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NEW OPTIONS FOR DIFFERENTIATED INTEGRATION IN THE EUROPEAN UNION

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THE LEGAL SPACE FOR STRUCTURAL DIFFERENTIATION IN THE EU: RECIPROCITY, INTERCONNECTEDNESS AND EFFECTIVENESS AS SOURCES OF CONSTITUTIONAL RIGIDITY

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ABSTRACT: This *Article* argues that the legal space for truly structural forms of differentiation in the EU is limited by several sources of rigidity. Sources of rigidity are thereby understood as legal rules and principles that, either by themselves or in interaction with other rules, principles and material facts, limit the scope for structurally significant differentiation in the EU's legal and constitutional set-up. A source of rigidity can therefore be broader than a single legal rule or principle because the rigidity may stem from a combination of or interaction between multiple principles, rules and facts. Using Brexit as a prism, this *Article* identifies at least three such sources of legal rigidity, being reciprocity, interconnectedness and effectiveness. These sources of rigidity also place significant limits on the possible dynamics of differentiation. It is demonstrated how Brexit brought these sources of rigidity to the surface, and how legal rigidity can and likely will collide with an increasing political desire for more structural differentiation in the future.

KEYWORDS: differentiation – legal rigidity – Brexit – differentiated integration – future of EU integration – general principles of EU law.

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I. Introduction

Differentiation has long been discussed as a possible tool to enable and improve future EU integration.[1] With a Union of 27 or more, it might not be possible to get unanimous agreement on further integration steps. Offering a choice to member states to participate might help overcome this challenge.[2] What is more, differentiation may have independent normative value. For example, it might offer more choice to member states and their electorates on the level of EU integration they want, potentially increasing legitimacy.[3]

Depending on ones' definition, moreover, a significant amount of differentiated integration already exists in the EU. Economic Monetary Union (EMU), Schengen and Permanent Structured Cooperation (PESCO) provide key examples, as does the mechanism for enhanced cooperation.[4] Yet one could also understand Treaty exceptions to free movement or the numerous exceptions contained in secondary legislation as a form of differentiation.[5] If differentiation simply means that EU law is not identical in all Member States, therefore, lots of differentiation already exists. Once we include the realities of how EU law is applied and enforced in different member states, moreover, differentiation may even turn out to be the norm, rather than the exception.[6]

The ubiquity of differentiation – broadly understood – is an important characteristic of the EU legal order. It offers an important counterweight to the more monolithic legal claims and principles that form the very foundation of the EU legal order.[7] Yet from a

[1] See for example already the 1979 speech by the then director of the LSE and former member of the European Commission R Dahrendorf, 'A Third Europe?' (26 November 1979) Archive of European Integration aei.pitt.edu; or the speech by former UK Prime Minister J Major, 'Europe: A Future that Works' (7 September 1994) John Major Archive johnmajorarchive.org.uk. More recently, see the option of more structural differentiation in the White Paper of the Commission on the future of Europe or the discussion in J Piris, *The future of Europe: Towards a Two-Speed Europe?* (CUP 2012).

[2] Cf B de Witte, 'Variable Geometry and Differentiation as Structural Features of the EU Legal Order' in B de Witte and others (eds), *Between Flexibility and Disintegration: The Trajectory of Differentiation in EU Law* (Edward Elgar Publishing 2017) 10.

[3] Cf for example M Demertzis and others, 'One Size Does Not Fit All: European Integration by Differentiation' (Bruegel Policy Brief 3/2018).

[4] See for a very useful and instructive discussion of the different models one can use to define and understand differentiation also D Thym, 'Competing Models for Understanding Differentiated Integration' in B de Witte and others (eds), *Between Flexibility and Disintegration: The State of EU Law* (Edward Elgar Publishing 2017) 28, 38-39.

[5] Cf also the contribution in this *Special Section* of T van den Brink and M Hübner, 'Accommodating Diversity through Legislative Differentiation: An Untapped Potential and an Overlooked Reality?' (2022) European Papers www.europeanpapers.eu 1191.

[6] See for example A Dimitrova and B Steunenberg, 'The Power of Implementers: A Three Level Game Model of Compliance with EU Policy and its Application to Cultural Heritage' (2016) Journal of European Public Policy 1211.

[7] See amongst many other examples case C-399/11 *Melloni* ECLI:EU:C:2013:107; joined cases C-402/05 and C-415/05 *Kadi and Al Barakaat International Foundation v Council and Commission* ECLI:EU:C:2008:461, or case C-284/16 *Achmea* ECLI:EU:C:2018:158, with interestingly also increasingly the values underpinning

more structural-constitutional perspective many forms of differentiation remain rather limited as to the flexibility they allow, and hence as to the actual choice they offer to member states and member peoples on their EU membership.[8] The freedom to join the patent court or not, for example, might not be the kind of choice that really gives the citizens a sense of control over EU integration. Consequently, many of the more limited forms of differentiation cannot fulfil the promise that is sometimes implied by or associated with differentiation: a real choice between different types or levels of EU memberships and the future path of EU integration for your member state.[9]

It is the legal space for such more far-reaching, structural forms of differentiation that form the focus of this *Article*. How much space does the EU legal and constitutional order provide for truly, structurally differentiated membership?[10] Structural differentiation is thereby understood as allowing a member state to dynamically choose a set of EU rights and obligations that deviates from the standard set to such an extent that this leads to an alternative level of membership instead of a 'mere' opt-out in one or more limited fields or domains.

The main tool used to chart the legal space for such structural differentiation is Brexit. Clearly Brexit concerns a third state, and hence does not constitute a form of differentiation *within* EU law. Nevertheless, the UK demands during Brexit forced the EU to assess the flexibility and divisibility of its own legal order. And over the course of the Brexit negotiations, EU law indeed appeared to become far more flexible than the initial EU legal theology on the unity and indivisibility of the acquis implied.[11] Under the Withdrawal Agreement, for example, Northern-Ireland was to remain semi-permanently in the internal market for goods, without the other freedoms applying, suggesting that the four freedoms are divisible, just like post-Brexit UK territorial sovereignty.

At first glance, therefore, it might appear that Brexit brought a more structurally differentiated EU a step closer. This *Article* argues that, on closer inspection, Brexit rather

the EU being included, as in case C-896/19 *Repubblika* ECLI:EU:C:2021:311 and cases C-156/21 *Hungary v Parliament and Council* ECLI:EU:C:2022:97 and C-157/21 *Poland v Parliament and Council* ECLI:EU:C:2022:98.

[8] See for a further discussion on the nature and role of Member Peoples A Cuyvers, 'The Confederal Come-Back: Rediscovering the Confederal Form for a Transnational World' (2013) ELJ 711.

[9] Cf also D Thym, 'Competing Models for Understanding Differentiated Integration' cit. 41.

[10] Although this *Article* often uses the example of different levels of EU Membership, which could be seen as a form of a "multiple speeds" Europe in the meaning of D Thym, 'Competing Models for Understanding Differentiated Integration' cit., the sources of rigidity seem relevant to all three conceptual ideal types of differentiation he identifies, even if it most directly connects with the ideal type of an EU *à la carte*, which really allows member state far-reaching and flexible powers to switch between different packages of EU rights and obligations.

[11] See for example, Special Meeting of the European Council (Art. 50) EUCO XT 20004/17 of 27 April 2017, Guidelines following the United Kingdom's notification under art. 50 TEU, p. 3 para. 1; and C Hillion, 'Withdrawal Under Article 50 TEU: An Integration-Friendly Process' (April 2018) CMLRev 29.

exposed several *structural sources of EU rigidity*.[12] Sources of rigidity are thereby understood as legal rules and principles that, either by themselves or in interaction with other rules, principles and material facts, limit the scope for structurally significant differentiation in the EU's legal and constitutional set-up. A source of rigidity can therefore be broader than a single legal rule or principle, like equality, precisely because the rigidity may stem from a combination of or interaction between multiple principles, rules and facts.[13]

Contrary to the more traditional approach, therefore, this *Article* does not focus on the positive examples of flexibility and potential ways to extrapolate them. Instead, it tries to identify those parts of the EU legal fabric that resist structural differentiation.[14] What are the sources of legal rigidity in the EU? How do they limit differentiation? And if some of these sources of rigidity were temporarily or partially overcome during Brexit, does this mean that they can also be overcome in a non-exit context or on a more permanent basis?[15] To use a building metaphor, the question is if there are some load-bearing walls in the EU legal construct that cannot be moved without bringing the whole building down. And if such load-bearing walls exist, what limits does this impose on any plans to structurally redesign the EU constitutional structure in a more flexible manner?

To keep the analysis manageable, the first part of this *Article* formulates three possible sources of legal rigidity, hypothesized to be particularly limiting.[16] These are: *i)*

[12] See for discussion on Brexit and differentiation also B de Witte, 'An Undivided Union? Differentiated Integration in Post-Brexit Times' (2018) CMLRev 227 and B De Witte, 'Near-Membership, Partial Membership and the EU Constitution' (2016) ELR 471.

[13] See for example on the limiting effects of equality J Wouters, 'Constitutional Limits to Differentiation: The Principle of Equality' in B de Witte and others (eds), *The Many Faces of Differentiation in EU Law* (Intersentia 2001) 301.

[14] In this sense it builds on the observation of De Witte, Ott and Vos that "finally, the question whether flexibility is a tool for disintegration or integration can only be answered by establishing what are the core institutional and policy elements, the core principles and values from which the Union of all EU Member States cannot deviate without putting the essence and functioning of the supranational entity at stake" in B de Witte, A Ott and E Vos, 'Introduction' in B de Witte, A Ott and E Vos (eds), *Between Flexibility and Disintegration: The Trajectory of Differentiation in EU Law* (Edward Elgar 2017) 6. See for an analysis of limits derived from the principle of loyalty also A Miglio, 'Differentiated Integration and the Principle of Loyalty' (2018) EuConst 475, and for an analysis focusing on the limits imposed by the principles of consistency and sincere cooperation in the context of PESCO the insightful contribution in this *Special Section* by AS Houdé and RA Wessel, 'A *Common* Security and Defence Policy: Limits to Differentiated Integration in PESCO?' (2022) European Papers www.europeanpapers.eu 1325.

[15] Cf also the recognition by Kingston that some form of an "essential, non-derogable core" is required to maintain the integrity and effectiveness of EU law and policy, even in the flexible domain of environmental policy. See S Kingston, 'Flexibility in EU Environmental Law and Policy: A Response to Complexity, of Fig Leaf for Expediency?' in B de Witte and others (eds), *Between Flexibility and Disintegration: The Trajectory of Differentiation in EU Law* cit. 360.

[16] For analyses on other legal and constitutional limits to differentiation also see J Wouters, 'Constitutional Limits to Differentiation' cit. and A Ott, 'EU Constitutional Boundaries to Differentiation: How to Reconcile Differentiation with Integration?' in A Ott and E Vos (eds), *Fifty Years of European Integration: Foundations and Perspective* (T.M.C. Asser Press 2009) 113.

reciprocity (many EU rights require Member State reciprocity);[17] *ii) interconnectedness* (many rights require a coherent package of rights to work);[18] and *iii) effectiveness* (lower levels of membership may still require full blown doctrines such as autonomy, supremacy and direct effect).[19] A fourth limiting factor concerns the cumulative *dynamics* of differentiation. Even if more far-reaching differentiation, such as creating different "levels" of EU membership, is legally possible, how would moving *between* these different levels work? And what would the cumulative effect be of multiple member states dynamically alternating between different packages of membership rights and obligations?

Once these possible sources of rigidity have been analysed, the next part of this *Article* explores if these sources of rigidity were overcome during Brexit. To that end, it zooms in on three legal outcomes, being the transition period, the Northern-Ireland Protocol and substantive free movement rights in the Trade and Cooperation Agreement (TCA). Subsequently, the conclusion assesses whether Brexit offers a legal steppingstone for more structural EU differentiation, or whether the sources of rigidity in reality limit the legal space for such differentiation unless some major constitutional redesign is successfully enacted.

Clearly the approach outlined here is limited and can only yield tentative conclusions. The conception of rigidity itself, for example, already requires more conceptual and legal work than can be offered here. This *Article* also largely focusses on the internal market, even if many other areas of EU law deserve and need to be included.[20] One should be, furthermore, be careful not to overlearn from Brexit, which was in part driven and determined by unique circumstances. The deliberate focus on legal limits to integration, moreover, is in no way intended to deny the many *political* limits to differentiation, the fact that several political limits have been dressed up as legal limits during Brexit negotiations, or the fact that in the EU seemingly rigid legal limits sometimes become rather fluid where sufficient political pressure builds up.[21] Lastly, the focus on limits to flexibility is in no way intended to deny the significant scope for flexibility, broadly understood, already present in the EU legal system nor its constitutional importance. To fully understand

[17] See already case C-26/62 *Van Gend en Loos v Administratie der Belastingen* ECLI:EU:C:1963:1 and for a Brexit analysis A Cuyvers, 'Balancing Sovereignty, Trade and Northern-Irish Peace: Free Movement of Goods Post-Brexit' in F Kainer and R Repasi (eds), *Trade Relations After Brexit* (Hart Publishing 2019).

[18] Cf Barnier's famous "Staircase to Hell", which even itself ran into significant legal complications, see B de Witte, 'An Undivided Union?' cit. 227.

[19] See in the context of Brexit, RC Tobler, 'One of Many Challenges After "Brexit": The Institutional Framework of an Alternative Agreement – Lessons from Switzerland and Elsewhere?' (2018) Maastricht Journal of European and Comparative Law 575.

[20] Cf also G de Búrca, 'Differentiation within the "Core"? The Case of the Internal Market' in G De Búrca and Scott (eds), *Constitutional Change in the EU: From Uniformity to Flexibility?* (Hart Publishing 2000) 133-171.

[21] See for example the fluidity of EMU law in case C-370/12 *Pringle* ECLI:EU:C:2012:756 and case C-62/14 *Gauweiler* ECLI:EU:C:2015:400, or the creativity behind the "one-off" funding mechanism enabling Next Generation EU.

flexibility, however, we must also understand the other half of the equation, being the legal forces that lead to rigidity and hence limit the scope for structural differentiation.

II. Sources of rigidity

Law inherently strives for a sufficient level of predictability and consistency. A law that changes daily would not even meet the minimum criteria for qualifying as law.[22] A certain amount of rigidity is therefore inherent in all law. For the EU legal order, however, the search for predictability and consistency is even more existential. With weaker political and societal foundations than most nation states, the EU relies on its legal order to a relatively large extent for effectiveness and stability.[23] EU law, moreover, must be rigid enough to guide and restrain 27 national legal orders. The existential threat experienced by EU lawyers when some of the foundational rules of EU law are challenged, for example by the German Constitutional Court or even more viscerally by the Polish Constitutional Court, illustrates the central importance of these foundational rules and the legal rigidity and stability they provide to the EU as a whole.[24] Many key norms of the EU polity have, therefore, been legally enshrined, often at the constitutional level, to ensure the stability of the EU. Such legalization and constitutionalizing itself already leads to more rigidity than where norms remain at the political or conventional level.

Consequently, underlying more specific sources of rigidity, there is already a level of conceptual and constitutional rigidity in EU law that seems to be higher than in national legal systems. As indicated, however, this *Article* will focus on several more specific sources of legal rigidity in the EU legal system which came to the fore during the Brexit negotiations. We will start with reciprocity, which is closely linked to the nature of the EU, and subsequently move on to interconnectedness and effectiveness.

[22] Cf L Fuller, *The Morality of Law* (Yale University Press 1969 2nd ed.) and R Raz, *The Morality of Freedom* (Clarendon Press 1998).

[23] See amongst many others *Van Gend en Loos v Administratie der Belastingen* cit., case C-6/64 *Costa v. E.N.E.L.* ECLI:EU:C:1964:66, case C-106/77 *Simmenthal* ECLI:EU:C:1978:49, or more recently case C-824/18 *A.B. and Others. (Appointment of judges to the Supreme Court – Actions)* ECLI:EU:C:2021:153 and A Cuyvers, *The EU as a Confederal Union of Sovereign Member Peoples: Exploring the Potential of American (con)Federalism and Popular Sovereignty for a Constitutional Theory of the EU* (Diss. Leiden 2013) part. I.

[24] See especially BVerfG of 5 May 2020 2 BvR 859/15 and the preliminary reference underlying this judgment, following up on the *Gauweiler* saga, as well as, of a different nature, the judgment of the Polish Constitutional Tribunal of 7 October 2021 in case K 18/04 declaring certain parts of the EU Treaties, as interpreted by the CJEU, incompatible with the Polish Constitution and hence not binding on Poland.

II.1. Omnidirectional reciprocity as a source of rigidity

EU law is largely based on reciprocal promises.[25] Member states promise to grant each other, and each other's citizens, largely identical package of rights and obligations.[26] Clearly reciprocity is a feature of many international agreements. But in the EU, the nature, level and significance of reciprocity has been lifted to a higher level, in part by the CJEU. Already in *Costa v. E.N.E.L.*, for example, the autonomy and supremacy of EU law was directly linked to its reciprocal nature: "The integration into the laws of each Member State of provisions which derive from the Community, and more generally the terms and the spirit of the Treaty, make it impossible for the States, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on a basis of *reciprocity*".[27]

One of the reasons that Member States have agreed to grant so many rights to others is because they receive the same rights in return. What is more, the right of one party often, by logical necessity, mirrors the obligation of the other party. The right of a Greek EU citizen to move freely to Estonia, for example, implies the obligation of Estonia to allow her in. What is more, for an internal market to work, the right of the Greek citizen to go to Estonia cannot not depend on the number of Estonians in Greece. Nor can it depend on whether Greece is respecting its own obligations under EU law.[28] As the CJEU has held, the failure of a member state to respect its obligations under EU law does not relieve other member states of their obligations under EU law towards this member state or its citizens. This is indeed a fundamental difference between the EU legal order and "ordinary" public international law which largely depends on self-policing and reprisals.

The importance of reciprocity is further illustrated by the principle of mutual recognition.[29] Mutual recognition in principle requires member states to reciprocally recognise the equivalence of each other's norms. Obviously, mutual recognition, and reciprocity in general, are far from absolute. For example, treaty exceptions and the rule of reason allow member states to restrict free movement rights to safeguard legitimate overriding objectives in a proportionate manner. Even in the strict mutual recognition framework of the European Arrest Warrant (EAW), the execution of an EAW may be halted, for example

[25] See for an example from the national perspective also how the French *Conseil constitutionnel* stresses the importance of reciprocity in its French Constitutional Council decision of 2 September 1992 no. 92-321 DC.

[26] Note that the prohibition of discrimination based on nationality as enshrined *inter alia* in art. 18 TFEU, one of the most fundamental norms of EU law, can also be understood as a form of reciprocity. Member States are not allowed to give more rights to their own citizens than to those of other Member States, essentially creating a reciprocal set of rights.

[27] Case C-6/64 *Costa v ENEL* cit.

[28] See for examples of reciprocity more common in "ordinary" public international law case C-265/19 *Recorded Artists Actors Performers* ECLI:EU:C:2020:677 para. 36, or case C-207/17 *Rotho Blaas Srl* ECLI:EU:C:2018:840 para. 45, where the CJEU confirms that it will not grant direct effect to WTO law as other WTO Members do not do so either.

[29] See already case C-120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* ECLI:EU:C:1979:42.

because of failing fundamental rights protection in the other member state.[30] These limits to mutual recognition, however, truly are the exception, and the CJEU has worked very hard to keep them as such.[31] What is more, most exceptions to mutual recognition are *also reciprocal*. Each member state must meet the same standard to justify restrictions or limits. These exceptions, and one could see as a second-order reciprocity which reciprocally regulates the exceptions to reciprocity, therefore create the requisite flexibility to allow a reciprocal system to function. None of the exceptions to reciprocity, therefore, allow differentiation to a degree that would undermine the level of reciprocity required for the stability and effectiveness of the EU legal order.[32]

Reciprocity creates a certain level of rigidity. Member states reciprocally promise each other and each other's citizens the same package of rights.[33] Differentiation in the package of rights of one or more member states then undermines reciprocity or requires complex arrangements as soon as the rights and obligations *vis-à-vis* one member state start to differ as compared to all other member states. Brexit illustrated this challenge. Granting the UK a different set of rights and obligation would either mean that the UK received more than it gave, or that all member states would have to start giving fewer rights to the UK and its citizens than they gave to all other member states and EU citizens. Having such a separate bundle of rights and obligations for only the UK might in itself still have been possible, even if already rather complicated. Yet such an approach of differentiated yet reciprocal packages of rights and obligations rapidly becomes untenable where multiple member states receive their own unique blend of rights and obligations. In fact, what the cumulative impact of such differentiation shows is how the EU in many areas relies on multidirectional or even *omnidirectional* reciprocity to function.

Many norms of EU law, including most internal market rights, only function because *all* member states offer by and large the same package of rights to each other. For example, the internal market for goods works because one good can move freely from Luxemburg to Germany, and another can move from Germany to Italy through Austria. This creates an omnidirectional reciprocity, whereby it no longer becomes necessary to check from which member state a good originally comes. Were the rights of a good to depend

[30] See for example case C-404/15 *Aranyosi and Căldăraru* ECLI:EU:C:2016:198.

[31] See generally in the context of services S Van den Bogaert and others, 'Free Movement of Services, Establishment and Capital' in PJ Kuijperand others (eds), *The Law of the European Union* (Deventer: Wolters Kluwer 2018) 539 ff.

[32] See also already M Dougan, 'The Unfinished Business of Enhanced Co-operation: Some Institutional Questions and their Constitutional Implications' in A Ott and E Vos (eds), *Fifty Years of European Integration: Foundations and Perspectives* (TMS Asser Press, 2009) 157, as well as the more general discussion on effectiveness below.

[33] Note in this context that exceptions to reciprocity through differentiation are also easier where they concern a limited, identifiable group of people with limited societal power such as non-EU citizens. For example, the far reaching opt outs of the UK in the area of asylum generally only affect the rights of asylum seekers. As such, they have a more limited impact on general reciprocity.

on bilateral reciprocity between each member state, however, it would remain necessary to check for each good in which state it originated and what the precise reciprocal rights are between the state of origin and the receiving state.

One member state with a different package of rights and obligations might not necessarily derail this omnidirectional set-up.[34] Yet if multiple member states receive the freedom to differentiate their packages of rights and obligations, it becomes almost impossible to maintain automatic, omnidirectional reciprocity. Rights and obligations will start to depend on *bilateral* reciprocity between Member States. The rights and obligations between specific member states and their citizens will then be determined by the overlap in the specific "packages" of rights and obligations each of these states has agreed to. The result would be a patchwork incapable of sustaining an effective internal market. For example, say Spain gives EU citizens equal access to its social security, yet Denmark does not. At some point, it will become untenable for Spain to continue awarding benefits to Spanish citizens in Denmark. This picture gets even more complicated where, for example, a Danish citizen moves to Portugal, acquires permanent residence, and then moves to Spain. Would this person be entitled to the Portuguese package of rights in Spain, or to the Danish? And what about individuals with multiple EU nationalities, or working in multiple member states? For goods, of course, as again illustrated by Brexit, a lack of omnidirectional reciprocity requires defining and tracking the origin of goods, seriously hampering free movement and reintroducing many of the barriers that an internal market is there to remove.[35]

The multidirectional reciprocity on which many parts of EU law, including the internal market, depends creates a rather high level of rigidity.[36] In turn, this limits the legal space for more structural differentiation in the rights and obligations of member states and EU citizens. Especially the *cumulative* effect of differentiation means that the packages of rights and obligations cannot differ too much from one member state to the next, *inter alia* where rights of individuals are concerned. Clearly, this reciprocity derived rigidity does not apply to all EU rights and obligations. The well-known areas of existing flexibility in EU law, including opt-outs in the areas of freedom, security and justice, and differentiation in membership in Schengen and the Eurozone, show that the rights and obligations of member states

[34] Cf for example the deviations allowed under art. 114(4) or (5) TFEU or limited exceptions such as for Swedish snus.

[35] See for a further discussion on goods A Cuyvers, 'Balancing Sovereignty, Trade and Northern-Irish Peace' cit.

[36] One could here also think of reciprocity in institutional rights and obligations. As debates about the creation of an EMU parliament and the "ins" and "outs" in the Eurogroup show, differentiating in the rights and obligations that Member States have in EU institutions rather quickly lead to rather intractable challenges. For example, on the one hand it is often untenable to differentiate in the representative rights of Member States or EU citizens. On the other hand, it will be equally untenable to continue to grant the same levels of representative rights to those Member States and EU citizens opting for smaller packages of rights and obligations. See for a discussion in the context of EMU LJ van Middelaar and V Borger, 'A Eurozone Congress' in S Hennette and others (eds), How to Democratize Europe (Harvard University Press 2019) 11.

can differ in certain areas and to a certain extent.[37] Yet even within these fields, however, the choice is often rather binary between participating or not participating.[38] For example, a member state cannot choose to join only certain parts of EMU, to accept only certain EAW's from certain member states or to ignore part of the Schengen Borders Code.[39] Once a choice to join has been made, the principle of reciprocity usually kicks in, precluding a member state to pick and choose its own basket of rights and obligations.[40]

In conclusion, reciprocity is a vital construct underlying the EU legal order. Structural differentiation, especially concerning the respective rights and obligations of member states, sits uneasily with (omnidirectional) reciprocity. Consequently, the need for reciprocity forms a source of legal rigidity which limits structural differentiation in the EU. This limiting effect is amplified by the related construct of interconnectedness, to which we now turn.

II.2. Interconnectedness as a source of rigidity

Your right to reside in another EU member state usually loses much of its value if you are not allowed to bring your spouse or send your kids to school. Equally, your right to provide medical services in another member state loses practical relevance if your medical degree is not recognized, you cannot insure yourself, or your services are not covered by national health insurance. As these examples show, many constructs of EU law depend on a web of interconnected rights and obligations to function. To use the example of a car: no matter how powerful your engine or shiny your rims, without a gearbox you will not get very far.

The level of interconnectedness required in part depends on the objectives pursued and the desired level of effectiveness. The CJEU thereby tends to opt for a rather ambitious interpretation of the objectives pursued and a very high level of effectiveness. Often, the CJEU will ask which interpretation of EU law *optimally* achieves a desired outcome. Consequently, EU law usually requires many interconnected rights to optimally ensure a certain right. For example, the CJEU has found that to be effective, the right to provide services must include the right to bring as many staff as you need for as long as you need them.[41] Similarly, an effective right to work in another member state not only includes

[37] For some strong overviews of differentiation in EU law see for example B de Witte and others (eds), Between Flexibility and Disintegration: The Trajectory of Differentiation in EU Law cit.

[38] See in this context also section II.2.

[39] It is recognized that certain non-EMU Members can selectively participate in some EMU-related mechanisms such as the ESM and the TSCG, but they cannot partially join the EMU as such.

[40] Cf also art. 326(2) TFEU which explicitly states that enhanced cooperation "shall not undermine the internal market". Even if a form of differentiation takes place outside the internal market proper, therefore, it may not undermine the internal market, turning the effectiveness and coherence of the internal market into a limit on differentiation. Cf also B de Witte, 'Variable Geometry and Differentiation as Structural Features of the EU Legal Order' cit. 21.

[41] See for example case C-113/89 *Rush Portuguesa v Office national d'immigration* ECLI:EU:C:1990:142.

the right of your children to go to school, but the right to *finish* this schooling. Even obstacles to participate in national sports competitions may threaten the effective free movement of workers.[42]

One can of course challenge the level of effectiveness the CJEU strives for. Yet even under lower standards, many EU rights and obligations are inherently interconnected. What is more, a certain level of interconnectedness already flows from simple *material* reality. People have babies and get sick, whether this is legally convenient or not. Similarly, physics, geography, production processes, logistical realities or the limits of ICT systems affect trade in goods and the possible ways to organize customs checks. If one truck carries packages from 50 different producers, for example, just tracking that truck is not enough to replace a customs border by "technology". Legal rules must therefore also consider the material interconnections between law and our physical reality.[43]

Consequently, any mechanisms for structural differentiation must respect the legal limits imposed by legal and material interconnections. One cannot, therefore, freely pick and choose from interconnected rights, which leads to rigidity. The limits imposed by interconnection, moreover, affect both attempts to *reduce* integration for certain member states as well as attempts to *deepen* integration for a coalition of the willing. For both reduction and deepening will likely not just affect a single rule or mechanism, but a whole web of related rules.

Interconnection, moreover, does not just play a role in the internal market. Even in areas that serve as prime examples of differentiation, such as EMU and Schengen, interconnectedness imposes clear limits on the nature and scope of differentiation. For instance, joining Schengen, and removing internal borders, creates the need to harmonize the protection of shared external borders. Hence, even if some flexibility remains, all states participating in the Schengen area need to sign up to a minimum of substantive rules as well as forms of institutional collaboration and coordination.[44] Similarly, a sufficient level of coherence also becomes necessary for an effective common asylum system.[45] As to EMU, a common currency not just requires a joint monetary policy but, as experience has shown, a host of norms on economic policy and banking supervision, combined with far reaching

[42] Case C-413/99 *Baumbast and R* ECLI:EU:C:2002:493 and case C-22/18 *TopFit and Biffi* ECLI:EU:C:2019:497.

[43] The author would like to thank Kalypso Nicolaïdis for her interesting suggestions on this point during the seminar.

[44] Cf Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code).

[45] See also the contribution in this *Special Section* by J Santos Vara, 'Flexible Solidarity in the New Pact on Migration and Asylum: A New Form of Differentiated Integration?' (2022) European Papers www.europeanpapers.eu 1243. For the additional point that we could (and should) understand fundamental rights as part of the interconnected set of rules, which thus add rigidity, especially in the area of asylum, see N El-Anany, 'The Perils of Differentiated Integration in the Field of Asylum' in B de Witte and others (eds), *Between Flexibility and Disintegration: The Trajectory of Differentiation in EU Law* cit. 362, 367.

institutional commitments including an independent central bank, EU institutional capacity to act in times of crises and, to that end, commit formerly unprecedented sums of public money. In other words, Schengen and EMU allow a certain level of *binary* differentiation in the sense that one can choose to take part or not. Once a choice is made to join, however, a Member State must sign up to a host of interconnected norms and institutional structures. This leaves little space for differentiation *within* Schengen or EMU.

What is more, even policy areas that might formally be separate from the internal market may use internal market tools to achieve certain aims or simply affect the functioning of the internal market directly or indirectly. In those cases, even such non-internal market areas may be constrained by the rigidity that derives from the interconnectedness of the internal market.[46] The spill-over of internal market rigidity, moreover, can also extend to external obligations of the EU and its member states. For example, due to internal disagreement, initial EU legislation on GMOs left significant space for Member States to adopt stricter norms.[47] The subsequent patchwork of national prohibitions, however, was subsequently found to contravene World Trade Organization (WTO) law, especially as no adequate scientific risk assessment had been carried out to justify many stricter national norms.[48] This demonstrates the rigidity created by the interconnection between internal legislation and external obligations of the EU and its member states.[49]

Rigidity is further increased by the interconnection between substantive norms and the EU's democratic and decision-making machinery. Again EMU provides a clear example.[50] Even if substantively some member states can choose to remain outside EMU, significant difficulties arise in respecting the democratic and decision-making rights of the "outs", and more generally in fitting the Eurozone into an EU constitutional and legitimacy

[46] See for example Regulation 2017/1369 of the European Parliament and of the Council of 4 July 2017 setting a framework for energy labelling and repealing Directive 2010/30/EU (Text with EEA relevance), which is part of the EU's environmental policy but also concerns the EU market for goods.

[47] See for example Directive 2001/18/EC of the European Parliament and of the Council of 12 March 2001 on the deliberate release into the environment of genetically modified organisms and repealing Council Directive 90/220/EEC.

[48] World Trade Organization, *DS921: European Communities – Measures Affecting the Approval and Marketing of Biotech Products* www.wto.org. See for discussion S Kingston, 'Flexibility in EU Environmental Law and Policy' cit. 354.

[49] Note in this context also that the increasingly strict requirement of coherence in the external position of the EU and its Member States may further increase rigidity and decrease the scope for differentiation. See for instance case C-246/07 *Commission v Sweden (PFOS)* ECLI:EU:C:2010:203. See also the contribution by AS Houdé and RA Wessel, 'A *Common* Security and Defence Policy: Limits to Differentiated Integration in PESCO?' cit., with further thanks for their valuable comments on this point during the seminar.

[50] Cf critically D Thym, 'Competing Models for Understanding Differentiated Integration' cit. and T Beukers and M Van der Sluis, 'Differentiated Integration from the Perspective of the Non-Euro Area Member States' in T Beukers and others (eds), *Constitutional Change through Euro-Crisis Law* (Cambridge University Press 2017) 143.

structure designed for decision-making by all member states jointly.[51] The interconnection between substantive norms and the institutional set-up of the EU, therefore forms a further source of rigidity.[52] As one cannot create endless permutations of EU institutions, one at some point has to choose between either allowing the "outs" a say on decisions in areas of EU integration they do not participate in, or limiting substantive integration to the extent that can be accommodated by the unitary institutional framework of the EU.[53]

A further complication arises, moreover, where we consider the interaction between reciprocity and interconnectedness. Interconnectedness can limit the options for differentiation to certain coherent packages of rights and obligations. Even if multiple coherent packages of rights can be designed, however, reciprocity may subsequently limit the capacity of member states to freely choose between these packages. After all, due to (omnidirectional) reciprocity, it may be necessary that all member states choose the same package of interconnected rights. If in one field this is indeed the case, member states in fact only have the freedom to jointly choose which coherent package of rights they will all reciprocally adopt, which significantly reduces the scope for structural differentiation.

Brexit also illustrates the limitations imposed by interconnectedness. For example, the UK initially wanted to retain free movement of services to a certain extent, especially for financial services. At the same time, it wanted to remove all residence rights connected to this freedom, especially for staff of service providers. After all, one of the core promises behind Brexit was to limit migration. The UK demand, however, went squarely against the case law of the CJEU, which holds that the right of service providers and staff to move and reside is inherently connected to the freedom to provide services, as is the right of service recipients.[54] As a result, the EU could only accept the full package of rights related to freedom of services or none at all.

[51] See for instance K Tuori, *The Eurozone Crisis: A Constitutional Analysis* (Cambridge University Press 2014) and A Hinarejos, *The Euro Area Crisis in Constitutional Perspective* (Oxford University Press 2015).

[52] See making short shrift of proposals for an EMU parliament for example also B De Witte, 'The Law as Tool and Constraint of Differentiated Integration' (EUI Working Paper RSCAS 2019/47) 15.

[53] See on this point also D Thym, 'Competing Models for Understanding Differentiated Integration' cit. 61, stressing that it is important that differentiation "is regularly embedded into the single institutional framework". Importantly, the European Parliament has historically strongly opposed any attempts to create asymmetric participation of MEP's. The recognition since Lisbon in art. 14(2) TEU that the EP is "composed of representatives of the Union's citizens" has only further entrenched this approach legally. See for an example the reaction of the European Parliament to suggestions made in the EMU context the Resolution 2012/2151(INI) of the European Parliament of 20 November 2012 with recommendations to the Commission on the report of the Presidents of the European Council, the European Commission, the European Central Bank and the Eurogroup "Towards a genuine Economic and Monetary Union". See for further discussion D Curtin and C Fasone, 'Differentiated Representation: Is a Flexible European Parliament Desirable?' in B de Witte and others (eds), *Between Flexibility and Disintegration: The Trajectory of Differentiation in EU Law* cit. 118.

[54] See for an overview S Van den Bogaert and others, 'Free Movement of Services, Establishment and Capital' cit. 539 ff., and for an overview of the much more limited system under the TCA: SCG Van den Bogaert and A Cuyvers, 'Het dienstenverkeer tussen de EU en het Verenigd Koninkrijk na Brexit' (2021)

The tense debate on the level playing field provides another example of interconnectedness. The more markets are integrated, the more important it is to guarantee a level playing field, for example concerning competition policy or environmental, labour, data protection or consumer protection standards, which impact competitiveness. If you do not harmonize these standards, undertakings from the member state with the lowest standards have an unfair competitive advantage, which they can freely exploit if they have unfettered access to the markets of other member states. It is true that jointly regulating all these areas significantly decreases the freedom of member states and thereby increases the sovereignty costs of free movement. Yet from the perspective of EU law, all these norms are interconnected. Hence, little structural differentiation seems possible within this coherent package of rights and obligations. As the UK was unable or unwilling to accept this full package, the only legally viable option was to go for a relationship that was much further removed from a real internal market, and hence did not require the full set of level playing field norms.

Another important example of interconnectedness, which dominated much of the later debate on Brexit, was the trilemma on the Northern-Irish border.[55] All parties wanted to avoid a "hard" border between Ireland and Northern-Ireland. Removing borders, however, is connected to a host of norms and institutions. Even in the specific circumstances in Ireland, where free movement of persons was already covered by the Common Travel Area, avoiding a hard border still required shared norms on *inter alia* customs and almost all other norms related to free movement of goods. Ultimately, therefore, the only solution parties could agree to was to keep Northern-Ireland in the EU customs union and largely within the EU internal market for goods, even though this involved creating a de facto border between Northern-Ireland and the rest of the UK.[56] This solution, which is far from perfect or even stable, illustrates just how hard it can be to disentangle different EU rights and obligations, even with significant political will and societal pressure. Northern-Ireland also illustrates the importance of material interconnectedness. Most of the UK proposals to solve the Northern-Ireland trilemma through "technology" were already non-starters because they ignored the interconnection between customs and free movement law and the limits imposed by the material reality on the ground. For example, the check whether a sheep or a wheel of cheese meets EU standards, or that a truck does not contain goods directly shipped in from China, simply must take place *somewhere*, with some form of

Bedrijfsjuridische Berichten 149. Also note, however, that interestingly the right of service recipients to remain in a Member State during the provision of the service is apparently not a necessary, interconnected part of the freedom to provide services in the context of the EU – Turkey association agreement, as held in case C-221/11 *Demirkan* ECLI:EU:C:2013:583.

[55] SCG Van den Bogaert and A Cuyvers, 'Brexit Blues: They Still Haven't Found What They're Looking For…' (2019) Nederlands Juristenbladd 1388.

[56] Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, Northern-Ireland Protocol [2019].

oversight to ensure the check is done correctly.[57] As a result, the material reality of customs and product standards has so far always required a border somewhere.

II.3. Effectiveness as a source of rigidity

The effectives of EU law not only depends on the substance of EU rights and obligations. It also depends on the legal machinery developed to ensure these rights and obligations are respected in practice. The key legal building blocks of EU effectiveness are by now part of its constitutional self-identity and legal mythology. Yet from our perspective it is important to explore to what extent core effectiveness doctrines such as direct effect, supremacy, autonomy, sincere cooperation as well as Commission and CJEU oversight may form sources of legal rigidity.

Considering the already rather far-reaching and absolute nature of many EU effectiveness doctrines, it seems unlikely that future differentiation will introduce even more comprehensive effectiveness requirements. Hence, the main question is if structural differentiation could *lower* standards of effectiveness. For example, in a scenario with different levels of EU membership, could there be a level where member states accept less than absolute supremacy and autonomy, or do so in some areas like migration or judicial organization?[58] Or does any form of real membership inherently necessitate the full gamut of effectiveness doctrines?

This question was of course also critical for Brexit. "Taking back control" and liberation from foreign judges were core rallying cries for Brexiters. Ending EU supremacy and the jurisdiction of the CJEU hence became some of the most entrenched red lines of the UK. In fact, before joining the Leave camp, Johnson explored options for some kind of national sovereignty lock that would preserve UK sovereignty from EU supremacy. The thinking apparently was that, if such a lock could be designed, an exit might not be necessary. The reply from EU law experts in the UK was that it could not be done, seemingly contributing to his decision to support Brexit.[59]

Considering the foundational importance of effectiveness for EU law, it does indeed not seem likely that any form of differentiation could escape or significantly lower the effectiveness standards as developed by the CJEU. For starters, most effectiveness doctrines have been in place for decades. Hence, they were already deemed necessary by the CJEU in earlier, less far-reaching phases of EU integration. What is more, the CJEU has

[57] See for further analysis A Cuyvers, 'Balancing Sovereignty, Trade and Northern-Irish Peace' cit.

[58] Cf the recent statement of chief negotiator turned presidential candidate Barnier on 10 September 2021 calling for France to regain its legal sovereignty, particularly in the area of migration or the judgment of the Polish Constitutional Tribunal in case K 18/04 cit. M Pollet, 'Presidential Candidate Barnier Wants to Limit Role of European Courts' (10 September 2021) Euractiv www.euractiv.com.

[59] See for an excellent overview T Shipman, *All Out War: The Fully Story of How Brexit Sank Britain's Political Class* (HarperCollins 2017) and T Shipman, *Fall Out: A Year of Political Mayhem* (HarperCollins 2018).

consistently stressed the existential importance of these effectiveness doctrines.[60] These doctrines are part of "the very foundations" of the EU legal order. Hence, any challenge to these doctrines may threaten to bring the whole construct down. For this reason, the CJEU has also opted for rather absolute conceptions of, for example, supremacy and autonomy. Be it the UN Security Council acting under Title VII, a national constitutional court defending its own constitutional core, or an arbitral award claiming finality under an international agreement, supremacy and autonomy must be respected, and only the CJEU can potentially weigh these foundational principles against other norms of EU and international law, within the system of EU law itself.[61] Lastly, and perhaps most fundamentally, even if there might be legal and conceptual space to soften some of the EU effectiveness doctrines, it is difficult to imagine how this could be done for only some member states. The effectiveness doctrines codetermine the very nature and effect of EU law. And the nature and effect of EU law in principle cannot differ from one member state to the other, already for reasons of reciprocity and interconnectedness.[62] Imagine for example that EU law is less supreme in Poland than it is in Germany. Such differentiation in effectiveness would already undermine the unity and uniformity of EU law. Yet it would also undermine reciprocity. EU rights and obligations would not be as effectively protected in Poland as they are in Germany, meaning that in effect Germany is giving more rights to Polish citizens and undertakings in Germany than Poland is giving to German citizens and undertakings on its territory. Such differentiation in effectiveness, moreover, might also conflict with interconnectedness. As multiple rights depend on each other, reducing the effectiveness of only some of these rights might undermine the effectiveness of the entire web of rights involved.

Considering these difficulties in differentiating within effectiveness doctrines, there only seem to be three options to create more legal space for differentiation. First, one could try to lower or soften effectiveness standards for *all* Member States. Second, one accepts the current effectiveness doctrines as a given, meaning that any future forms of differentiation must remain within the rigidities imposed by these doctrines. Third, one moves outside the realm of EU law proper to avoid the limits imposed by effectiveness. Here the European Stability Mechanism (ESM) and the Treaty on Stability, Coordination and

[60] In this light, it is of course interesting in itself that in some areas of EU law the CJEU did not or does not have jurisdiction to *inter alia* enforce these doctrines, which apparently does not conflict with the very foundations of the EU legal order.

[61] *Melloni* cit.; *Kadi and Al Barakaat Internation Foundation v Council and Commision* cit.; case C-284/16 *Achmea* ECLI:EU:C:2018:158; case C-638/19 P *Commission v European Food and Others* ECLI:EU:C:2022:50; case C-234/04 *Kapferer* ECLI:EU:C:2006:178.

[62] Note though that it might be possible for Member States to reciprocally award each other the freedom to differentiate from effectiveness doctrines to a limited extent in a number of selected areas they themselves choose. This would resemble the second-order, reciprocal right to limit free movement based on legitimate objectives discussed above, which leads to differences in the application of EU law in different Member States but retains reciprocity at the higher level as the same exceptions and conditions apply to all Member States equally.

Governance (TSCG) provide interesting examples.[63] By acting through "ordinary" public international law, member states created a kind of flexible shell around EU law, which is not EU law in a strict sense, yet remains closely related and intertwined with the EU legal order and its institutions.[64] And although these "external" norms may not conflict with the EU law obligations of member states, the EU effectiveness doctrines do not fully apply within these international legal instruments.[65] One can of course debate whether this last option should be seen as differentiation *within* EU law, or if extensive us of this option might undermine the EU legal order and the "Community method".[66] Even leaving aside those, rather significant, questions, however, going outside of EU law only seems a feasible option where EU law wants to regulate a new field or wants to add or strengthen rules which are not yet fully contained in EU law, like in the case of the ESM and the TSCG.[67] Otherwise, it would become necessary to first remove some elements currently covered by EU law from the EU legal order, and then move them to an international agreement. Barring a full exit of a Member State, which like in the case of the UK would allow the EU and this now third state to reorganize all their obligations outside of EU law proper, this seems rather hard, especially where it would only be done for a selection of member states and would involve changes to primary law. No matter which of these three options is chosen, therefore, effectiveness will impose a certain level of rigidity on any attempt at differentiation.

Clearly, the rigidity imposed by effectiveness was also on full display before, during, and after Brexit. The inability of the UK to accept the EU's effectiveness doctrines not only created significant difficulties in itself. It also had a significant impact on the possible *substantive* rights and obligations that could be agreed between the EU and the UK in the TCA. The lack of supremacy and CJEU jurisdiction, for example, restricted the ways in which EU law could be integrated into the TCA, as under the principle of autonomy the CJEU must retain the final say over the interpretation and application of EU law.[68] In turn, the inability to directly integrate parts of EU law limits the options for the UK to directly

[63] See Treaty establishing the European Stability Mechanism [2012], as well as the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union [2012]. For further suggestions along this path also the more recent suggestion floated by French President: E Macron, *Speech by Emmanuel Macron at the Closing Ceremony of the Conference on the Future of Europe* (9 May 2022) French Presidency of the Council of the European Union presidence-francaise.consilium.europa.eu.

[64] Cf V Borger and A Cuyvers, 'Het Verdrag inzake Stabiliteit, Coördinatie en Bestuur in de Economische en Monetaire Unie: de Juridische en Constitutionele Complicaties van de Eurocrisis' (2012) Tijdschrift voor Europees en Economisch Recht 370.

[65] For example, the duty of sincere cooperation will have to be respected in designing such international agreements. See SCG Van den Bogaert and V Borger, 'Differentiated Integration in EMU' in B de Witte and others (eds), *Between Flexibility and Disintegration: The Trajectory of Differentiation in EU Law* cit. 230.

[66] Cf also *Pringle* cit. and case C-258/14 *Florescu* ECLI:EU:C:2017:448.

[67] See for a discussion of the further limits, *inter alia* deriving from primacy, also B De Witte, 'The Law as Tool and Constraint of Differentiated Integration' cit. 11 ff.

[68] See for instance case C-706/17 *Achmea* ECLI:EU:C:2019:407, as well as for an apparent softening Opinion 1/17 ECLI:EU:C:2019:72, opinion of AG Bot.

connect to the EU acquis, for example in the area of free movement, asylum or the EAW. Rejecting EU effectives doctrines, therefore, limits the possible connection to and participation in key areas of the EU legal order to such an extent that the relationship that remains no longer really qualifies as a form of differentiated membership but rather as some form of relationship between the EU and a third state.

In addition to reciprocity and interconnectedness, the principle of effectiveness therefore also forms a significant source of rigidity. For no matter how far substantive rights and obligations might be differentiated, it seems that only limited differentiation is possible as to the effectiveness doctrines. And where effectiveness requirements are not met, substantive EU law might not be directly connected to or built upon. This is particularly relevant for the future of EU differentiation as it often seem to be these effectiveness doctrines that are felt to threaten national identity and sovereignty the most and hence lead to the most resistance and demand for differentiation or "lighter" forms of membership.[69] If differentiation in substantive rights does not lead to reduced effectiveness requirement, this may therefore also make such substantive differentiation less relevant or attractive for national electorates. This therefore raises the question if more far-reaching differentiation in substantive rights would even be able to address some of the key criticisms levelled against the EU, and if not, if it is worth the hassle. A hassle that is only increased if we do not just look at differentiation statically, but also consider that structural differentiation would have to be dynamic in nature.

II.4. The clash between rigidity and the dynamics of differentiation

So far, we have looked at differentiation as a rather static phenomenon. Could one or more states receive a different package of rights and obligations? For differentiation to become a structural feature, however, we need to explore the *dynamics* of structural differentiation, which lead to several additional complexities. To start with, simultaneous differentiation in multiple member states multiplies the tensions between differentiation and the principles of reciprocity and interconnectedness. As to reciprocity, most member state will no longer have the same bundles of rights and obligations, limiting the reciprocal nature of the EU. As to interconnectedness, with all these bilaterally different bundles of rights and obligations, it will become harder to make sure that all interconnected rights are sufficiently guaranteed in all member states. Consequently, it becomes very hard to determine the relation between all different levels of membership as a whole, which may lead to a de-facto system of bilateral relations between Member States instead of a real union.

In addition to the substantive complexities created by dynamic differentiation, moreover, additional problems arise as to *process*. Would moving to a different level of

[69] See for further discussion on this point A Cuyvers, 'Brexit and the Real Democratic Deficit: Refitting National and EU Democracy for a Global Reality' in E Ellian and R Blommestijn (eds), *Reflections on Democracy in the European Union* (Eleven Publishing 2020).

membership, for example, require consent from other member states, and, if so, from how many? Or would opting for a more differentiated relation with the EU be a "sovereign" choice of each Member State *à la* Wightman?[70] Yet if it is a sovereign, free choice, could a member state switch plans when it wants to and as often if it wants to, potentially leading to chaos? And if not, who gets to set these limits? As also demonstrated by Brexit, moreover, one might further need a form of transitional period to deal with the impact of moving between levels of membership. Such a transition is already complex in itself. Yet it becomes even more complex where multiple states are transitioning in overlapping intervals. In such a scenario, the different transitional regimes must fit together, both in relation to member states that do not differentiate and between all those member states that do. These dynamic challenges, moreover, increase where member states cannot just choose between certain predefined membership packages, but can customize their package of rights and obligations.

A fully flexible, dynamic model of differentiation therefore leads to impressive legal (and political) headaches. The EU is simply not a gym where one can easily move between levels of membership. One could of course try to address these complications by reducing the freedom of choice for member states. For instance, one could allow member states to only opt for *more* integration, but never less, keeping the current level of integration as a minimum and only allowing one-way traffic on the road to deeper integration. Alternatively, time periods could be imposed to limit how often member states could change their EU membership. All such limitations, however, have the effect of limiting the effective choices available to member states. If one key aim of differentiation is to offer member states, and national electorates, more control over their level of EU membership, thereby increasing the democratic legitimacy of the EU, restricting choice in this manner interferes with this objective. This especially applies where the only choice offered is to opt for *more* integration. At the same time, offering full flexibility simply seems legally impossible. Consequently, the need to limit the near exponential challenges created by the dynamics of differentiation seem to create a further source of rigidity. Any model of more structural EU differentiation must take these dynamics into account, requiring legally sound answers to questions such as how, when, and under which conditions member states can opt for differentiation, how much customization in rights and obligations is feasible, and what happens if multiple member states decide to opt for different forms of differentiation at the same time.

III. Brexit insights for future attempts at structural differentiation

The previous section outlined several sources of EU rigidity which must be respected, or at least considered, when designing future structural differentiation. Brexit brought these

[70] Case C-621/18 *Wightman* ECLI:EU:C:2018:999 and for discussion A Cuyvers, 'Wightman, Brexit, and the Sovereign Right to Remain' (2019) CMLRev 1303.

sources of rigidity to the fore. At the same time, as indicated in the introduction, Brexit also appeared a time of unprecedented flexibility. To better understand the limits imposed by the sources of rigidity for future attempts at structural differentiation this section will briefly look at three legal outcomes of Brexit, being the transition period, the Northern Ireland protocol and the free movement rights in the TCA. For reasons of space, the discussion will focus on key elements relating to rigidity only.

III.1. The transition period as sheer rigidity

What to do when you do not want to extend negotiations, but you do not agree on the new EU-UK relation either? You create a transitional period from 1 February 2020 to 1 January 2021 during which the UK formally leaves the EU, yet essentially all EU rights and obligations continue to apply.[71] Consequently, the UK remained bound by all EU law, even though it formally became a third country and lost all its political rights in EU decision-making. This to the frustration of some Brexiteers who did not perceive this as the sovereign freedom promised, or to the joy of some other Brexiteers who did not fully understand this solution and happily pointed out on 2 February 2020 that leaving the EU did not seem have any negative impact on the UK and its economy, proving all those experts wrong.

From one perspective, the transition period showed extreme flexibility. Before Brexit, most EU lawyers would have deemed it impossible to award full membership rights and obligations to a third country. After all, EU membership is a special status only acquired after a long and arduous accession process. Many membership rights, moreover, depend on operating within the overarching system of the EU legal order. In the context of withdrawal, however, and with a state which had been a member state until rather recently, it was deemed feasible to temporarily extend the application of all EU rights and obligations. The CJEU even held that European Arrest Warrants could continue during transition. Even though the mutual trust required for this mechanism is anchored directly in EU membership. Yet in the unique context of transition, the continuing commitment of the UK to the ECHR apparently sufficed, even if one hopes this does not apply to all ECHR members.[72]

On closer inspection, however, it can be argued that the transition period demonstrates extreme rigidity. The aim of the EU and the UK was to negotiate a new relationship with a new balance of rights and obligations. This proved a Herculean task, in no small part due to the reciprocal and interconnected nature of EU law and the effectiveness doctrines that kick in even if you only opt for some of the EU rights involved. Each time the UK wanted to eliminate a certain EU norm, such as free movement of persons, EU fish quota or state aid controls, it turned out that these norms were connected to a whole web of other rights and obligations that parties could not or did not want to scrap. Clearly

[71] Art. 126 ff. of the EU-UK Withdrawal agreement.

[72] Case C-327/18 *PPU RO* ECLI:EU:C:2018:733. Normally, one would imagine, the mere applicability of the ECHR would not suffice to enable mutual trust and mutual recognition with say Russia before its exit of the ECHR or Turkey.

some hard-nosed economic and political bargaining took place, also on the EU side. But the legal reciprocity and interconnectedness of rights and obligations greatly complicated this economic bargaining and limited the legal space for political compromise, often much more than the UK understood or was willing to understand. Similarly, the existential importance of the effectiveness doctrines for the EU further limited the scope for compromise. For as long as the UK demands implied continued application of some EU norms, the EU was legally obligated to insist on the *whole* array of effectiveness doctrines, including supremacy and jurisdiction for the CJEU, already not to run foul of the strict autonomy doctrine jealously guarded by Luxemburg.

Faced with this legal rigidity, as well as limited time and political deadlock in the UK, the only feasible option became to simply apply the *entirety* of EU law to the UK. From a perspective of differentiation this can only be seen as a victory for rigidity. The creativity and flexibility demonstrated by temporarily retaining a third country as a member state was actually driven by the inability to overcome rigidity. Consequently, the totality of EU law, with its interconnected and reciprocal web of substantive rights and effectiveness doctrines, had to remain in force. And this was the case even though Brexit only concerned one member state in a one-off, non-dynamic context, and even though the UK was loathe to accept continued application of the entirety of EU law, including new secondary acts adopted during transition. Instead of an example of flexibility and differentiation, therefore, the transition period can be better understood as proof of the enormous legal rigidity in EU law, and therefore provides a cautionary tale for future plans for structural differentiation.

III.2. The Northern-Ireland Protocol: Flexible borders and rigid law

Leaving aside important legal nuances, the key compromise underlying the protocol is that Northern-Ireland remains in the EU customs union and internal market as far as goods are concerned. This removes the need for border checks on goods between Northern Ireland and the Republic of Ireland, and hence the need for the feared "hard border". The price to pay, however, is a customs-border in the Irish sea. To prevent products moving from the UK to the EU internal market without paying EU customs or respecting EU product standards, all products that move from the rest of the UK to Northern-Ireland have to be checked.[73] What is more, the Commission and the CJEU retain significant jurisdiction to ensure that EU norms are effectively applied in Northern-Ireland.[74] In a softening of the initial so called back-stop, these legal quantum mechanics, where Northern-Ireland simultaneously is part of the EU and the UK internal market, remain in place until parties can find a better solution, or until the Northern-Irish parliament, with a sufficient majority, decides to remove itself from this mechanism and thereby risks a hard border with the EU.[75]

[73] See *inter alia* art. 5 and 7 of the Northern-Ireland Protocol of the EU-UK Withdrawal agreement.
[74] *Ibid*. art. 12(4) and (5).
[75] Art. 18 Northern-Ireland Protocol.

Again, one can see this protocol as an example of significant flexibility. To begin with, a part of a third country is allowed to remain in the EU customs union and internal market. To make this possible, an EU customs border is created within the sovereign territory of a third state. What is more, Northern-Ireland only partakes in the free movement of goods, and not in the other freedoms. Within the free movement of goods, moreover, some EU rules do not apply, and exceptions that do not exist under EU internal market law have been included.[76] These outcomes seem to fly in the face of the unity and indivisibility of the internal market proclaimed by the EU at the start of Brexit negotiations.[77] As such, one can understand why, at first sight, the protocol might raise visions of structural differentiation, at least within the EU internal market.

On closer inspection, however, the solution chosen again rather demonstrates rigidity. For starters, the EU position on the absolute unity of the internal market was itself a rather recent invention. Here it might suffice to point out that most freedoms developed separately from each other, services started life as a residual category, and that for example the agreements with the European Economic Area (EEA), Turkey and Switzerland already differentiate between the freedoms as well. Splitting the freedoms in the protocol is not as novel, therefore, as it may seem.

As far as customs and goods were concerned, moreover, it proved impossible to separate these two bodies of law. The only way to avoid a hard border was for Northern-Ireland to accept virtually the whole of EU substantive rules in these areas, and for the UK to accept the unprecedented, and according to a previous and current version of Boris Johnson, unconscionable, step of creating a de facto border between Northern Ireland and the rest of the UK.[78] Here again we can see different sources of rigidity at work. Preventing a border is a very reciprocal exercise. All parties need to agree to all the rights and obligations required to make a border legally redundant. In terms of interconnectedness, all parties furthermore need to accept *all* interconnected rules required to do away with borders, including shared norms on customs rates, collection, product standards and indirect taxes. If only one of these norms is not dealt with, a full border becomes necessary. To make all these norms sufficiently effective to allow for borderless coexistence, moreover, one needs the complete EU legal machinery on effectiveness. Even a reduction of free movement to "only" customs and goods, therefore, still requires the full set of EU effectiveness doctrines, revealing this third source of rigidity at work. Lastly, the tortured rules for a potential change in or end to the protocol, as well as the major political fight that ensued when the UK almost

[76] *Ibid*. art. 16.

[77] See on this point *inter alia* S Weatherill, 'The Several Internal Markets' (2017) YEL 125 and C Barnard, 'Brexit and the EU Internal Market' in F Fabbrini (ed.), *The Law and Politics of Brexit* (Oxford University Press 2017).

[78] At the time of writing, the Northern Ireland Protocol Bill, which unilaterally suspends and violates key aspects of the Northern-Ireland protocol, had just passed the first reading in the House of Commons, and is set for a long and bumpy road, especially in the Lords, see UK Parliament, *Northern Ireland Protocol Bill* bills.parliament.uk.

immediately started to demand changes, demonstrates the rigidity imposed by the challenge of dynamics. Even leaving the political dimension aside, dynamically changing the Norther-Ireland protocol is legally highly complex due to the rigidity imposed by reciprocity, interconnectedness and effectiveness.

The Northern-Ireland protocol, therefore, primarily testifies to the legal rigidity inherent in the EU legal framework enabling borderless trade. In turn, this raises serious doubts as to how much differentiation may be legally feasible in any area building on the free movement acquis, especially concerning effectiveness. At the same time it must be observed that the Northern-Ireland protocol does confirm that free movement of goods can be legally separated from other freedoms, most importantly from the free movement of persons.[79] Even though one can ask if a similar flexibility is possible *within* EU law and membership, especially in light of the fundamental status of EU citizenship and the free movement rights attached to that status, this might open up space for future differentiation.[80] Considering the close connection between free movement of persons and some of the most contested and sensitive issues of EU law, including migration and access to social benefits, this may prove an interesting area to explore further. Overall, however, the Northern-Ireland protocol, and its painful birth and existence so far, seem rather imply more rigidity than flexibility for future plans for structural differentiation.

III.3. The TCA as the residual space of rigidity

Few EU lawyers might even recognise the TCA as EU law, and indeed at multiple places the TCA tries very hard to stress that it is not EU law.[81] For example, there is no real free movement of goods, very little on services to talk of, and free movement of persons has certainly ended, except for retained rights of (former) EU citizens.[82] Similarly, all of the hallmarks of EU law including direct effect, supremacy and autonomy are almost completely gone, as is the jurisdiction of the CJEU, replaced by an arbitral system that feels much more like ordinary public international law.

In short, the UK wanted a different relation with the EU, and it certainly got one. Instead of anything still remotely resembling EU Membership, however, it seems more accurate to see the TCA as a very thin agreement, rather close to a hard Brexit. And one of the reasons why the TCA is so thin, is because the rigidities in EU law would not allow a thicker relation without crossing several UK red lines. In terms of reciprocity, the EU could not give the UK more rights than its member states would get in return, for example in fields of (financial)

[79] Of course, the movement of persons in Ireland is taken care of via the Common Travel Area, but this does not remove the legal flexibility on this point under EU law.

[80] Case C-184/99 *Grzelczyk* ECLI:EU:C:2001:458.

[81] See for example art. 1 of the TCA stressing the "autonomy and sovereignty" of both parties, or art. 4 stressing that the TCA forms public international law, and should be interpreted like that, and not as EU law.

[82] For an excellent short overview see the analysis by S Peers, 'Analysis 2 of the Brexit Deal: EU/UK Trade and Cooperation Agreement – Overview' (31 December 2020) EU Law Analysis eulawanalysis.blogspot.com, for services specifically see SCG Van den Bogaert and A Cuyvers, 'Welcome to Brexit, It Ain't Pretty' cit.

services or the free flow of data. Due to interconnectedness, moreover, even if the UK would have wanted to retain something like free movement for financial services, it would have been very hard to legally separate these services from, *inter alia*, the free movement of all other services, as well as the free movement of the service providers and their staff. And even if it had been possible to disconnect individual free movement rights and for example only include a reciprocal right of free movement for financial services, even such a limited direct use of or connection to the EU acquis on free movement would have required the full application of all doctrines of effectiveness, including the doctrines of supremacy, direct effect and autonomy. To make matters worse, at least from the UK perspective, such a direct connection to the EU acquis would also necessitate an ongoing calibration between EU and UK law whereby they UK would be obligated to dynamically incorporate EU secondary law into UK law, without any input.[83]

Seen from Barniers famous staircase to hell (or to heaven, depending on one's view), the TCA ended up almost at the bottom, with an agreement that is basically a comprehensive free trade agreement based on other such agreements like CETA. From the perspective of rigidity, one could almost see the TCA therefore as the mirror image of transition. During transition it proved impossible to craft a genuinely new or differentiated form of EU membership, due in no small part to UK red lines but also partially due to EU rigidities, leading to a choice to simply retain the entire package of EU rights and obligation minus participation in decision-making. For the TCA this was clearly not an acceptable solution for the UK. Just as during transition, however, parties were again not able to come up with a relationship which one could genuinely call an alternative for EU membership. The only option remaining on the table, therefore, was to opt for a relationship based on public international law which is so far removed from EU membership that one would be hard pressed to call it a differentiated form of EU membership instead of a last-minute attempt to limit the legal and economic damage of a clear political choice.

IV. Conclusion: Rigidity roadblocks to future structural integration

So what legal space for structural differentiation do the sources of rigidity leave? The insights provided by Brexit suggest not that much. Instead of flexibility, Brexit rather illustrates the significant sources of rigidity in the EU legal order, and how these restrain structural differentiation. Of course many creative solutions were sought and found, and, as during the euro crisis, parts of EU law proved flexible in ways that lawyers might never have dared predict. On closer inspection, however, despite all the political and time pressure involved, despite all the cliffs that loomed along the way, and despite the fact that Brexit

[83] The UK currently still benefits from equivalence decisions in many areas, but this should not be confused with free movement of financial services. See *inter alia* N Moloney, 'Financial Services under the Trade and Cooperation Agreement: Reflections on Unfinished Business for the EU and UK' (Brexit Institute Working Paper Series 3/2021) and F Pennesi, 'Equivalence in the Area of Financial Services: An Effective Instrument to Protect EU Financial Stability in Global Capital Markets?' (2021) CMLRev 39.

concerned one of the most powerful member states with which, for multiple reasons, many in the EU would have liked to retain a relatively close relationship, rigidity could often not be overcome. No new package of rights and obligations was found that could meet the requirements of reciprocity, interconnectedness and effectiveness, let alone in a dynamic manner involving multiple EU member states at a time.

This *Article*, moreover, only focused on three sources of rigidity. Other sources of rigidity exist, including some key principles of EU law such as equality, consistency and loyal cooperation.[84] In addition, this *Article* only touched briefly on the rigidity imposed by the need for a sufficiently coherent and uniform institutional framework. Yet any form of truly structural differentiation will run into massive complexities as to the design of the EU's system for decision-making, representation and legitimation. Either some member states and member peoples are excluded from decisions they should have a say on, or some receive a say over matters they should not be able to co-determine. These complexities are only deepened as the overall legitimacy demands on the EU increase, for example because the EU enters ever more deeply into sensitive areas like defense, health, social security, migration and environmental protection. Another potentially increasing source of rigidity concerns the ongoing legal operationalization of EU values, including especially the rule of law.[85] If EU values and objectives become enforceable legal limits, these might provide additional sources of legal rigidity, limiting the legal space for structural differentiation. After all, it is hard to see how any member state would be allowed to opt out of the values that are now being defined as the foundation of the EU, or the systems designed to enforce respect for these values and prevent backsliding. In this sense, legally operationalized values have a similar nature and impact as the effectiveness doctrines, which we saw are a significant source of rigidity that is hard to differentiate. The more the EU is pressed to transform its values into legally and financially enforced obligations, therefore, the more limited the space for differentiation will become. As a result, a future clash can arise between values and structural differentiation, just as between legal principles and differentiation, leading to some hard choices.

Although Brexit can in one way be understood as an almost desperate cry for more differentiation and choice in European integration, it at the same time seems to confirm how hard it is to offer such differentiation and choice in the current EU legal and constitutional framework. Several foundational principles of EU law create rigidities that make differentiation hard. This of course leads to the question if we can alter these sources of rigidity themselves, so as to create more space for differentiation. Could we have less reciprocal and less interconnected rights which require a lower standard of effectiveness to function? These are hard but necessary questions to answer. The analysis above,

[84] Cf J Wouters, 'Constitutional Limits to Differentiation' cit.; A Miglio, 'Differentiated Integration and the Principle of Loyalty' cit. and AS Houdé and RA Wessel, 'A *Common* Security and Defence Policy: Limits to Differentiated Integration in PESCO?' cit.

[85] Cf *Repubblika* cit., *Hungary v Parliament and Council* cit. and *Poland v Parliament and Council* cit.

however, seems to suggest that creating such space for structural differentiation may indeed require us to move several of the load bearing walls of the EU legal order. An exercise that requires great care and time, and offers many opportunities for costly mistakes. So if structural differentiation is the only politically feasible option to enable future integration or further expansion of the EU, we are set for a significant clash between legal rigidity and political necessity. And though law might be able to become more flexible under political pressure, it should not be forgotten just how central law and legal stability are for the survival of the EU. In such a context, creating a second ring of public international law collaboration tied to the inner circle of EU law may again prove the safest and most feasible route, for example in the context of a European Political Community.