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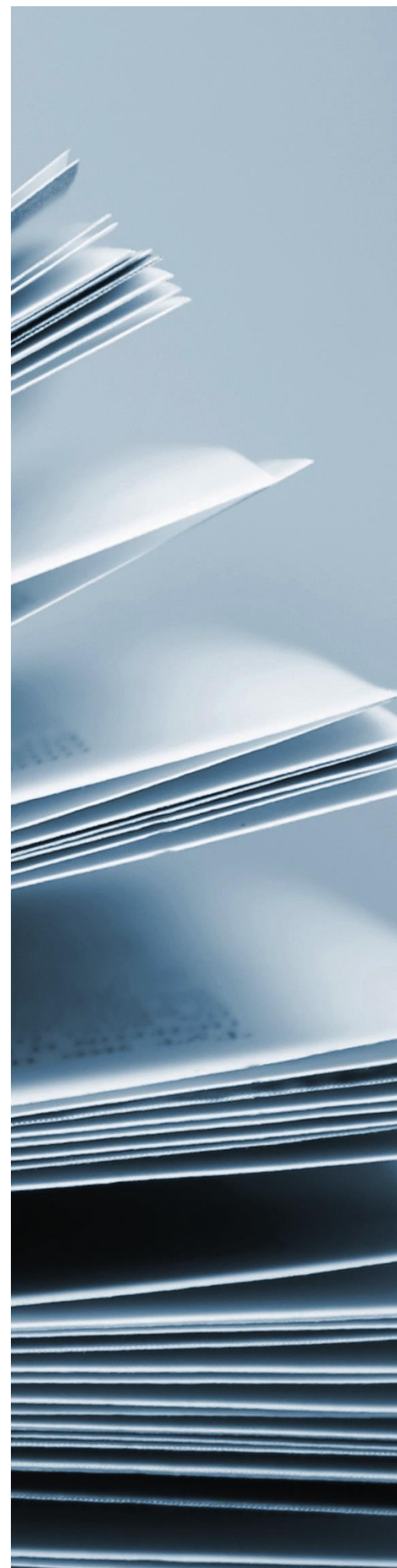
**The Commission and the challenges of differentiation post-Brexit: its role
and the new inter-institutional balance**

ISL WORKING PAPER

2018:1

Cristina Fasone and Diane Fromage

ISSN 1893-2347



The Commission and the challenges of differentiation post-Brexit: its role and the new inter-institutional balance

Abstract

Over the last few years the process of European integration has been challenged by several crises. The prompt responses given to them often led the governments of the Member States rather than by EU institutions to take the lead, as for the political directions the integration should follow especially. Those unprecedented crises, and amongst them certainly is Brexit, have for the first time, to such a great extent, put on the table the question of differentiation within the EU, between Eurozone and non-Eurozone countries and, relatedly, between debtor and creditor countries; between Member States that favour more collaboration on the side of migration and the system of migration quotas and those refusing it; between exiting and remaining in the EU. Who can (and arguably should) lead the EU in the hard times of the quests for more differentiation and, as some argue, in coping with the threat of disintegration? Could the European Commission play this role, in the post-Brexit context, as it did in previous stages of the process of integration and if so, how?

Drawing on the Commission's White Paper on the future of Europe and its 5 scenarios for the EU 27 – “Carrying on”, “Nothing but the single market”, “Those who want more do more”, “Doing less more efficiently”, “Doing much more together” – the paper focuses on the role the Commission could play under the scenario of an increased differentiated integration within the EU-post Brexit. On the basis of the role fulfilled by the Commission over the first 60 years of European integration, the paper deals first with the potential the Commission has to cope with the challenge of differentiation. It then assesses what the effects of a leading role of the Commission would be on the interinstitutional balance within the EU.

1. Ruling the EU in time of crises and of differentiation post-Brexit

Decades have passed since the time when the European Community was meant to integrate a relatively small and rather homogeneous bunch of countries. The never ending process of enlargement has led the Community, now the European Union (EU), to grow in less than 45 years from six founding states in the 1960s to 28 Member States today, with increasingly different cultural, political and legal backgrounds as well as divergent views on where the EU should head to.¹ These several enlargements have made the decision-making more complex and, coupled with further conferrals of powers to the EU, have led to the emergence of new modes of

* Cristina Fasone is Assistant Professor of Comparative Public Law, LUISS Guido Carli University, Rome. cfasone@luiss.it; Diane Fromage is Assistant Professor of European Law, Maastricht University. diane.fromage@maastrichtuniversity.nl. Although the paper is a joint work of the authors and the conclusion (section 5) was jointly drafted, Cristina Fasone wrote sections 1 and 3, while Diane Fromage drafted sections 2 and 4.

¹ N. Walker, *Sovereignty and differentiated integration in the European Union*, 4(4) *European Law Journal*, 1998, 355-388.

decision-making, like the open method of coordination, whereby the European Commission, a traditional bulwark of the Community method, has been somewhat sidelined.²

In parallel, in the institutional practice and then in the Treaties, differentiation, although always surmountable, has been acknowledged as a legitimate solution to allow for the further deepening of the process of European integration, the creation of the Schengen area starting from mid-1980s and the setting up of the Economic and Monetary Union in the 1990s being the two major examples.³ The European Commission, under those circumstances, has managed to play a key role even in the “differentiated areas of integration”, despite the fact that this could not be given for granted. Indeed, in principle differentiated integration favours a more proactive involvement of the governments of the Members States concerned.⁴

However, the most recent crises that the EU has experienced (the financial crisis since 2008, the migration crises since 2014 and the rule of law crisis since 2015) have further exacerbated the tension between unity-uniformity and differentiation within the Union:⁵ Eurozone vs. non-Eurozone countries; creditors vs. debtors; countries within vs. states outside the Schengen area; countries of first reception of migrants and asylum seekers vs. (some) countries of relocation. In addition to this, informal clusters of countries try to coordinate more and more often their positions according to their common strategic interests: for instance, big countries vs. small countries (see further section 3); Northern vs. Southern states, Eastern countries as countries of recent accession and Western countries.⁶ At the same time Brexit, after 23 June 2016, is another example of crisis the EU is facing and that might affect differentiation, either by countering this threat through the withdrawal of one of the most “problematic” countries in this regard and by showing the urgency of the need for reform within the EU or by triggering a domino effect whereby other countries – especially in Eastern Europe – in the future might be willing to follow

² K. Armstrong, *Governing Social Inclusion: Europeanisation through Policy Coordination*, OUP, 2010, 29 ff. and M. Dawson, *New Governance and the Transformation of European Law: Coordinating EU Social Law and Policy*, CUP, 2011, 24-68.

³ On the many meanings of the terms differentiation in the EU, see H. Wallace & W. Wallace, *Flying Together In A Larger And More Diverse European Union*, Working Document, The Hague, 1995, B. Leruth and C. Lord, *Differentiated integration in the European Union: a concept, a process, a system or a theory?*, 22(6) *Journal of European Public Policy*, 2015, 754-763, 758-761, and M. Abvelj, *Differentiated Integration—Farewell to the EU-27?*, 14(1) *German Law Journal*, 2013, 192-200.

⁴ M. Abvelj, *Differentiated Integration—Farewell to the EU-27?*, 14(1) *German Law Journal*, 2013, 207-208. This is why the position of the European Commission for what concerns differentiated integration has been compared to the troubled position of the European Parliament on the issue: see D. Curtin and C. Fasone, *Differentiated Representation: Is a Flexible European Parliament Desirable?*, in B. de Witte, E. Vos, and A. Ott (eds), *Between Flexibility and Disintegration: The State of EU law today*, Edward Elgar Publishing, 2017, 118-145.

⁵ B. De Witte, *Variable geometry and differentiation as structural features of the EU legal order*, in B. De Witte, A. Ott, and E. Vos (eds.) *Between Flexibility and Disintegration: The Trajectory of Differentiation in EU Law*, Edward Elgar, 2017, 23-26. On the potential effects of the Eurozone crisis on differentiation in the EU, see J.-C. Piris, *The future of Europe: Towards a Two-Speed EU?*, CUP, 2012, 53 ff.

⁶ See L. Kirk, *Small EU states caught between France and Germany*, *EU Observer*, 10 November 2017, <https://euobserver.com/nordic/139820>, On national multilateral cooperation among EU countries by clusters of interests, see D. Fromage, *Increasing Inter-Parliamentary Cooperation in the European Union: Current Trends and Challenges* 22 (4) *European Public Law*, 2016, 749-772, 761 ff.

a similar path.⁷ Where does the European Commission stand in this complicated scenario? Can it cope with increased differentiation effectively and, ultimately, is the Commission apt to play a leadership role in this context? In fact, should it play such a role?

This paper analyses the role of the European Commission in light of the challenges brought by increased differentiation post-Brexit referendum. Within this context it looks in particular at the Commission's position in the inter-institutional balance and its prospective relationship with the European Parliament (EP). The paper tries to assess if and how the Commission can play a leading role in an increasingly differentiated EU, whether it is willing to do so and if such a role is desirable. However, whether increased differentiation in itself is a positive or a negative development for the future of the Union or the form(s) it should take remain outside of the scope of this paper. To this end, the paper proceeds as follows: first, it provides a brief historical excursus of the Commission's traditional position in the emergence of differentiated integration and within it, before the eruption of the many crises affecting the functioning of the EU; second, it considers the role of the Commission under the five scenarios envisaged in the White Paper on the future of Europe, the views of national governments on them and the recent view expressed by President Juncker in the State of the Union speech in 2017; third, it deals with the ability of the Commission to tackle and tame differentiation in the post-Brexit referendum situation; fourth, as to conclude, the paper assesses whether it is desirable for the overall institutional balance in the EU that the Commission takes up a leadership role in an increasingly differentiated Union.

2. The transformation of the Commission's role in the development of a differentiated Europe

As explained in the introduction, the issue of differentiated integration is one of the most debated issues at present within the EU. Nevertheless, this phenomenon is not new; in fact, some argue that 'differentiation has been, and still is, a constant feature of EC [European Community] legislation'.⁸ This conclusion drawn when the Treaty of Nice entered into force in 2001 is still particularly adapted to describe the current situation. To assess the role the Commission may potentially assume in these trends in a post-Brexit EU, it is first important to understand how differentiation has developed within the EU since the beginning of the integration process (a). Second, the role assumed by the Commission in this evolution is examined, providing important background information (b).

a. A brief historical sketch on differentiation within the EU

⁷ B. Leruth, S. Gänzle and J. Trondal, *Differentiated integration and disintegration in the European Union: State-of-the-art and ways for future research*, 1 ISL Working Paper, 2017, <https://differentiatedintegration.files.wordpress.com/2017/02/wp-1.pdf>. See also M. Wind, *Brexit and Euroscepticism: Will "Leaving Europe" be Emulated Elsewhere?* and U. Puetter, *Brexit and EU Institutional Balance: How member States and Institutions Adapt Decision-making*, both in F. Fabbrini (ed.), *The Law & Politics of Brexit*, OUP, 2017, respectively 221-245 and 247-265

⁸ B. de Witte, D. Hanf and E. Vos, *Introduction* in id. *The many faces of differentiation in EU Law*, Intersentia, 2001, xi. See also B. Leruth and C. Lord, *Differentiated integration in the European Union: a concept, a process, a system or a theory?*, 22(6) *Journal of European Public Policy*, 2015, 754-763.

Although the possibility for Member States to cooperate in the form of ‘enhanced cooperation’ was only introduced in primary law by the Treaty of Amsterdam (1997), differentiation in the cooperation among Member States has arguably existed longer if it is understood as ‘the facilitation or accommodation of a degree of difference between Member States or regions in relation to what would otherwise be common Community or Union policies’.⁹ This contrasts with the view - that long predominated within the Community - that EC law had to be applied as uniformly as possible hence requiring that national judges applied it directly and also justifying the Commission’s launch of infringement procedures.¹⁰

At Treaty level, the Single European Act took the first step in this direction by including the possibility to have flexible approaches to the implementation of the Single Market. It was then possible for Member States to obtain environmental derogations from internal market harmonization.¹¹ This possibility was rarely used by Member States in practice though and has not had the negative effect on the unity of the common market some had anticipated; rather it has allowed some Member States to apply more protective environmental standards.¹² Later, the Maastricht Treaty foresaw a differentiated approach in the Economic and Monetary Union (EMU) whereby the United Kingdom was allowed to opt-out of the establishment of a common European currency. These differences were further increased with the deepening of European cooperation in the area of Justice and Home Affairs when the Amsterdam Treaty was approved for instance.¹³

b. The Commission’s role in increased differentiation

As stated above, the Maastricht Treaty anchored the possibility of a two-tier Europe as a result of the possibility open to the UK to opt-out of the last phase of the EMU. As the EMU is the result of a process that started formally during the mid-80s when Delors re-launched the process of integration towards the completion of the Single Market with his White Paper in 1985, the Commission can be said to have played indirectly an important role in the emergence of differentiation.¹⁴ However, it was never its intention not to include all Member States and it is only incidentally that differentiated integration arose due to the UK’s opposition. Later on too Member States played a major role as they were at the origin of the inclusion of the possibility of ‘enhanced cooperation’ in the Amsterdam Treaty.¹⁵ Indeed, the Treaty of Amsterdam introduced the possibility of ‘enhanced cooperation’ among certain Member States only. With the increasing

⁹ B. de Witte, D. Hanf and E. Vos, *Introduction* in id. *The many faces of differentiation in EU Law*, Intersentia, 2001, xii.

¹⁰ B.de Witte, *Variable geometry and differentiation as structural features of the EU legal order* in B. de Witte, A. Ott and E. Vos, *Between flexibility and disintegration. The trajectory of differentiation in EU law*, Edward Elgar, 2017, 9-27, 9.

¹¹ Ivi, 11.

¹² Ibid.

¹³ On the several shapes differentiated integration can take see, amongst many, A. C.-G. Stubb, *A Categorization of Differentiated Integration*, 34(2) *Journal of Common Market Studies*, 1996, 283-295.; on the drivers and explanations for differentiated integration, see T. Winzen and F. Schimmelfennig, *Explaining differentiation in European Union treaties*, 17(4) *European Union Politics*, 2016, 616-637.

¹⁴ ‘Completing the Single Market’, White paper from the Commission to the European Council, COM(85) 310 final.

¹⁵ B. de Witte, D. Hanf and E. Vos, *Introduction* in id. *The many faces of differentiation in EU Law*, Intersentia, 2001, xi.

size of the EU, the feeling existed that more flexibility was needed in order to (temporarily) accommodate differences.¹⁶ It was however never the intention that these differences would become permanent. In fact, differentiation was a non-issue until the discussions that preceded the adoption of the Amsterdam Treaty. When they took place, France and Germany in particular ‘argued for a “constitutional” recognition of differentiation, while other Member States, joined by the Commission, tried to limit the impact of such a recognition in order to ensure a maximum of uniformity’.¹⁷ In this regard, the Commission can be said to have been playing its role of ‘mediator’ among the variety of Member States’ interests, just like it does currently with the sixth scenario for the future of Europe presented by President Juncker in his State of the Union 2017 as detailed below. The different stances on the issue of enhanced cooperation led to a complex solution some even deemed ‘unworkable’.¹⁸ At the same time as it was ‘communitarising’ Schengen, the Amsterdam Treaty hence provided for ‘some general mechanism of institutional flexibility [...that would be...] encapsulated within the existing EU framework and made subject to rather strict conditions’.¹⁹ Given that it was always the intention to re-integrate non participating Member States at a later stage, and that uniformity was still a goal, it makes sense that differentiation would be conceived within the European framework. This has nevertheless set the European Commission in an odd position as explained below.

A few years after the entry into force of the Amsterdam Treaty, the Nice Treaty was approved and it relaxed slightly the criteria for Member States to be able to resort to enhanced cooperation,²⁰ making it a more practicable option.

Twenty years after the introduction of the possibility of enhanced cooperation in the Treaties, Member States have in fact used it in a very limited number of occasions only²¹ (none of which occurred pre-Lisbon), but they have nevertheless resorted to other instruments to allow for differentiation, such as international Treaties (for instance: Treaty on Stability, Coordination and Governance (TSCG) and European Stability Mechanism Treaty (ESM Treaty)). In this sense, it

¹⁶ D. Hanf, *Flexibility clauses in the founding Treaties: from Rome to Nice* in B. de Witte, D. Hanf and E. Vos, *The many faces of differentiation in EU Law*, Intersentia, 2001, 3-26, 4-5. The information that follows is also extracted from this chapter.

¹⁷ Ibid.

¹⁸ See the so-called “Dehaene Report”: R. von Weizsäcker, J.-L. Dehaene, D. Simon, *The institutional implications of enlargement*, Report to the European Commission, 18 October 1999, section 2.2.8., 10 and D. Hanf, *Flexibility clauses in the founding Treaties : from Rome to Nice* in B. de Witte, D. Hanf and E. Vos, *The many faces of differentiation in EU Law*, Intersentia, 2001, 3-26, 5. On these conditions: S. Peers, *Enhanced cooperation: the Cinderella of differentiated integration* in B. de Witte, A. Ott and E. Vos, *Between flexibility and disintegration. The trajectory of differentiation in EU law*, Edward Elgar, 2017, 76-91, 77.

¹⁹ B. de Witte, *Variable geometry and differentiation as structural features of the EU legal order* in B. de Witte, A. Ott and E. Vos, *Between flexibility and disintegration. The trajectory of differentiation in EU law*, Edward Elgar, 2017, 9-27, 16.

²⁰ S. Peers, *Enhanced cooperation: the Cinderella of differentiated integration* in B. de Witte, A. Ott and E. Vos, *Between flexibility and disintegration. The trajectory of differentiation in EU law*, Edward Elgar, 2017, 76-91, 78-9; more in depth: J. M. de Areilza, *The reform of enhanced co-operation rules: towards less flexibility?* in B. de Witte, D. Hanf and E. Vos, *The many faces of differentiation in EU Law*, Intersentia, 2001, 27-39.

²¹ So far, four initiatives have been successful whereas one is still under discussion. The successful procedures have concerned a European unitary patent, divorce law, property regime rules, the European Public Prosecutor’s Office; no agreement could be reached on the Financial transaction tax so far, although enhanced cooperation has been authorized.

can be said that, on the one hand, the perspective of enhanced cooperation may act as an incentive for reluctant Member State to compromise in order not to remain excluded, especially as enhanced cooperation is always open to non-participating States wishing to join later whereas this is not necessarily the case of international Treaties²². On the other hand, it is clear that the limited uses of the formal enhanced cooperation procedure do not adequately mirror the evolution of differentiation within the EU over the past two decades.

3. The role of the Commission in the White Paper on the future of Europe: the challenge of differentiation

Over the last few years and coinciding with the increasing tension between unity-uniformity and differentiation in the EU, the European Commission has been subject to two opposite pressures. On the one hand, the Commission has risked to be set aside by the new intergovernmentalism on the rise and the strong political directions provided by the European Council during the crises, since the Treaty of Lisbon expressly acknowledged this institutional role in its Article 15.1 TEU.²³ On the other hand, the *Spitzenkandidaten* experiment of 2014, most likely to be replicated also in 2019, has favoured a process of politicization and parliamentarisation of the Commission, strengthening its ability to provide political guidance to the development of the process of European integration, in close cooperation with the EP.²⁴

It is in this framework and in its capacity to put forward a range of proposals on how to shape the future of the EU at 27 – thus excluding already the UK from the broader perspective of the destiny of the European integration – that the European Commission has presented the *White Paper on the future of Europe* on 1 March 2017 (COM(2017)2025). The White Paper, as announced in its Foreword, was expected to form the ground for discussion with regard to the State of the Union Speech of September 2017 by President Juncker and to orient the European Council to draw first conclusions on the matter by the end of the year. Despite being presented as the Commission's contribution to the Rome Summit of 25 March 2017, celebrating 60 years since the Rome Treaty, the White Paper, as it is in the tradition of this kind of EU consultation documents, remains neutral towards the five scenarios depicted.²⁵

The first scenario “Carrying on” proposes to keep the status quo. The Union and the European Commission, with the support of the 27 Member States, are expected to pursue the existing agenda updating it according to the emergence of new problems and challenges. The single market will be strengthened, for example by creating an energy union; the functioning of the

²² S. Peers, *Enhanced cooperation: the Cinderella of differentiated integration* in B. de Witte, A. Ott and E. Vos, *Between flexibility and disintegration. The trajectory of differentiation in EU law*, Edward Elgar, 2017, 76-91, 88.

²³ U. Puetter, *The European Council and the Council: New intergovernmentalism and institutional change*, OUP, 2014, 227 ff.

²⁴ M. Goldoni, *Politicising EU lawmaking? The Spitzenkandidaten Experiment as a cautionary tale*, 22(3) *European Law Journal*, 2016, 279-295.

²⁵ See A. Cuyvers, *Five Scenarios for Europe – Understanding the EU Commission's White Paper on the Future of Europe*, *Verfassungsblog*, 10 April 2017. A critical account of the *White Paper on the Future of Europe* is provided by M. Abvelj, *What Future for the European Union?*, Discussion Paper SP IV 2017–802, Center for Global Constitutionalism, WBZ – Berlin Social Science Center, July 2017, who systematized the five scenarios under three visions: the status quo vision; the status quo ante vision; the reformist vision, the latter supported by the author, with some adaptations.

single currency will be improved and financial supervision will be reinforced. Defence cooperation will be deepened, progresses will be made toward the setting up of a common asylum system and in foreign policy the EU will speak with one voice. The EU will thus continue to work through a mixture of supranationalism and pooling of competences and procedures and intergovernmentalism and coordination of national policies. The role of the Commission, under the “Carrying on” scenario, most likely will remain as ambiguous as it is today, at the test bench between uniformity and further differentiation.

The second scenario, “Nothing but the single market”, is even less ambitious than the former. It appears inclined to re-center the institutional balance in favour of supranational institutions and, hence at the benefit of the Commission, on the internal market only while excluding them from a series of key policy areas, like international trade, which will be defined by Member States on a bilateral basis. This scenario is based on a lack of commitment by Member States to work more together in the least integrated areas, such as migration and defence, and is willing to make the single market “the main «raison d’être» of the EU27” (p. 18). The deepening of the single market will be achieved mainly through de-regulation and this risks jeopardizing the integrity of the single currency.

The third scenario, “Those who want more do more”, instead, is perfectly in line with the idea of exploiting the tool of institutional, procedural and policy differentiation better. The scenario revolves around several and asymmetric “coalitions of the willing”, whereby, depending on the issue at stake, different groups of Member States may decide to strengthen their cooperation. For instance, this could imply that, by 2025, some Member States can cooperate deeper on defence matters and/or on intelligence services to fight against terrorism as well as on taxation and social policy, while other States will lag behind. This scenario is likely to impair the ability of the Commission to act as an engine of EU integration and to play a key role in decision-making whereas the role of intergovernmental institutions and bodies will be on the rise.

The fourth scenario, “Doing less more efficiently” is very close to the second one and is anchored to the view to reduce EU competences, giving powers back to Member States. The EU and its States will decide to focus on a selected number of policy priorities related to the internal market although not just to it in order to deliver better. For example, it is envisaged for the EU to step up from fields like regional development, public health and state aid control while gaining more powers on management of external borders, space cooperation and defence. Given the retreat of traditional areas of Commission’s domain, like structural funds and state aid, the fourth scenario is likely to seriously undermine the authority of the Commission, although this institution might gain powers in the “new” areas of fully-fledged integration depending on how relevant procedures will be designed.

The fifth scenario, “Doing much more together”, creates expectations for an “ever closer Union”. More powers and resources are pooled and managed by the EU in all domains. The EU will represent and speak on behalf of Member States in most international organizations; a European Defence Union will be established; there will be a fully integrated capital market and joint investments in innovation and research will be effective as well as closer coordination on taxation and social policy. This idealist vision of the EU, should it be eventually pursued, is the only one to really reinforce, without much doubts, the role of the Commission in the future of the Union.

Also for this reason it does not come as a surprise that in the State of the Union Speech of 13 September 2017 the President of the Commission, when outlining his own “sixth scenario”, in fact clearly endorses the “reformist vision”²⁶ of the EU described as “Doing much more together”. In addition to it, Mr. Juncker rejects any path towards further differentiation.²⁷ Indeed, what he proposes is precisely to move away from existing forms of differentiation in the EU: the Schengen area should be immediately open to Bulgaria and Romania and gradually to Croatia; the euro has to become “the single currency of the European Union as a whole” and this will be supported through a Euro-accession Instrument; all Member States are encouraged to join the Banking Union; a European Social Standard Union and a European Pillar of Social Rights should be agreed as soon as possible. Other proposals within this sixth scenario range from the setting up of a European Intelligence Unit to the creation of a European Defence Union by 2025. Along these lines, among the major institutional innovations put forward and aiming to strengthen the role of the Commission in the EU institutional balance are the merging of the President of the Commission with the President of the European Council and the appointment of a European Minister of Economy and Finance, who should be a Vice-President of the Commission and the Commissioner in charge for economic and financial affairs, responsible towards the European Parliament as the only Parliament of the euro area. These latter proposals were further developed in the Package for the reform of EMU presented by the Commission on 6 December 2017.²⁸

This patent shift from a prospective vision of the EU dominated by differentiation (under scenarios 1, 2, 3 and 4) to the scenario going in the direction to strengthen EU powers and supranational institutions in all domains and to possibly overcome differentiation as a hurdle to further integration has not remained unnoticed at national level. If the response of the Commission to the challenge of differentiation is to refuse any prospect of further differentiation in the future and to depart from the existing forms of differentiated integration as a way out from the EU existential crisis, the reaction of national political leaders has gone in the opposite direction. This reaction is well exemplified by President Macron’s speech at Sorbonne on 26 September 2017. While sharing many of the proposals put forward by President Juncker in his State of the Union Speech – like his commitment to the creation of an Energy Union, of a common asylum policy, the digital single market project, the creation of a European Labour Authority and of common European social standards, just to mention few –, President Macron has a different view on differentiation in the EU and on the role of the Commission. In several passages of the speech at Sorbonne he has repeated that differentiation is the current engine of European integration: “we need to constantly accommodate the driving ambition of some while allowing others to move ahead at their own speed”.²⁹ He also foresees and endorses greater

²⁶ See M. Abvelj, *What Future for the European Union?*, cit., 15-18.

²⁷ The same approach had been endorsed by the Commission in its reflection papers published in 2017, such as European Commission, *Reflection Paper on the Deepening of the Economic and Monetary Union*, 31 May 2017; European Commission, *Reflection Paper on the Future of European Defence*, 7 June 2017; European Commission, *Reflection Paper on the Future of EU Finances*, 28 June 2017.

²⁸ See the Communication from the European Commission on *Further Steps Towards Completing Europe’s Economic and Monetary Union: A Roadmap*, COM(2017) 821 final, Brussels, 6.12.2017, and the other related Communications and legislative proposals: COM(2017) 822 final, COM(2017) 823 final, COM (2017) 824 final, COM (2017) 825 final, COM (2017) 826 final, COM (2017) 827 final and its Annex.

²⁹ Excerpts from the English translation of President Macron’s Speech at Sorbonne on 26 September 2017, available here: <http://international.blogs.ouest-france.fr/archive/2017/09/29/macron-sorbonne-verbatim-europe-18583.html>

differentiation compared to what we have now in place. “let’s embrace the differentiations [emphasis on the plural added], the vanguard, the heart of Europe”; “No State must be excluded from the process, but no country must be able to block those wanting to make faster progress or forge further ahead”.³⁰ President Macron also referred to the idea of a stronger budget for the Eurozone and a Common Minister for the Eurozone, without detailing his proposal on this occasion. Most likely, however, and in contrast to President Juncker’s auspice, he does not see the Common Minister appointed from within the Commission. He has also envisaged an overall reshaping of the Commission’s composition. Indeed – he has argued – a Commission of nearly 30 members, each of them looking after the national particular interests, can no longer work. The idea, then, is to set up a “15-strong Commission” and, in his view, the major founding countries should be the first to give up “their” commissioners”, starting from France. It should be highlighted, however, that this proposal has nothing to do with the possibility to change the status and the powers of the Commissioners depending on their country of origin and their participation in forms of differentiated integration. From a structural point of view and likewise the European Parliament, indeed, it would be extremely problematic to affect the internal composition of the Commission following differentiation in a certain policy area, given the ‘general interest of the Union’ it pursues (Art. 17-1 TEU) and the ‘extremely important institutional link [it provides] between the different types of activities of the Community/Union, as it assures the necessary coherence between them’.³¹ The plea for the Commission’s institutional unity, hence, has been supported by the ‘vast majority of opinions’,³² although at least in one instance, the draft of a Constitution of the European Union presented to the European Parliament in 1994 (the Herman Report, Art. 46), it was suggested that Commission’s members from countries not participating in a certain activity should have to abstain.

The ideas formulated by President Macron in fact build up on a previous declaration by the four largest countries of the Eurozone – France, Germany, Italy and Spain – in March 2017: in response to the Commission’s White paper, these Member States expressed their clear preference for scenario 3 in an informal meeting organized in Versailles.³³ Any such move is however strongly opposed by other Member States, notably from Central and Eastern Europe.³⁴ This lack of consensus among Member States arguably forces the Commission to adopt a neutral position, i.e. to respect its role as defined by Art. 17-1 TEU, i.e. ‘The Commission shall promote the general interest of the Union and take appropriate initiatives to that end’.

³⁰ Ibid.

³¹ C.-D. Ehlermann, *Increased Differentiation or Stronger Uniformity*, EUI Working Paper RSC No. 95/21, 30; see also J.-L. Bourlanges, Draft Report on the Operation of the Treaty on European Union with a View to the 1996 Intergovernmental Conference. Implementation of the Union, European Parliament, Committee on Institutional Affairs, PE 211.920/A, 10 April 1995 and H. Wallace and W. Wallace, *Flying together in a larger and more diverse European Union*, Netherlands Scientific Council for Government Policy, Working Document 87, The Hague, June 1995. A full analysis of the pros and cons of a differentiated European Commission, however, remains outside the scope of this paper.

³² C.-D. Ehlermann, *Increased Differentiation or Stronger Uniformity*, EUI Working Paper RSC No. 95/21, 23-24.

³³ Politico, *In Versailles, EU’s big 4 back multispeed Europe*, 6 March 2017 and F. Fabbrini, *Brexit and EU constitutional reform* in ibid (ed), *The law and politics of Brexit*, OUP, 2017, 267-291, 289.

³⁴ F. Fabbrini, *Brexit and EU constitutional reform* in ibid (ed), *The law and politics of Brexit*, OUP, 2017, 267-291, 289.

Thus, it is evident that, should this proposal to push differentiation further and to differentiate the formats of cooperation within a multi-speed Europe be eventually embraced, the Commission will find it difficult to lead the process, even more so in the event of a reduction of commissioners. Although, the current 28 commissioners, one per Member State, are not pursuing national interests but rather the European common good as per their mandate, the exclusion of some states from the Commission, as also provided by Art. 17-5 TEU, might impair the Commission's ability to control the development of differentiated integration, whose initiative and fulfillment lies mainly in the hands of Member States' governments. Whereas it can be expected that a smaller Commission would gain in efficiency, it can also be anticipated that it may lose part of its legitimacy in euroskeptic states if they do not have any commissioner 'representing' their Member State. Therefore the underlying tension between the refusal to further differentiation by the Commission and the pro-differentiation view of the French, the German as well as other national governments may represent a serious challenge to the authority of the Commission.

4. Is the Commission well-suited to cope with differentiation inside the EU?

Beyond the actual role played by the Commission in initiating differentiated integration, the question can be asked as to how it is affected by this trend and whether it is best-suited to cope with (increasing) differentiation within the EU. Indeed, a certain paradox exists for two reasons at least: first, the Commission is always involved in all EU policy areas, even those ruled by enhanced cooperation and second, even where differentiated integration takes place outside of the EU legal framework, the Commission is involved as is evidenced in the content of the Treaty on Stability, Coordination and Governance (TSCG) and in the Treaty on the European Stability Mechanism (ESM Treaty).

As is well-known, the Commission is fully involved in policy areas in which not all Member States participate, such as for instance EMU. As recalled above, the British and the Danish opt-outs were however never meant to be permanent when they were first introduced so that the question of the Commission's involvement in this domain in which temporarily not all Member States participated was not even an issue.³⁵ Beyond this, even where not all Member States participate, these policies remain part of EU law so that an involvement of all EU institutions appears logical, even if Member States have recently opted for the establishment of a dedicated court in matters of patent, a policy area governed by enhanced cooperation, instead of delegating this task to the Court of Justice.³⁶ It is interesting to note furthermore that the Commission has even been led to authorize the 'opting in' during the negotiations of States that had previously opted out.³⁷

³⁵ See A. Forster, *Britain and the Maastricht Negotiations*, Palgrave, 1999.

³⁶ B.de Witte, *Variable geometry and differentiation as structural features of the EU legal order* in B. de Witte, A. Ott and E. Vos, *Between flexibility and disintegration. The trajectory of differentiation in EU law*, Edward Elgar, 2017, 9-27, 23.

³⁷ Steve Peers refers for instance to the authorization given to Ireland and the UK to join immigration, asylum and civil law measures pre-Lisbon. S: Peers, *Enhanced cooperation: the Cinderella of differentiated integration* in B. de Witte, A. Ott and E. Vos, *Between flexibility and disintegration. The trajectory of differentiation in EU law*, Edward Elgar, 2017, 76-91, 80.

For what concerns international Treaties by contrast, this is not as obvious. In the case of the TSCG, the Commission's involvement is now less problematic than it was when the Treaty entered into force however. Article 8 TSCG indeed requires (or better said: required) the Commission to assess whether the states party to the Treaty have adequately incorporated the balanced budget rule (or 'golden rule') in their legal order and whether they respect their obligations with regard to independent fiscal institutions. As the saying goes, 'better later than never': the Commission finally issued its report on this issue in Spring 2017 and though its assessment may be controversial, this obligation has now been fulfilled.³⁸ For the rest, the Treaty simply reproduces obligations and tasks conferred upon the Commission by secondary EU law too. Consequently, the difficulty for the Commission does not lay in it having different obligations under EU law and under international law. Rather, it derives from the fact that it is called to intervene in an area in which not all Member States participate. In reality, this is also the case in EU law between Eurozone and non-Eurozone Member States. With a Commission clearly seeking to further expand the Union in the near future to new Member States who will most probably not become Eurozone members straight away while further increasing diversity within the EU, this evolution is perhaps unavoidable, though problematic.

The Commission's role in the ESM goes deeper in that it foresees its involvement in risk assessment and in the definition of conditionality linked with financial support under the ESM, and these provisions are not contained in other (EU) norms.

5. Is a leadership role of the Commission desirable within an increasing differentiated EU? Effects on the EU inter-institutional balance

As detailed above, the Commission is in a somewhat 'uncomfortable position': it has to accommodate very different stances on the future of the EU by the Member States while at the same time ensuring that the Union remains viable and an attractive project. It is also challenged by Member States in its quality of unique organ entitled to propose legislation.

In that regard, the recent decision by the United Kingdom to leave the Union has opened an interesting window of opportunity for change. First of all, Brexit is yet another manifestation of the institutional crisis the EU has known for the last decade as explained in the introduction; the different views on the perspectives of differentiated integration have become more visible precisely in that framework. At the same time, Brexit is also having a somewhat less expected consequence. Indeed, article 50 TEU does not offer the possibility to revise the Treaties via the 'divorce agreement' contrary to what happens when a Member State joins the Union. Sooner or later the Treaties will hence need to be revised to remove the 120 mentions of the United Kingdom and more specifically the definition of the territorial scope of EU law will need to be amended (art. 52 TEU and 355 TFEU).³⁹ The simplified revision procedure defined in Article

³⁸ More detailed on this: P. Dermine and D. Fromage, *The Commission's report on the Fiscal Compact and its expected (cautious) assessment*, EUFINACCO blog, 31 March 2017.

<https://eufinacco.wordpress.com/2017/03/31/the-commissions-report-on-the-fiscal-compact-and-its-expected-cautious-assessment/>

³⁹ More on this question : F. Fabbrini, *How Brexit Opens a Window of Opportunity for Treaty Reform in the EU*, spotlight europe #2016/01, J. Delors Institute, <http://www.delorsinstitut.de/2015/wp->

48-6 TEU is not available for such change given the domains it affects: the simplified revision procedure is strictly limited to Part III of the TFEU. The ordinary procedure foresees a possibility to avoid the setting up of a Convention as ‘the European Council may decide by a simple majority, after obtaining the consent of the European Parliament, not to convene a Convention should this not be justified by the extent of the proposed amendments’. In the latter case, the European Council shall define the terms of reference for a conference of representatives of the governments of the Member States.’ (Art. 48-3 TEU). Whereas Member States are likely to consider that the changes made necessary by Brexit are cosmetic changes that are not serious enough to require the preliminary work of a Convention, perhaps the European Parliament will seize this opportunity to launch a deeper reflection on the institutional structure of the EU.⁴⁰ Such a move is not totally unlikely to materialize given the unfortunate rise of euroskeptical parties we witnessed during the last European elections in 2014. Even more moderate MEPs might be tempted to re-open the ‘Pandora box’ by provoking a Treaty revision to try and remedy the institutional failures in the EU as evidenced by the crises. Should this happen, the Commission could in fact end up being strengthened, or at least in a better position than it currently is, as the hardest part, i.e. starting the revision procedure would have already been initiated by the EP and it would for sure take place under the auspices of EU law and not in the form of an international Treaty. Indeed, as evidenced in recent past, this solution (the approval of international Treaties) is always available to Member States where they cannot move forward within the EU since the *Pringle* judgement has left the door open to such developments.⁴¹ It could also happen that the Commission has to play a role of mediator among the different interests at stake in the Convention’s discussions, like it did during the negotiations of the Amsterdam Treaty.

In the absence of any Treaty revision procedure, it is unlikely that the Commission as it currently functions will take the lead in introducing more differentiated integration as its own leadership and authority have already been diminished by the different crises and as strong divergences among Member States exist on this issue. If it wishes to maintain its authority in the reluctant (mostly Central and Eastern) European States, against which it additionally already should do much to preserve core European values, then it is indeed perhaps wise for it not to take side for the largest (and richest) European States in favour of a two-tier Europe. At the same time, this position in favour of the status quo is, in our opinion, only sustainable as long as it does not endanger the survival of the common currency or of the EU as a whole because then the Commission has a duty to act for the safeguard of the Union and to promote its general interest (art. 17-1 TEU) even if that means disregarding the opinion of some of its Members.

content/uploads/2016/09/spotlight_europe_01_2016.pdf and D. Fromage, *Brexit and the need for a Treaty revision*, Blog droit européen, 23 January 2017.

⁴⁰ F. Fabbrini, *Brexit and EU constitutional reform* in *ibid* (ed), *The law and politics of Brexit*, OUP, 2017, 267-291, 272.

⁴¹ See case C-370/12, *Thomas Pringle v Government of Ireland and Others*, Judgment of the Court (Full Court), 27 November 2012, ECLI:EU:C:2012:756

Beyond all this, the fact that enhanced cooperation as foreseen in the Treaties has now been used in some occasions might be an incentive for the Commission to propose initiatives in this area contrary to what its attitude in the past had been where ‘[t]he existence of unanimity, coupled with the rarity of enhanced cooperation, may also [have been] deterring the Commission from putting other proposals forward’.⁴² In that sense, the Commission could be a motor of further differentiation within the EU, only that it would take the form of enhanced cooperation, i.e. a procedure of last resort that remains open to all Member States at all times, and not of a (permanent) multi-speed EU with more advanced States.

⁴² S: Peers, *Enhanced cooperation: the Cinderella of differentiated integration* in B. de Witte, A. Ott and E. Vos, *Between flexibility and disintegration. The trajectory of differentiation in EU law*, Edward Elgar, 2017, 76-91, 90.