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1 Differentation or Disintegration

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The history of European integration has been accompanied by two fundamental dichotomies from the outset. The first, more familiar and more spectacular antagonism lies between the concepts of the Europe of nations and a supranational Europe. This antagonism, by using another strong simplification, can also be interpreted as a debate between sovereignists and federalists. In the other dichotomy, the themes of flexibility, diversity and heterogeneity are on the one side, and the requirement of unity and homogeneity is on the other side, so the question becomes to what extent these divergences are acceptable within a uniform, integrated system, not only on the level of the member states but also, on that of some groups of member states. The question is what the scope and methods of the enforcement and appearance of the historical, geographical, economic, geopolitical, security policy and last but not least, cultural differences between the member states and the individual groups of member states should be (including, of course, the differences between the legal cultures, structures, and techniques).

Although these two questions which are fundamental for integration are correlated, they are by far not equivalent. They are similar to each other to the extent that neither of these contradictions can be eliminated by the clear acceptance or rejection of one or the other tenet. The choice between the Europe of nations and a supranational Europe was wisely avoided by the founding fathers too, they basically left the debate open, or they left this choice to the future and the interpretation of the treaties. The very founding treaties but also, secondary law and judicial practices wished to create a continuously renewing balance between the two approaches and this essentially did happen. The debate, primarily in the political field, is continuing with varying intensity but the currently effective founding treaties also refrain from taking a clear stance on this question. Many of us think that this is the right path and that it makes more sense to disregard the sharp dichotomy of the "either – or", or at least, this should be left for the simplified political slogans. The basis for the continuous elimination of the contradiction is provided by the rules of the founding treaties regarding the Union's competences and the interpretation of these is meant to create balance between the opposing theoretical and political tenets. Thus, the debate primarily boils down to the division of competences at any time, more precisely, the point is the field and extension of the competence conferred to the Union by the sovereign member states. It is undoubted that the structure of integration, as well

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as its system of institutions and norms have shown the content features of both the idea of member state sovereignty ("the Europe of nations") and those of federalism ("a supranational Europe") from the beginnings till now. The currently effective rules already clearly define the principle of conferral, so the Union's competence extends only in so far as the sovereign member states have conferred to it (Section (1), Article 4 and Sections (1) and (2), Article 5 of TEU). The Union rules adopted in this field take priority over the laws of the member states. Thus, the federal element appears, which is still restricted, in a disputed scope, by the provision on respecting the national identities of the member states as stipulated by Section (2), Article 4, as well as the principle of constitutional identity derived from this.[1]

In addition to the division of member state and European Union competences, it is yet another important question how the conferred powers are exercised, *i.e.* whether the European Union's institutions make their decisions unanimously or with a qualified majority. The federalist approach has encouraged the extension of the scope of decisions adopted with a qualified majority since the beginnings, while the approach focusing on the autonomy of the member states insists on maintaining unanimous decision-making in as wide a scope as possible. The process of the deepening of integration to date has resulted in the increasing scope of decisions made with a qualified majority and the supporters of further deepening have proposed, recently with renewed intensity, the continuation of the process and the extension of the scope of decisions adopted with a qualified majority by using various techniques.[2] What the contradiction between the uniform, homogenous system and the flexible structure that allows divergences demonstrates is basically not the antagonism of the Europe of nations and a supranational Europe. The relationship between sovereignism and federalism is defined by the division of competences between the member states and the institutions of the European Union, while flexibility and the acceptance of diverging regulations only come up in the context of the member states' assigning the exercising of their competences to the Union's institutions to some extent. In the scope of powers that are not conferred, the

1 *See*, among others: László Kecskés, *EU-jog és jogharmonizáció* (EU Law and Harmonization of Laws), HVG-ORAC, Budapest, 2005, pp. 848-898; Ernő Várnay, *Az Európai Unió joga* (The Law of the European Union), KJK, Kerszöv, Budapest, 2005, pp. 304-317; János Martonyi, 'Globális szabályozások és Európa' (Global Regulations and Europe), in: *A közigazgatás egyes alapproblémái* (Some Fundamental Questions of State Administration), Szeged, 2007, pp. 90-94; Armin von Bogdandy & Stephan Schill, 'Overcoming Absolute Privacy: Respect for National Identity under the Lisbon Treaty', *Common Market Law Review*, Vol. 48, 2011, pp. 1-38; János Martonyi, 'Európai jog – magyar jog' (European Law – Hungarian Law), in: *Tizenegyedik Magyar Jogászgyűlés* (Eleventh Conference of Hungarian Lawyers), Balatonalmádi, May 24-26, 2012, Budapest, 2012, pp. 73-76; László Trócsányi, *Az alkotmányozás dilemmái, Alkotmányos identitás és európai integráció* (Dilemmas related to the Constitution – Constitutional Identity and European Integration), HVG Orac, Budapest, 2014, pp. 70-80.

2 In the 2017 State of the Union Address, the President of the European Commission drew attention to the application of the option of "passerelle", *i.e.* the authorization given by the Council of Europe, by unanimous decision, to the Council to adopt decisions by a qualified majority (Jean-Claude Juncker, State of the Union Address, 2017).

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competence of the member states is untouched and they exercise this competence in line with their independent decisions, which conveys the message that the diverging regulations are natural. The situation is that the non-conferred part of the competence of the member states enjoys constitutional protection, even in the cleanest federal systems, *i.e.* the federation may not withdraw the competence of the members of the federation even in the United States of America. The basic question of flexibility and the differentiaton that is built on the latter is to what extent and in what ways it is possible to to apply rules that diverge from the general ones in the competence assigned to the European Union, within the general frameworks, in the individual member states and mainly, in the groups of the member states.

Thus, the concept of differentiation does not include the differences between the regulations of the individual member states, as these differences exist from the very start in the field of unassigned competences. Those cases are also outside the scope of differentiation where the uniform EU regulation, in lack of a common standpoint and solution, refers to the law of the member states, and it orders that the rules that are different in each member state be applied.[3]

The point of integration lies in the building of a system of uniform regulation. However, it should be realized that acknowledging a certain extent of differences, the inevitable acceptance of flexibility on a certain level, were already present at the beginning of the integration process. In some cases, differentiation proved to be a useful means, the application of which was made necessary by the existence and elimination of the differences in the economic and political features of the member states, their situation, interests and ambitions. It could of course not be regarded as a goal or a fundamental principle, it was much rather a means that was made necessary by some concrete situations, that was tolerated and preferably applied only temporarily, which makes progress possible, resolves a dilemma that can otherwise not be resolved and which, by this, may lead to the creation of a subsequent complete unity. It was also undoubted that this useful means may at the same time be the source of significant risks and may jeopardize the fundamental goals and principles of the integration process. It is exactly because of this that this should be applied with untmost care and both its contents and impacts, as well as its form and legal techniques should be thoroughly analyzed. From among these techniques, what should be applied is the one that exerts its effect to the lowest possible extent and in the narrowest possible scope and which acts for the most limited duration of time. The legal means that is applied should be interpreted in a restricted sense, as this comes from the exceptional nature of the acceptance of the divergence. The legal techniques of differentiation changed and increased by time as a result of the political and economic circumstances and factors at any time, and the question that initially used to bear less signifi-

3 This method, not coincidentally, is especially often applied in the field of civil law regulations (e.g. corporate law guidelines), or in the standardization of international private law norms.

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cance has by now become one of the most important factors, in the opinion of many, the most important factor that determines the future of the integration process.

As regards these techniques, the very founding treaties acknowledge such exceptions which, by reference, for example, to public order, public safety, public morals or public health, although with strict conditions, allow the application of measures that are different from the general requirements (Articles 36 and 52 of TFEU). The temporary exemptions specified in the European Union Accession Treaties of the states resulted in differentiation. These entitled the new member state or the Union to maintain the regulations that differ from the general norms for a predefined period of time in various fields, primarily in the scope of the four freedoms. Exceptionally, there was also an example for an acceding state to receive authorization for the maintenance of a difference on a permanent rather than a temporary basis, as has happened in the case of Swedish tobacco and the restriction of obtaining second residence in Denmark. Thus, the distinction between temporary and permanent differentiation already appeared in the Accession Treaties, which received special significance for the subsequent processes. Then the permanent opt-outs also emerged, which means permanent exemptions given to some member states from certain institutions and rules, which were generated in different political and legal situations, as a result of very different circumstances but all in all, they allowed the permanent rather than temporary maintenance of the differences between the member states. This is what happened in the case of Denmark's opt-out from the defense cooperation, and this is how the United Kingdom, Ireland and Denmark opted out of some of the areas of the legal and judicial cooperation of the Union (AFSJ). Of course, the acceptance of the genuinely relevant differences was represented by the opt-out of the United Kingdom, Ireland and Cyprus from the Schengen area (in the case of Romania, Bulgaria and Croatia, we only talk of a temporary opt-out), as well as the establishment of the eurozone. In the latter case, it was only the United Kingdom and Denmark that were allowed a permanent opt-out, the others will be obliged to join the eurozone when they meet the relevant requirements, so the derogation is only of a transitional nature even in the case of Sweden. In the case of the members states that joined the Union in 2004 or later, this obligation was specifically confirmed in their accession treaties.

In the range of the techniques for differentiation, strengthened cooperation is undoubtedly the means that incurs the lowest risk, which harmonizes the opposing criteria of unity and flexibility on the basis of clearly defined rules and satisfies the requirement that in some cases, it should be possible to take action even if only a part of the member states requires such action. At the same time, it sets strict requirements in order to ensure that these strengthened cooperations involving a group of the member states should not jeopardize the fundamental objectives and principles, they should not lead to the fragmentation of the uniform system, or the breaking up of the integration process. In the range of these criteria, it is especially important that it is not possible to strengthen cooperation in areas that exclusively belong to EU competence (for example, in the field of

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common trade policy), as in this case, the European Union has to act as a unit, as an international legal entity (Section (1), Article 20 of TFEU), and cooperation may not negatively impact the internal market (Article 326 of TFEU). Furthermore, strengthened cooperation is only an "ultimate possibility" and it should be open to all the member states. The content and detailed procedural criteria are meant to ensure that these cooperations do not jeopardize the fundamental unity of integration.

The possibility of strengthened cooperation exists in the field of common foreign and security policy too, although in the framework of a procedure that differs from the general rules, and with such conditions too. This policy is basically intergovernmental in its nature, and the decisions should be made unanimously as a general rule. The narrow range of exceptions from this unanimity is defined by the provision set out in Section (2), Article 31 of TFEU, which is supplemented by the next Section (3) with a special "passerelle" option, according to which the Council of Europe may provide, in a unanimously accepted decision, that the Council may act with a qualified majority in cases that are different from the ones specified in Section (2). The next provision stipulates that the exceptions from the requirement of unanimous decision-making specified in Sections (2) or (3) do not refer to the decisions on military or defense issues. On the other hand, the decisions on common security and defense policy are accepted by the Council unanimously (Section (4), Article 42 of TFEU). The most important difference related to strengthened cooperation is that a group of the member states ("member states with military capabilities meeting higher requirements") develops a permanent structured cooperation. The decisions on the development of such structured cooperation, the participation or exit of one of the member states are adopted by the Council with a qualified majority.[4]

While this strengthened cooperation is the least dangerous differentiation technique, the out of contract solutions, *i.e.* those out of the founding treaties, pose the highest risk to the unity of the integration process. An example for this has so far only been provided by the so-called fiscal compact, *i.e.* the Treaty on Stability, which was made necessary by the British opposition to the European Union's legislative act requiring unanimity in 2011.[5] The solution was justified in the situation in question but the conclusion of an international treaty outside the system of the founding treaties created a dangerous precedent, despite the fact that the very international treaty stipulates that the goal is to intergrate this treaty into the Union's legislative system as soon as possible. In the primary European Union law, there is no express prohibition for a group of member states to enter into an international law agreement with one another and by this, for them to

4 *See more in*: Csaba Törő, 'Accommodating differences within the CSPD: Leeway in the treaty framework', in: Steven Blockmans (ed.), *Differentiated Integration in the EU – From the inside Looking Out*, CEPS, Brussels, 2014.

5 Gianni Lo Schiavo, 'The Treaty on Stability, Coordination and Governance and the ESM Treaty: Intergovernmental Arrangements Outside EU Law, but for the Benefit of the EMU?', in: *Flexibility in the EU and Beyond, How Much Differentiation Can European Integration Bear?* Nomos Verlagsgesellschaft, 2017.

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establish a closer, federation-like cooperation in certain areas. However, it is indisputable that these agreements may not violate the objectives and fundamental principles of the founding treaties, for example, the duty of sincere cooperation, they may not run counter to the prohibition of discrimination between the member states, they may not jeopardize the policies and activities of the European Union, they may not break the unity of the internal market, the free movement of goods, services, people and capital, and so on. If this was not so, the path to fragmentation and disintegration would open, unions within the union could be established, the union of the unions could be born, which would basically result in the dissolution, *i.e.* the termination of the existence of the European Union.

This is how we arrive at the fundamental question, in the wake of listing the legal techniques of differentiation, which is how the disintegration of the uniform system can be averted, how such differentiation techniques can be applied which bring sensible (and inevitable) flexibility into the system without leading to its gradual fragmentation and dissolution. As the case may be, even some useful and necessary steps may exert toxic effects sometimes, this is why the legal techniques of differentiation deserve special attention and this is why their application requires special prudence.

This is especially so when those political endeavors gain new momentum and increased strength which are aimed at achieving some "two-speed", "multi-speed", "two-tier", "multi-tier", "changing geometry" kind of integration, as they are referred to by diverse, vague and ill-defined turns of phrases. Unclarified nature is a common element of these concepts, which is generally typical of the language of political discourse, especially but not only among the concepts of European integration.

The ideas related to two- or multi-tier integration go back to several decades. The proposal made by Schäuble-Lamers regarding the creation of a "Kerneuropa", *i.e.* a "core Europe" was made in 1994, Chirac brought up the idea of a "pioneer group" in 2000, Joschka Fisher proposed the establishment of a "gravitational center" in the same year, while in 2001, Jacquac Chirac suggested that an "avant-garde" be established. We can find the same sentiment underlying all these proposals: let us return to the beginnings, to the golden age when only a few of us were sitting around the table, as this is the only way that we can prevent the expected dilution of the integration due to the unavoidable Eastern expansion and the ensuing grave consequences.

It is remarkable that neither of these ideas, which had different names but pointed to the same direction did not bring about any major political consequences and institutional changes. On the contrary, the Constitutional Treaty brought a sensible and balanced solution in this area too, which was integrated into the Lisbon Treaty in an unchanged form. (It is worth noting for the future too that the coming into effect of the very Constitutional Treaty was hindered not by the new member states that joined the Union in the wake of the "dilution" caused by the expansion but by the referenda held in two founding member states which belonged to the "core Europe.") This system of flexibility

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regulated in the current founding treaties, more precisely, the institution of strengthened cooperation basically operates appropriately, it fulfills its function without endangering the unity of integration.

So, what is the reason for the extraordinary strengthening of the political endeavors aimed at the creation of a two- or multi-tier ("two-speed" or "multi-speed") European Union recently?

There are several factors that contribute to this development. One of these is undoubtedly the increased number of member states, mainly as consequence of the Eastern expansion of the European Union, which should of course rather be called the reunification of Europe. In the countries of the "core Europe", many see the source of all the problems of the European Union in the "hasty", "not properly prepared" expansion and they feel that their concerns that preceded the expansion are justified. The economic indicators show just the opposite of this, the economies of the new member states have proven to be considerably more resistant to the sovereign debt crisis than those of the older member states which needed rescue packages. The second reason, quite interestingly, was the very financial and economic crisis, which very gravely affected the economy of the European Union, it almost led to the failure of the euro and the strengthening of the euro is definitely necessary for the avoidance of the recurrence of these problems. This, in turn, puts the need to increase the independence of the eurozone on the agenda, which is undoubtedly the main source of the fragmentation risk and at the same time, the most obvious and most dangerous way to develop a two-tier integration. The strengthening of division within the European Union, *i.e.* the deepening of the dividing lines which appear in various fields, is another important factor. There is a lot of talk about the differences of the economic philosophies and budgetary policies of the North and the East, and there is even more discussion about the deepening antagonisms between the West and the East, which was mainly made topical by the debate that broke out about immigration and refugee policies. The latter is aggravated by that it can be connected to the first contributing factor, *i.e.* to declaring the expansion a scapegoat and the deeply rooted distrust towards the "East", which is caused by ignorance, the lack of knowledge in the better case, while by the historical feeling of superiority in the worse case. The division based on geographical criteria is also coupled with other, economic and cultural factors such as the differing levels of economic development and the major differences between the approaches to the point and the roots of European identity. However, it should be realized that the geographical dividing lines are not carved in stone in either case and they are by far not absolute in nature. Economic philosophies and budgetary policies may change, in pretty much the same way as the differences between the levels of economic development. Although they are enduring, cultural differences do not live for ever either. In relation to the East-West division, the cooperation of the Visegrád countries is often referred to, mainly in a negative sense, disregarding the fact that the regional cooperations within the European Union (Benelux states, Nordic countries, Baltic countries, the V4 countries)

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are related to real historical, geographical, economic, geopolitical and security policy factors and they are the important building elements of the cooperation between all the member states, rather than factors contributing to division. It is obviously also a mistaken assumption which considers the V4 standpoint on the debate on immigration the only cohesive element of the cooperation between the Visegrád countries, as what we are talking about here is a cooperation going back to one quarter of a century, with changing intensity but one which is durable and successful, and which has a strengthening role in the progress of the process of European integration as a whole.

Thus, the dividing lines do exist but they are given exaggerated emphasis for various reasons and they serve as the political means for promoting two- or multi-tier integration. It is these endeavors that pose the gravest threat to the future of the European Union today. Averting this risk is the most important task for the committed believers in European integration.

It was in this situation that the external challenges to the European Union intensified. The reshuffling of global economy and geopolitics, the often-quoted "great shift", the fragmentation and regionalization of the world trade system, the decentralization of global power and influence, the becoming of a one-time bipolar system unipolar, then multipolar, the revival of the spheres of influence, and the appearance of antagonsims and tensions that arose from the latter, have all in all made the European Union confront a considerably more precarious and dangerous world, a new situation. All this was topped off by the brutal message of the enormous wave of refugees and immigrants, which was unprecedented in modern history. All these factors have made it clear that the Union has to improve the quality of its external action both in the area of foreign, security and defense policy, and in the field of international trade policy.

And it is at this time that those developments occurred which increased the feeling of crisis to the point of irrational prophecies about the collapse of integration. It was only gradually that it became clear that Brexit and the Trump phenomenon did not only pose a challenge but they also created a possibility and an opportunity. The former undoubtedly strengthened the cohesion of the EU-27 ("Brexit glue"), while the latter made it point blank clear to Europe that sooner or later it should stand on its own feet, as this had already been indicated more than fifty years ago by a French general and head of state. However, for this, it is not only the means of external action that should be strengthened but also, we should recognize the lack of balance between the economic and political dimensions in the integration process, which has been present since the beginnings. The European "project" started off with the goal of creating a political unity but "finalité politique" has remained but a nice slogan repeated over and over again during the decades. The much talked-about "peace dividend", *i.e.* ensuring peace between the member states is in fact an outstanding achievement but at the same time, it also played a role in the underestimation of the external threats, in forcing foreign, security and defense policy to play a secondary role and pushing the political dimension into the background, as

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opposed to the spectacularly successful economic dimension. The disproportionality between the two basic objectives, *i.e.* the political and economic dimensions naturally exerted a strong effect on the method of building integration, the applied means, as well as the institutional-legal techniques. Economic integration, which was realized gradually, as an organic process, mostly requires a method and measures that are aimed at the resolution of concrete issues, that are of a functional approach and technocratic, which are generally reactive in nature, as they have to respond to specific developments (often to situations called crises). This incremental, gradual development has brought extraordinary results in the field of economic integration but it was obvious as early as several years ago that the possibilities inherent in this method reached their limits and were practically depleted. It is this depletion that already appears in the area of economic integration now and this results in recurring, increasingly severe and accumulating crises. This technocratic, (neo)functional method, which was taken over from economic integration, has proven to be unsuitable for the realization of political objectives, more precisely, for taking on a stronger role in global politics and the creation of the means of foreign, security and defense policy necessary for the former, from the start. The pushing into the background of the third, cultural dimension, *i.e.* European identity for a long time involved even graver consequences, which was largely due to the general aversion to the community-level cultural identity and the opposing approaches to the relevant elemens of the European cultural heritage. The distrust towards all forms of community identity undoubtedly played a role in this, which was especially strong against national identity, for the well-known historical reasons. The ideological antipathy to national identity radiated to the other forms of community identity too, thus especially to the European identity. By this, what happened was that the key anthropological basis of the European integration process, *i.e.* common identity was not given the role on which the whole "project" should have been built. This is how the lack of balance between the economic, political and cultural dimensions occurred, which endangers the successful progress of European integration even today.[6]

The first concrete task of the creation of the balance between the different objectives is to decrease the disproportionality between the economic and political dimensions. Also, the strengthening of the political dimension coincides with the requirement that is set by the above-mentioned external challenges in the current geopolitical situation, which is the renewal and strengthening of the means of external action, primarily in the field of

6 This is the situation despite the fact that literature in general, and the rich Hungarian legal literature in particular, drew special attention to the significance and correlations of the cultural dimension. *See* first of all Miklós Király, *Egység és sokféleség, Az Európai Unió jogának hatása a kultúrára* (Unity and Diversity: The Effect of the Law of the European Union on Culture), Új Ember Kiadó, Budapest, 2007. On cultural identity, *see* Lisanne Wilken, 'Anthropological Studies of European Identity Construction', in: *A Companion to the Anthropology of Europe*, Blackwell Publishing Ltd, 2012.

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common foreign, security and defense policy. The first steps have already been taken, the Commission document on the future of European defense was prepared,[7] which outlined the scenarios of the strengthening of common defense and made it clear that the right path was to create common defense and security. In the document, the significance of cooperation with NATO is highlighted, pointing out that "the protection of Europe would become a mutually reinforcing responsibility of the EU and NATO."[8] Pursuant to Section (6), Article 42 of TFEU, the first Permanent Structured Cooperation (PESCO) was established with the participation of 25 member states, which indicates that the overwhelming majority of the member states recognized the critical need for the deepening of cooperation in the field of defense a and the strengthening of defense capabilities. Permanent Structured Cooperation is a good example for that the application of more flexible means in certain areas does not weaken but strengthens the role and action of the European Union and at the same time, it creates an opportunity for opting out of this cooperation for those member states which do not wish to undertake stricter obligations for different reasons. The fact that there are as many as 25 participants of PESCO at the same time also proves that there is no "avant-garde" in the area of defense either, the situation is that certain member states do not hinder the progress of others, *i.e.* sometimes the overwhelming majority in the area in question, with their absence. All this does not change the fact that in the area of external action, uniform action bears special significance. If the European Union wishes to increase its role and weight against the processes of the global world economy and geopolitics of the opposite direction, then the unity of this action should be strengthened simultaneously, and in close connection with the strengthening of the means of external action.

The European Union has played a critical role in the other main area of external action, *i.e.* in the global system of world trade for at least fifty years by now. We can also witness the disproportionality between the economic and political dimensions here too, the super power status in trade policy is coupled with a very weak geopolitical role. The exclusive community or union competence in the field of trade policy excludes strengthened cooperation and the other, more dangerous techniques of differentiation from the start. This does not mean that external action does not have to be made more uniform and effective in the field of trade policy. It is in this direction that opinion No. 2/15 of the Court of Justice of the European Union on the free trade agreement between the EU and Singapore[9] took a step. This opinion is an important milestone on the long way that leads to the expansion of the exclusive community / union competence mainly through the broadening of the concept of common trade policy and thus, it becomes part

7 Reflection Paper on the Future of European Defense, European Commission, COM (2017) 315 of 7 June, 2017.

8 "Protection of Europe would become a mutually reinforcing responsibility of the EU and NATO", see ibid., p. 14.

9 Opinion 2/15 of the Court of Justice of the European Union, 16 May, 2017, ECLI:EU:C:2017:376.

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of the long list of the contractual amendments and European Court decisions that result in this. This opinion regards the trade in goods, the overwhelming majority of the trade in services (except for freight services), the direct foreign investments, the intellectual property rights, the competition rules and the questions of sustainable development (environmental protection, social rights) as issues that belong to the scope of common trade policy (Note e), Section (1), Article 3 of TFEU) and by this, it defines the area of exclusive EU competence in the broadest way ever, *i.e.* the scope where the Union is entitled to enter into international agreements on its own, without the member states. As regards the area of transport (sea, railway, public road and inland water freight services), however, the opinion founds the existence of the exclusive European Union competence on Section (2), Article 3 rather than on Note d), Section (1), Article 3, according to which the Union has exclusive competence for entering into international agreements if the conclusion of such is required by one of the Union's legislative acts, if such is necessary for the internal exercise of its competences, or to the extent that this may affect the common rules or change the application thereof. As quite a number of secondary internal Union laws was adopted in this scope, and the provisions set out in Article 216 entitles the Union to enter into international agreements in this scope, in harmony with the earlier court decisions based on the fundamental parallelism of internal and external competences, the Union's competence in the trade of freight services is exclusive as well.

The opinion has only established the lack of an exclusive Union competence in the case of two provisions of the free trade agreement. One of these is the provision regarding the "portfolio", *i.e.* the one on non-direct foreign investments, where the investors have no right of management and control (the wording of Article 207 clearly assigns only the direct investments to the scope of common trade policy), while the other one is the regulation of the settlement of disputes between the state and the investors, which removes the assessment of some of the legal disputes from the jurisdiction of the member states. This, however, is not possible without the member state's express, independent undertaking of an obligation, *i.e.* without its appearing as a contracting party.

Thus, the opinion in fact gives the opportunity for the Union's entering into trade agreements in its exclusive competence, provided that it drops the above-mentioned two questions, or perhaps further questions too from the regulatory scope of the agreements.[10] By this, the external action in the area of international trade policy may become more efficient but at the same time, it also brings up grave problems for the unity of the Union if some relevant member state interests are pushed to the background by decisions that are adopted on important questions with a qualified majority. (The provisions set out in Section (4), Article 207 of TFEU stipulate the requirement of unanimous decision-making in the field of trade policy agreements only in a narrow scope.) This situation may be especially dangerous for mid-size or small member states, all the more so because

10 The draft negotiating mandate of the latest trade agreements (Australia, New Zealand) was prepared in the spirit of this method, which is built on the separation of questions that require entering into joint contracts.

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the rules of calculating qualified majority have been changed to their detriment since the adoption of the Lisbon Treaty. The Declaration of the Council of Europe on Section (4), Article 16 of TFEU and Section (2), Article 238 of TFEU somewhat alleviates this danger but it does not avert it. The solution may be that on the issues that are especially sensitive and deemed vital by some of the member states, the member states with a qualified majority should apply sober self-restraint and should not jeopardize the internal cohesion that is necessary for efficient external action. The solution according to which in such sensitive situations, the national parliaments would also be assigned a role seems to be expendient and sensible too, which would reduce the concerns of the member states and would at the same time strengthen the democratic legitimization of the decision. Thus, a rational and balanced compromise will be necessary in all those cases where there is a legal possibility for making decisions with a qualified majority but the preservation of loyalty and cohesion between the member states justifies that the interests of all the member states should be taken into account.

Thus, the precondition to the effectiveness of external actions is unified action both in the area of external, security and defense policy, and in the field of trade policy. All such aspirations which result in, or are aimed at the destruction of internal unity, the triggering off or strengthening of fragmentation processes, or the creation of two- or multi-tier integration will result in the weakening of the Union's weight and influence in geopolitics and world trade. This external erosion is a fundamental parallelism, which was recognized by the Court as early as decades ago, which means that it also unavoidably increases internal erosion due to the fundamental parallelism and correlations of the internal and external competences (and processes). It is because of this that negative feedback which weakens both the internal and external unity by mutually accelerating each other, can be generated. This is why all such proposals which are aimed at, or may lead to the establishment of a one-, two- or multi-tier European Union, is playing with fire and this is why those differentiation techniques which create the necessary flexibility in a moderate and controlled form acknowledged by the founding treaties should not be disregarded. Of course, the real danger is posed by the intensifying, increasingly openly proclaimed political goals rather than the legal techniques of differentiation.

However, the creation of a two- or multi-tier integration is also faced with significant political and legal restraints. It is not a coincidence that the goal has been proclaimed several times, as we have seen but it has not yet been realized. The establishment of "Kerneuropa", *i.e.* a "core Europe" would first of all presume the existence of a "core", *i.e.* of such a narrow "vanguard", or an "avant-garde", which can be clearly separated from the majority that is lagging behind. The situation is that there is no such "avant-garde", the eurozone now has 19 members, the other members of the EU-28, with the exception of Denmark, are obliged to join, several member states would like to do so as soon as possible but they are not yet able to, in the case of yet another group of member states, the conditions essentially exist but there is no enthusiasm. This means that there is

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no permanent borderline, the number of member states with derogation is continuously decreasing, while the number of the members of the eurozone will constantly grow. There is a similar situation in the case of Schengen as well, where three member states are awaiting accession. The picture is made even more colorful by cooperation in home affairs and justice, where 2 out of the 28 member states do not take part in each field of the cooperation. Thus, there is no permanent borderline carved in stone, the situation is just the contrary: the borderlines are constantly on the move and the number of participants is increasing. On the other hand, the already mentioned borderlines that can also be demonstrated geographically (North-South, East-West) cannot be translated into different levels, as this is not substantiated by the otherwise changing differences in economic philosophies and budgetary policies, the decreasing differences in the level of economic development, or the antagonisms related to the European identity and the preservation thereof, which arise from the different historical experiences. It is another question whether the new fighters for the "core Europe" wish to found their newly defined political goals on these differences and the borderlines that have been consciously built on the latter.

Thus, the key objective hindrance to a multi-tier Union is the fact that there is no permanent, single, "across the board" economic, political, geographical and institutional-legal borderline between the member states until such a borderline is successfully created.

At the moment, the most obvious means for establishing such a permanent and institutionalized borderline and through this, different levels, is the isolation of the eurozone within the Union. This would not make a core Europe either but this would allow the gradual development of an internal and an external circle, in such a way that in the framework, and under the pretext of the justified strengthening of the economic and monetary union, and for ensuring its long-term stability, institutionalized and regulatory differences between the member states within and outside the eurozone should be created in as wide a range of economic policies as possible (taxation, social policy, etc.). This is why the proposals on making the eurozone independent are dangerous (independent budgets, independent parliamentary control). The realization of these proposals would run counter to the main principles of the fundamental treaties, the union of the European Union, the single internal market, the rules of the system of institutions, also with regard to that the provisions set out in Article 136 of TFEU set clear legal restrictions concerning the scope of actions regarding the eurozone.

Thus, the eurozone that comprises 19 states at the moment can in no way be regarded as core Europe. With Brexit, the eurozone will make up for more than 85% of the total GDP of the European Union and this rate will grow further after the accession of further member states. The eurozone is not something "hard-core" but by time, it will mean the European Union itself, irrespective of when the full overlap is achieved, *i.e.* when all the member states introduce the single currency. The date of the latter will obviously be further postponed by the further expansions as well, as the new member states cannot

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have the conditions for the introduction of the euro at the moment of their accession. All this does not change the fact that the euro is not the currency of the individual member states but that of the European Union as a whole and this currency can by no means serve as a tool in the hands of such a political aspiration and process which would create a union within the Union, in other words, would lead to the union of unions.

The possibility of multi-tier integration, in a less detailed and reserved form, appears in the scenarios presented in the White Paper of the European Commission too.[11] It is a significant merit of these scenarios that they step out of the customary binary logics, *i.e.* from the dichotomy of more or less Europe and they make an attempt at extending the range of possible options. The actual goal is to illustrate the theoretical possibilities by adding that neither of the versions can be realized fully and exclusively. The assumption that most probably, the winning scenario will be the mix of the third and fourth scenarios is realistic.[12] The third version says that "those who want more will do more", while the fourth version proposes that "we should do less but do it more efficiently." However, the real question is what the proportion of the two versions will be, which scenario will be the decisive one in this "mix": the third version in which differentiation is put into the foreground, or the fourth version that preserves unity and wishes to increase efficiency? And also, how long may the individual member states use the opportunity of "those who want more will do more", where are the economic, political, institutional and legal borderlines of those differences the surpassing of which will result in the fragmentation of the uniform integration, *i.e.* the development of the often mentioned two- or multi-tier Europe?

These are the key questions about the future of the European Union today and the answers to these will determine the further development of the integration process in the upcoming years or even decades, with special regard to the situation of Central Europe and Hungary in this process. The situation is that if the third version in fact did not mean more than the application of strengthened cooperation in the frameworks defined in the founding treaties and with the observance of the criteria defined therein, then the differentiation within the competences conferred to the Union would not pose the threat of shattering the unity of integration. However, all kinds of "wanting more" and mainly, realizing more beyond the current frameworks of the founding treaties, would unavoidably lead to the development of a two- or multi-tier integration, through the permanent institutionalization of the isolation of the eurozone, which goes against the treaty, or through another solution.

This is how the issue of the legal solutions of differentiation which seems to be one of technical nature leads to the fundamental questions of the debate on the future of Euro-

11 White Paper on the Future of Europe, Reflections and Scenarios for the EU 27 by 2025, European Commission COM 2017(2025) of 1 March, 2017.

12 Péter L. Balázs, 'Európai forgatókönyvek, Magyarország stratégiája' (European Scenarios: Hungary's Strategy), in: *Károli Tanulmányok a gazdaság- és társadalomtudományok köréből I.* (Károli Studies on Economic and Social Sciences I.), Budapest, 2017.

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pean integration. This is how a necessary, even useful, as the case may be, legal technique may become such a toxic element which jeopardizes the successful progress of the entire process. But the debate on the future of the Union has begun, the break is over, the confrontation of the different approaches and views has commenced. In this debate, the key role should be played by the creation of a balance between the historical meaning of the entire project and its strategic goals, as well as an equilibrium between the individual goals and dimensions. But as the integration process has been realized through institutions and the norms created by these institutions from the outset and this will remain so in the future too, despite all the doubts and trendy criticisms of the role of these institutions, special attention should be paid to the operation of these institutions and the applied legal techniques.

As the debate has kicked off, what is more, we are already in the middle of it, let us see a few proposals by way of a summary of the above.

1. The cultural anthropological basis of European integration is the European identity, without the exploration, recognition and acceptance of which there is no, and there will be no real unity, no genuine economic and political integration. It is the cultural-civilization dimension that should be put in the focus of the further building of Europe. This contradicts neither the unconditional respect for universal values, nor the fact that we do not all see the individual content elements of European identity and their serial order in the same way. We must respect and accept the diversity of European identity and all the values that are important to others. Without strengthening the European identity built on the cultural heritage that was passed down to us from our past, with which the majority of European citizens can identify, not even the most perfect economic, institutional and legal solutions will guarantee that we can give a more successful and more unified Europe to the upcoming generations.
2. The strategic goals should be precisely defined, with a new approach but within the current constitutional frameworks, *i.e.* without the amendment of the founding treaties. This means, among others, respecting the duty of sincere cooperation, subsidiarity, national and constitutional identities, as well as the competences of the member states, *i.e.* the political units of integration.
3. From this follows the highlighting of those areas in which the Union may and should progress, given the external and internal conditions and possibilities at any time. First of all, such areas include the strengthening of external action, foreign policy, security and defense policy, increasing the economic and commercial role of the European Union, or using the opportunity provided by the evolution of international trade policy. Unified action is especially important in these fields, as the application of the differentiation techniques may only take place exceptionally and in such a case if this strengthens the external action (PESCO). Furthermore, progress may and should be made in the area of the further building and completion of the single internal market.

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The further development of the banking union, the building of the capital markets union and the digital union are some of the important and urgent tasks but the full enforcement of the four freedoms and the gradual equalization of the differences in the levels of economic development are also indispensable elements of the strengthening of the single internal market. And the situation is that it is impossible to do the latter without a strong cohesion policy that supports convergence and which is supplied with adequate resources.

4. It is a precondition to the strengthening of external action and making the internal single market complete that by fully observing the provisions set out in the founding treaties, it is always the differentiation technique which poses the lowest risk for the single system of integration and its operation, *i.e.* the one which involves the lowest risk of fragmentation that should be given preference to. This technique is strengthened cooperation. All other solutions may involve the formation of permanent dividing lines between the member states. The application of means out of contract is the least preferred method. On the other hand, strengthened cooperation is also excluded from the important areas of external action (the common trade policy is an exclusive competence of the Union), and, as we have seen, the functioning of the internal market cannot be adversely affected by a strengthened cooperation either.
5. We do not only need a new approach but also, a new method in all dimensions of integration. The possibilities of the technocratic, (neo)functional methods have been depleted. This method was outstandingly successful in the field of economic integration, it acted as a self-stimulating mechanism but it may easily transform into a self-destructive mechanism. Unbridled centralization should be stopped, the regulatory spiral should be left. Rather than having detailed regulations in place, it would make more sense to set the goals and leave it up to the member states to select the way and method of achieving the goals. This, at the same time, would also be in harmony with the goal of doing less but doing it more efficiently.
6. In the current situation, the most important goal is to prevent the realization of the two- or multi-tier integration structure, in whatever area and with whatever method attempts are made to realize this political goal. Within the Union, there is no single geographical, political or cultural borderline for eternity which would in any way legitimize, and at the same time, make functionable, an integration that is built on different levels.