members to make their own demands for special membership deals – which could provoke the unwinding of the EU in the same way that Brexit itself could [...] Germany wanted to keep the UK in the EU, but, in case of doubt, if it had to choose between having a larger, more loosely integrated EU with the UK (that it feared would unravel) and a smaller, more tightly integrated EU without the UK, it would prefer the latter – in line with its historical stance on the issue".[58]

Adherence to the view that differentiated integration is an exception, to an extent that it is considered something to be discouraged in order to avoid the collapse of the EU, which then has the consequence of calling into question the future of the EU when the Member States leaves, is hugely problematic.

This is not to say that having given a little more to the UK in the renegotiation the UK would have necessarily voted to remain, rather this *Article* does not make a comment on the multifarious complex factors which contributed to the choice of holding the referendum itself or the resultant vote. The argument made by this *Article* is that throughout the EU's history, differentiated integration has been used to find solutions to problems as apparently intractable as this, but there is a concurrent reluctance to do so with an explicitly wider acceptance of differentiated integration in terms of both legal permissiveness and extent as well as attitude within the Union. The pursuit of convergence should not be premised on fear of disintegration or ineffectiveness and differences between the Member States should be addressed with differentiated integration in an open and accepting manner. Brexit is the framework which demonstrates the real consequence of reluctance to embrace differentiated integration more whole heartedly.

In consequence on the referendum outcome, the UK triggered the withdrawal process provided for in art. 50 TEU. As the ultimate elaboration of constitutional devices, Hillion suggests that the existence of the right to withdraw also confirms that participation in the

[57] F Schimmelfennig and T Winzen, *Ever Looser Union?* cit. 146-147.
[58] D Webber, *European Disintegration?* cit. 196.

European integration process is essentially voluntary and that "the continental vocation of 'ever closer union' cannot trump its democratic foundations",[59] which one can arguably translate into the ultimate attempt at sovereignty preservation. The CJEU in *Wightman*[60] expounded the importance of sovereignty in the art. 50 TEU process, "the Member State is not required to take its decision in concert with the other Member States or with the EU institutions. The decision to withdraw is for that Member State alone to take, in accordance with its constitutional requirements, and therefore depends solely on its sovereign choice".[61] Perhaps the art. 50 TEU process is just an exercise in sovereignty restatement, or perhaps it is a form of managed differentiation, the ultimate opt-out mechanism?

This *Article* therefore propounds that Brexit actually mirrors what has been happening historically with regard to differentiated integration. The EU's concerns that if it allowed the UK to achieve divergence through the art. 50 TEU Brexit process it may essentially create a competitor, not a close neighbour, are seemingly evidence of a reversion to the desire to achieve the rigid adherence to the rules, in order, so the concerns of the EU appear to be, to ensure the single market and indeed the entire EU project will not be undermined.[62] However, trying to achieve uniformity is almost impossible with the widely diverged economies that there are in the EU, and sovereignty[63] means that there are

[59] C Hillion, 'Leaving the European Union, the Union Way' cit. 10. For more on this point, see C Hillion, 'Accession and Withdrawal in the Law of the European Union' in A Arnull and D Chalmers (eds), *Oxford Handbook of European Union Law* (Oxford University Press 2015) 126.

[60] Case C-621/18 *Wightman and Others* ECLI:EU:C:2018:999, especially para. 5 which provides, "[i]n addition, Article 50(1) TEU provides that any Member State may decide to withdraw from the European Union in accordance with its own constitutional requirements. It follows that the Member State is not required to take its decision in concert with the other Member States or with the EU institutions. The decision to withdraw is for that Member State alone to take, in accordance with its constitutional requirements, and therefore depends solely on its sovereign choice" and paragraph 56 "[i]t follows that Article 50 TEU pursues two objectives, namely, first, enshrining the sovereign right of a Member State to withdraw from the European Union and, secondly, establishing a procedure to enable such a withdrawal to take place in an orderly fashion" and again at para. 72 "[a]s regards the proposal of the Council and the Commission that the right of the Member State concerned to revoke the notification of its intention to withdraw should be subject to the unanimous approval of the European Council, that requirement would transform a unilateral sovereign right into a conditional right subject to an approval procedure. Such an approval procedure would be incompatible with the principle, referred to in paragraphs 65, 67 and 69 of the present judgment, that a Member State cannot be forced to leave the European Union against its will".

[61] *Ibid*. especially para. 5.

[62] The Economist, 'The EU Rejects Theresa May's "Pick 'n' Mix" Brexit Plan' (8 March 2018) The Economist www.economist.com and BBC, 'Andrew Marr Show: Full Interview with Theresa May MP' (25 March 2018) BBC www.bbc.com.

[63] This was a significant motivation behind the referendum result, as nearly half of leave campaigners (49%) gave this as their single biggest reason for their views in the referendum, specifically the principle that "decisions in the UK should be taken by the UK". See Lord M Ashcroft, 'How the United Kingdom Voted on Thursday… and Why' (24 June 2016) lordashcroftpolls.com. See also A Biondi, PJ Birkinshaw and M Kendrick (eds), *Brexit* cit. See also J Raz, 'The Future of State Sovereignty' (King's College London Law School Research Paper 2017-42) 7.

tensions caused by attempts to change and reform. Consequently, fear of disintegration provides too cautionary an approach to accommodating difference. Seeking uniformity as the goal risks achieving the opposite. Rather, a new attitude towards differentiated integration can have a positive effect in facilitating reform to the European Union project.

III.2. The challenge for the future

According to Hooghe and Marks, "permissive consensus" is being replaced with "constraining dissensus" as integration and competence expansion occurs, providing more political overlap between the Member States and the EU.[64] This has produced the negative perspective, which is evident today, against the use of differentiated integration mechanisms, and the attitude that they are the exception, and even the rare exception, rather than the norm. Stubb suggests that this is because most of the "flexibility debate revolved around 'what should not' as opposed to 'what should be done'".[65] It is the suggestion of this *Article* that the reverse of this historical attitude displayed by the EU towards the incorporation of differentiated integration should now transpire as a response to the advent of Brexit. The EU's attitude should no longer be based on what should not be done, but on how it can accommodate the differences of its Member States in an environment of openness and inclusivity, rather than obstructive exceptionalism.

Brexit arguably demonstrates that distrust of a "greater Europe", and fierce insistence on state sovereignty, remain live issues in today's politics.[66] This is suggested by Heuser, who has considered the history of sovereignty in Europe over the course of several centuries, reflecting on lessons which can be learnt from history when applied in the context of Brexit.[67] The intention of this section of this *Article* is to equally consider what the discussion so far could contribute to envisioning the future of differentiated integration in the EU.

In its "White Paper on the Future of Europe: Reflections and Scenarios for the EU27 by 2025", the European Commission set out five possible scenarios for the future post-

[64] L Hooghe and G Marks, 'A Postfunctionalist Theory of European Integration: From Permissive Consensus to Constraining Dissensus' (2008) British Journal of Political Science 21.

[65] A Stubb, 'Negotiating Flexible Integration in the Amsterdam Treaty' in K Neunreither and A Wiener (eds), *European Integration After Amsterdam* cit. 171.

[66] B Heuser, *Brexit in History: Sovereignty or a European Union?* (Hurst 2019).

[67] *Ibid*. Heuser argues that attempts at "European Union" have been around since at least the early 1300s if not before and that the idea of a united states of Europe with states formally treated as equals, as "sovereigns" with a permanent Congress or Senate and the possibility of disputes being settled by arbitration or judicial pronouncement. In contrast to the current version of European Union, majority voting featured in previous designs throughout history. Heuser argues in essence that there has always been a discussion to deal with wars and lack of cooperation in Europe and that the idea of European Union is nothing new nor are the reasons for its design and existence. The question has always been about sovereignty and the current design was never inevitable, quite the opposite. The early ideas were not considered the most realistic or plausible with options of empires and super-states on the table, from suggestions by Saint-Pierre, Bentham and Kant, to name but a few.

Brexit.[68] Scenario one would be to just carry on as the EU is presently.[69] Scenario two, is to gradually re-centre the EU on the single market, and consequently everything the EU does would be to further single market objectives, "[t]he EU's re-centred priorities mean that differences of views between Member States on new emerging issues, often need to be solved bilaterally, on a case by case basis".[70] The third scenario is described as "[t]hose who want more do more", meaning that the EU will allow willing Member States to do more together in specific areas, "the EU27 proceeds as today but where certain Member States want to do more in common, one or several 'coalitions of the willing' emerge to work together in specific policy areas. These may cover policies such as defence, internal security, taxation or social matters".[71] Scenario four is unambitiously described as "[d]oing less more efficiently", which means that:

> "[i]n a scenario where there is a consensus on the need to better tackle certain priorities together, the EU27 decides to focus its attention and limited resources on a reduced number of areas. As a result, the EU27 is able to act much quicker and more decisively in its chosen priority areas. For these policies, stronger tools are given to the EU27 to directly implement and enforce collective decisions, as it does today in competition policy or for banking supervision. Elsewhere, the EU27 stops acting or does less".[72]

The final scenario is more ambitiously described as "Doing Much More Together".[73] According to the Commission, this means that "[i]n a scenario where there is consensus that neither the EU27 as it is, nor European countries on their own, are well-equipped enough to face the challenges of the day, Member States decide to share more power, resources and decision-making across the board. As a result, cooperation between all Member States goes further than ever before in all domains".[74] The Commission does however recognise that there could be an issue with this option, which is that "there is the risk of alienating parts of society which feel that the EU lacks legitimacy or has taken too much power away from national authorities",[75] we are therefore back, according to Heuser's analysis, to the centuries old problem of trying to reconcile sovereignty with a project to unify Europe.

The only option that can really be said to embrace differentiated integration, most explicitly, is scenario three.[76] What is envisaged are coalitions of the willing which crucially want to do more and are being given a choice as to if, and presumably how, they wish to

[68] European Commission COM(2017) 2025 final of 1 March 2017 White Paper on the Future of Europe: Reflections and Scenarios for the EU27 by 2025.

[69] *Ibid*. 16.

[70] *Ibid*. 18.

[71] *Ibid*. 20.

[72] *Ibid*. 22.

[73] *Ibid*. 24.

[74] *Ibid*.

[75] *Ibid*.

[76] F Schimmelfennig and T Winzen, *Ever Looser Union?* cit. 1.

proceed with integration. Whilst it is positive to see differentiated integration appearing as a potential scenario, in light of the argument put forward in this article, it would need to be accompanied by an attitude more accepting of flexibility arrangements.

In essence, whatever model is chosen, and whether or not any of these particular scenarios feature, what needs to be borne in mind is that the monodirectional march towards deeper, uniform integration between an ever increasing number of States is neither inevitable nor assured and the differences between the 27 Member States have not disappeared. The centuries old problem of trying to reconcile sovereignty with a project to unify Europe, which Heuser identifies,[77] is still very much alive and well. Having applied Brexit as a framework in this *Article*, the lesson to be learnt on differentiated integration is that it is not the exclusive domain of the UK and should not be seen as an exercise in British exceptionalism. The possibility of Union action post-Brexit will be more effectively served by permitting wider use of differentiated integration. Whatever model the EU chooses, the challenge for the future is whether or not the EU will be more embracing of differentiated integration.

IV. Conclusion

Historically, the use of differentiated integration mechanisms has been based on the idea of the widening and deepening of the European Union, necessitated by the enlargement of the bloc through the addition of Member State countries. The advent of Brexit means that we are in a rather different situation today, where the monodirectional march towards deeper, uniform integration between an ever increasing number of States is neither inevitable nor assured. Differentiated integration has always been an historical feature of Europe, "as integration has always meant joining together in differentiation".[78]

Whilst this *Article* does not make a comment on the multifarious complex factors which contributed to the choice of holding the referendum itself or the resultant vote. The argument made by this article is that throughout the EU's history, differentiated integration has been used to find solutions to problems as apparently intractable as this, but there is a concurrent reluctance to do so with an explicitly wider acceptance of differentiated integration in terms of both legal permissiveness and extent as well as attitude within the Union.However, Brexit essentially provides evidence that the level of flexibility available in the Union, far from causing its disintegration, has actually been insufficient to prevent its disintegration because it does not accommodate the differences between the Member States to a sufficient degree. This is exacerbated by conceptual confusion and disagreement. The title of this *Article*, "Brexit: the ultimate opt-out", summarises what this *Article* propounds, which is that with insufficient flexibility within the EU, the UK is seeking a more flexible arrangement from outside the EU.

[77] B Heuser, *Brexit in History* cit.
[78] K Patel, *Project Europe* cit. 229.