

Membership of the EU: Formal and Substantive Dimensions

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Mackenzie-Stuart Lecture 2020

Professor Catherine Barnard

Good evening ladies and gentlemen. Very nice indeed to welcome you all here to tonight's McKenzie-Stuart Lecture.

I'm going to say a few words of welcome to Paul Craig, and then we'll give him the opportunity to lecture to you and then he's kindly agreed to take some questions afterwards. At the end of the election discussion there will be drinks outside and you're warmly invited to join us for that.

So, Paul Craig what can I say? Paul Craig, MA 1973 Oxon Gibbs prize 1972, Henriques prize 1973, Vinerian Scholar 1974, Professor of English law since 1998, and for those of a certain generation the Terence Stamp of British academia. Now one of them has been described as a handsome devil with impeccable manners and a gleam in his eyes. Who also managed to romance Brigitte Bardot and Judy Christie, and one of them taught EU law. Now for my generation for my generation Paul is quite simply the king even though he's Oxford he has led the way in matters of European law. He writes incredible tomes on EU law. He's helped shaped the academic discipline. He's been the chronicler of all major stages of the evolution of the EU and author it must be said of its decline in the United Kingdom at least. Through works such as *'Brexit a drama in seven acts'*.

It's hard to believe he's retiring. More of that anon. But we are enormously grateful to him that he's agreed to give this McKenzie-Stuart Lecture this year. This lecture named after Baron McKenzie-Stewart, the first British judge at the European Court of Justice.

Paul has become very much part of the fabric of CELS life, as indeed have the McKenzie-Stewart lectures. They have been generously funded for the last three years by Shearman and Sterling. Sadly none of the members of the McKenzie-Stewart family can be here tonight, but they are very much in our thoughts. Paul's lecture as you can see is entitled '*Membership of the EU: Formal and Substantive Dimensions*'. Ladies and gentlemen, I give you this year's McKenzie-Stuart lecturer Professor Paul Craig.

Professor Paul Craig

Catherine thank you very much indeed for that really wonderful welcome. I didn't really deserve any of it but I'll take it nonetheless.

So it's a great honour to be here it's a great pleasure to be here giving the McKenzie-Stuart Lecture and I've been told to speak for about 45 minutes, or 40 minutes, and that's what I will try and do in the circumstances.

Let me make clear at the outset this is not a Brexit lecture okay, it's not a Brexit lecture. It's a lecture which does touch on issues about exit, but it's an investigation more generally into the conceptions of membership formal and substantive. And what inspired me to look at this was partly that an earlier conference I was asked to look at it, and I started thinking about it and actually it struck me as to use an overused word but one which is particularly apt in these circumstances, it is genuinely under-theorised. So there are numerous works and very good works on differentiated integration, and I'm going to be touching on that in the course of my analysis. But if you think about it compared to the number of edited volumes books articles on DI - differentiated integration - there is very little which looks at the issue through the other end of the lens. Membership - differentiated integration - is an exception, a qualification, to a prima facie understanding of membership. But actually we don't look very much at what that entails. So this is a preliminary investigation (the word preliminary is always one of those words of an academic uses when they say I'm thinking about it don't take this as the last word etc, but it is preliminary but hopefully adding some value to our understanding of this concept). And it is about both the formal and substantive

dimensions, and I begin with the formal dimensions and I'm going to begin slowly but we're going to speed up and build.

So we start off as we know with the formal criteria for membership articulated in Article 49 of the TEU, and people in this room will be very familiar with the text of this particular article. Let me break it down into certain noteworthy features of Article 49. There are in my view both formal preconditions and substantive preconditions. Formal preconditions if you disaggregate, take apart, Article 49, formal preconditions unanimity required to join counter voting to be union unanimous plus the consent of the European Parliament. A second formal precondition - the terms of accession are to be determined between the exceeding state and the existing Member States. And a further third precondition - the agreement containing the terms of accession is to be ratified by the Member States in accordance with their constitutional requirements. Note however also the substantive preconditions built into membership in Article 49, in particular there is the commitment to EU values in Article 2 of the TEU, and that substantive precondition is important for reasons in and of itself, but it's also important for reasons which I will articulate in more detail later, because the linkage between Article 49 and Article 2 is important for the legitimacy of CJEU intervention in relation to rule of law backsliding by Poland and Hungary etc.

Further substantive precondition is that the conditions laid down in 49 don't give you a right to enter. It's not a right to enter. A state may apply if it complies with these values, but there's no necessary guarantee that it will be accepted having applied.

So turn it around – withdrawal, Article 50. Never heard of it. Totally unfamiliar with it. This magical article which we have passed and taken apart with the zeal of a biblical exegesis, over the course of the last three years, is set out before us and we all know again its salient features. But again let me disaggregate within Article 50 both the formal and substantive dimensions of Article 50.

Formal dimension - the notice from the member states seeking to withdraw has to be in accord with its constitutional requirements, and the elaboration of those constitutional requirements in the UK was what occupied the court in *Miller 1* at the Supreme Court. And note also a second formal precondition if there's a withdrawal agreement you only need QMV - you don't need unanimity. Comparison to accession.

There's also a substantive precondition built into Article 50 which became painfully apparent in the last two and a half years. Article 50 is predicated on the bifurcation of the withdrawal agreement, and the agreement on future relations, including predominantly trade relations but not only trade relations. Now let me make clear, that bifurcation is both logical stroke rational and problematic. That's not a contradiction in terms things can be both logical and rational but also problematic. And I make this point because there's been a lot of, I think rather ill-informed chatter about this. Why is it logical and rational to have the bifurcation? It's logical and rational for the very simple reason that a full FTR - a full agreement on future relationships - might take three, four, five years to conclude. Boris Johnson hopes for a bare-bones agreement to be concluded by the end of December. We'll see. But even if he does get that it'll be a bare-bones agreement, it's not going to be a full agreement. A full agreement covering services and goods, covering security, covering the environment, and all of that is going to take a lot longer. So a full agreement on future relationships will take about four or five years probably to conclude. You cannot keep a state that seeks to withdraw in the EU for five years until the future agreement on trade and the like is completed. You can't - it's simply impossible. So that's why it's logical and rational it's also problematic however. The bifurcation of problematic, and the problematic nature of the bifurcation, was revealed in spades in the last two and a half years stroke three years. And again it's very simple and fundamental. What the bifurcation means is that in reality, Brexit, or any other kind of exit, is likely to be, or almost predestined to be, blind. Essentially. Why? For the reasons set out in the last bullet point of this slide. A withdrawing state may have thought through the nature of its future relationships before deciding to invoke Article 50 - it's possible. But probably it will not have done so. And certainly there's no evidence that the UK government either under Cameron or under May

or under anybody else had thought that issue through. In which case it's inevitable that once you trigger Article 50, you're at least walking down the path of the blind Brexit. Blind Brexit meaning the following: that whether you leave or not, or whether you want to leave or not, may well be crucially dependent upon the nature of the deal that you make thereafter. And indeed people's voting inclinations about leave or remain will almost certainly be powerfully affected - if they knew it - by the nature of the relationship that was going to happen thereafter. Either no deal, hard Brexit, EEA type deal, EEA plus type deal. But you don't know what that deal is going to be when you vote on Brexit - when you take part in the referendum.

Now this tension - this very real tension - was evident for those who followed it throughout the entirety of the last two and a half years. If you look at all of Theresa May's major speeches and actions about Brexit: Lancaster House, Florence, Mansion House, the government white paper, and then Checkers. The entirety, or almost the entirety of those documents, were concerned with issues which were not on the table when negotiating the withdrawal agreement. They were concerned with the shape of future relationships thereafter. And whatever Theresa May felt about that, as attested to a hard Brexit as qualified in the Lancaster House speech, and Mansion House and Florence and Checkers etc. Whatever she may have felt, the other key thing is not only were those issues not on the table at the time when you were negotiating the withdrawal agreement, they of course were not for the unilateral determination of the UK. Whether we end up with a hard, soft, medium, Brexit is not our unilateral determination. When the time comes, the UK puts its cards on the table, and then it's a matter of discussion with the other side - the EU. And the EU won't necessarily accept that. But I repeat this bifurcation was at the heart of virtually everything that happened at the executive level of the UK, and at the heart of everything that happened at the legislative level. All the legislative machinations in Parliament which are now receding into history, but all of those legislative machinations - those great times when we stood be dazzled as all those motions and different counter-motions got put, and the House of Commons rules of Byzantine procedure were drawn out and used by people who knew how to use them. All of that was about the stuff that wasn't at stake in the

withdrawal agreement. And even if those votes have gone more towards the EEA they wouldn't have been binding on anyone, well they wouldn't have been binding or determinative of the nature of the future relationship.

So we do have what we have seen is that there is a problem with a bifurcation and the bifurcation is both logical and rational as I've said on the one hand, but also problematic on the other for the reason in the last part of this slide.

So, standing back in terms of the formal dimension, if we compare and contrast accession and withdrawal, it is quite an interesting comparison and contrast. There's two dimensions to both - there's an agreement to get in or out, and then the trade terms thereafter. Accession is actually considerably simpler. It's prima facie a *prix fixe* deal. Okay you have an accession agreement, and it's predicated on the default position that the acceding state complies with the entire EU *acquis* as a precondition of membership. They might try and negotiate an opt-out from this, or a qualification to that, but the bottom line is you apply, and you are very much on the back foot - you don't have the cards in your favour - and any concession that you want to squeeze from the other side in terms of opt out, that's going to be a concession which you have to squeeze. Again, so that's the accession agreement. The trade dimension is again a *prix fixe* deal. We have got a whole set of EU rules on the single market, competition, state aid, the whole nine yards of what constitutes the substantive dimension of the EU law, and that's the terms of the trade dimension that you sign up to.

The withdrawal is more complex in both respects. It is prima facie *a-la-carte* in both respects. So if you take the withdrawal agreement, and then the agreement on future relations. The withdrawal agreement: There is no boilerplate on which to rely it has to be crafted afresh as we've seen, painfully or not, in the last three years. And again with the trade dimension, again it's *a-la-carte*. There is simply no a priori reason why there should be any particular type of trade deal, or deal on future relations between the EU and the withdrawing state. There's simply a range of possibilities which are open to negotiation,

which include no deal at one end (hard Brexit), hard Brexit which leads to No Deal, and then various forms of softer Brexit, whether signing up to the customs union, signing up to aspects of the single market etc. At the moment, by way of comparison to the two Theresa May - under Theresa May, it was quite clear that the go-to word in every one of those speeches that I mentioned before, including the notification of withdrawal letter itself, the go-to word was “frictionless”. We were going to have a “frictionless” trade relationship with the EU. Now I'm not sure what exactly the antonym of frictionless is in the circumstances, but it is clearly the antonym which at present captures the approach of Boris Johnson and Michael Gove to the trade negotiations which are going on. Very much say we're not going to sign up to the EU rulebook, we're not going to follow it, we're going to have greater aspects of regulatory autonomy and the like. We'll see how that plays out.

Okay, now let's move to the substantive dimension. Again I'm going to look at membership and withdrawal. But let's start off with membership.

So again starting off with obvious propositions but moving on from there. Membership was undertaken by the acceding state, and has consequences for the state quoy member state when its application is accepted. Now those consequences take the form of rights, powers and duties, but those are not conceptually uniform. Consider by way of example the duties that in here in membership. We can distinguish between different kinds of duties and again this is early stages of elaboration of these ideas but I think that the... it's helpful nonetheless to distinguish between different kinds of duties. So we have discrete primary duties which were associated with membership, and these capture much of the core substance of EU membership, such as for example the duties associated with the four freedoms, and the single market, the duties associated with the state aid regime, duties flowing from EU environmental rules etc. Now I accept that the word “discreet” here is itself has elasticity. Before people start firing barbs at me saying “yes Craig, but Article 30 is pretty wide and not very discreet at all” or whatever, I accept that. I accept that. It is relative. Relatively discrete, and more general. So what I mean by that is that they are identifiable substantive obligations which adhere to the state which is becoming a member of the EU.

And then in addition you'll get what I'm calling for these purposes, more general or abstract primary duties. Consider for example Article 2 of the TEU which has come into greater prominence more recently, for reasons which will become clear when we look at the kind of rule of law backsliding dimension. A union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law, and respect for human rights including the rights of persons belonging to minorities. Those values are common to the member states in the society in which pluralism, non-discrimination, tolerance, justice, solidarity, and equality between men and women prevail. Now for a long time people thought this is merely hortatory stuff, but actually experience has shown that it has a more and more substantive real dimension to it than we might have thought hitherto, and I think rightfully so.

Okay, but again then we have discrete secondary remedial duties, we have primary duties which are the ones I just elaborated, both discreet and general, but also if you think about it in conceptual terms the EU has both discrete and general secondary duties. So an example of a more discrete secondary remedial duty is found in Article 19, particularly Article 19 Para 2, which tells us that member states shall provide remedies sufficient to ensure effective legal protection in the fields covered by union law, and again we'll see the importance of that link to Article 2 in a moment. But again, if you stand back and think about the treaty, and the architecture of the treaty, there are also more general secondary duties which are exemplified and epitomized by Article 4.3 of the TEU. I'm not saying this is the only example, but it's an example. The duty of sincere cooperation. Union and the member states shall inform, mutual respect, assist each other and carry tasks which flow from the treaty, member states take appropriate measures to ensure fulfilment of obligations, and arising out of the treaties or resulting from acts of the Union, and then the Member States shall facilitate the treatment, the achievement of the union's task and refrain from any measure which could jeopardize the attainment of the union's objectives.

Now I'm maybe rather quaint and old-fashioned but I tend to take these things quite seriously, and I actually think, this is not a lecture about Brexit but I actually think that a failure to comply both with Article 4.3 and with a free-standing independent normative constitutional obligation pursuant to UK law was apparent throughout the Brexit process. If you want an example - not an example which I think is, with respect to those involved pretty outrageous - the UK undertook a very detailed study. Indeed where all departments of government were asked to consider - this is prior to the referendum - they were asked to consider the effect of union law on that area of domestic law. There were detailed studies. They were procedurally impeccable. Procedurally impeccable in the sense that the civil service in the UK was wholly impartial. It's not partial at all they said "we've been given a job. We're going to be do the job" so we're asked to look at the effect of EU single market rules on the UK's business strategy etc etc, that's what we're going to do. Procedurally impeccable in the sense that they took evidence from a wide range of sources - town hall meetings, online access, and then also procedurally impeccable because what they did was that the department would then formulate its conclusions, and then the department would go to the Cabinet Office and present the prima facie conclusions before the Cabinet Office, and the Cabinet Office would bring in two outsiders. I know this because I was one of the outsiders on four occasions. There were multiple instances of this. And those outsiders would give the draft conclusions a good turnover, and see if they withstood examination in the light of the evidence. And quite often we would say "okay, look that's fine and that's fine, but you need more evidence for that, or that conclusion isn't substantiated". The bottom line is, as attested by a wealth of secondary literature looking at this material, pretty much all of those studies without exception found that membership of the EU was either beneficial, or at the very worst neutral for the area in question. There was no collaboration between the departments - they did their studies at different times. How much did the public know about this when it came to the referendum? Zero. The hard line Brexiteers had hoped that the study would show all sorts of malfunctioning in the EU and bad consequences for the UK - didn't show any of that, so they didn't mention it. They swept it under the carpet. Now it seems to me in my quaint old-fashioned way, that independently of Article 4.3 there is a free-standing UK constitutional obligation that a

government - whatever its persuasion or view - should put before the public objective evidence, which is relevant for the issue which is to be decided. I don't regard that as rocket science and I didn't regard that as controversial. If someone think to the contrary I'm very happy to take an answer take a question on that, and see what the argumentation is, as to why such a constitutional obligation doesn't exist. It didn't happen. Now would it have made any difference in the referendum? I have no idea. I have no idea. We can't do a counterfactual. We can't go back and do a lab experiment to know would it have been different. But in any event I think those secondary duties are important.

Okay so moving on, there's a linkage between the primary and secondary duties of membership, and it is powerfully exemplified by an issue that I've touched on, as we've gone through, which is the recent CJEU caselaw on backsliding by member states. So what's happened in this case is that Article 2, one of our more abstract primary duties, has provided the locus for the primary duty of compliance with the rule of law. And Article 19.2 has provided the locus for the secondary remedial dimension, and you see that in these (I could give much longer extracts but I don't have time) but you see that in two of the seminal cases - the Portuguese judges case, and Commission against Poland - and we'll see it again when the CJEU grapples with the Polish law in interim proceedings, which are coming before it as we speak as it were. So in the Portuguese judges case, the guarantee of independence which is inherent in the task of adjudication, is required not only at EU level as regards the judges of the union and the advocates general of the Court of Justice - as provided for in the third sub para of Article 19.2 - but also at the level of member states as regards national courts. Again in *Commission v Poland* the requirement the courts be independent which is inherent in the task of adjudication forms part of the essence of the right to effective judicial protection, and the fundamental right to a fair trial which is of cardinal importance as a guarantee that all the rights which individuals derive from EU law will be protected, and that the values common to the Member States set out in Article 2 TEU - in particular the value of the rule of law - will be safeguarded. And I think both of those judgments are very powerful and very persuasive, and I'm very happy to take further questions. But all I'm doing for the

moment in this lecture is exemplifying the link between the use of a more general abstract primary duty - Article 2 - and the secondary remedial duty in Article 19.2.

Okay, again still sticking with the substantive dimension of membership. So far we've been looking at the substantive dimension of membership in relation to the obligations which flow therefrom for member states. But of course the EU as we know very well is also for the citizens thereof. And again I think it's just interesting, conceptually and normatively interesting, to think about the membership dimensions which inhere in citizens. So we have the benefits of EU citizenship for example. So what's the relationship between membership and EU citizenship? Well in my view is not a priori. It is perfectly possible to have a community with member states thereof, without necessarily having Articles 18 to 22 of the TFEU on citizenship - indeed we had it for many years before they came on board into the treaties. It's not a priori, but it's not fortuitous either. Clearly the inclusion of those provisions was driven by a desire to thicken the political and civic bond created by the EU. Again, one of the seminal features of the EU law - the benefits of direct effect - again reflecting on the relationship between membership and direct effect, again it's not a priori. It's perfectly possible to have a community with member states without direct effect and the rights attached thereto. Again not fortuitous - driven by a desire to render more effective the enforcement of EU law, and to drive home the idea that the EEC was not merely an order of member states like other international treaties. So again, these are just examples. This is not the entirety of the substantive dimension.

So now let's turn through the lens of membership to the relationship between membership and differentiated integration. About which there has been a lot and a great deal of value written. I think it's very important at the outset when thinking about DI - differentiated integration - to distinguish different models of DI, because otherwise confusion emerges if we elide these models. And I think Daniel Thym in a recent essay - in one of the books of essays, the one edited by Bruno de Wit and various other people - correctly distinguishes (not for the first time but he puts it very neatly) between three primary models of DI: 1) Multiple Speeds, 2) Federal Core Europe, and 3) Flexibility a-la-carte.

The essence of a multiple speeds model - key characteristic: you're all going to the same end point, you're just going there at different time lines. Some of you are ready now. Some of you are not ready now. Some of you can go there immediately. Some of you may go there five years later. So as Daniel Thym says, multiple speeds means differentiation as a transitional and transitory phenomenon, in response to objective distinctions between member states in terms of stages of economic development and the like.

The federal core Europe model is a very different idea of DI. Here the key characteristic is to retain the momentum in support of closer integration. To forge ahead with those who are willing and able to do so, through - for example - treaty reform plus opt outs, enhanced cooperation etc. But the idea is you're moving toward some finality as it were, which is a core Europe finality, and it's a more federal dimension of the EU than exists at present.

Whereas the third model which is out there - flexibility a-la-carte model. Here I think Thym again is correct that the key characteristic is a rejection of an a priori federal vision, an emphasis instead on quote "the principle freedom of the member states to decide upon the degree of participation in the EU", and that mirrors aspects of intergovernmental international relations theory.

So lots and lots written about DI but just bear with me and start reflecting on DI when viewed through the lens of membership, rather than just straight on itself. So the relationship between membership and differentiated integration. Let's look at some first principles. So does the concept of membership entail uniformity across all terrains? No, not in my view. There's no a priori reason why membership has to entail absolute uniformity of application across all domains of EU law. Many organizations have different terms of membership, with different obligations attaching thereto. Turn it around the other way. Does the very concept of membership entail differentiated integration? Again, I think the answer, logically, is no. There's no a priori reason why membership has to entail any differentiation integration. Many organizations function in effect with flat rights and

obligations that pertain to all - maybe some tweaking around the edges but pretty much a flat terrain subject to that. So what are the factors which circumscribe the uniform conception of membership, and drive differentiated integration? What actually are the factors which drive us in this way? Well again I put I think two on the table here. I don't regard these as particularly novel or controversial (if anyone does so then again and they have a chance to fire shots at me in questions). So other things being equal the greater the substantive reach of a treaty regime and the greater the number of member states, then the greater incentive for some differentiated integration. So it's not surprising then that we first started talking seriously about DI in the late nineteen nineties. That was when the first studies really started happening. And it is not surprising that that coincided with an expansion in membership, and not surprising though it coincided with an expansion of the realm of EU competence. So we expanded the substantive reach of the treaty regime. We expanded the number of member states. And that increased the incentive for some differentiated integration.

The second factor - again other things being equal and borrowing out of playbook of economists all the time here - all things being equal the more demanding or far-reaching the nature of the EU obligations, and the more intrusive they are on national sovereignty, the greater the incentive for, or pressure for, some special treatment by some member states. And again I don't think this is particularly surprising, but with other things being equal helpful to put it on the table. Two prominent examples: EMU and the era of freedom security and justice are both areas which in different ways entail pretty significant intrusion on national sovereignty, and it's not surprising that in both areas there have been pressures for some form of differentiated integration. The practice may take the form of complete opt-out of the single currency. They may take more milder forms. And the UK availed itself of pretty much all of this spectrum of opportunities, and still wasn't content. But excuse me I had to say that. Got it off my chest.

So moving on, again I think it's helpful to look at DI through a lens of membership, because I think it helps us to think about the issues which we're going to think about now. So what

are the factors then, if we're thinking about the relation between membership and differentiation integration? We've looked at the factors driving DI. What, by way of contrast, are the factors which circumscribed differentiated integration, and drive commonality in conceptions, terms, results of membership? Well I put down I'm going to look at a number of them. Firstly there are what I call decisional considerations. And this is to satisfy the formal legitimacy of such provisions. So there are a number of different decisional considerations that need to be borne in mind in this respect. Firstly DI in order to attain formal legitimacy may have to be embodied in a treaty or treaty amendment, such as opt outs. Basically the more far-reaching the DI - the differentiated integration - the more likely it is you're going to need to secure it by some treaty amendment. If you don't do that then the DI - the differentiated integration - has to be embodied in EU legislation, which is a result of decisional choice in accord with the rules from making such decisions, provided of course that the rules last made are consistent with the empowering treaty provisions pursuant to which the regulation directive is made. We all know that differentiated integration often takes the form of, or is operationalized through, a regulation or a directive which contains exceptions, qualifications for its application to a particular state or range of states. But that is only formally legitimate if the regulation and directive is made in relation to the procedures in the treaty for the making of such regulations, and is consistent with the empowering treaty provisions.

The third kind of decisional foundation for differentiated integration is the dodgiest, as it were. It's where differentiated integration is the result of practice, power politics, inadequate enforcement, and all of those may be inevitable, but they're nonetheless questionable in terms of formal legitimacy.

We've got now a different set of factors which circumscribe differentiated integration. Again we're looking through the lens of membership. So here I'm calling it "functional considerations", and the functional considerations are linked by a realisation of the negative externalities created by differentiated integration. The negative externalities can take different forms. So one form of functional negative externality created by differentiated

integration is the realisation that if you give too much latitude to member states, and too much difference in the application of the relevant rules it can lead to significant negative consequences. we don't have to be hypothetical about this. There are real instances. If you look back to the financial crisis 2008-2009 the financial crisis in the EU has its roots in part in the asymmetric rules in the treaty concerning economic Union and monetary union, and what it meant in brief, given the exigencies of time, is that member states were accorded too great a latitude in the regulation of banking institutions in particular, which played a part in the perfect storm which followed, which was the conjunction of a banking crisis and the sovereign debt crisis.

A second kind of negative externality and functional problem is related but distinct, and here it's the fact that a differential treatment allowed in one member state can have effect on the application of regulatory provisions in other member states. And again we don't have to search for hypothetical examples. In the 80s and 90s the who rage was pretty much for let's have minimal harmonisation, let's give maximum flexibility to the member states, and actually the Commission has certainly pulled back - notwithstanding some of the rhetoric - has pulled back, because it realises the negative externalities that's created by that kind of regime, and in many areas it's moved towards a more maximal harmonization.

A third kind of limitation on DI is what I call "normative". There are normative constraints on differentiated integration which flow from conceptions of membership properly understood. So a couple of points here. The central idea here is that different parts of the EU are not hermetically sealed one from another. A danger inherent in differentiated integration is that it infringes on precepts of equality, wherein the member states share the benefits and burdens of membership, and differentiated integration can therefore - dependent on the form that it takes - generate free rider problems. Again a second normative constraint on differentiated integration, which flows from ideas of membership - in my view at least - is that differentiated integration de jure or de facto, whether it's a treaty amendment, or practice, or whatever else, cannot be allowed to impinge on common core EU values. The content of the common core may be contestable, but it does not

undermine the point that I'm making here. So for example differentiated integration that seriously impinges on Article 2 values would not, in my view, in any circumstances be acceptable as exemplified by the rule of law problems with Hungary and Poland. Nor do I believe that differentiated integration that undermined central core content of the single market and the level playing field, I don't believe that would be acceptable either.

Okay, so when I produced this slide I did have to just giggle at myself a bit, because I thought this is kind of a wonderful slide, but people would either say “this is a kind of wonderful slide”, or they'd say “really you cannot be serious”, or they might say both at the same time. In any event, where this leads me just by way of preliminary conclusion in relation to this part of the lecture concerning substantive dimensions of membership and the relationship between differentiated integration and membership, is the two parts of this slide. The logic of chaos is order. Status quo. And what I mean by that - that's where we are now. And what I mean by that is the following: the substantive content of EU membership does, and can vary, depending inter alia on the degree of differentiated integration. And the precise content of EU membership in any single member state, and as between member states, is dynamic and will vary across time. Nonetheless, common institutions and decisional rules continue to apply, subject to any ad hoc amendment thereof demanded by differentiated integration. So when I say this is the logic of chaos, this is messy. It's not perfect. It's not pristine. It doesn't have neat boxes, but it's relatively stable. We've been doing it for 30 years, and we bump along. Now, compare and contrast the logic of order is chaos, so you go for a possible change - you say we want analytical purity, we won't need boxes, we want professors or somebody else to come up with a cleaner neater set of rules which we can take home in a ribbon tied box. So what we have is proposals which say let's formalize the different degrees of DI through concentric circles, or the kind of suggestion made a number of years ago by Jean-Claude Piris in his world. And what this means is that the precise content of EU membership is formalised to a greater degree, depending on the placing of the state within the pattern of the preordained concentric circles. And that also leads to changes in the institutional and decisional rules to reflect different types of EU membership. So for example the suggestions of a separate

European Parliament and all that kind of stuff. Now this is neater in theory, but incredibly unstable, I think, and I don't think it's actually attainable, so again I'm very happy to take queries about that.

Now I'm approaching my time limit, which is good. But I'm also approaching the end of my slide, so it's a happy conjunction of necessity in both respects. Substantive dimension withdrawal. *Whiteman* is, I think, instructive in this respect. Of course *Whiteman* in its formal sense was never used, and by that I mean *Whiteman* said that you could unilaterally revoke the notice of withdrawal under Article 50, if the UK sought to do so. It didn't seem to do so, and in that respect the decision is moot. But it's not really moot in a broader deeper sense, because *Whiteman* is underpinned by a conception of membership, and the conception of membership which underpins *Whiteman* is a conception of membership which applies to exit from the EU, as well as entry. And the conception of membership which underpins *Whiteman* which led the court inexorably to disagree with the Commission and the council, and to agree with the claimants case, is what I call voluntariness and state sovereignty. I have extracted a few paragraphs from the court's judgment in this respect. In para 50 we are told Article 50 para 1 provides that any member state may decide we draw from the EU in accord with its own constitutional requirements. It follows that the member state is not required to take its decision in concert with the other member states or the EU institution. The decision is for that member state alone to take, in accordance with its constitutional requirements, and therefore depends solely on its sovereign choice. So voluntariness and state sovereignty shot through that part of the judgment, and the same themes recur throughout the judgment. So we're told in para 56, Article 50 TEU pursues two objectives - namely first enshrined in the sovereign right of the member state to withdraw from the EU, and secondly establishing a procedure to enable such a withdrawal to take place in an orderly fashion. And that same theme is repeated throughout the judgement. It's very much the idea that the EU is formed from sovereign states. A sovereign state chooses to accede pursuant to Article 49, and if its membership application is accepted it becomes a member state of the EU, and that same idea of voluntariness and state sovereignty informs the CJEU's reasoning and conclusions in

terms of exit. I'm not going to read all this, just summarise in 65, given that a state cannot be forced to accede to the union against its will neither cannot be forced withdraw from the EU against its will.

Thank you very much indeed for listening to me this evening. Just a final word. I think that at the moment in the history of the EU some focus on membership in and of itself, and the obligations that adhere in membership, both formal and substantive, is really pretty important. Really what underlies the situations in Poland and Hungary, in relation to their judiciary, is something very fundamental - a state wishes to be part of the EU, but wishes to undermine one of the central precepts of membership. Having an independent judiciary is (if you think about it for more than about 30 seconds) not only an integral part of the rule of law - any conception of the rule of law - but having an independent judiciary, is if you like, in many respects the premier right or the premier aspect or a premier aspect of the rule of law. Why? Think about it. If you do not have an independent judiciary, then pretty much everything else that the rule of law stands for will be shot to pieces. So rule of law stands for the proposition that a league of a political order can only take decisions in accordance with the constitutional legal rules for the making of laws within that society. A non-independent judiciary will not protect that aspect of the rule of law. They will bend and distort the interpretation of constituent power, and the conditions for legal legislation, in a way that leans strongly in favour of the government. Equally other aspects of the rule of law whether its protection of fundamental rights, whether its access to court, whether its injunctions against over-generalised and vague legislation, if you do not have an independent judiciary, they will not meet and protect those rules. And in the EU it's even more important. It's important for all those reasons, and important because the whole functioning of the EU legal order as instantiated through and by Article 267, is dependent upon independent national courts. If you do not have independent national courts, and they do not adhere to the precepts, fundamental precepts of membership, there really will be troubling times ahead. And the importance of that is attested to - this is my final word - the importance of that is attested to a letter sent to the then candidate for Commission President by the presidents of the three prominent national Court Associations, so the

President of the Supreme Court, President of the Administrative Law Courts etc, expressing their disquiet about the challenges to the independence of the judiciary within certain member states, and the dangers that that brought in its wake for the survival of the EU.

Thank you very much indeed.