

FINALITÉ REVISITED: ON THE DYNAMICS OF SUPRANATIONAL INTEGRATEDNESS



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Abstract

Interpreting European supranationality as a long-standing, highly institutionalised practice of multilevel liberal communitarianism, the present contribution reflects on the current situation and future prospects of the EU. Its tentative diagnosis is that there may no longer be any clear directionality, while a sustained dynamism persists. The contribution hence calls for a terminological de-rigidification to better grasp the current set-up, and it proposes the concept of institutional fluidity as a potential desideratum for a new constitutional balance.

Keywords: European integration, finalité, liberal communitarianism, terminological de-rigidification, institutional fluidity.

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*‘Getting the boundaries right, not only in geographic but also in functional terms, is enormously difficult (...)’*¹

1. Liberal communitarianism for a multilevel polity

There are various reasons why the quote at the top of this paper seemed a suitable way to begin. It reads like a diagnosis which might well have been the starting point of the working group whose deliberations have resulted in the present book, or rather like a defeatist summary of its findings. In fact, the quote may easily qualify as a timeless companion to European integration, seeing as any of the recurrent debates on its *finalité*, which have been present since at least the 1960s, can be read as a variation on this theme.

The quote’s original context, however, is different. It has been taken from an article by Michael Walzer, a leading communitarian thinker. One may consider it a symptom of this orientation that he speaks of boundaries, emphasising, thus, the inclusive, community-enhancing dimension of what would otherwise, and more commonly, be referred to as borders.

The article was published in 1997, and it provides a general and mostly conceptual reflection on “Statehood and Toleration in a Multicultural World”. There is no mention of Europe in his article, and we have little indication² as to whether its US-based author was aware of how much a case in point European integration had for long been at the time of publication – and still was, especially in the post-Maastricht years when the functional boundaries had just been redrawn, and when the geographic ones were about to be. This is unfortunate, since a Walzerian perspective could prove fruitful in a debate about the development of the European Union (EU).

“Liberal communitarianism”³ is a term which has become an established label for Walzer’s approach and that of some related thinkers. Their quest is to set limits to the inherent universalistic (and by implication atomistic) tendency of liberalism,⁴ to emphasise the value of community (mainly as a precondition of identity), and to calibrate the antagonism between the two concepts.⁵ “Toleration” is hence a key concept in Walzer’s thinking.⁶

1 Walzer, 1997b, p. 174.

2 There is a recognition of Europe as a complicated case in this regard, in Walzer, 1997a, pp. 48 et seq.; however, he does not pursue this in depth.

3 For an overview (with a critical ambition), see Watson, 1999, pp. 211 et seq.

4 For a discussion of Walzer’s view on that tendency, see Graser, 2008, pp. 131 et seq., 316.

5 For a discussion of that antagonism, see, e.g., Kymlicka, 1988, pp. 181 et seq.

6 For a focused treatment of the relevance of this concept in Walzerian thinking, see his own short volume entitled “On Toleration”, Walzer, 1997a.

The same is true, as can be seen above, for “boundaries”.⁷ And mind the plural form! The multiplicity of coexisting associations is a central premise for Walzer, undoubtedly in empirical terms, but perhaps normatively as well.

However, the kind of plurality that has received most attention in that approach is different from the one we are dealing with here. Liberal communitarianism is typically interested in coexisting affiliations based on kinship, creed, or culture – next to nationality, of course. However, calibrating the competing political affiliations within a multilevel polity is not a prominent theme of it. It has developed as a theory of multiculturalism, not of supranationalism.

We cannot, accordingly, expect this literature to provide any specific lessons for the design of such a polity. Nevertheless, it can offer some prompts for our analysis. This may, first and foremost, apply to the concept of “liberal communitarianism” itself, and the inherent tension it encapsulates. Do its two components not seem, in many ways, to reflect the dilemma which a supranational polity needs to manage? Moreover, is it not the appropriate extent of “toleration” on either side that is the key matter to be settled when drawing the “right boundaries”?⁸

The present article seeks to elaborate on these questions within the specific setting of the EU. It should be borne in mind, however, that it is not about any solutions to the above dilemma, but rather focusing on its management and the intricacies involved in it. This is because, firstly, “solving a dilemma” might be a conceptually problematic notion to begin with; secondly, because in the present context, there is certainly nothing that could plausibly be labelled “a solution” while being at least remotely realistic; and thirdly, because the EU might indeed best be understood as the institutionalisation of an unresolvable tension. We shall return to this idea towards the end of this contribution.⁹

7 On the relevance of this concept see, in particular, Walzer, 1981, pp. 1 et seq. The text is reprinted as chapter 2 of ‘Spheres of Justice: A Defense of Pluralism and Equality’, New York, 1983, which is among Walzer’s most influential works. For a more recent appraisal of the relevance of the concept see Miller, 2013, pp. 142 et seq.

8 In a similar context, albeit 25 years ago, Weiler has elaborated on this idea in a response to Fischer, who at the time was the German Minister of Foreign Affairs. Fischer had presented his vision for a new, federal constitution for the EU in his widely debated speech ‘Vom Staatenbund zur Föderation: Gedanken über die Finalität der europäischen Integration’, delivered at the Humboldt University, Berlin, on May 12, 2000, reprinted and translated in Joerges and Mény and Weiler, 2000, pp. 5 et seq. (The volume contains a variety of prominent voices which, the different historical context notwithstanding, in many respects seem still relevant to the present debate. Weiler responded in his contribution within that volume by praising and elaborating on what he calls ‘one of Europe’s most important constitutional innovations, the Principle of Constitutional Tolerance’ (capitalization in the original); cf. Weiler, 2000, pp. 244 et seq. The present article owes much to that contribution (and to its author).

9 See in particular section 7 and 10 (at their respective ends).

2. A questioned community

Why Europe? Or, to frame the question more precisely: What is European integration good for? There have been quite a few answers to this question. However, before we have a closer look at them, it may be worth pausing for a moment and noting one important assumption already implied in that question.

Unlike many nation states, the EU is commonly expected to be justifiable in functional terms. It does not typically feature as an existential given, and understandably so. The EU is an artefact of political creation by pre-existing nation states. Hence it would appear to be a matter of choice, rather than of historical destiny.

This is not to say that nation states were not artefacts as well, the “destinedness” of which has typically emerged (or been crafted) only post-hoc in performative historical narratives.¹⁰ However, this does not render nation states a phenomenon any less “real”, nor their difference to the EU any less pronounced.

That this supranational entity may, in our perception, turn from an option into a given seems unrealistic at present, and a distant trajectory at best. So far, the EU has always needed to have a *raison d'être*, and ideally also to have it close to hand as an answer to the euroscepticism which has been a permanent companion from its early days.¹¹ More precisely, though, it has never been just one answer, but many different ones, with varying weight depending on time, space, and the actual addressee.

3. Raisons d'être

So, again: Why Europe? Notoriously, in the aftermath of World War II, the strongest motive to justify the project of integrating (core, continental and de facto only Western) Europe was the preservation of peace.¹² Economic considerations were present in that initial period, too: facilitating the reconstruction of the war-ridden countries was an evident desideratum per se. Also, enhancing the economic interdependence of the involved nations states seemed the most promising means to the end of preventing any future military confrontation between them.

10 This observation has been made frequently; for an influential account, see Anderson, 1983.

11 The term “euroscepticism” refers to a political position which is opposed to European integration – thus the definition by McEvoy, 2024a, who claims that it has been ‘a fixture of European politics for decades’ and presents recent data on the issue. The attitude seems to predate the term considerably, as the latter is said to have been coined only in 1985 by The Times newspaper; Alibert, 2015.

12 The “classical reference” is the Schumann Declaration, proposing the creation of a European Coal and Steel Community, and presented by French Foreign Minister Robert Schuman on May 9, 1950, cf. Schumann, 1950. See, most notably, the following quote: ‘... this proposal will lead to the realization of the first concrete foundation of a European federation indispensable to the preservation of peace’.

Soon, economics would begin to move to centre stage,¹³ based on the expectation of increasing wealth in a single common, i.e. post-protectionist European market. Concurrently, albeit a bit slower maybe, the preservation of peace as a rationale lost traction as war became an increasingly remote scenario. Pinpointing these developments to an exact period is difficult and beyond the ambition of the present analysis. However, we may safely assume that by the late 1970s, peace preservation was not a function by reference to which European integration could forcefully be promoted, whereas increasing prosperity would no doubt seem plausible.

Similarly, as the common market was approaching its completion in the late 1980s,¹⁴ the economic rationale called for a renewal. Extrapolating its development from an internal perspective, it was almost self-suggesting to embark upon further Europeanisation, thereby pushing economic integration yet a step further by working towards a currency union, and, more ground-breaking still, to expand upon the political dimension and transform the EU into a platform for effective policymaking in various new sectors. There is, no doubt, also some plausibility to this latter aspect. There are policy areas that would seem almost certain to need political responses on a level beyond those of national governments. One may think of the challenges of environmental protection or of migration management that certainly transcend national borders. In foreign policy, too, it would seem, at the very least, helpful to join forces if the Member States would want to be heard in the global arena. Hence there were new visions for European integration that could complement the previous ones.

At the same time, however, the picture became more diffuse. With the fall of the Iron Curtain, geopolitics would resume a more prominent role in European integration. Next to a further deepening of the EU, its territorial expansion became a priority. Of the next Member States to join the EU, the vast majority had been contained within the sphere of the Soviet hegemony. One may have thus hoped to achieve a new stabilising framework for the European continent, and more sustainably so than with the previous antagonistic one based on mutual threats between East and West. Looking back now, in the third year of the war between Russia and Ukraine, any

13 See, for example, the address given by Walter Hallstein, first President of the Commission of the European Economic Community, in Milan on Dec. 13, 1958; cf. Hallstein, 1958. At that point, the economic rationale had already become so prominent that Hallstein dedicated the entire speech to emphasising that there were more (important) reasons underlying European integration. We can find the following lines on page 1 of his manuscript: 'The danger therefore exists (...) that what we have been pursuing with so much energy and perseverance since the end of the second world war may be misinterpreted as being no more than a material, or economic, exercise. Moreover, we would not even be justified in blaming the victims of this misapprehension. What words do they hear when there is talk of European integration? Coal and steel, free movement of goods, circulation of capital, customs tariffs, quotas. They hear of commercial policy, transport policy, agricultural policy, social policy, monetary policy, market policy, investment policy, etc. This is calculated to give the impression that the only objectives are increased trade, greater output and productivity, a better division of labour, more extensive markets and a higher material standard of living. These are in all truth essential aims, but they are not the only aims'.

14 A milestone was the Single European Act of 1986 which set the end of 1992 as a deadline for the completion of the internal market.

such hope for lasting stability on European soil may seem less plausible. This does not imply, however, that EU enlargement towards the East had been a geopolitical failure. For it is unknown how the continent would have been faring since without these steps.

In any event, the eastern enlargement changed the EU with regard to its size, heterogeneity and internal dynamics. And while, as a response, its operational set-up was also adjusted,¹⁵ the EU's policy-making capacity appears to have lagged behind at least some of the challenges it has since faced, perhaps most prominently those in the field of migration.¹⁶ Additionally, in two more recent crises, namely COVID and the war in Ukraine, the EU has not seemed to be equipped for playing a leading role in their effective management.¹⁷

Most recently, the war has moved geopolitical considerations to the centre again. For a number of countries in the EU's periphery, the prospect of an accession within the foreseeable future seems to have improved.¹⁸ However, it is unclear whether this will actually materialise, whether it would actually promote peace, and whether the EU's institutional set-up would be ready for this.

4. Variable balance sheets

Hence, peace initially, prosperity then and throughout, and remarkably late also governance capacity, give a broad indication of how the functional justifications have changed over time. Their respective force has not been constant either. Nevertheless, such variation notwithstanding, being part of (that European integration project which has eventually come to be labelled) the EU appears to have retained considerable appeal up until the present day. Twenty-two states have joined the six founding members, only one has left, and the list of candidate countries is long. This is an indication that, on balance, it still pays to be a member.

15 Namely in the Treaty of Lisbon, concluded in 2007 and entered into force in 2009.

16 The Common European Asylum System (CEAS) had for long proved dysfunctional in many respects. There had, for many years, been efforts towards a comprehensive reform, with consensus having been reached as recently as May 14, 2024. It remains to be seen how effective the new regime will be.

17 However, the assessments of the EU's performance differ, depending, most likely, on the level of expectation. There have been very critical appraisals especially from an outside perspective: for COVID, see, e.g., Pitty, 2022, pp. 4 et seq.; for the Ukraine war, see, e.g., Naylor, 2024; on the other hand, there have also been accounts that are more differentiated, such as the ones by Anghel and Jones, 2022, pp. 766 et seq.; and Börzel, 2023, pp. 14 et seq., both addressing also the question of how these crises might affect European integration.

18 At the time of writing, this appears to be true for the Western Balkan states, Ukraine, Moldova and perhaps Georgia, although most recently the enactment of the Law on Foreign Agents seems to have diminished the Georgian prospects, illustrating the current volatility of this matter.

The key phrase, however, is “on balance”, and for a number of reasons. The most obvious among them is that EU membership comes at a price. It is to be paid in terms of national autonomy, and potentially a number of other negative effects as well. To be sure, this price may be offset by corresponding gains in various other respects. However, there is still a price.

Further, it is important to note that both the price to be paid and what is gained in return, will likely be different for each Member State. Their size matters, for example when it comes to their corresponding political weight within the EU. Evidently, the membership deal is different in this regard for, say, Malta and Germany. And it is different not just because of the size of a country, but also for many other reasons, maybe most prominently because of the structure and actual situation of the respective economy, including wage levels, tax rate, investment capacity, and preferred export markets. Factors like these will determine the effects of EU membership on a country. Furthermore, even the geographic location within the EU makes a difference. When it comes to, for example, migration policy, the situation of a Member State will, by all means, depend significantly on whether it is situated at an external border of the EU, especially on the Mediterranean Sea.

This list could be expanded, but the point should already be clear. When we disaggregate the common narratives pertaining to the functional justifications of the EU, we may imagine there to be individual balance sheets at Member State level listing the advantages and disadvantages arising from EU membership. There are a multitude of factors determining this balance, and since these factors differ across countries and over time, so too will the balance sheets.

Such disaggregation, moreover, does not have to stop at the level of individual countries. There too is a lot of variation within the Member States, since some groups of people may benefit from a certain aspect of EU membership, while others may not. Entrepreneurs might be in a different position than employees; the sector within which one works might matter; one’s education; even age; and again, the grouping of such “winners” and “losers” will vary across countries and time.

So, we can imagine there to be even more balance sheets, each potentially different and variable. To actually prepare them, however, would be a hard task, not just because of their level of differentiation. Also, and maybe more importantly, the individual entries would be difficult to assess, especially as it is often about prognoses. How, for example, should one predict whether a country’s (or a group’s or individual’s) situation would be affected positively or negatively by, say, (not entering) the Schengen Agreement or the Currency Union? And moreover, how to produce a net total, when effects of the individual entries into the sheet(s) are hardly commensurable?

Brexit may serve as an example. The public debates were characterised by a high degree of uncertainty and disagreement on how to assess the consequences with regard to both the individual aspects of this step, and to their aggregate. And this was the case not only before the step was taken, but is true even now when discussed with hindsight.¹⁹

19 For a recent account of the pertinent evidence and its persistent ambivalence, see Portes, 2023.

The observations presented here may be rather unsurprising. Such multi-dimensionality, ambivalence, and incommensurability are features of modern politics in general. So, most of the above could similarly be said about national politics, and about any balance sheet that could be imagined in that context as well. For the EU, however, there is an important difference, related to the kind of its *raison d'être*. Due to its dependence upon functional justifications, the balance sheets matter more. They are relevant not just for individual policy choices, general political preferences, or the support of any given government. Rather, (a predominance of) negative balance sheets might turn into an existential question for the polity itself.

Their variability, hence, poses a threat to the EU for which there is no pendant on the national level. The EU needs to maintain (a continuous perception of) positive returns on part of its constituent parts. That is, on the part of its Member States primarily, as this is the level upon which the issue of EU membership may be debated and ultimately decided. Arguably, that threat is further enhanced by the complexity of those imaginary balance sheets, their ambivalence, and their resulting susceptibility to misleading public portrayal. A swing, not necessarily in the EU's actual performance, but even in its mere public perception might be sufficient for that threat to materialise.

The relative stability, gradual expansion and persistent attractivity of EU membership over time may be taken, against this background, as an indication that there has so far been a positive net total summed up on those imaginary balance sheets, at least most of the time. Such an agreement, however, may not be all that stable. There are strong eurosceptic discourses in a number of Member States,²⁰ and Brexit has shown that they could have manifest consequences. So, there is a point in keeping an eye on the development of these balance sheets.

However, it is not only as a predictor of centrifugal tendencies that the balance sheet notion can be applied. It may also be useful when it comes to understanding the disparate visions on the structure of the EU and its future development. For these are likely to be driven not just by abstract political convictions, but also by concrete parochial interests.²¹ The variability of the balance sheets gives reason to expect some dynamism in this regard as well. The recurrent debates about the EU's desired role and shape testify to this point.

20 On the respective strength of this position in selected countries, see the analysis by McEvoy, 2024b.

21 For an influential elaboration of how this "insight" may translate into a theoretical approach see Moravcik and Schimmelpfennig, 2019, pp. 64 et seq.

5. Dynamism without directionality

Its dynamism has always been a characteristic of the European integration project which has eventually come to be labelled the EU. Only in part, this is due to the disparate and variable interests of its constituent units. Part of it, by contrast, was intentionally built into the system already from the outset. The goals that provided its functional justification were distant and ambitious. Their pursuit could hence serve as a *raison d'être* for a long time. This is certainly true for the creation of a common market – an endeavour that would span the first decades of European integration. However, it may also apply to the formation of a political union, the somewhat more amorphous undertaking embarked upon in the early 1990s.

With hindsight, being on such a long-term mission appears to be a relatively comfortable situation. This is because it affords some stability to the overall project. Or more precisely, it helps cope with the instability that comes with being grounded on functional justifications rather than being a nation-like community which is conceived of as primordial.

Without doubt, some challenges have remained. Not making any progress is problematic even when the goals are distant. Walter Hallstein's famous metaphor comes to mind, likening European integration to a cyclist for whom standing still means falling off.²² In retrospect, one is tempted to add that reaching a goal may entail the same risk. Nevertheless, as we have seen before, this risk has not materialised so far. The aims of integration have varied over time. Earlier ones have been (not quite replaced, but) reframed, renewed, or complemented by new ones, so that to this day, the cyclist has never needed to stop.

Against this background, it seems to be symptomatic that the debates about Europe's *raison d'être* would often be presented as the question about its finalité.²³ While both terms translate as “purpose”, the latter comes with a strong connotation of directionality. And indeed, it is not just the dynamism, but also its directionality that have been defining features of the EU (and its predecessor organisations) so far.

European law has indeed always been explicit about this directionality, namely ‘an ever closer union among the peoples of Europe’, which is probably the most famous phrase of primary law.²⁴ The formulation may be rather unspecific as to its aim, but it does prescribe a direction.

The phrase is remarkable in several respects. It is not all that uncommon, to be sure, for a polity to programmatically declare its constant orientation towards progress. We find a statement to this extent, for example, on the Brazilian flag (which

22 Although this metaphor is often cited (see e.g., Schwarz, 2023; Eppler, 2016), tracing it to Hallstein seems to be difficult. Typically, it is just said to be commonly ascribed to Hallstein and cited indirectly – thus the two texts, and the present contribution, too.

23 A prominent example is the speech ‘Vom Staatenbund zur Föderation: Gedanken über die Finalität der europäischen Integration’, delivered by Fischer, 2000.

24 Currently, the phrase is found in Art. 1 section (2) of the TEU as well as in the preambles of both, the TEU and the TFEU. It was included already in the preamble of the Treaty of Rome.

reads “*ordem e progresso*”²⁵). Similarly, the Australian coat of arms is commonly said to include the kangaroo and the emu because both animals can hardly move backwards.²⁶ However, there is no indication in these cases that the envisaged development pertains to the set-up of the polity itself. Presumably, they are about progress with regard to economic and social conditions, and maybe, using a more recent interpretation, also environmental ones. In the EU, by contrast, forging a closer union must, against the background of European integration, be understood as referring, at least *inter alia*, to the organisational set-up of the polity itself. This does not rule out, of course, to read it as an aspiration that covers more social cohesion as well.

Furthermore, the EU’s progressive commitment resembles a phrase in the preamble of the constitution of the USA, expressing the intention “to form a more perfect Union”.²⁷ Yet again, there are notable differences. For one, there is no explicit progressivity in the American phrase as it may be taken just to express the intention behind the constitution, i.e. an aim which inspired the wording of the constitutional text and which was accomplished by its enactment, rather than entailing a continuous mandate and task for the future. It should be noted, though, that such a prospective understanding is frequently expressed in references to this phrase when adding “toward(s)” to “a more perfect Union”. Second, and more importantly, “more perfect” is less specific in its directionality than “ever closer”. In this regard, the European commitment resembles the Australian one in that it allows for one direction only. It contains an integrationist mandate, even if, at some point, “perfection” were to be found in the opposite direction.

Given this specific directionality, it is, moreover, noteworthy that there is some inherent tension within the European phrase. Despite its mandate towards more integration, it also implies that this process would have to stop before reaching any nation-like level at which the (distinct) “peoples” to whom it refers would be merged into one. Prescribing continuous movement in a certain direction while disallowing the attainment of a goal which may be distant, but lies in that very direction sounds like a paradox. It could be solved only by imagining a process of asymptotic approximation, a notion which in the present context seems rather far-fetched, if not silly.

Be that as it may, it draws our attention to a more serious aspect: The program of constant integration becomes potentially more questionable with every step of its progression in that very direction, and it may at some point lose its appeal completely. One may disagree on where this point is, for how long the EU could still keep going until reaching it, or maybe for some, for how long it has already travelled since passing it. Regardless, there is reason to consider what the new situation would and should be after the EU may have crossed that point.

25 See, e.g., Smith, 2001.

26 Thus the Australian Government, no date.

27 The full quote reads as follows: ‘We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America’.

Presumably, there would not be any distinct directionality anymore then. One can always commit to (further) progress, and strive for (more) perfection. The examples cited above have illustrated this. However, these goals are so general that not proclaiming any of them would not make much of a difference either.

Directionality does not seem indispensable. Even for a polity in need of functional justifications, these do not have to imply any directionality, although some of the EU's have done so and would need to be adjusted. Also, the EU would retain some of its dynamism. For not all of it seems to be due to the EU's intentional directionality. We have seen this in the previous section, and the next will address a related aspect.

6. (Persistent) Imbalances of European supranationality

Hallstein's metaphor likening European integration to a cyclist raises an essential question about the EU: Is there any stable equilibrium to this system? And in fact, it seems to be not just the variability of balance sheets across countries and points in time that may destabilise any status quo. It is also the set-up of the EU itself that entails some inherent tensions which, in turn, may have contributed to keeping the system in motion, at least so far.

This observation is by no means new, and there have been various related diagnoses. Maybe the most influential account of such an inherent tension is associated with the juxtaposition between what is termed "negative" as opposed to "positive integration", and with an alleged imbalance between the two.²⁸ It is a claim about EU law and its operation within the common market. Integration, accordingly, refers to the process of making the law, both of the Member States and of the EU itself, compatible with the demands of an integrated market. Negative integration is the process of eliminating features of the law of individual Member States that are found to be incompatible with these demands. Positive integration, by contrast, is the process of creating new rules that apply jointly for all Member States on the EU level. Negative integration, is what the EU's judiciary does, based on the rules of market integration, and it is deregulatory in nature. Positive integration, by contrast, is what the EU's legislature does, by enacting common rules that may restore or even exceed the rules that were in place on a national level, and it is regulatory in nature.

This description comes with the diagnosis of an imbalance. Put simply, the claim is that European law has set off a strong machinery of negative integration from its

28 The concepts have been used in many different analyses. For an influential – and arguably classical – application see Scharpf, 1995. For a more focused (and in the author's own words: legible) rendition of his thinking on this matter see the (German) text at Scharpf, 2008, pp. 49 et seq. The present section is largely inspired by Scharpf's approach.

very inception in the Treaty of Rome onwards, and that it has always been difficult for the resulting deregulatory drive to be outweighed by regulatory measures, i.e. by positive integration, because the central level is restricted by limited legislative competences and procedures requiring a high level of consensus. The effect, so the argument states, is a deregulatory bias within the EU, leading to an incremental erosion of the overall level of market regulation.

This analysis calls for some qualification. For one, it is true that in its jurisprudence on fundamental freedoms, the European Court of Justice has not always focused exclusively on promoting market integration. It has also defined limits to this program and repeatedly upheld measures of market regulation by Member States despite their disintegrative effect.²⁹ So, the claim cannot be that this had been negative integration at maximum speed. Nevertheless, the point remains that the Court could not do anything else but to either uphold such measures or to sweep them away. It could not act positively, i.e. by restoring restrictive measures on a central level.

Such a restoration of market regulation could only be achieved by the legislature, and there has indeed been a wealth of areas in which this has been done,³⁰ hence the second objection. The capacities of positive integration have never been at zero level, and they have grown over time, with the EU's incremental transition from a common market paradigm into that of a political union. So, just as the negative integration machinery has never been at maximal operation, neither has the positive mechanism ever been totally inoperative.

So, again, the claim is not one of rapid, irreversible deregulation. It is just about an imbalance that may incrementally bring about the bias mentioned before. What is important about this diagnosis in our context is that the imbalance induces some integrative dynamic within the system, a demand that is, for further political integration, in response to that of the common market. This makes it more unlikely for the system to remain static as long as this demand is not met.

It was mentioned at the beginning of this section that there are various diagnoses of such inherent tensions within EU law, such as the one sketched above. Indeed, it is not just the common market that may drive the EU forward. Similar accounts could be given about Schengen Agreement, with open borders calling for a joint European migration policy, and the Eurozone, requiring more centralisation with regard to fiscal policy. These steps, too, would seem to have created imbalances, and hence suggest that the system might not remain static as long as the resulting demands are not met.

29 Maybe, the most spectacular example is the court's partial revision of its earlier jurisprudence on free trade in goods in its 1993 decision of the joint cases *Keck and Mithouard*, C-267/91 and C-268/91.

30 An example might be the advanced level of European regulation in the realm of consumer protection. The viability of such measures of positive integration is dependent not only on legal factors, i.e. the existence of a legislative competence of the union and the respective decision-taking procedure, but also the constellation of national interests with regard to the matter at hand; for details, see Scharpf, 2008, pp. 80 et seq.

On the other hand, why is it that these tensions and the resulting imbalances have not already been resolved for a long time? Are they really just transitory phenomena? While the answer to the first question is rather obvious, the second is much harder.

Giving in to the system's inherent drive towards centralisation would come at a high price. In order to re-establish regulatory capacities at a central level, the Member States would have to trade in the respective dimensions of their autonomy, not an easy step from the perspective of individual Member States, but all the more problematic in that democratic participation on an EU level is widely viewed as suboptimal.³¹ To be sure, one could, when extending central competences, also concurrently expand the role of the parliament and widen the scope for majority voting. However, the cure for any perceived democratic deficit on an EU level does not rest solely in institutional reforms. There are social factors that would have to go hand in hand with it³² – a pan-European landscape of interest groups and public media, a defragmented public discourse about European politics, maybe also more of a collective European identity. While it is uncertain whether these conditions are attainable, it is clear that as long as this has not yet been achieved, institutional reforms would not suffice to do the job and might even be counterproductive. The resulting shift of politics from the national to the supranational level may be viewed as hollowing out national democracies, and depending on one's assessment of their current quality, the shift to the European level may actually imply a net loss in this regard.

Thus far the discussion has focussed on the reasons why the sketched imbalances have persisted so far, and why it might be considered desirable for them to last even longer. By all means, they may still be transitory. Who would be in a position to predict the long-term trajectory? The pressure towards centralisation might rise, and concerns about national autonomy decline, and democratic participation be viewed as less important, or the conditions on an EU level at some point as satisfactory. So, the tensions could be alleviated, and one day the imbalances reduced.

However, as long as they are present, they will add to the system's inherent dynamism, with some players seeking to continue driving the wheel forward, and others advocating that it rather should be turned back at least a little. History has shown that this does not mean that the EU was unable to function. Nevertheless, it seems unlikely for it to remain static, at least in the foreseeable future.

31 For an overview on the debate, see Neuhold, 2020.

32 As the German Federal Constitutional Court has been particularly concerned with (the absence of) these conditions in the context of European integration, a compilation of relevant factors can, e.g., be found in its decision on the (German ratification of) the Lisbon Treaty, see BVerfGE 123, 267, 358 et seq. – Lissabon.

7. Conceptual reorientation

Reflections about the future of the EU are no less warranted than ever. However, the previous analysis suggests that some parameters are changing, and that it is therefore time to reconsider some of the core concepts of these debates.

The most important aspect may be the EU's directionality. "An ever closer union" – once this central mission loses traction, be it because it has mostly been attained, or because euroscepticism has gained ground, this may mean that recalibration becomes necessary. This applies at least on the condition that the EU has not turned into a community that is perceived as primordial, but instead requires some functional justification.

While we will hence still need to ask, and answer, the question of "Why Europe?", we may want to drop the term "*finalité*" as the headline for the related debates. The reason, as we saw, is its implicit directionality. We might not be moving steadily towards a more or less distant goal anymore. While we might still need to be constantly "perfecting our union" (to borrow from the American framing), this could involve moving in different directions at different times, depending on the respective contexts and preferences.

Maybe, we should even limit our usage of the term "European integration". For a long time, studying the EU and its predecessor organisations was synonymous to studying "European integration", and this term retains its accuracy when speaking of the historical process that has led us where we are today. For this has been a story of steady progress, not without the occasional stand-still, to be sure. But there have not been any turns, and no change of direction has been seriously considered. In a post-directional future, this may be different.

Admittedly, the key question to be discussed will be very similar. What level of integration could and should we aim for? However, this is about the envisaged level of integration, of the state of "integratedness",³³ if you will, rather than an ever progressing process of "integration". For this can no longer be presupposed as a commonly consented goal.

The adjusted framing of the question does not imply any diminished salience. A potential end of consented directionality does not equal a final "mission accomplished", nor does it mean general satisfaction with the status quo. The inherent tensions and imbalances within the EU's set-up, its Member States' varying balance sheets, and the resulting dynamism are likely to bring up the issue of desirable "integratedness" once and again for the foreseeable future.

33 Hence the awkward-sounding phrase in the title of the present contribution.

8. Terminological de-rigidification

European supranationality has always been difficult to grasp, for lawyers in particular. Their terminological toolkit is notoriously rigid, and understandably so, with coherence and predictability being of paramount concern for this discipline. European integration has in this regard been a challenge from its early years onwards, beginning, arguably, with the groundbreaking decisions in *Van Gend*³⁴ and *Costa ENEL*³⁵. Without doubt, that novel supranational entity, “*sui generis*” as it would soon be labelled³⁶, could easily be located somewhere on the continuum between a nation state and an international organisation.³⁷ However, the terms used for either end of the scale did not quite fit. They were not made for a hybrid organisation, let alone for one that was in (almost) continuous motion towards its distant target.

Paradoxically, the fact that it was not only a hybrid, but also a moving target may have fostered terminological conservatism. It invited observers to consider the “*sui generis*” a transitional stage, not warranting hence any principled terminological overhaul. Instead, one could just wait until the EU would one day have morphed into a large, federal state, and in the meantime assert that it had not yet achieved this stage, and that, until then, it basically remained an (exceptionally advanced) international organization, composed of member states which were (still) sovereign.

It may have further contributed to the persistence of such terminological conservatism that it is compatible with both, euroscepticism and euphoria alike: While proponents of the latter would optimistically maintain that the EU was (soon) ready to become a federalist state and push for a fast transition, those of the former would consider this unrealistic or undesirable and insist on preserving the status quo. Fighting their battle, both sides could thus employ the same terminological weaponry.

This has for long been reflected in the debates about European integration and its *finalité*: Is the EU (becoming) a federal state? Are the Member States (still) sovereign? Is there (to be) a European constitution? These are the questions that have set the scene for many pertinent debates up until today. However, with EU’s directionality coming to an end, so would the transitionality of its condition *sui generis*, and this might, in turn, underscore the need for a de-rigidification of the terms that feature prominently in these key questions.

To avoid any misunderstanding, there is nothing wrong about asking these questions. Dealing with them has been as instrumental in the past, as it will likely be in

34 Case 26/62 *Van Gend en Loos*, 1963.

35 Case 6/64 *Costa v. ENEL*, 1964.

36 For an early use of that term, see Hallstein, 1962, distinguishing this new kind of a political animal from other types of organisation, p. 25 et seq.

37 This is a paradigm that works up to this day; e.g., Hlavac, 2010.

the future. For it can indeed pave the way towards a nuanced understanding of some of the characteristics of European supranationality. However, this is when they are used for purely analytical purposes, and not when they come with the normative overtones that they often comprise.

Let us, by way of illustration, focus first on the term “constitution”. This could be understood broadly as any set of rules pertaining to the functioning of an organisation, setting out its competences, actors and procedures. When people speak of the constitution of the United Nations, for example, or of the Council of Europe,³⁸ this is evidence for such an understanding of the term. For others, however, it entails, and requires, more.³⁹ When the EU failed in consolidating its primary law within a comprehensive Constitutional Treaty some 20 years ago,⁴⁰ this was probably because the first component of this name was understood more narrowly as implying a state-like level of integration, and because this idea appeared undesirable at the time, at least for sufficiently many people to veto that step.

Analytically, both a broad as well as a narrow understanding could work, as long as there is an agreed definition in any given context. Indeed, any term could in theory be filled with any stipulated meaning, of course. Nevertheless, if using the term constitution, as in our example, is taken to entail a normative spin towards a higher level of integratedness, it may be preferable to avoid it, at least when there is no common normative consensus to this extent.

The same might apply, *mutatis mutandis*, to the respective terminology of international law. Although EU primary law would certainly qualify as a special case, it could be brought under the category of a treaty under public international law, depending on how the term is understood. However, if the adopted usage were to impart a (potentially controversial) normative message regarding the EU’s integratedness, it would again be conducive to the discourse if a more neutral terminology were used. And as has been said before, this seems all the more warranted when there might be no end in sight anymore for the EU’s hybridity.

Similar considerations apply when it comes to the other key terms. Let us begin with federalism. What would be the criterion for labelling the EU “federal”? A broad understanding might put this label on any stabilised system of vertically shared competences for the exercise of public power. The EU would clearly pass this test. A more restrictive one, by contrast, could be whether sovereignty rests with the central level, or with the subunits. Then, the EU would not qualify as federal as long as its constituent units are considered sovereign states, provided, of course, that sovereignty were to be viewed as indivisible.

This takes us to the third key term, sovereignty. This is typically understood as legitimate authority (or just actual power) to govern (within a certain polity). Yet again, there are several definitions, broad and narrow, differing *inter alia* on

38 See, for example, Fassbender, 1998; and Walter, 1999.

39 For an elaborate account of the various facets of the concept, see Grimm, 2012.

40 For an account of this failure, see Baldwin, 2006.

the above question as to whether such sovereignty can be shared between different entities. If yes, that would be the case for the EU and its Member States. If not, one would have to identify where sovereignty actually lies.

The criteria may not be all that obvious, and neither is their application to the EU. Legislative competences have long been split, and the final say on judicial conflicts has been contested over and over.⁴¹ Maybe sovereignty could rest on the authority to distribute competences between the levels – the *Kompetenz-Kompetenz*, to use an odd German expression for this.⁴² This power, however, is vested neither in the EU, nor in any individual Member State. So, it may ultimately turn on the right to withdraw from the Union, or to deny such a desired withdrawal. However, would such reference to an extreme and mostly hypothetical situation provide an operable criterion?⁴³

Be that as it may, a narrow understanding exists for federalism as well as sovereignty. As such, it is susceptible to being laden with normative premises regarding the EU's desired level of integratedness. Just as for the term constitution, it seems advisable, when thinking about, and discussing the future of the EU, to avoid the spin that such terms may impart. This might have been preferable even in earlier times when supranationality was predominantly considered an interim stage, but it definitely is once supranationality is viewed as being here to stay.

The terms used to describe such supranationality should no longer imply any insistence on this being a transitional stage between the ideal type notions of a state and an international organisation. The corresponding bifurcation of the terminological toolkit, which has been especially characteristic of legal discourses, should be overcome. We need this terminological derigidification so as to render our analyses of and our debates on the EU's current and future shape more neutral and better able to account for the peculiarities of a persistently hybrid polity.

41 See, for example, on the recurrent contestation on part on the German Federal Constitutional Court, Graser, 2023.

42 While the term has got a long history in German legal discourse, it seems to have spread internationally with the 1993 decision of the German Federal Constitutional Court regarding the ratification of the Maastricht Treaty, in which the conferral or assumption of competences was a core issue; for the decision, see BVerfGE 89, 155 – Maastricht.

43 Admittedly, it would not be an unknown technique. Probably the most prominent example is the thinking of Carl Schmitt, encapsulated most succinctly in his definition of sovereignty at the very beginning of his work of 1922 on “political theology”: ‘*Souverän ist, wer über den Ausnahmezustand entscheidet.*’ (Sovereign is he who decides on the exception.); for an English version, see Schmitt, 2005; for a discussion of this element in Schmitt's thinking see Graser, 2008, pp. 51 et seq.

9. Institutional fluidity

Among the tasks, which a prospective conceptualisation of the EU might need to tackle (and which a de-rigidified terminology might help accomplish), is the promotion and delimitation of a heightened degree of institutional fluidity. Why is that?

We have seen that a post-directional EU will retain some of its potential dynamism. It will most likely not be static even if it no longer strives for the creation of an ever closer union. It may have to adjust to internal shifts in aggregated preferences, i.e. the balance sheets, to accommodate further enlargements and other changing context factors, most notably in the geopolitical sphere, and maybe also to take account of new insights into its functioning, based on the somewhat optimistic assumption that such self-reflective learning is possible and we are not left with evolutionary selection as the only mechanism for improvement. All of these factors, to be sure, may still point towards further integration. However, occasionally, they may also require steps that go backwards or sideways.

So, the quest is for an appropriate degree of institutional fluidity, that is a set-up which allows for recurrent recalibration while not compromising too much on the stabilising function of the present structures. The actual scope and exact contours of this task are yet to be explored. It is likely to be a difficult, maybe daunting one, and it certainly exceeds the capacities of the present contribution. However, we can at least consider a few aspects that could help understand its intricacy.

For one, the fluidity of an institutional set-up as it is used here should be distinguished from its flexibility. While the latter shall refer to the leeway an institutional set-up gives without being changed itself, the former shall denote that set-up's own adaptability. Admittedly, it may not always be evident where to draw a line between changes within and of a set-up. Nevertheless, in most cases, this distinction should be workable as it corresponds to that between changes to a constitutional framework as opposed to those of simple statutory measures or policies.

Further, fluidity is not what one typically looks for when it comes to assessing a polity's institutional set-up. It is stability that rather tends to be appreciated.⁴⁴ However, with one being the flipside of the other, this is mostly a question of perspective. And there is widespread recognition of the possibility that stability can turn from a "good" into a "bad" when there is too much of it. Occasional discussions regarding a potentially excessive level of constitutional entrenchment testify to this point.⁴⁵

44 For a thorough theoretical treatment of this feature (and predominant function) of legal institutions see Engel, 2005.

45 For a discussion of the example of the so-called eternity clause in the German Basic Law and of, i. a., its potentially adverse effects see Preuss, 2011; for the same concern applied to – the special case of – constitutional adjudication see Graser, 2001, based on a related earlier treatment of that issue within the US legal system by Monaghan, 1975.

Nonetheless, the focus is typically on stability rather than fluidity. This is despite the fact that a need for adjustment may arise also in other polities, namely states. Geopolitical context, aggregated internal preference – all of the above factors play a role here as well, and, naturally, they may change, too. When the need for fluidity is still less pronounced in these contexts than it might be in case of the EU, this may be for two reasons. Firstly, the EU is not the only polity for anyone, but always an additional one. This may render stability less essential. Secondly, and relatedly, the need for adjustments to circumstantial change may be much more immediate in a polity based on functional justifications.

In light of such heightened importance of fluidity for the EU, however, would one not have to expect it to have been provided for already? For indeed, the institutional set-up of the EU and its predecessor organisations has been adjusted numerous times over the past decades. So, what is new about the suggested need for fluidity? Here, again, directionality and its potential abandonment become relevant.

So far, and still owing to the EU's rootedness in international law, the threshold for any changes of the institutional set-up has been set very high. Basically, every Member State retains veto power. Formally, this applies to all changes, regardless of their direction. Hence, moving forward has been very demanding. But arguably, the arrangement renders backwards movements even more unlikely, because once there has been agreement for progress, a complete reversal of such a consensus does not seem realistic. In addition, there is the inherent forward drive resulting from previous integrative steps as discussed before.⁴⁶ Moreover, it should be noted that judicial interpretations of primary law take part in its entrenchedness. So, progressive interpretations can be reverted (by the judiciary itself, if the opportunity arises, but typically) only by consensual amendment of primary law by all Member States.

In summing up, this is a system that is generally hostile to change and particularly geared towards locking in the respective “acquis” at any point in time against future fallback. This makes sense for a community that is committed to forge an ever closer union. It seems quite intuitive that in a post-directional EU, this regime should be reconsidered. More fluidity might be preferable.

The challenge, however, lies in determining both, the appropriate scope (as some matters should certainly remain stable) and the modes of implementing fluidity. The latter is a novel task in that it requires an inversion of the stability-oriented perspective of traditional constitutional design. This is a desideratum for further research on the future of the EU and its potential trajectories. The target would not have to be a comprehensive plan on how to increase institutional fluidity within the EU. For, realistically, such rearrangement would anyways not be brought about at once by a single reform, but could only develop incrementally through multiple

46 On this drive, see section 5.

steps. Nonetheless, as the suggested direction is rather new, it seems that more orientation would certainly be helpful.

10. A contingent civilizational achievement

A normative premise implicit in the present contribution has been its positive attitude towards European integration, understood as the past process that has brought us to where we are, and as a potential future one that maintains or even optimises European integratedness prospectively. While a full-fledged treatment is, again, clearly beyond the scope of this article, it may still be warranted, before closing, to add a few words of reflection on this premise, and in its defence.

This is important as not everybody will share this optimistic premise. The perception of European integration is not always positive. Some may view it as an example of hypertrophic federalism, far too advanced in its integrative ambitions and incapable of managing the community's heterogeneity. Some may see it as a fragmented system of divergent nationalism, thus coming to a similar diagnosis, but ascribing failure to the constituent units rather than to the central level. Others, by contrast, may perceive European integration as a success story of covert hegemonialism, through which one or a few large Member States stabilise (and economically exploit) their dominating position within Europe. Relatedly, such hegemonialism may, from an outside perspective, also be ascribed to the EU as a whole, following a neo-imperial agenda and positioning itself as an actor of global politics. Again, this might not be a narrative of failure, but certainly one of a success that would be morally reprehensible.

So, there are many perspectives on European integration that are negative. And how could it be otherwise, when talking about such a complex, multifaceted phenomenon? There are, and probably will always be, multiple ways in which it can simultaneously be good and bad.

These pros and cons will often be incommensurable. How large should an increase in prosperity be so as to outweigh the hegemonial imbalance that comes with it? How much more improbable must war be rendered by European integration so as to make up for the dilution of the democratic participation which accompanies it? Posing these questions is not to suggest that one could not decide, when faced with these or similar trade-offs, for one alternative or the other. However, such choices will be based on preferences that are subjective and potentially divergent. Consensus is by no means guaranteed. It is just possible, at best.

All the more, it is important that all views be included in the discourse. And with abounding expressions of discontent everywhere, optimistic perspectives may at present need to be remembered explicitly. One such view has been the implicit premise of the present text. It reads European supranationality as a long-standing,

highly institutionalised practice of multilevel liberal communitarianism, a rich reservoir of experience and reflection on getting the boundaries right, on calibrating the “us versus them” in its multiple permutations, and hence on one of the fundamental questions of human civilisation in the most literal sense.⁴⁷

The European answer that has developed so far may be far from satisfying, it will need much, and possibly constant, adjustment in the future, and it might even eventually fail. However, this could also apply to a Europe without supranationality, just as, in fact, a European continent composed merely of nation states would hardly seem to be any better prepared for the main challenges of our time.

47 From this perspective, one would indeed expect there to be a keen interest from other regions of the world in drawing lessons, positive or negative, from the European experience. For an exploration of the – relatively limited – extent to which such transfers of ideas (and still less so: institutions) have so far taken place, see the report on the research cluster ‘The Transformative Power of Europe: External and Internal Diffusion of Ideas in the European Union’ by Tanja Börzel and Thomas Risse written in 2018.

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