Brexit: The Legal Implications

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Editor

Prof. Andrea Biondi is Professor of European Law and Director of the Centre of European Law at King's College London

Introduction & Contents/Subjects

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Differentiated Integration Amongst the EU27: Will Brexit Make the EU More Flexible?

Maria Kendrick

§6.01 INTRODUCTION

There have been many opportunities throughout its history for the European Union (EU) to openly engage in differentiated integration. Traditionally, the motivation behind adopting mechanisms to accommodate the differing views of the Member States as to how the EU should progress, has been the ever-increasing enlargement of the Union project, with the constant addition of States. That is until now. The United Kingdom's (UK's) vote to end its membership of the EU has the potential to herald the cessation of the previously constant widening and deepening of EU competences.[1] In many ways Brexit is unprecedented: one particular significance is that it is enlargement in reverse. The suggestion may therefore be that without the motivation of impending enlargement, the EU27 can rest assured that there is no need to differentiate. On the contrary, Brexit is arguably one of the EU's historical opportunities.

The negotiations on both the UK's withdrawal and future relationship with the EU[2] have prominently featured discussions on convergence and divergence.[3] The EU

1. *See* M. Dewatripont, F. Giavazzi, J. von Hagen, I. Harden, G. Roland, H. Rosenthal, A. Sapir, & G. Tabellini, *Flexible Integration,* Centre for Economic Policy Research 6th Monitoring European Integration Report, 1996.
2. It is the view of the author that Art. 50 TEU anticipates two agreements.
3. The Prime Minister's 'three basket' proposal suggests that Brexit is essentially a process which reflects the phrase agreed in the Cabinet meeting in Chequers on 22 February of 'managed divergence'. In essence, the UK is seeking opportunities to completely diverge in some areas, as well as remain in a state of equivalence in others, whilst at the same time diverging from EU rules but basically reaching the same end result but in a distinctly British way again in other areas, with

are concerned that if they allow the UK to diverge, on the one hand they will create a State competitor, but on the other hand they will give the wrong signal that looser application of the rules is available, at a perceived risk of undermining the single market and indeed the entire EU project, which is premised on the idea of a process of convergence between its constituents.[4] However, these are neither new nor novelty terms in the EU and the current convergence and divergence debate does not happen in a Brexit vacuum. Of course, it impinges on the UK's settlement, but in turn, it also influences discussions between the Member States as to their own future as a bloc of twenty-seven, and as a bloc of twenty-seven interacting with their new, possibly partly converged, possibly partly diverged, partner third country of the UK.

Paradoxically, it has been the UK inside the EU that has prompted the debate on flexibility, as the UK has not been shy of using a mechanism for differentiated integration. In actual fact, the UK has been the most noticeable Member State

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the distinction between the three yet, at the time of writing, to be defined, or agreed, between the negotiating parties. An attempt at a definition of the 'three basket' proposal has been produced by the Institute for Government: first, a 'Core tier', which are 'areas of regulation where the UK continues to achieve the same goals as the EU and continues to meet them in the same ways. In those areas, the UK would agree to continue to fully align to EU regulations and continue to adopt new rules automatically. If the UK diverged, it would immediately lose barrier-free market access. Given its concerns of potential 'regulatory dumping' by the UK, the EU would likely insist on including some of its most important level playing field rules, for example on competition and state aid, in this tier'. Second, a 'Mid tier', which are 'areas of regulation where the UK could diverge from EU rules to achieve the same regulatory goals or outcomes by different means. This would effectively be a form of managed mutual recognition of rules. If the UK's divergence was shown to have a material impact on the Single Market, it would lose market access. This could potentially include some other level playing field provisions, for example, environmental protection standards'. Third, an 'Outer tier', which are 'areas of regulation where the UK would be free to diverge from EU rules from the start with no consequences for market access. This would include everything currently outside the Single Market acquis, but could go further and include areas where it was agreed that rules had no impact on EU-UK trade.' The Institute for Government, *What is Managed divergence?* available at https://www.instituteforgovernment.org.uk/explainers/managed-divergence-regulation-after-brexit last accessed 7 Apr. 2018. *See also* The Economist 10–16 Mar. 2018, *The Brexit Negotiations: Thanks, but no thanks*, p. 28 and the interview with the Prime Minister on the BBC Andrew Marr show on 25 Mar. 2018. A full transcript of the Prime Minister Theresa May's speech on the UK's future economic partnership with the European Union is available at https://www.gov.uk/government/speeches/pm-speech-on-our-future-economic-partnership-with-the-european-union last accessed 7 Apr. 2018. *See also* Chequers meeting of the Cabinet reported in The Economist, 3–9 Mar. 2018, *Bagehot, Parliament's silent majority*, p. 28. The essence of this strategy has only developed modestly with the latest Chequers Statement of 6 July 2018, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/723460/CHEQUERS_STATEMENT_-_FINAL.PDF accessed 20 August 2018.

4. Paragraphs 7 and 12 of the European Council (Art. 50) (23 Mar. 2018) – Guidelines reiterate these points, as does the Council of the European Union General Affairs Council (Art. 50) 20 Mar. 2018, Brussels, Press Release SN 1885/18, p. 2. *See also* the Economist 10–16 Mar. 2018, article entitled, *The Brexit Negotiations: Thanks, but no thanks*, p. 28 and the PM interview on Andrew Marr 25 Mar. 2018. Guy Verhofstadt indeed confirmed that basically convergence is acceptable, divergence is not (*see* Interview with Guy Verhofstadt on the BBC Andrew Marr show on 18 Feb. 2018). Although it has been suggested that 'The government might get a better response if it started from a presumption of close alignment' rather than divergence, or utilised alternative epithets such as mutual recognition or regulatory equivalence (The Economist, *Regulation after Brexit: To Converge or diverge?*, issue 14–20 April 2018, pp. 24–25).

proponent of flexibility arrangements, although not the only Member State to have such, as no one Member State applies all the provisions of the Treaties.[5]

There have been many theories of integration which have been prompted by discussions around the differentiation mechanisms that the UK has precipitated.[6] It is now, arguably, the case that the UK's exit, through which is it seeking flexibility from outside the EU, has the potential to precipitate a replacement of these theories with a vocabulary of convergence and divergence, as the debate progresses alongside the Brexit negotiations.

The question therefore is: has Brexit been the catalyst for the EU27 to realise that a more flexible Europe, not just more Europe, is needed? This chapter will seek to address this question by considering why Brexit should be the motivation behind the EU embracing more differentiated integration. It will then consider the viability of some of the EU's options for achieving this, by discussing a few of the legal flexibility mechanisms available.[7]

§6.02 WHY DIFFERENTIATE?

An impetus for the EU to embrace differentiated integration actually comes from Brexit. This is because the process of the UK leaving the EU has instigated a shift inside the EU itself, creating a dual focus. First, the EU wants to ensure that it does not create, in the UK, a State that becomes a competitor, either through a relaxation of market regulation in goods or services or in the form of a neighbouring tax haven, by encouraging the UK to become attractive, to corporations in particular, through the lowering of its tax rates.[8] The EU is therefore trying to keep the UK as closely aligned as possible.[9] Here, one can see the UK again acting as the main protagonist in attempting to obtain flexibility. The UK sought divergence in some areas whilst in the EU, however, it appears that the level of flexibility available was insufficient and consequently with Brexit one can see the UK now seeking the ultimate opt-out. Therefore, if the EU really wants to successfully limit the scope of opportunity for the UK to achieve 'managed divergence' outside of the EU, it has to be accommodating of some of the UK's wishes,

5. D. Chalmers, *Editorial. Cut off from Europe – the fog surrounding Luxembourg,* 33(2) ELJ 135, 136 (2008).
6. *See* generally Alexander Stubb, *'A Categorization of Differentiated Integration',* Journal of Common Market Studies Vol. 34, No. 2, June 1996, p. 283.
7. Piris states that 'external' cooperation, which occurs when some Member States cooperate in a manner which does not utilise the EU institutions, should be distinguished from 'internal' cooperation between the Member States, utilising the EU institutions, which are their 'common property', as 'some observers tend to mix together these two kinds of cooperation, but they are legally different', Jean-Claude Piris, *The Future of Europe: Towards A Two-speed EU?.* Cambridge University Press, Cambridge, 2012, p. 65. Whilst it is recognised that the Member States have utilised international law as a means of achieving cooperation in certain areas, defence being a prime example, the mechanisms referred to in this chapter relate to what Piris would describe as 'internal' examples of differentiation.
8. *See* Judith Freedman, *Tax and Brexit,* Oxford Review of Economic Policy, Volume 33, Issue supplement 1, 1 Mar. 2017, pp. 79–90.
9. Interview with Guy Verhofstadt on the BBC Andrew Marr show on 18 Feb. 2018.

which means that it has to adopt the flexibility mind-set and become more openly embracing of differentiated integration.

Second, Brexit is an historical opportunity for the EU to reform. Whatever one's opinion on the merits of Brexit, for the EU to lose a longstanding Member State and reverse what was, until now, thought to be the irreversible process of enlargement, is a low point in the EU's history. The EU consequently needs to reform in order to stop history repeating itself. If it is going to do so, a more openly willing attitude towards utilising the mechanisms of differentiation will be required. This is because it is not just the UK which has differentiated integration arrangements. Other Member States also have opt-outs, or have not participated in enhanced cooperation endeavours, for example.[10] The EU is therefore likely to find that not all of the remaining Member States are going to agree on all forthcoming legislative proposals, such as the new digital tax,[11] and therefore flexible arrangements will be required amongst the EU27.[12]

This is not to say that there has been no recent recognition on the EU's part that flexibility is possible, or even desirable. The European Commission's White Paper on the Future of Europe,[13] authored in light of the referendum result, contains, as the proposal with the strongest hint that there is an attitude of openness towards differentiated integration, the option entitled 'Those who want more do more'.[14] This means that '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'.[15] This appears to be an express endorsement of the hard

10. On which *see* the next section and n. 34 *infra*. The enhanced cooperation mechanism is to be found in Treaty Arts 20 TEU and 326–334 TFEU.
11. European Commission – Press release 'Digital Taxation: Commission proposes new measures to ensure that all companies pay fair tax in the EU' Brussels, 21 Mar. 2018 available at http://europa.eu/rapid/press-release_IP-18-2041_en.htm last accessed 25 Mar. 2018; European Commission Proposal for a Council Directive laying down rules relating to the corporate taxation of a significant digital presence COM (2018) 147 final Brussels, 21.3.2018, 2018/0072 (CNS); European Commission Proposal for a Council Directive on the common system of a digital services tax on revenues resulting from the provision of certain digital services COM (2018) 148 final Brussels, 21.3.2018, 2018/0073 (CNS); Commission Recommendation of 21.3.2018 relating to the corporate taxation of a significant digital presence, C(2018) 1650 final, Brussels, 21.3.2018; and Communication from the Commission to the European Parliament and the Council, *Time to establish a modern, fair and efficient taxation standard for the digital economy,* COM (2018) 146 final, Brussels, 21.3.2018. *See also*, House of Commons European Scrutiny Committee, Thirty First report of Session 2017-19 and Documents considered by the Committee on 13 June 2018, HC 301-xxx, 19 June 2018. Ireland has already declared its opposition: The Times, *I'll block digital tax, Varadkar warns EU* 22 March 2018, available at https://www.thetimes.co.uk/article/i-ll-block-digital-tax-varadkar-warns-eu-h6p79vqj2 last accessed 27 Apr. 2018.
12. *See* L. S. Rossi, The Principle of Equality Among Member States of the European Union, in L. S. Rossi and F. Casolari (eds), The Principle of Equality in EU Law, (Springer 2017) p. 21.
13. European Commission White Paper on the Future of Europe: Reflections and Scenarios for the EU27 by 2025 European Commission, COM (2017) 2025 of 1 March 2017.
14. *See* https://ec.europa.eu/commission/white-paper-future-europe/white-paper-future-europe-five-scenarios_en last accessed 9 Apr. 2018 and European Commission White Paper on the Future of Europe: Reflections and Scenarios for the EU27 by 2025 European Commission, COM (2017) 2025 of 1 March 2017, p. 20.
15. *Ibid*.

core(s) theory,[16] which propounds that a core, or cores, of Member States will move ahead, integrating to a greater extent than the rest. Although space precludes a detailed critique of this theory, suffice it for present purposes to highlight one particular issue, which is that it does not deal sufficiently with the status of those States which do not want to participate in one, even if not all, 'coalitions of the willing'. The example of the UK and the Financial Transaction Tax illustrates this well, because the UK unsuccessfully complained to the European Court of Justice[17] that the non-participating Member States were caught by the extra-territorial effects of the legislative proposal, and therefore spill-over meant that they could not exclude themselves from the attempt by the participating Member States to integrate through the use of the enhanced cooperation mechanism of differentiated integration. There are other legal difficulties which will be addressed in the next section of this chapter, but what one can deduce at this stage is that the most pro-differentiation suggestion for reform seems to be reliant on an old disproved theory, rather than embracing the new convergence/divergence vocabulary of flexibility.

In addition, recent political speeches[18] have appeared to endorse the idea of more flexibility in the EU.[19] However, this has been reported under the guise of the multi speed theory,[20] which can be criticised because the practical examples of differentiation, such as the UK's opt-out from the Euro[21] or Schengen,[22] to name but two, demonstrate that not all Member States will move forward at multiple speeds, in actual fact some are determined not to move at all.

Although the sentiments contained in these proposals and suggestions, which appear to speak positively of differentiated integration, or at least contemplate it, are to be welcomed, unfortunately they do not seem to equate to a *new* willingness to openly embrace it. However, should the EU's dual focus result in a realisation that a new era of embracing flexibility is required, what are the options available? A brief account of three of the main options will now be provided.

16. Wolfgang Schäuble and Karl Lamers, *Reflections on European Policy,* Bonn CDU/CSU Group in the Bundestag, 1994 and Karl Lamers and Wolfgang Schäuble, Financial Times online August 31, 2014, available at http://www.ft.com/cms/s/0/5565f134-2d48-11e4-8105-00144feabdc0.html#axzz3NDVoJWPb last accessed 28 Dec. 2014.
17. *United Kingdom v. Council* [2014] EUECJ C-209/13, ECLI:EU:C:2014:283.
18. *See* President Macron's speech on 29 Aug. 2017 in which he stated that 'we have to think up a Europe with several formats, go further with those who want to go forward, without being hindered by States that want – and it is their right – to go not as fast or not as far', available at https://euobserver.com/institutional/138832 last accessed 1 September 2017 and The Guardian newspaper, *Macron lays out vision for 'profound' changes in post-Brexit EU,* 26 September 2017 available at https://www.theguardian.com/world/2017/sep/26/profound-transformation-macron-lays-out-vision-for-post-brexit-eu last accessed 28 Sep. 2017.
19. *Ibid*.
20. Attributed to Willy Brandt 'Immediate Action Programme' speech to the European Movement in Paris in November 1974 and Leo Tindemans Report on European Union: Willy Brandt, *Rede des Vorsitzen der Sozialdemokratischen Partei Deutschlands,* vor der Organisation française du movement Européen, in Paris 19 November 1974, in Europa-Archiv (30) 1975, D33-38, D36 and Leo Tindemans, *European Union,* supplement Bull. EC, no. 1/76, respectively.
21. Protocol (No. 15) on certain provision relating to the United Kingdom of Great Britain and Northern Ireland.
22. Protocol (No. 19) on the Schengen *acquis* integrated into the framework of the European Union.

§6.03 FLEXIBILITY: THE OPTIONS

There are a variety of mechanisms that might address the convergence/divergence issue in the EU, that have been available historically. As space precludes a detailed discussion of all of them, this chapter will therefore evaluate three particular mechanisms which represent a spectrum of options in terms of effectiveness for the achievement of flexibility in the EU. These are: protocol opt-outs; minimum harmonisation; and enhanced cooperation. Whether or not they could result in the actual achievement of a sufficient degree of differentiated integration will be addressed, along with a further evaluation of the theories criticised in the previous section.

Arguably, the most effective option for achieving a new attitude towards flexibility is the protocol opt-out. Evident in every Treaty, including the Treaty of Rome and since, this mechanism allows each Member State to have a protocol attached to the Treaties stating expressly what areas of EU policy do not apply to that particular State. Generally, and the UK's Protocol opt-out of Schengen is an example of this,[23] these protocols also include provisions permitting the relevant State to choose to opt-in to a new legislative measure proposed in that area.

However, there are criticisms of this mechanism, which are twofold. First, whether or not the Member State to which the protocol opt-out applies is actually able to avail itself of its opt-out is dependent on the Treaty Article chosen as the legal basis of any proposed EU legislative measure.[24] In essence, it is the EU institutions and not the Member States themselves, which ultimately decide whether the differentiated integration mechanism of the protocol opt-out will actually provide the Member State with flexibility in any given EU legislative incidence.

The second, and probably fatal criticism, of this mechanism, is that in order to achieve a new attitude within the EU, flexibility will not just require alterations to current protocols, but new protocols will be needed in addition. The reason for this is partly to deal with Brexit, because of the number of protocols involving the UK, and partly to achieve some clarity, rather than cause any increase in the already complex myriad of protocol and Treaty provisions. Even if each Member State were only modestly to adjust its position, the sum of these amendments would likely be extensive, and would therefore inevitably involve Treaty change. Considering how legally and politically difficult and unpopular this would be, it could well be perceived less as the most effective option and more as the nuclear option.

In contrast, the low-key option would be to attempt differentiated integration through minimum harmonisation. A differentiation mechanism which has been used particularly in the area of tax, minimum harmonisation measures set a floor above which Member States are free to differentiate, usually by applying stricter or more

23. *Supra* n. 22, Arts 4 and 5.
24. *See Commission v. Parliament and Council* 2014 EUECJ C-43/12, published in the electronic reports ECLI:EU:C:2014:298 and Maria Kendrick, *Judicial Protection and the UK's Opt-Outs: Is Britain Alone in the CJEU?*, in Patrick Birkinshaw and Andrea Biondi (eds) *Britain Alone! The Implications and Consequences of United Kingdom Exit from the EU,* (Kluwer, 2016).

far-reaching standards.[25] In terms of differentiation, the idea is that minimum harmonisation just sets the bottom line[26] of standards or implementation that needs to be met by the Member States. It is quite different to the concept of total harmonisation. In essence, Member States retain the competence to either keep the more stringent measures they already have in place, or adopt new more stringent measures. Minimum harmonization therefore demonstrates a potential to acknowledge the sensitivity of the particularities and differences in national Member State regulatory initiatives.[27] The benefit of this mechanism, and why it is considered the low-key option, is that it can achieve differentiation slowly, over time. However, areas where it may be tempting to use this mechanism are those with the potential to ensure regulatory alignment of the UK with the EU after Brexit. These could therefore perhaps include financial services regulation and taxation. The difficulty here, at least with the latter area, is that because the legal basis for measures tend to be either Article 113 TFEU, or Article 115 TFEU, there is a requirement of unanimity voting. Consequently, it must be anticipated that further reform in this area may make the achievement of unanimity extremely difficult because there may be some Member States prepared to alter their tax rates or bases on the basis of new proposals, such as the new digital tax,[28] but others may be either reluctant or determined not to do so. Unless compromise solutions can be found, flexibility will be required more than ever. The result is that the achievement of an EU wide minimum harmonisation measure may be unlikely, and consequently recourse to the enhanced cooperation mechanism will be necessary.[29]

The realistic option for achieving flexibility in a reformed EU is therefore the enhanced cooperation mechanism. Contained in Articles 20 TEU and Articles 326–334 TFEU, it permits a minimum of at least nine Member States to proceed to engage in a legislative endeavour at EU level on the basis of a proposal, which would have initially been suggested as an EU wide measure, but has been rejected by some Member States. It essentially splits the Member States up into participants and non-participants, with only the former being bound by, and indeed paying for, the legislative proposal which is eventually the subject of the endeavour.[30] However, these Articles, although appearing to endorse flexibility at Treaty level, provide for a stringent list of criteria, as well as procedural hurdles, which must be complied with before the mechanism can be used. The provisions are technical and extensive, therefore it is sufficient for present purposes to summarise the most important elements in order to highlight the features which are most relevant to the present discussion. In summary: Article 20 TEU provides that Member States can use the EU institutions to adopt enhanced cooperation measures within the scope of the EU's non-exclusive competences (Article 20(1), first

25. Ellen Vos, *Differentiation, Harmonization and Governance,* in B. De Witte, D. Hanf and E. Vos, *The Many Faces of Differentiation in EU Law* (Intersentia Antwerpen – Oxford – New York, 2001) p. 148.
26. *Ibid*., pp. 153–154.
27. *Ibid*., pp. 153–154.
28. *Supra* n. 11.
29. *See* M. Lang, P. Pistone, J Schuch, and C. Staringer (eds), *Introduction to European Tax Law on Direct Taxation* 3rd edn, (Linde 2013) p. 5.
30. *See* Art. 20(1), (2) and (4) TEU in particular.

sub-paragraph TEU). That process must 'aim to further the objectives of the Union, protect its interests and reinforce its integration process', and must also be 'open at any time to all Member States', which is known as the principle of openness, in accordance with Article 328 TFEU (Article 20(1), second sub-paragraph TEU). Enhanced cooperation must involve at least nine Member States, and can only be authorized by the Council 'as a last resort, when it has established that the objectives of such cooperation cannot be attained within a reasonable period by the Union as a whole', in accordance with Article 329 TFEU (Article 20(2) TEU). All Member States may take part in discussions, but only participating Member States may vote on the measures implementing enhanced cooperation, in accordance with Article 330 TFEU (Article 20(3) TEU). Also, enhanced cooperation measures only bind participating Member States, and new Member States do not have to accept them (Article 20(4) TEU).

The TFEU further specifies that enhanced cooperation must: 'comply with the Treaties and Union law'; 'not undermine the internal market or economic, social and territorial cohesion'; 'not constitute a barrier to or discrimination in trade between Member States', or 'distort competition between them' (Article 326 TFEU); and 'respect the competences, rights and obligations' of non-participants, who must however 'not impede' the enhanced cooperation (Article 327 TFEU). An enhanced cooperation endeavour must follow a request to the Commission by a group of Member States, and then a subsequent proposal from the Commission to the Council, which must approve that proposal with the consent of the European Parliament. The costs of enhanced cooperation endeavours are borne by participating Member States only (Article 332 TFEU); it is possible to change the voting rules on the measures concerned, again for participating Member States only (Article 333 TFEU); and enhanced cooperation measures must be consistent with other EU measures (Article 334 TFEU).[31] In addition to these features, it is a requirement to receive authorisation to utilise the enhanced cooperation mechanism by a Qualified Majority Vote (QMV) between all Member States.

The sum of these provisions denotes two interconnected issues, which can impact on the viability of achieving flexibility. First, the conditions and requirements are difficult to comply with and fulfil.[32] Not only are the provisions lengthy, but they require a balance, which can actually be perceived as a contradiction, between providing some assurances to the non-participating Member States that their position as non-participants will be respected, but at the same time allowing them to join in at a later date should they decide to do so, whilst concurrently warning the non-participants not to interfere with the participating Member States which are forging ahead with their integrative endeavour. In addition, the 'last resort' requirement means that in practice enhanced cooperation flexibility is not a speedy solution to the need for differentiated integration, nor is it conducive to encouraging a positive environment

31. Steve Peers *Enhanced cooperation: the Cinderella of differentiated integration,* in Bruno De Witte, Andrea Ott and Ellen Vos (eds), *Between Flexibility and Disintegration: The Trajectory of Differentiation in EU Law,* (Edward Elgar Publishing, Cheltenham, UK, Northampton, MA, USA 2017).
32. Gaja, *How Flexible is Flexibility Under the Amsterdam Treaty?* 35 CMLRev (1998) 855.

which is welcoming to the idea of flexibility, because in order for the Member States to reach the stage where enhanced cooperation is a last resort, there has to have been a breakdown in the usual legislative process. The EU's members therefore have to be in a state of disagreement.

Second, the practical examples demonstrate that not only is this mechanism difficult to engage, but, following on from the criticisms highlighted in the previous section, it does not support either the multi-speed nor hard core(s) theories implied in the European Commission's White Paper nor the recent political speeches. This is because the principle of openness, combined with the fact that the voting threshold for use of the mechanism is QMV, means that in practice the participating Member States cannot say to the remaining non-participant Member States that they are the pioneers and determined to integrate further between themselves in the manner they so choose, whether the non-participants like it or not. Echoing this sentiment, Amtenbrink and Kochenov in fact suggest that Member States which are party to an enhanced cooperation should have more say over which Member States join them and on what terms, and that the principle of openness actually acts as a disincentive to the mechanisms use.[33] Nor do the examples of the use of the provisions actually demonstrate that a vanguard will de facto form. On the contrary, each of the practical examples of the use of the enhanced cooperation mechanism have [34] seen a different formation of Member States participating. As even Wallace pointed out back in 2000, when the benefit of hindsight as to how the enhanced cooperation mechanism might work in practice was not available, 'The constraining of flexibility by a series of conditions and qualifications will not make it so easy for the purported vanguard group to run ahead and pick up new challenges.'[35] The combination of these two issues makes the possibility of an emergence of 'coalitions of the willing' highly unlikely without reform to the mechanisms of differentiation currently available.

While the principle of openness may contribute to countering the possibility of the formation of a hard core or vanguard de facto forming within the EU27, the difficulties with this principle, and indeed the other provisions of the mechanism,

33. Amtenbrink and Kochenov, *Towards a More Flexible Approach to Enhanced Cooperation,* in Ott and Vos (eds) *Fifty Years of European Integration: Foundations and Perspectives* T.M.C. Asser Press 2009 pp. 194–195. Thoughts echoed by Gaja, *ibid*.
34. Which are: the law applicable to divorce and legal separation Council Decision 2010/405/EU of 12 July 2010 authorizing enhanced cooperation in the area of the law applicable to divorce and legal separation O.J. 2010, L 189/12; the creation of unitary patent protection Council Decision 2011/167/EU of 10 March 2011, Regulation 1257/2012 O.J. 2012, L361/1 and Regulation 1260/2012, O.J. 2012, L361/89; the financial transaction tax, Council Decision 2013/52 O.J. 2012, L22/11; the European Commission Proposal for a Council Decision authorising enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions on the property regimes of international couples, covering both matters of matrimonial property regimes and the property consequences of registered partnerships, COM (2016) 108 final, 2016/0061(NLE), Brussels, 2.3.2016; and the establishment of a European Public Prosecutor's Office, which is an example of the accelerated enhanced cooperation procedure, Council Regulation 2017/1939/EU of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO') [2017] O.J. L 283/1.
35. H. Wallace, *Flexibility: A Tool of Integration or a Restraint on Disintegration?,* in Karlheinz Neunreither and Antje Wiener (eds), *European Integration After Amsterdam: Institutional Dynamics and Prospects for Democracy,* Oxford University Press, Oxford, 2000, p. 190.

operate in a slightly different way in relation to the multi-speed theory, as the joined cases of *Spain and Italy v. Council* and *Italy v. Council*[36] illustrate. Contrary to the suggestion that Member States are essentially travelling in the same direction, just at differing speeds, in this case, Article 327 TFEU was cited by the non-participating Member States as they complained that their rights had been infringed. They argued that, contrary to Article 327 TFEU, the enhanced cooperation endeavour on the subject of unitary patent protection did not respect their rights as non-participating Member States, because their right to take part in the enhanced cooperation in future was compromised as they were unable to accept the terms of the proposed measure.[37] The response from the Council and the intervening Member States was to reiterate that the Treaty makes it quite possible for the non-participating States to join the enhanced cooperation later, consequently rendering this argument otiose.[38] The Court decided not to uphold Spain and Italy's application. The Court held that even if those taking part in the cooperation prescribe rules with which those non-participating States would not agree if they did take part, this 'does not render ineffective the opportunity for non-participating Member States of joining in the enhanced cooperation'.[39] Weatherill has been highly critical of this approach. He states that '[i]n truth the Court had two principal options: to take seriously the protection of the internal market promised by the preconditions [to the use of enhanced cooperation] and to find that enhanced co-operation is in practice unfeasible or instead to treat that protection as in practice devoid of concrete legal meaning and force and thereby to loosen the political discretion pertaining to pursuit of enhanced co-operation. It chose the latter'.[40] Contrary to the Court's reasoning, it appears from the position of the applicant Member States that it is not an issue of travelling at different speeds, but rather whether it is possible to travel at all.[41]

Because of the limitations of the provisions of this mechanism, and because, as stated above, Treaty change in order to overhaul its provisions is in practice highly unlikely, a new attitude of open willingness to embracing flexibility will probably need to be accompanied by a new attitude towards how these provisions are interpreted and work in practice, including from the Court of Justice. The last resort requirement, for example, needs to be viewed from a perspective that does not require a breakdown in relations between the EU27, but rather an amicable agreement for a smaller group of at least nine Member States to respectfully alter their EU legislative obligations. This may also encourage the vocabulary of the theories of integration to be replaced.

36. 2013 EUECJ Joined cases C-274/11 and C-295/11. This chapter will refer to the lead case, *Spain and Italy v. Council* C-274/11 published in the electronic Reports of Cases ECLI:EU:C:2013:240.
37. *Ibid*., para. 79.
38. *Ibid*., para. 80.
39. *Ibid*., paras 81–83.
40. Stephen Weatherill, *Several Internal Markets,* Oxford Legal Studies Research Paper No. 64/2017, p. 34 available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id = 3032513 last accessed 29 Apr. 2018 and Yearbook of European Law, Volume 36, 1 January 2017, pp. 125–178.
41. For a more detailed analysis of this case, *see* Maria Kendrick, *Judicial Protection and the UK's Opt-Outs: Is Britain Alone in the CJEU?, supra* n. 24.

§6.04 CONCLUSION

The title of this chapter asks a very important question: will Brexit make the EU more flexible? In attempting to grapple with the possibilities for the EU27 to adopt a new attitude of openness to the concept of flexibility, and to using the mechanisms of differentiated integration, in answer to this question, the chapter has highlighted and explained the fact that Brexit is one of the EU's historical opportunities to embrace reform. The dual focus which has been created by the UK's withdrawal of its membership substantiates this. Consequently, one has seen some indication that the EU may be open to embracing flexibility more in the future than it has done in the past, but whether these proposals and suggestions signify a *new* attitude to becoming more flexible is not conclusive. The fact that there are options available to the EU, should it chose to adopt a new attitude and become more openly flexible, in particular the three mechanisms of protocol opt-outs, minimum harmonisation and enhanced cooperation, which represent a spectrum in terms of effectiveness for the achievement of flexibility in the EU, establishes that it is possible to answer the question positively. There are issues with all of these mechanisms, as this chapter identified, but they do not mean that it is impossible for the EU27 to become more flexible from a legal point of view.

Brexit should make the EU more flexible in principle and it should not shy away from having a more open view towards flexibility and being more willing to accept divergence than it has in the past. However, what this chapter has demonstrated is that shy of Treaty change, this attitude will have to take place in a manner that both disregards old theories of integration, which have not helped or encouraged the EU to be sufficiently flexible in the past, and also views the existing mechanisms of differentiated integration, particularly enhanced cooperation, from a different more flexibility embracing perspective.