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Flexible Integration as a Target System of Governance for the European Union

Abstract: *This article is an attempt to formulate a theoretical model for governance of the European Union. On one hand it takes into account the ongoing theoretical debate in this field, and especially the critical analysis of recent years, while on the other it refers to the actual course of the European Union's systemic reform in terms of its coherent reform plan for the Economic and Monetary Union (especially the euro area). It also refers to the reforms of the EU proposed in academic literature.¹ The article analyses various models of differentiated integration. Regarding the implemented reforms and the future model for the governance of the EU, the starting point is the dominant assumption in the discussions that the focus should be on the cohesion of the institutional and legal system of the EU. The model of 'flexible integration' presented in the article takes as a starting point the fact that the internal differentiation of the various statuses of EU Member States has now become a systemic trend of the European integration process. Within the framework of the 'flexible integration' model, the author identifies the essential institutional and legal elements of the EU that will allow it to maintain its cohesion.*

Keywords: flexible integration, differentiation of the EU, the Schengen Method, EU governance

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¹ For more detailed information on this subject, see J. Barcz, *Główne kierunki reformy ustrojowej Unii Europejskiej (aspekty instytucjonalno-prawne)* (*Main Directions of the EU Constitutional Reform Legal-Institutional Aspects*), "Państwo i Prawo", No. 7/2015, p. 23 ff.

1. Introductory remarks

As regards plans that have crystallised on the part of the European Union, the primary reference point is the programme of reforms contained in the Communication from the Commission of 28 November 2012 – *A blueprint for a deep and genuine economic and monetary union: Launching a European Debate*.² This was subsequently developed in a report drafted by the then-President of the European Council Herman Van Rompuy (presented on 5 December 2012)³ and in the Communication from the Commission of 20 March 2013 – *Towards a Deep and Genuine Economic and Monetary Union. The introduction of a Convergence and Competitiveness Instrument*.⁴ Recently, the above plans were updated and extended in the Five Presidents' Report (President of the Commission Jean-Claude Juncker, President of the Euro Summit Donald Tusk, President of the Eurogroup Jeroen Dijsselbloem, President of the European Parliament Martin Schulz, and President of the European Central Bank Mario Draghi), presented on 21 June 2015: *Completing Europe's Economic and Monetary Union*.⁵

At the outset we should note that despite their belated reaction to the financial crisis, the European Union and the members of the euro area have shown considerable reform capability.⁶ In 2010–2012, a sustainable financial support mechanism for euro area countries was created (the European Stability Mechanism). This required a revision of the TFEU

² European Commission, *A Blueprint for a deep and genuine Economic and Monetary Union: Launching a European debate*. Press release Brussels, 28 November 2012, IP/12/1272; as well as Communication from the Commission. *A blueprint for a deep and genuine economic and monetary union. Launching a European Debate*, Brussels, 30.11.2012, COM(2012) 777 final/2. Corrigendum.

³ *Towards a Genuine Economic and Monetary Union* (a report prepared by the President of the European Council in close collaboration with José Manuel Barroso, President of the European Commission, Jean-Claude Juncker, President of the Eurogroup, and Mario Draghi, President of the ECB). Cf. also the later report – European Council, the President, *Towards a Genuine Economic and Monetary Union. Interim Report*. Brussels, 12 October 2013.

⁴ Communication from the Commission to the European Parliament and the Council. Brussels, 20.3.2013, COM(2013) 165 final.

⁵ Cf. European Commission Press Release, Brussels, 22 June 2015 – The Five Presidents' Report defined a plan of deepening the European Economic and Monetary Union from 1 July 2015 onwards. The press release quotes other related EU documents. It will be further referred to as: *Completing Europe's Economic and Monetary Union*. Five Presidents' Report of 21 June 2015.

⁶ Cf. M. Schinas, *The EU in 2030: a long-term view of Europe in a changing world: keeping the values, changing the attitudes*, "European View", No. 11(267)/2012.

(amendment of Article 136 TFEU), which was effectively conducted through the so-called passerelle procedure. In the same period, the Stability and Growth Pact and economic governance were consolidated by adopting the legislation making up the six-pack and the two-pack, and finally the Stability and Growth Pact was additionally strengthened, although through an intergovernmental measure (the Fiscal Compact). Even more importantly, the foundation was laid for the harmonisation of the Member States' budget policies (especially the euro area members) and for institutional consolidation of the euro area (the Fiscal Compact provided a legal basis for a separate euro area summit).

In addition, so far the post-2012 action plan drafted by the European Commission has been consistently executed. Measures adopted under the plan in the short term include the adoption of legislation constituting the foundation of the three pillars of the banking union, which was finalised in 2014; operationalisation of new instruments of economic governance; and the completion the investment intensification programme (especially in euro area countries). The Five Presidents' Report of 21 June 2015 *Completing Europe's Economic and Monetary Union* benefits from past achievements and contains a series of concrete proposals and also updates the programme of establishing a 'genuine' EMU. Most importantly, however, it sets the pace for the planned activities because for the first time it specifies the deadline for establishing a 'genuine' EMU – 'by 2025'.

2. New challenges faced by the theory of European integration

In the context of the work on the Constitutional Treaty, it was generally adjudged many years ago that the intellectual format of theoretical concepts of European integration⁷ – developed since the establishment of the European Communities – had already become exhausted, both in economic sciences (the concept of negative integration, the concept of positive integration, and the perception of integration as a 'state and process') and in the political and legal sciences (the federal and confederal concepts, the communicational concept, functionalism, and neofunctionalism).⁸ They never become a point of direct reference in the work on subsequent stages of European integration, nor did they lead to

⁷ For a review of the theories of European integration, see F. Strzyczkowski, *Teorie integracji europejskiej w doktrynie amerykańskiej (Theories of European Integration in the American Doctrine)*, Warszawa 2012.

⁸ Cf. J. Barcz, M. Górka, A. Wyrozumska, *Instytucje i prawo Unii Europejskiej (The Institutions and Law of the European Union)*, Warszawa 2012, p. 24.

defining the target vision (model) of this process. Sometimes they served *ad hoc* political goals, as was the case with the concepts of federalism and confederalism, used in the last two decades by the proponents of European integration (federalism); or by the advocates of the renationalisation, weakening or fragmentation of this process (confederalism).⁹

Hence, it comes as no surprise that contemporary theoretical discourse has focused mostly on explaining the phenomenon of cooperation between the Communities (presently the European Union) and the Member States, all the more so because the phenomenon of supranationalism brings about challenges unknown in relations between classic international organisations and their member countries. There have emerged such concepts of cooperation (co-governance) as the fusion thesis (*Fusionsthese* – W. Wessel, M. List); the concept of a multi-level system (*Mehrebenensystem* – E. Grande, M. Jachtenfuchs); the concept of multi-level governance (G. Marks, F. Nielsen, L. Ray, B. Rosamond); and the concept of deliberative supranationalism (Ch. Joerges, J. Neyer).¹⁰ In the Polish doctrine, the concepts that went in this direction included the concept of multi-centrism of the legal system (E. Łętowska), which explained the interaction between the EU and national law;¹¹ and the concept of complex interdependence of integration (J. Barcz), which perceives the relations between the Union and its Member States in terms of adjustments and cooperation in their mutual relations, on the part of both the Member States and the EU alike.¹²

Presently, given the actually existing differentiation among the Member States and the euro area reform, which is clearly aimed at making the euro area autonomous within the European Union (and perhaps even beyond it), the debate on the theoretical approach to European integration naturally invokes – even despite considerable differences, particularly in the political situation – the popular concept¹³ put forward

⁹ Cf. J. Kranz, *Jak postrzegać Unię Europejską? Kilka podstawowych pojęć i problemów (How to Perceive the EU? Some Basic Concepts and Problems)*, Warszawa 2013, p. 112 ff.

¹⁰ For a critical analysis of these concepts, see J. Barcz, *Pojęcie suwerenności w świetle współzależności między sferą ponadnarodową i państwową (The Concept of Sovereignty in Light of the Interdependence between the Supranational and National Spheres)* in: *Suwerenność i ponadnarodowość a integracja europejska (Sovereignty and Supranationality in the Context of European Integration)*, J. Krauz (ed.), Warszawa 2006, p. 55 ff.

¹¹ E. Łętowska, *Multicentryczność współczesnego systemu prawa i jej konsekwencje (Multicentrism of the Contemporary Legal System and its Implications)*, „Państwo i Prawo”, No. 4/2005, p. 3 ff.

¹² J. Barcz, *Pojęcie suwerenności w świetle...*, op.cit., p. 55 ff.

¹³ *20 Jahre 'Kerneuropa'. Wo stehen wir und wo wollen wir hin? Zusammenfassung (N. Koenig) einer Diskussion während der Konferenz, die am 1. September 2014 in Berlin stat-*

by Wolfgang Schäuble, Karl Lamers and Theo Waigel on 1 September 1994 in the working document *Überlegungen zur europäischen Politik*.¹⁴ Their concept initiated one of the most serious debates over the target (final) governance system of the European Union. It is based on the idea that a ‘two-speed Europe’ should be institutionalised within the EU, based around ‘*Kerneuropa*’ (core Europe). Consequently, under this concept the leading role in the process of European integration should formally be given to a group of Member States that would set the dynamics and course of the EU’s further development. Thus it explicitly referred to actual diversification of the Member States’ status in the EU decision-making process and to the polarisation of views concerning the pace and directions of development of European integration. Let us recall that at that time the EU had to deal with serious challenges¹⁵ – institutional (the establishment of the European Union), economic (the completion of single market liberalisation and launch of the Economic and Monetary Union), and political (the war in the Balkans). At the same time, the so called ‘big bang’ enlargement, which was to effectively double the number of EU Member States, was taking a concrete shape as well.

3. Differentiated integration

The above discussion was based on the model of ‘differentiated integration’,¹⁶ which assumes an internal differentiation of the EU stemming from the widely accepted premise that not all Member States will be subject to the integration process the same way and to the same extent; on the contrary, a group of Member States may enhance integration in some areas in relation to the other Member States. This group of Member States – referred to as ‘core’ or ‘hard core’ (meaning countries

tand und von Jacques Delors Institut in Zusammenarbeit mit Konrad-Adenauer-Stiftung und der Open Society Initiative for Europe organisiert wurde, Jacques Delors Institut, Synthesis, 30 September 2014, p. 1.

¹⁴ Formally, it was a working document of the CDU/CSU faction in the Bundestag, submitted during the FRG’s Presidency of the EU Council.

¹⁵ The document mentioned, *inter alia*, the following: ‘Der europäische Einigungsprozess ist an einen kritischen Punkt seiner Entwicklung gelangt. Wenn es nicht gelingt, in den nächsten zwei bis vier Jahren eine Lösung für die Ursachen dieser gefährlichen Entwicklung zu finden, dann wird die Union sich [...] unaufhaltsam zu einer lockeren, im Wesentlichen auf einige wirtschaftliche Aspekte beschränkten Formation mit verschiedenen Untergruppierungen entwickeln’.

¹⁶ For more, see N. Tocci and G. Faleg, *Towards a More United and Effective Europe: A Framework for Analysis*, “Imagining Europe Series”, Istituto Affari Internazionali, No. 1/October 2013, p. 12.

that are deepening their cooperation in a specific field of integration) is a fairly fluid notion. Geographical criteria are not the determining factor in distinguishing this group, neither are country size or subject-matter criteria in the strict sense (it can be linked to a specific policy, or based on horizontal cooperation). Moreover, the delineation of a 'core' does not need to be rooted in procedures arising from the Treaties; it can be based on actual political cooperation. Finally, in a given sphere a 'core' could comprise all of the EU Member States or just some of them. In any case, the countries forming the 'core' within the EU need to exhibit the political will to deepen cooperation in a given area of integration and, most importantly, work out a suitable domestic political consensus and have sufficient resources at their disposal (capability).¹⁷ For example, the rules governing the transition, within the Economic and Monetary Union (EMU), from a state with the status of a country subject to derogation (e.g. Poland) to the status of a full-fledged euro area member clearly show a practical scheme for the functioning of membership criteria of a 'core' (as the euro area is undeniably such a 'core').

The concept developed by Schäuble, Lamers and Waigel was referred to as 'variable geometry'. Other concepts based on the model of differentiated integration included¹⁸ a 'multi-speed Europe' (W. Brandt, L. Tindemans), and 'Europe à la carte' (R. Dahrendorf). These were developed in more detail, in theoretical terms, by C.-G. Stubb,¹⁹ who described them using three variables: time, space, and subject matter.²⁰ In his view, the essence of the 'variable geometry' Europe was – under the criterion of *space* – a division of the EU into 'core' Member States and other states, making up the EU periphery (non-core states). While the concept of a multi-speed Europe was also – under the criterion of *time* – about the emergence of a group of Member States forming a 'core EU', it was additionally accompanied by the idea that the other states would gradually join this 'core'. Finally, the '*à la carte* Europe' – under the criterion of *subject matter* – would mean that the EU Member States, being connected by a set of common goals, could choose from among the existing EU policies as one orders from a restaurant menu, deciding about the extent to which they wished to get involved in a particular EU programme.

¹⁷ For more on this topic, see *ibidem*, p. 11.

¹⁸ For more on these concepts, see G. Majone, *Unity in Diversity: European Integration and the Enlargement Process*, "European Law Review", Vol. 33(4)/2008, p. 6 ff.

¹⁹ C.-G. Stubb, *A Categorisation of Differentiated Integration*, "Journal of Common Market Studies", No. 2/1996. His views were analysed in detail by N. Tocci and G. Faleg, *op.cit.*, pp. 12–13.

²⁰ C.-G. Stubb, *op.cit.*, p. 284.

While the above models of differentiated integration are an important reference point for theoretical considerations, it was noted already in the previous decade that they do not constitute a coherent theory of European integration, and that they had been developed and presented as an *ad hoc* reaction to the challenges related to the growing number of Member States and to the ever greater diversity among them.²¹

4. Criticism and new concepts

Recently, while discussing the model solutions for the reforms of the European Union presently under consideration, N. Tocci and G. Faleg conducted a critical analysis of Stubb's concepts.²² They observed that the criterion of time, which is at the core of multi-speed Europe, does not reflect contemporary trends in European integration. This is because differentiation within the EU will not be temporary; we should rather ultimately expect lasting differentiation between the EU Member States. Therefore, in preparing the EU reform we should seek 'permanent institutional solutions to adopt and govern heterogeneity'.²³ Heterogeneity, or internal differentiation within the EU, would mainly be subject to two opposing forces: centripetal forces, represented by Member States striving to deepen integration around the 'core', and centrifugal forces, represented by Member States advocating weaker degrees of integration and more 'opt out' solutions in areas of deeper integration.²⁴

As for the rest, Tocci and Faleg adopted Stubb's theoretical concepts as the starting point for their deliberations and – referring also to the thought of K. Junge²⁵ and the earlier works by Tocci (and D. Bechev)²⁶ – formulated four models of a heterogeneous European Union, based on the criteria of political unity, policy effectiveness, and institutional governability:²⁷

²¹ G. Majone, *op.cit.*, p. 8.

²² N. Tocci and G. Faleg, *op.cit.*, p. 13.

²³ *Ibidem*, p. 14.

²⁴ *Ibidem*.

²⁵ K. Junge, *Differentiated European Integration*, in *European Union Politics*, M. Cini (ed.), Oxford University Press, Oxford 2007, p. 391 ff.

²⁶ N. Tocci and D. Bechev, *Will Turkey Find its Place in Post-Crisis Europe?*, "Global Turkey in Europe Policy Brief", No. 5/2012.

²⁷ N. Tocci and G. Faleg, *op.cit.*, p. 13 ff.

- **A Europe of concentric circles:**²⁸ This model is related to the concept of a variable geometry Europe and consequently takes into account the influence of centripetal forces; it assumes the development of a ‘hard core’ EU, which is currently built around the euro area, and of an ‘outer circle’, the periphery. The Member States that do not belong to the hard core would remain bound by the EU internal market and the EU acquis, and once they have met the required criteria they could join the hard core, but they would not be able to pick only those elements that suit them (an idea referred to as cherry-picking). Developing the institutional structure of governance in this model requires great care because separate institutions are established in the hard core and the outer circle (presently, the separate institutions of the euro area);
- **A multiple clusters Europe:** This model²⁹ assumes the emergence of various ‘clusters’ of enhanced integration, depending on the desire of groups of Member States to deepen cooperation in given areas (hence it also refers to the influence of centripetal forces). This model’s reference point is the enhanced cooperation procedure – the ‘clusters’ of deepened cooperation that emerge following the procedure’s application can overlap to a certain extent, and all Member States remain tied by shared EU membership. They are also free to choose whether they wish to participate in the given ‘cluster’ of enhanced cooperation (examples of such ‘clusters’ include: the euro area, the Schengen area, and potentially foreign policy);
- **A hub-and-spoke Europe:** This model³⁰ resembles a bicycle wheel with the hub and spokes, albeit without the rim and tire. The hub remains the core of the integration process, but at the same time a number of countries opt out from certain EU practices under bilateral regulations (the spoke connecting a country with the hub, i.e. the EU). A practical example of this model is Denmark’s opt out from defence policy as well as the United Kingdom’s and Denmark’s opt-out from EMU. Hence this model takes into account the centrifugal forces active in the EU and measures aimed at renationalisation of the Union (e.g. David Cameron’s statements concerning the renegotiation of membership terms). On the other hand, this model corresponds with concepts of special types of membership for Turkey or Ukraine, or a change in the UK’s membership terms: floating concepts such as ‘virtual membership’, ‘associate membership’ and ‘privileged partnership’;

²⁸ Ibidem, pp. 14–16.

²⁹ Ibidem, pp. 16–17.

³⁰ Ibidem, pp. 17–18.

- **A patchwork core Europe:** This model can reflect the influence of both centripetal and centrifugal forces in the EU. In this model the entire EU remains the ‘core’ of the integration process, and all Member States will gradually join the already existing areas of closer cooperation (the euro area and the Schengen area), but groups of states striving for deeper integration will further emerge, either in the context of specific policies or horizontally. These groups can take a leading role in deepening integration in a given area (the centripetal influence), but they can also remain autonomous within the EU and even strive towards renationalisation (the centrifugal influence). Consequently, the activity of such groups can be limited to political (diplomatic) measures, but it can also lead to diversification of the EU’s institutional system.

In constructing the above models, Tocci and Faleg are aware that these are only theoretical patterns, ideal types compatible only to a certain extent with the reforms of the EU’s governance system that are currently being executed, especially in the context of the euro area. They write that: ‘As ideal types, we do not expect any one of these models either to perfectly apply to tomorrow’s EU or to reflect what an ideal Union might look like. On the contrary, we expect to find elements in all four models being both applicable to emerging realities and desirable. The task at hand is thus that of imagining what mix between them might cater best for a more united, effective, governable, as well as legitimate EU’.³¹

From this starting point, Tocci and Faleg conduct a critical analysis of the above four models.³² They stress that the concentric circles model and the multiple clusters model, which take into account the influence of centripetal forces in the EU, should constitute the reference point for establishing a cohesive, effective and strongly legitimised Union. Nonetheless, both models have some significant weaknesses, In the concentric circles model the spillover effect shows similar flaws as neofunctionalism and it is not certain that it will actually take place;³³ while the model of multiple

³¹ Ibidem, p. 20.

³² Ibidem.

³³ Ibidem, pp. 14–15. A similar conclusion was reached by the participants of the sixth European Forum of think tanks (18–19 September 2014, in Turin): ‘For many years, the predominant theoretical framework of the EU integration has been representing by theories of functionalism and neo-functionalism, and the idea of spillover effect. However, participants of the Forum agree that EMU shows the failure of this approach. The lack of trust clearly shows that there was no spillover effect as desired.’ M. Menghi, *What Political and Institutional Evolutions for the EU and the EMU?* Notre Europe, Jacques Delors Institute, Synthesis, 30 October 2014, pp. 3–4.

clusters implies considerable disruptions of governability and democratic legitimacy.³⁴ Similar problems are also entailed by the patchwork core model,³⁵ although this model is more a description of the current actual state of the Union rather than a theoretical construct.

The final conclusions, resulting from studies conducted under the *Imagining Europe* programme, clearly undermine the reliability of the theoretical models presented above.³⁶ On one hand, it is pointed out that the predicted emergence of a 'hard core' within the EU has not been confirmed in practice. A detailed analysis of individual selected EU policies, including the flagship example of differentiation – the euro area – reveals that the measures adopted in recent years to strengthen the EU are characterised by 'openness' towards the countries that remain outside the area, so it is more likely that 'the Eurozone will eventually expand to all members of the Union'. In turn, with the exception of the euro area it is rather hard to notice any beginnings of other 'hard cores'. As mentioned before, measures aimed at strengthening the euro area are characterised by 'openness': 'The result is the absence of a clear divide between two zones, but rather a mushrooming of initiatives and institutions with variable and fluid memberships. The basic reference point remains the EU as a whole'.³⁷

The second concern is much more important, however:³⁸ It is highlighted that the theoretical models discussed above do not provide answers to the essential question: How are we to build a European Union that will be more united and effective? The conclusion drawn from practical experience, however, is clear: For all reforms 'the EU as a whole will remain the principle reference point'.³⁹ While this does not preclude short-term opt outs as well as enhanced horizontal cooperation or cooperation under specific EU policies, '[...] on a whole, the EU will remain as one'.⁴⁰ It is then stressed that while in the upcoming years the EMU, and especially the euro area, will surely set the pace and structure of the development of European integration – 'There is no reason to assume

³⁴ N. Tocci and G. Faleg, op.cit., p. 16.

³⁵ Ibidem, p. 20.

³⁶ Cf. N. Tocci, *Imagining Post-Crisis Europe*, "Imagining Europe Series", Istituto Affari Internazionali, No. 10/June 2014.

³⁷ Ibidem, p. 13.

³⁸ Ibidem, p. 18.

³⁹ In the extreme scenario, the United Kingdom will follow its own path, which no other EU Member State is likely to follow. However, if it were to remain associated with the EU on special terms, it could offer an interesting model for future closer forms of association with countries like Turkey or Ukraine. N. Tocci, op.cit., p. 18.

⁴⁰ Ibidem.

that integration in this area would indefinitely be limited to a sub-set of member states, but may gradually expand to include (almost) all'.⁴¹

Consequently, the conclusions of the studies conducted under the *Imagining Europe* programme point to the inadequacy of the European Union theoretical models in terms of both the current EU governance system and the challenges the EU faces. It is stressed that the EU as a whole remains the reference point for governance reforms, and that the differentiation taking place is internal, hence it does not threaten the EU's cohesion and will not lead to its fragmentation (the threats discussed are evaluated in terms of 'the myth of a core Europe').⁴²

The research conducted under *The European Forum of Think Tanks* has led to slightly different conclusions.⁴³ The common thought in the discussion is the idea of retaining cohesion within the European Union and improving its effectiveness as a whole, as well as adopting a critical approach to the applicability of the theoretical models proposed in the past, especially highlighting the complete inadequacy of neofunctionalism and the related notion of spillover effect in relation to the actual state and development of the EU's governance system.⁴⁴ As a result, the deliberations under this project effectively leave the theoretical models aside and focus on the possibility (necessity) of deepening European integration taking into account two EU reform trends: deepening integration through centralisation of power at the EU level; and deepening integration through internal diversification in the Union.

- **Deepening through centralisation:**⁴⁵ In light of the mistakes in the original construction of the EMU and the gravity of the financial crisis in some euro area countries, it became imperative to improve solidarity between the Member States and 'communitisation' (currently 'unitisation') of further areas within the EU (centralisation). At the same time, this tendency doesn't concern the euro area alone. Reforms aimed at unitisation (centralisation) need to take into account two circumstances, in particular: the principle of subsidiarity; and public opinion (which is divided on this issue, with growing eurosceptic tendencies). As far as the principle of subsidiarity is concerned, it is already playing an important role in the context of competences conferred upon the EU by the Member States, but it is relevant only in the areas of shared competences (i.e. not in areas where the EU retains

⁴¹ Ibidem.

⁴² Ibidem, p. 12.

⁴³ M. Menghi, op.cit., pp. 18–19.

⁴⁴ Ibidem, pp. 3–4.

⁴⁵ Ibidem.

exclusive competences). The point is, however, that monetary policy remains within the EU's exclusive competences, while fiscal policy is a shared competence – and within this framework (the fiscal union), the principle of subsidiarity should be particularly meticulously respected. The second issue refers to the possibility of reforming the Union in the current political conditions (mainly with regard to public perception). In this case the problem comes down to the fact that the idea of transferring subsequent competences to the EU level (centralisation) is encountering ever stronger reservations among the public: 'The dilemma is that the economic logic needs deepening in the direction of a federation, but the political situation does not allow it. Still, there is no example in human history of a monetary union without a political union'.⁴⁶ Thus the use of centralisation mechanisms should be carefully measured (a big-bang-type reform is out of the question). This process (the introduction of political union on the basis of the euro area) is referred to as 'a new kind of federation', and it takes into account political and historical determinants as well as the national specificity of the individual EU Member States.⁴⁷ It is naturally linked to the need to introduce new mechanisms to strengthen the Union's democratic legitimacy. The concept of 'a new kind of federation' mainly reflects the aforementioned cautiousness when referring to state-forming processes in the context of reform of the EU governance system, and should rather be perceived as a reinforced implementation of principles resulting from the idea of federalism into the EU's governance structures.

- **Deepening through differentiation:**⁴⁸ Regardless of theoretical considerations, differentiation within the European Union has long been considered a potentially very important mechanism (a 'sleeping giant') for consolidating the integration process.⁴⁹ What is mainly stressed in this context is the enhanced cooperation procedure, which is enshrined in the EU Treaties and was put into practice following the entry into force of the Treaty of Lisbon. Its main advantage is that it allows deepening integration in specific fields without the need to revise the Treaties, while the key problem with using this procedure is the likelihood of its abuse, which could threaten the cohesion of the Union. In this case we are talking about an evolution towards a permanent structural principle of further integration development

⁴⁶ *Ibidem*, p. 9.

⁴⁷ *Ibidem*, p. 6.

⁴⁸ *Ibidem*, p. 5 ff.

⁴⁹ *Ibidem*, p. 5.

which would lead to a lasting differentiation between the status of individual EU Member States; hence the proposal for self-imposed limitations in the application of this procedure, which should produce a 'sustainable asymmetry'.⁵⁰ Presently, however, the problem that is at the fore is that of differentiation related to the euro area reform. In this regard the focus is not so much on its theoretical classification as on the issue of the 'method' applied. There has been harsh criticism of the intergovernmental method⁵¹ (a group of countries concluding international agreements outside the EU's institutional and legal framework), combined with a search for 'differentiation' procedures within the EU's institutional and legal framework.

The principal conclusion resulting from the above considerations is the need to find a path such that '[t]he consolidation of the euro and the deeper integration in the EU complement each other'.⁵² Three arguments are cited to show that 'consolidating the EMU means consolidating the EU'⁵³:

- **The economic argument:** Rehabilitation and consolidation of the euro area equals consolidation of an element which constitutes the foundation of European integration;
- **The institutional argument:** The success of the institutional reform in the euro area will also constitute an important test, and opportunity, to shape the future EU governance system. In particular, it will demonstrate that the EU's cohesion is not weakened by working within various areas of enhanced cooperation within the EU. As a consequence, this will open the possibility for further development of enhanced cooperation areas: *'show[ing] that it is possible to work between reinforced areas of unification in a larger area of integration'*;
- **The political argument:** A consolidated and effective euro area is a prerequisite for maintaining and consolidating the Union's role as a reliable actor in the global environment of a multi-polar world, where the 'unite or perish' alternative for Europe is becoming ever more visible.⁵⁴ Thus, the European Union needs to provide an answer to this central challenge if it intends to maintain, and strengthen, its political and economic role as one of the key actors in the world.⁵⁵

⁵⁰ Ibidem, p. 6.

⁵¹ Ibidem, p. 7 ff.

⁵² Ibidem, p. 1.

⁵³ Ibidem.

⁵⁴ Ibidem, p. 2.

⁵⁵ 'Indeed it is necessary to answer the question: what role does the EU want to play in a world facing so many challenges and undergoing such rapid transformation? Do we

To sum up, the general conclusion derived from the studies conducted under *The European Forum of Think Tanks* programme is that in light of the current reforms the consolidation of the European Union's coherence and effectiveness should coexist with its (progressing) internal differentiation, in particular with autonomisation of the euro area. This approach is pragmatic rather than theoretical.

5. The 'flexible integration' model

The above-discussed constructs for governance of the European Union can be gathered into a single coherent model, which I would refer to as the 'flexible integration' model. The structural framework of this model would be composed of four essential boundary conditions.

- **First** – the point of reference for this model is still the European Union (an international organisation made up of Member States, often referred to as 'supranational' due to its special form). It is hard not to agree with the view dominating in the above-described theoretical discussion that, regardless of the scope and effectiveness of the current governance reforms (especially in the euro area, including the expected drive to establish a political union within this area), the evolution of the EU governance system will take place within the EU's legal and institutional framework;
- **Second** – internal differentiation (within the Union) among the EU Member States has long been a fact⁵⁶ (the Schengen area, enhanced cooperation, EMU, Permanent Structured Cooperation under the CSDP, etc.), and it should be assumed that further internal differentiation of the EU will be a structural and essential element of the development of European integration;
- **Third** – special forms of differentiation, such as Member States and 'associated country status' can also have an important 'external' aspect. They will allow the EU to actively influence its immediate environment, on one hand by creating a special status for countries withdrawing from the EU (the debate on Brexit), and on the other hand by opening a special 'European prospect' for such countries as Turkey or Ukraine (a special kind of association or membership);

want to stay in the centre of the world or at the periphery? The way the EU responds to this question is crucial if it wishes to remain a central actor in the world, both economically and politically. "The world is not waiting for us." *Ibidem*, p. 1.

⁵⁶ More on EU mechanisms of such differentiation: A. Ott, *A Flexible Future for the European Union: the Way forward or a Way out?* in: *Reconciling the Deepening and Widening of the EU*, S. Blockmans and S. Prechal (eds.), T.M.C. Asser Press, The Hague 2007, p. 133 ff.

- **Fourth** – all the boundary conditions presented above should be brought under the umbrella of an evolution of procedures in the European Union that would keep internal differentiation within the EU's institutional and legal framework. While, as mentioned above, such mechanisms already exist in the EU Treaties, the main challenge today is the Schengen method, which has gained special importance in connection with the reform of the euro area (the Fiscal Compact and the Treaty establishing the European Stability Mechanism – ESM), all the more so because it is being considered as an important instrument for both continuing the euro area reform and as a general instrument for the development of European integration.

Various forms of 'flexibility' have been emerging in the European Communities and then in the European Union since the second half of the 1980s; manifested by the gradual replacement of unanimous decision-making in the Council with qualified majority voting in an increasing number of areas, followed by confirmation of the role of the Open Method of Coordination in the Lisbon Strategy of 2000,⁵⁷ and by the introduction of the enhanced cooperation procedure. Special importance was attributed to these various forms of 'flexibility' in the context of the 'big bang' EU enlargement (2004, 2007) and the related increased diversification of economic capacity and political efficiency among the EU Member States. Furthermore, concepts stressing the need for a certain degree of 'flexibility' have emerged in external relations in connection with the turbulences related to the enlargement strategy, in particular to the controversies regarding the membership prospects for Turkey (and in a more remote perspective, Ukraine). One of the ideas considered in this context has been, in particular, to establish forms of association that could constitute an attractive alternative to full accession. These concepts include, for example: 'enhanced multilateralism', drawing on the experience of the European Economic Area, and 'enhanced bilateralism', referring to the special relations between the EU and Switzerland.⁵⁸

Andrea Ott aptly sums up the experience with 'flexibility' gained so far in the process of European integration (related to the establishment of the common market, the 'big bang' enlargement, and the Constitutional Treaty), stressing that 'flexibility' has become a 'by-product of the complexities of this evolving organisation' (the EU).⁵⁹ She points out that

⁵⁷ Cf. G. Majone, *op.cit.*, p. 4 ff.

⁵⁸ Cf. A. Łazowski, *Enhanced Multilateralism and Enhanced Bilateralism: Integration without Membership in the European Union*, "Common Market Law Review", No. 45/2008, p. 1433 ff.

⁵⁹ A. Ott, *op.cit.*, p. 156.

consistency in the application of EU law and the Community method (now the Union method) is necessary in order to maintain the European Union's constitutional system, while the 'flexible approach' is necessary for maintaining the processes of widening and the dynamic process of integration of a diversified group of Member States (deepening).⁶⁰

The 'flexible integration' model proposed herein goes far beyond the above diagnosis. It is not considered as a 'by-product' of the evolution of European integration; instead it is seen as the basic model for the EU's future dynamic development. Taking into account the 'boundary conditions' described above, the model has the following basic characteristics:

(1) In contrast to the concept of 'differentiated integration' - meaning partly a temporary 'differentiation' of the Member States' status and partly internal differentiation within the EU's institutional and legal framework, as well as processes leading to strong autonomisation of some groups of Member States (mainly the euro area) and in consequence to a possible fragmentation of European integration – the description of the integration model as 'flexible' means that:

- **Firstly**, the progressing differentiation among EU Member States is 'natural', permanent and is a part of the structural characteristics of European integration which condition its dynamic development. It should be mentioned, however, that the 'permanent' character of this differentiation does not mean that there is no exchange between the various groups of states; rather it means that the very existence of this differentiation in various groupings of Member States is structural and in this sense 'permanent'. It should also be stressed that the division into various groupings is no longer that between the 'old' and the 'new' Member States and is governed today by a different dynamic (as reflected in the process of rehabilitation and consolidation of the euro area).
- **Secondly**, it is necessary to establish a 'carefully crafted institutional mechanism'⁶¹ that would guarantee, on one hand, the efficient functioning of the political centre of deepened integration, and on the other hand maintain the cohesion of the entire European Union through the establishment of effective procedures of cooperation between the states forming this political centre and the noncore (peripheral) states, regardless of whether they intend to join the political centre or remain

⁶⁰ Ibidem.

⁶¹ N. Tocci and G. Faleg, *op.cit.*, p. 10.

permanently outside it.⁶² As a consequence, the characteristic feature of the ‘flexible integration’ model is the structural internal differentiation of the EU within its institutional and legal framework, which ensures a coherent process of European integration.

- **Thirdly**, this ‘carefully crafted institutional mechanism’ must take into account the Union’s external relations. It must create an ‘attractive alternative’ to full accession for some neighbourhood countries which, for various reasons, experience problems with obtaining member status, naturally keeping at the same time the right balance between the EU’s internal regime and the ‘attractive alternative’ regime. This ‘extension’ of the EU regime must, in this case, take place in a specific institutional and supervisory framework, ensuring that the necessary cohesion is retained (the concepts of ‘enhanced multilateralism’ and ‘enhanced bilateralism’ are interesting points of reference in this context).

(2) Preserving the institutional and legal coherence of such a highly diversified European Union requires the establishment of suitable procedural guarantees within the model of ‘flexible integration’. While the flexibility mechanisms enshrined in the EU Treaties should be taken advantage of to the maximum extent, they are undeniably insufficient. The following concepts are worth considering as, under certain circumstances, they would guarantee the dynamic development of ‘flexible integration’ while at the same time preserving the cohesion of the European Union:

- **Firstly**, what comes to the foreground here is the concept of ‘creative flexibility’.⁶³ According to this concept, ‘flexibility’ means taking advantage of all the measures for reforming the euro area available within the present institutional and legal framework of the EU, while at the same time avoiding the need to amend the Treaties. In this case, the reference point is the implemented reforms of the Stability and Growth Pact and the establishment of the banking union, essentially on the basis of EU secondary legislation. While this approach is crucial, according to the ‘flexible integration’ model it is confronted by existing barriers. Hence the last stage involves the need for either a revision treaty (requiring unanimity), or amendment of the Treaties through the passerelle procedure, by changing the decision-making procedure from unanimous to qualified majority voting (which, however, first requires unanimity in the European Council – Article 48(7) TEU).

⁶² Ibidem.

⁶³ M. Menghi, *op.cit.*, p. 10.

- **Secondly**, the effectiveness of the ‘flexible integration’ model requires considerable modification of the procedure for adopting revision treaties (the ordinary revision procedure of the EU Treaties). This refers to the long-advocated notion of a revision treaty that would enter into force upon ratification by only some of the Member States, with the remaining Member States being bound by the previous *acquis*. This format has already been confirmed to a certain extent in the adoption of the Treaty Establishing the European Stability Mechanism (which entered into force upon ratification by the countries that had signed it, accounting for 90 per cent of the founding capital) and the Fiscal Compact (which entered into force upon ratification by at least 12 countries of the euro area). While these cases concerned the so-called intergovernmental measures, they are closely linked to the Union and we should bear in mind that apart from the benefit of ‘forcing’ EU Member States to ratify a revision treaty without delay, the abovementioned format of adopting revision treaties would also surely limit the further use of intergovernmental measures (i.e. international agreements concluded outside the EU’s institutional and legal framework by only a group of Member States).
- **Thirdly**, in the ‘flexible integration’ model we cannot exclude the application of the Schengen method (i.e. concluding the aforementioned international agreements outside the EU’s institutional and legal framework), even more so as two such agreements play an important role in the rehabilitation and consolidation of the euro area (the Fiscal Compact and the Treaty establishing the European Stability Mechanism) and – despite some reservations – are rather commonly evaluated as offering an important precedent to the EU’s institutional structure (the plans for establishing a political union in the euro area explicitly include the possibility of using intergovernmental measures, i.e. intergovernmental agreements). Thus the key problem comes down to one of ‘binding’ such intergovernmental measures within the EU’s institutional and legal framework, and consequently ensuring the cohesion of the Union. A good reference point is the practice that has emerged in relation to the aforementioned international agreements, the signing of which caused a number of political and legal controversies and consequently led to a better definition of the barriers to this method, in light of both EU law and the constitutional laws of the Member States. From the legal perspective, explicit barriers to the use of this method were defined by the EU Court of Justice in its judgement of 27 October 2012 in case 370/12 *Pringle*: intergovernmental measures are not permitted to interfere in areas

of the EU's exclusive competences, nor to concern coordination of the economic policy of the Member States (reserved for the Union) or to confer any powers upon EU institutions; the involvement of those institutions in mechanisms established under such measures would have to fall within the framework of the competences already conferred upon the EU institution concerned. Other important instruments would include clauses that would ensure the inclusion of the regulations contained in intergovernmental measures to the EU acquis.⁶⁴ The 'flexible integration' model would require enshrining these conditions in the Treaties.

6. Conclusions

(1) The differentiation of the EU Member States' status has become a fact, while the measures applied in the euro area reform (the Schengen method) and the level of the euro area's emancipation within the European Union have brought to the fore the problem of fragmentation of European integration. Consequently, all attempts at a theoretical description of European integration are confronted with some important new developments.

(2) 'Differentiated integration' models, which first appeared over a quarter century ago in the context of the subsequent waves of enlargement of the Communities (and later the EU) and the deepening divergence of Member States' own interests, have constituted an important point of reference for theoretical discussion. However, it was rightly noted already in the previous decade that this had not led to the development of any coherent theory of European integration. On the contrary, the 'differentiated integration' models were *ad hoc* responses to the challenges arising out of the growing number of Member States and their increasing differentiation.

(3) The 'flexible integration' model approach tries to address the present-day structural challenges to European integration. Its starting point is the adoption of two basic assumptions:

- **First**, that the internal differentiation of the EU has become a structural trend in European integration, which conditions this process's dynamic development in the future;

⁶⁴ Cf. J. Barcz, *Orzecznictwo niemieckiego Federalnego Trybunału Konstytucyjnego wobec reformy strefy euro. Studium prawnoporównawcze (German Federal Constitutional Court's Case-Law on the Reform of the Euro Area. A Comparative Study)*, Dom Wydawniczy Elipsa, Warszawa 2014, p. 101 ff.

- **Second**, that the fundamental core of the EU governance reform must be its institutional and legal framework, i.e. keeping the cohesion of its governance system.

At the same time, the ‘flexible integration’ model identifies those essential institutional and legal elements that will ensure the cohesion of the EU governance system, while at the same time using the internal differentiation of the Union as a way to bolster the dynamic development of European integration.

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