

Chapter 6

Variations in the European Union



6.1 Introduction

The previous chapter discussed the existing forms of variation within the internal market. The remainder of this book discusses forms of variation that fall both within and outside the current framework of European Union Treaty law. This chapter connects the various dots to reveal a broad range of variation options.

6.2 Three Dimensions of Variation

Variation has three dimensions, associated with: (1) policy content, (2) decision methodology, and (3) the Member States. Based on these dimensions, the options for variation can best be presented as a three-dimensional continuum whereby the degree of uniformity in each dimension runs from minimum to maximum.

Variation in policy content

The first dimension concerns the scope for variation within the content of policy, i.e. the leeway that each Member State has to interpret how certain public interests, objectives and values are to be achieved. This means that Member States can have different priorities and interpretations but continue to participate in a political form of solidarity. More specifically, they are given more policy discretion in directives involving minimum harmonisation or open standards. Such directives employ concepts that allow the Member States to shape national policy as they see fit. This form of variation also includes European 'guidelines' established within the OMC, which afford the Member States maximum autonomy in their interpretation of policy. At the other extreme are regulations that limit national policy discretion. The chapter on the internal market offers examples of existing forms of variation in that specific policy domain.

The room for manoeuvre created in this manner prevents the tensions caused by diverging aims from resulting in opt-outs, for example. *Variation in policy content* makes it possible to incorporate the Member States' diverse motivations into the process of European integration without compromising unity. The process of policymaking must then reveal, time and again, how much room for manoeuvre there actually is.

Trade-offs are also possible within a policy area. One example of this is 'flexible solidarity' within the context of migration, asylum and borders. Variation in this domain is not meant to ignore the basic principle of solidarity, but it does mean paying greater attention to differences between countries. This means that those regions where public support and opportunities for personal development are greatest (Northwest Europe, the 'destination countries') can expand their asylum policies. The impossibility of full harmonisation does not mean that solidarity cannot be achieved in other ways. Allowing countries to buy their way out of quota obligations with larger financial contributions is not the only alternative. In the future, transit countries in the East and South could, perhaps, play a larger role in circular migration, once their economic structures and employment rates so permit.

Variation in the decision-making method

This dimension concerns the way in which policy and legislative decisions must be taken: in an intergovernmental context, via the Community method, or perhaps even at supranational level.

Within an intergovernmental framework, there is no interference from institutions to which the cooperating states are subordinate; competences are not transferred and are retained at the national level at all times. Decision-making thus requires unanimity. In effect, states have the right to veto policy and legislation, guaranteeing that their policy autonomy is preserved. The open method of coordination (OMC), which does not involve legislative competences and in which decisions are taken on the basis of unanimity, is one example of this form of variation.

Policies and legislation developed according to the Community method apply equally to all participating Member States and are based on (1) supranational institutions as initiators and guardians of the Treaty order, (2) qualified majority voting in the Council and (3) co-decision-making by the European Parliament (ordinary legislative procedure). The difference between this and a fully supranational decision-making framework is that, in the Community method, qualified majority voting makes it possible to form blocking minorities, for example in the Council. Unlike in the supranational method, a simple majority is not enough to reach a decision.

Variation in membership/members

The third dimension concerns membership. If the Member States' 'motivations for collective action' differ too much to fulfil public tasks by means of the Community method or *variation in policy content*, the Member States can switch to the most extreme form of variation, i.e. *variation in membership*. In this form of variation,

the Member States do not see sufficient reason to undertake collective action and must pursue a different type of relationship with one another. Examples include opt-outs, establishing lead groups beyond the EU structures, transition periods, and close cooperation.

Figure 6.1 shows the three dimensions of variation in the shape of a cube. The X-axis represents variations in decision-making, with the degree of uniformity in decision-making rising from intergovernmental to supranational. The Y-axis represents variations in EU membership. The minimum form of integration here is the ‘lead group’ and the maximum form is ‘all EU Member States’, with opt-outs positioned midway between the two. Finally, the Z-axis represents variation in policy content. Examples include ‘policy guidelines’ within the OMC or ‘trade-offs’ within the same policy domain as a minimum form of integration. The maximum form is far-reaching harmonisation (e.g. by means of regulations). In between these two extremes, the Member States have more or less latitude to develop their own policy within EU directives and other frameworks that are more or less specific. We illustrate the variation options by positioning a number of specific legislative and policy instruments within the figure.

For the Union to utilise the variation options in actual practice, it must keep an open mind to the opportunities afforded by the existing Treaties by (1) considering the relationship between motivations for collective action and the possible institutional orders, and thus (2) relinquishing its fixation on the Community method and the resulting compulsion to rely on certain motivations for collective action.

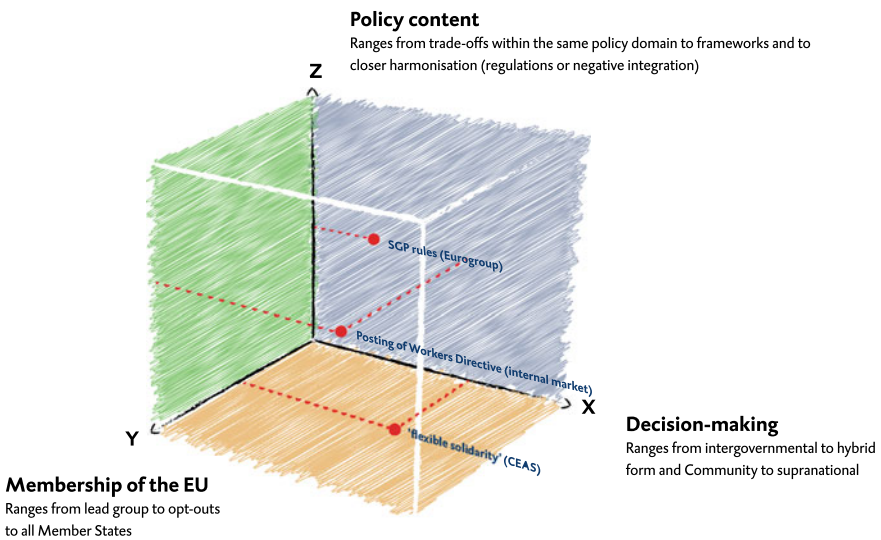


Fig. 6.1 A three-dimensional representation of variation options in the EU

6.3 A Guideline to Variation

The uniform model of integration—in which all Member States have the same rights and obligations—has dominated the integration process, and in particular the *thinking* about that process, since the end of the Second World War. The predominance of this model is largely due to the expectation that a single European market would produce mutual benefits in terms of efficiency, growth and jobs. The fact that these expectations were largely fulfilled in the decades following the Second World War, but also the fear of being deprived of the benefits, boosted the dominance of the uniformity model even more. Nevertheless, from the outset European integration has also involved all sorts of variation in policy implementation, often based on and firmly anchored in the principle of subsidiarity, and variation in membership. Gradually, the different forms of variation have developed into instruments that can be used to find a solution to the central problem of collective action, which we can describe as follows: although the outcome of cooperation is clearly beneficial for all the participating states, one or more parties still impede such cooperation because they consider their individual advantage more important than the collective advantage. This is a constant struggle within the context of European integration.

Relinquishing the fixation on greater uniformity also offers new opportunities for a discussion on the future of European integration that does more justice to reality. This new approach makes it possible to get beyond the simplified debate of national state versus federation. This stylised juxtaposition, while simplifying the debate, does not do enough justice to the multifaceted reality of cooperation, integration and interdependence. Nevertheless, it is a juxtaposition that has dominated the debate on the future of European integration, as if that debate ultimately involved a stark choice between one ideal or another, and as if it were the institutional order of cooperation alone that defined the reality of Europe. Both assumptions hamper the pursuit of real solutions, something that is perfectly possible within the existing frameworks.

Variation is not equally possible in all policy domains. Variation can create room for manoeuvre, but it also has its limitations. There are also different forms and degrees of variation, as the introduction to this chapter makes clear. We can now use the analysis framework constructed in the previous chapters and the variation options in the internal market that we have identified to produce a guideline that prioritises variation in policy content in European integration, simultaneously linking it to variation in membership/members, which can serve as a remedy in extreme cases. The guideline for applying variation is as follows:

If the Member States' 'motivations for collective action' differ too much to fulfil European public tasks according to the existing variation options permitted under the Treaties and the Union's institutional order, i.e. variation in policy content or trade-offs in a policy domain, the Member States can switch to the most extreme form of variation, i.e. variation in membership/members.

Applying this guideline may produce new insights, and in particular lead to a reappraisal of the existing diversity in the EU. That is already a step forward, if only because, in many respects, diversity has been at the heart of the process of European integration in recent decades. Nevertheless, such diversity has not always been sufficiently acknowledged. For us, this is the most important reason for recommending that the matrix presented in the previous chapters be used to analyse the tasks of the European Union. Doing so makes it possible to identify which institutional order and which grounds for collective action should be applied. In some instances, this is likely to lead to a fundamental review of the choices that have emerged from the negotiation process; in others, it will lead to improvements and firmer arguments. These analyses heighten the value of variation and make its implementation more precise.

In addition to variation within the European internal market as described in the previous chapter, there are various other forms of variation in today's EU. For example, better-known and more striking forms of variation in membership/members include the Schengen area, the euro area and the opt-outs of EU Member States in various policy domains. There are, however, also many lesser-known alliances within the EU that illustrate variation in membership/members, such as EU Battlegroups,¹ the G6 meetings on law enforcement and security matters,² the 'EU big three'³ or the target interbank payment system.⁴

The approach proposed here not only offers improvements in governance. It is vital for politicians to abandon the old habit of presenting European decision-making as an obstacle that must be removed purely in the national interest. A proper analysis of the interests at stake will also allow politicians and others involved in decision-making processes to explain variation in a different and more convincing way, by arguing that, in the light of the EU's internal socio-economic and socio-cultural differences, variation in policy content and in membership/members is and can be useful and in the interests of both the Member State and the EU as a whole.

In the following two sections, we delve deeper into where variation in membership/members stands (as the most extreme form of variation) and make suggestions for dealing more constructively with it than has hitherto been the case.

6.4 Variation in Membership/Members

Variation in membership/members is by no means a new phenomenon in European integration. Even before the Treaty of Amsterdam laid the foundations for 'enhanced cooperation', there were ways of downplaying uniformity in European policymaking. When the European Communities were established, it was stipulated that the Treaty provisions would not preclude the existence or completion of the regional unions between Belgium and Luxembourg or the Benelux (now Article 350 TFEU). Territorial clauses allow variation in the conditions under which the Treaties are applied in the 'outermost regions' of the Member States and some other

territories. This variation in membership/members has also existed since the founding of the Communities, now provided for under Article 349 TFEU.

The main variation in membership/members can be found in the Title on Economic and Monetary Policy (Title VIII of Part Three of the TFEU), which distinguishes between Member States that do and do not have the euro as their currency. The financial and economic crisis and the impending financial collapse of some euro-area Member States led to a system of separate treaties and decision-making structures being developed on that basis.⁵ The inclusion of transitional provisions upon the accession of new Member States has always been established practice, although such derogations from the *acquis* have become much more pronounced in the more recent accessions.

There are other examples of variation in membership/members, including the limited participation of some states in the cooperation between police and judicial authorities in the area of freedom, security and justice (Title V). Two Member States (Poland and the United Kingdom) have even been granted a special status with regard to the judicial enforcement of the Charter of Fundamental Rights of the European Union,⁶ an exception that is at odds with the fundamental values of the Union. Article 31 TEU allows a Member State to abstain from applying a decision within the context of the Common Foreign and Security Policy. Article 42(2), second paragraph, accepts variations within the context of the Common Security and Defence Policy depending on whether or not EU Member States belong to NATO. The execution of military missions may be entrusted to a group of Member States (Article 42(5) and Article 44). Article 42(6) and Article 46 permit a group of Member States to establish permanent structured military cooperation with one another.

The picture that emerges is further defined by the fact that some non-Member States participate in elements of EU policy and the associated legal rules. We illustrate this in Fig. 6.2.

The question, then, is not so much *whether* variation should be permitted to ensure that the European project can continue successfully, but rather *how* variation can best be used to revitalise the European Union in a meaningful and more persuasive manner. That may be in existing policy domains, whenever uniformity appears to breed too much tension, or in new areas of cooperation.

There are two routes to more variation within the existing structures of the EU.⁷ One is the enhanced cooperation procedure, put in place by the Treaty of Amsterdam (1997) and revised several times since then. It is now set out in Title IV of the TEU. Member States may establish enhanced cooperation within the framework of the Union's non-exclusive competences, making use of its institutions. The other route involves concluding separate agreements which, although they operate outside European Union framework, are nevertheless linked to it, such as the additional treaties on monetary cooperation. The Prüm Convention on combating terrorism, cross-border crime and illegal migration, which was concluded by a number of Member States in 2005, was also adopted and remained entirely outside the Union framework until 2008, when it was partially subsumed into EU law.

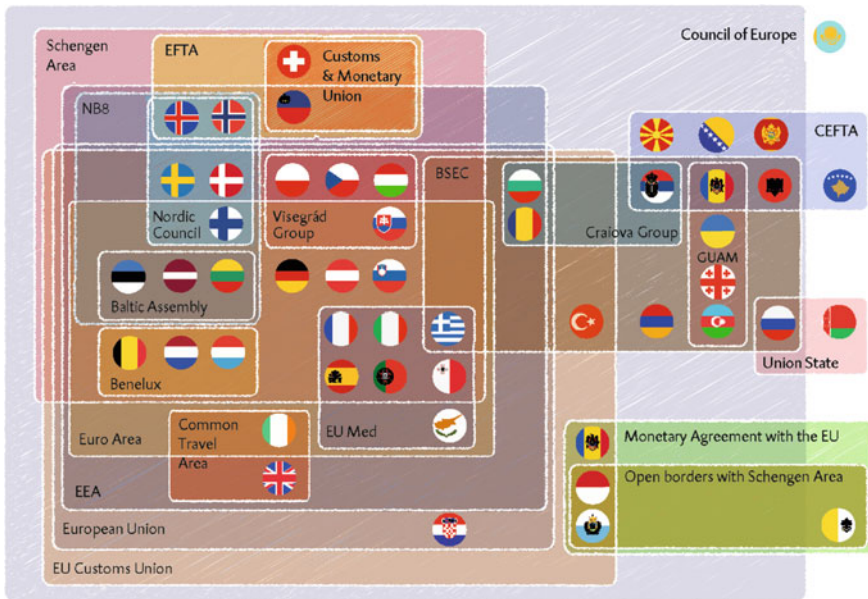


Fig. 6.2 European variation options in membership

What is notable about the existing variation in membership/members is that it usually arises from differences of opinion or differences in the speed of acceptance. What then follows can be described as a form of ‘learning by doing’ whereby the initial cooperation, which was not binding on all Member States, frequently leads to closer and broader cooperation at a later stage, often within the normal framework of the Union (with possible opt-outs). Examples include the Schengen treaties, which were subsequently integrated into the main body of EU law under the Treaty of Amsterdam.

6.5 Assessing the Desirability of Variation in Membership/Members

As described above, variation in membership/members is an outcome of the decision-making process. That is not the same as variation as a conscious choice. Our analyses in Chaps. 4–6 and the guidelines provided in this chapter can be used to develop variation ‘as a conscious choice’. Such analyses can also provide building blocks for the necessary political arguments. The scope that these analyses allow for changes over time is crucial, since circumstances and opinions are subject to constant change. Approaching variation in this way makes it more proactive and, above all, more conscious in nature. Although the free movement of persons

implied borders that could not be effectively closed, the 1980s saw a greater need for more cross-border police and judicial cooperation, including cross-border ‘hot pursuit’. Similarly, the Member States whose currency is the euro are more likely to feel the need to develop common socio-economic policies. In both cases, the dynamic nature of the policy itself made it possible to avoid the pitfall of untenable institutional uniformity and come up with complicated solutions.

Variation in membership/members should imply that the participants embark on cooperation—in terms of the speed or the objectives of a certain European policy—not to circumvent stagnating decision-making procedures but rather to do justice to real differences between Member States. Variation in membership/members therefore needs to be addressed in the policy preparation stage. This will then lead to formal and informal arrangements, either within or outside the Union framework (variation in membership and accession as well as different types of economic, trade and security relationships), giving the actors on the EU stage different rights, obligations and perspectives on the integration process.

Member States may introduce some form of variation in membership/members for a variety of reasons, for example: (1) to represent certain (geopolitical) interests, (2) for its symbolic effect, (3) to establish a relationship with a certain region, or (4) when widening the EU in terms of Member States, cultures, backgrounds and wishes, to ensure that deepening also takes place. Such political motivations are not necessarily consistent with the rationale—as derived from the motivations for collective action (logic of appropriateness and logic of consequences)—for limiting the remit of a particular policy domain or a particular piece of legislation. Further variation in membership/members will therefore also need to be supported by substantive arguments that are consistent with those put forward for other policy domains. The most explicit and well-thought-out argument favouring variation in membership/members dates from 1994 and comes from the German politicians Wolfgang Schäuble and Karl Lamers, who at the time were the leader and the European Affairs spokesperson of the CDU parliamentary group in the Bundestag. Their proposal soon vanished from view, including in the Netherlands, but it has remained extremely relevant to this day,⁸ so much so, in fact, that it is worth briefly reviewing the main points (see Box 6.1).

Box 6.1. The Schäuble-Lamers Paper

Wolfgang Schäuble and Karl Lamers, at that time the leader and European Affairs spokesperson of the CDU parliamentary group in the German Bundestag, penned their paper because they believed that the process of European integration had arrived at a ‘critical point’ in 1994. In their diagnosis, ‘[i]f the causes of the current dangerous trend cannot be addressed in the next two to four years, the EU will end up as little more than ... a sophisticated free trade area, incapable of tackling the fundamental problems of European societies’. What causes and problems were Schäuble and Lamers referring to?

To summarise, they identified three main problems. First, there was the problem of enlargement. The EU had grown from six Member States, the founders of the integration process, to twelve when they wrote their paper, and would welcome many more if former EFTA countries Sweden, Austria and Finland were to join (which they did in 1995) and if former Warsaw Pact countries came to be viewed as potential members—something that had become increasingly plausible in 1994. Schäuble and Lamers believed that the existing EU institutions were not equipped to handle this.

Schäuble and Lamers were not opposed to EU enlargement, quite the opposite in fact. But they had noted that this process aggravated a second problem. The growing number of members had led to more divergence between the Member States' interests, a logical result of the increasing gap between the various economies in the EU. Moreover, the diverse interests and strategic visions entering the EU in this way threatened to outweigh the opportunities for compromise—the very essence of post-war European integration. This would be a major risk in the long run. Third, Schäuble and Lamers saw a dangerous trend towards what they referred to as 'regressive nationalism'. This longing for the old nation-state was growing, slowly but surely, fed by mounting fears of prosperity loss and declining well-being. These fears were kindled by the erosion of old certainties. Unemployment, a shrinking welfare state and immigration had fuelled a defensive reflex to withdraw to within the borders of the national state. This also worried Schäuble and Lamers. After all, that reflex was driven by denial of the problems of the post-Cold War era and globalisation, potentially making these problems impossible to solve.

In this context of fresh problems, the EU could only survive if the heart of the new, extended integration process remained stable. The centrifugal forces that had been unleashed could only be contained if they were counterbalanced by a far-reaching deepening of European integration. According to Schäuble and Lamers, that should have been top priority for Germany and Europe because it was the only way to exorcise the ghosts of Europe's dark past after the Cold War as well. But the big question was: how to go about it? How should a widening EU be stabilised?

Schäuble and Lamers' plan was called '*die weitere Festigung des Kerns*', a 'core Europe'. That core was to be built around a Franco-German axis, the centre of successful reconstruction during the Cold War, i.e. Western Europe.

It should be noted that this proposal was far from self-evident in 1994. After all, Western Europe's exceptional position was rapidly dismantled in the 1990s in favour of European integration. Schäuble and Lamers argued in favour of preserving the essentials of that successful Western Europe, however. The core Europe they had in mind consisted of five countries: France, Germany, the Netherlands, Belgium and Luxembourg.

A crucial point for Schäuble and Lamers was that their core Europe was merely a means to saving the EU, not an end in itself. They believed that a

core Europe was the best way to reduce the dangerous tension that had arisen between EU enlargement on the one hand and deeper integration through the currency union on the other. Only a strong core Europe could show that widening and deepening could occur simultaneously.

The members of the core Europe that they envisaged were therefore the Member States that had not only demonstrated the political will to integrate but could also do so within the framework of the monetary union agreed in the Maastricht Treaty—the latter being the decisive factor.

After all, in the post-‘Maastricht’ EU, deepening integration meant economic and monetary integration. Italy was therefore not part of Schäuble and Lamers’ core, let alone Greece. Only the five countries mentioned could actually attain the far-reaching level of European cooperation in the relevant socio-economic, budgetary and fiscal policy domains deemed necessary for a robust currency union. And only this lead group of countries was economically fit enough and had the political will to ‘Europeanise’ the necessary democratic control and ensure that the future currency union would remain healthy through these channels (competitiveness, political will and democratic control).⁹

Schäuble and Lamers timed their paper so that their lead group scenario could be incorporated into the Treaty texts as part of the negotiations leading to the Amsterdam Treaty (1997). The key point was that a lead group willing and able to embark on deeper integration based on hard criteria for a healthy economy should not have its ambitions vetoed by other EU members.

The Schäuble-Lamers plan was quickly shot down in the run-up to ‘Amsterdam’. The Italians were angered and insulted and the French were suspicious. One of the cardinal problems was that the plan made too blatant a distinction between ‘us’ and ‘them’. Critics openly questioned the motives of the German ‘European’ authors. Did their proposals not, after all, promote the very fragmentation that they claimed to want to avoid? No one therefore heard their most important message, which Lamers summed up years later as ‘a little more Europe isn’t possible’.

6.6 Conclusion: Dealing Proactively with Variation

The EU’s current situation forces us to rethink existing variation options and to deal more consciously and proactively with them. In the forms of variation proposed above, the focus is mainly on variation in policy content, but variation in membership/members is also certainly possible. What is important here is that making more conscious use of variation can contribute to a greater sense of control and offer an alternative to relying on the ‘binding effect’ of the Community method on *all* the Member States and the associated convergence. This has been

underscored by the European Commission's White Paper and the follow-up Franco-German initiatives (see Chap. 2), which put the option of a 'multi-speed Europe' back on the European political agenda.

There are also objections to variation, undeniably so. Variation can be a complication. Embracing it too quickly and without the necessary critical examination will not restore the credibility of the European project, and in fact could even damage it. If it does not seem to matter who does or does not commit to European policy, why is European policy important at all? Conditions must therefore be set for closer cooperation, as well as for opt-outs and forms of cooperation created outside the Union framework, to prevent the EU from becoming an à la carte menu. The following chapters will examine which conditions may apply in which situations.

Variation must be less 'opportunistic' than it has been so far. Instead, it should be reassessed in line with the EU policy domains that can be deduced from the Treaties. Not all Member States should be required to accept the EU's intervention in all these domains. Where they do, their legal order can be integrated using the Community method, as before, ensuring that no hybrid situations arise for every directive, regulation or policy measure.

Focusing too narrowly on the details of variation and the technique used—on the 'how'—may distract from the question of 'why'. That is why we proposed a different approach in the previous chapters, one that responds to the need for variation but explicitly interprets it in terms of content. That interpretation has everything to do with the need to reassess, to consider the EU's public tasks and how it fulfils them within the context of public interests, objectives and values.

The following chapters examine the options for variation by considering a number of topical issues: Economic and Monetary Union (EMU) (Chap. 7) and migration, asylum and border control (Chap. 8). Chapters 7 and 8 look in-depth at variation and the different forms that it can take by examining its existing pluriform nature and its potential. Our focus is therefore on both the *form* of cooperation (who cooperates on what, and in what way) and the *content* of the variation: how does it seek to balance the various public interests, what is the relationship between fundamental values and public goods such as stability and security. These chapters are meant to illustrate the main arguments of this book.

Notes

1. EU Battlegroups are rapid response units within the armed forces of the EU. They are made up of battalion-sized forces of about 1500 military personnel. Many of the Battlegroups are multinational, with military personnel being drawn from different EU Member States. Larger Member States sometimes form their own Battlegroups, while smaller Member States form groups together. Four non-EU Member States participate: Norway and Turkey (NATO members) and Macedonia and Ukraine (non-NATO countries). EU Member States Denmark and Malta do not currently participate in a Battlegroup.

2. The Group of Six (G6) is an unofficial group formed by the six largest EU Member States that deals with counter-terrorism, immigration policy and law enforcement. The G6 was established in May 2003 as the G5, initially made up of France, Spain, the United Kingdom, Germany and Italy. Poland joined the group, whose members are the Ministers of Foreign Affairs, in 2006.
3. The 'EU big three' refers to the informal partnerships within the European defence and security policy between the three most powerful EU Member States, the UK, France and Germany, which have jumped into fill a leadership void. See C. Hill, in *The EU presence in International Organizations*, Blavoukos, S., & Bourantonis, D. (2011). Routledge.
4. TARGET (Trans-European Automated Real-time Gross Settlement Express Transfer) was a European interbank payment system, replaced in November 2007 by TARGET2, a uniform payment system run by the European System of Central Banks. Target was established to facilitate interbank payments between the various participants in the Economic and Monetary Union (EMU). International payments between commercial banks are facilitated by the national central banks, with the European Central Bank (ECB) being given the role of clearing house.
5. Fabbri et al. (2015).
6. The provisions of this Protocol read as follows:

Article 1

1. The Charter does not extend the ability of the Court of Justice of the European Union, or any court or tribunal of Poland or of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms.
2. In particular, and for the avoidance of doubt, nothing in Title IV of the Charter creates justiciable rights applicable to Poland or the United Kingdom except in so far as Poland or the United Kingdom has provided for such rights in its national law.

Article 2

To the extent that a provision of the Charter refers to national laws and practices, it shall only apply to Poland or the United Kingdom to the extent that the rights or principles that it contains are recognised in the law or practices of Poland or of the United Kingdom.

7. For a complete overview of the most important forms of variation in membership within the current Treaty frameworks, see De Witte (2018).
8. On the eve of founding the European Convention to draft a Constitution, the debate on lead groups and differentiation resurfaced. At the time, prominent voices (Fischer, Chirac, Delors) advocated setting up a permanent lead group. Nevertheless, the Laeken Declaration and the European Convention

focused on a new common framework for all in an attempt to avoid the ‘second-class Member State’ label.

9. It is no coincidence that the idea of a core Europe came from the German Christian Democrats. The idea, as elaborated by Schäuble and Lamers, harkens back to the ‘ordoliberal’ approach to economic integration. The proper functioning of the market is central to that approach. This means, first and foremost, that integration must be supported by the economies involved (which should grow more similar) and that it must happen spontaneously, without the need for a centrist bureaucracy of redistribution. In other words, economic integration is like a chain. It can only be sustainable if the links are strong enough, social security is adequate, and the individual economies are healthy enough. Each link is responsible for its own prosperity and well-being, something it must earn by means of price stability, economic prudence and a hard currency (monitored by an independent central bank). Integration can be a tremendous help but it can also frustrate these efforts, for example if it turns out to be a stepping stone to common debt or debt union because the differences between the integrating economies are too large and competition in the market is too fierce for some of the members. While this ordoliberal-inspired logic has influenced European integration, it has never been absorbed entirely, not even in the euro area.

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