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Natolin



College of Europe – European University  
Institute

Joint conference on  
***Differentiation in the European Union:  
A new pragmatism or the end of “ever closer  
union”?***

Thursday 17 November 2016  
College of Europe

**Position Papers  
&  
Summary of proceedings**

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The summaries in this document are intended to identify the main issues that were covered in each session. Although they reflect the gist of the main arguments and points raised in the presentations and the discussion that followed, they are not verbatim minutes of the proceedings. They do not necessarily reflect the views of the speakers or other participants. All speakers and participants who made comments spoke in a personal capacity.

## Introduction

The referendum in the UK in favour of withdrawal from the European Union, the economic problems in the Eurozone and the influx of refugees and other migrants have raised questions about the legitimacy and effectiveness of EU policies, have exposed the limits of the willingness of Member States to be bound by common rules and act in unison in times of crises and have cast doubt on the aim of “ever closer union”.

In this context, the College of Europe and the European University Institute organised their second joint conference on 17 November 2016 in Bruges. The conference examined, from the perspective of different disciplines, whether it was feasible or desirable for smaller groups of Member States to act alone to address those problems. What would be the consequences? Would cooperation among fewer Member States be more effective or would it contribute to unravelling of the European Union? Would small groups of willing Member States be able to act without undermining the single European market and weakening the fundamental freedoms on which it is based?

Before the referendum in the UK, the agreement of 19 February 2016 on a new settlement between the EU and the UK conceded that not all Member States shared the same vision on the future path of integration. In the immediate aftermath of the referendum, European leaders reacted by expressing two opposing views: deeper integration v repatriation of competences to Member States.

The forthcoming negotiations on the terms of exit of the UK are supposed to be between two sides. Yet, it is increasingly obvious that neither on the UK side, nor on the EU side is there a cohesive view on the nature of a future relationship. There is, however, a growing realisation that whatever is agreed is likely to affect profoundly the process of further integration among the remaining Member States.

Each session of the conference addressed the nature of possible differentiation, identified likely consequences and considered their impact on the evolution of the EU. A session specifically focused on the developments concerning the negotiations with the UK.

## Programme

- 9.00-9.15 **Welcome address** by Jörg MONAR, Rector of the College of Europe in Bruges and Renaud DEHOUSSE, President of the European University Institute in Firenze.
- 9.15-10.30 **Definitions and implications of “differentiation” and “flexibility”:  
Views of speakers from different disciplines**  
**Chair:** Marise CREMONA, Professor of European Law, European University Institute, Firenze  
**Speakers:**  
Sieglinde GSTÖHL, Professor and Director, Department of EU International Relations and Diplomacy Studies, College of Europe, Bruges  
Stefano MICOSSI, Director-General ASSONIME, Rome  
Wolfgang WESSELS, Jean-Monnet Chair, University of Cologne
- 10.45-11.45 **What have we learned from the negotiations between the UK and the EU on the feasibility and side-effects of seeking differentiation? And, first indications on the likely process and outcome of the withdrawal negotiations.**  
Jonathan FAULL, Director-General, European Solidarity Corps, former Director-General of the Task Force for Strategic Issues related to the UK Referendum, European Commission
- 11.45-13.00 **Deeper integration without discrimination of non-participating countries: The euro**  
*Deeper integration within the Eurozone is bound to have an impact on non-Eurozone countries. Common rules or policies do not have to be discriminatory to have such an impact. What kind of assurances can be given to non-participating countries and what can be done when cross-border effects through normal market mechanisms cannot be avoided?*  
**Chair:** Phedon NICOLAIDES, Professor and Director of the Department of European Economic Studies, College of Europe  
**Speakers:**  
Daniel GROS, Director, Centre for European Policy Studies, Brussels  
Stefano MICOSSI, Director-General, ASSONIME, Rome
- 14.00-15.15 **Temporary suspension of fundamental freedoms: Movement of persons**  
*Some Member States are in favour of safeguards in the form of restrictions on movement and access to social security. Do conditional and temporary safeguards provide solutions that can apply to all Member States, establishing “temporary differentiation” that can function as a relief valve? Or, will they create permanent sources of friction and discord?*  
**Chair:** Inge GOVAERE, Professor and Director, Department of European Legal Studies, College of Europe

**Speakers:**

Gareth DAVIES, Professor of European Law, Free University, Amsterdam  
Sacha GARBEN, Professor, Department of European Legal Studies, College of Europe

Claire KILPATRICK, Professor of International European and Social Law,  
European University Institute, Firenze

Paul NEMITZ, Director, Directorate-General for Justice, Directorate  
Fundamental rights and Union citizenship, European Commission

15.30-16.45 **Applying a brake to deeper integration: Democratic legitimacy and greater involvement of national parliaments**

*It is often claimed that the EU suffers from a democratic deficit that fuels disaffection among its citizens. Will the concerns of EU citizens be allayed by greater involvement of national parliaments? What is the likely impact of greater involvement of national parliaments on the EU's decision-making efficiency?*

**Chair:** Olivier COSTA, Professor and Director, Department of Political and Administrative Studies, College of Europe, Bruges

**Speakers:**

Michele CHANG, Professor, Department of Political and Administrative Studies,  
College of Europe, Bruges

Thomas CHRISTIANSEN, Chair in European Institutional Politics, University of  
Maastricht

Adrienne HÉRITIER, Emeritus Professor, European University Institute, Firenze

16.45-18.00 **External differentiation: Foreign policy**

*Integration progresses through spill-overs from one policy to another. Is the reverse process also possible? Given that Member States have widely divergent interests in areas of EU external action, how does internal differentiation spill-over to external differentiation?*

**Chair:** Simon SCHUNZ, Professor, Department of EU International Relations and Diplomacy Studies, College of Europe, Bruges

**Speakers:**

Marise CREMONA, Professor of European Law, European University Institute,  
Firenze

Simon DUKE, Professor, European Institute of Public Administration,  
Maastricht

David PHINNEMORE, Professor of European Politics, Queen's University Belfast

Frank SCHIMMELFENNIG, Professor of European Politics, ETH Zürich

18.00-19.00 **Conclusions**

The chairs of the various sessions summarise the main points of discussion and identify common themes and possible conflicting views

## Welcoming speeches<sup>1</sup>

The conference was opened by Jörg MONAR, Rector of the College of Europe and Renaud DEHOUSSE, President of the European University Institute. They welcomed speakers and participants, explained the purpose of the initiative of the joint conferences between the two institutions and outlined the objective and context for the second joint conference that was devoted to the theme of “differentiation” in the European Union.

When the College of Europe (CoE) and the European University Institute (EUI) agreed on a common theme for their second joint conference, few people anticipated how timely the issue of 'differentiation' would become. The relevance of the chosen subject here underlines how higher educational institutions work. Scholars tend to choose topics and issues precisely because of their academic significance and relevance for broader issues. Occasionally, due to a convergence of circumstances, their subject becomes a challenge of immediate relevance. The deliberations between the College and the Institute led them to define as the objective of the conference a concept which is not *per se* new. Indeed, since the Treaty of Maastricht and in the subsequent context of European integration and cooperation, 'differentiation' has evolved into an almost constitutional feature of the European construction.

The subject of this conference can first be explained by the changing context since the inception of the European Union. Indeed, differentiation used to be perceived as a response to the diversity of the ever wider EU policy agenda, as well as of the European Union itself. It has ultimately come to be regarded as a management tool to support the process of integration, *i.e.* to facilitate progress in specific fields. Yet, the traditional thinking on differentiation has become obsolete and that calls for new approaches and a fresh look at the meaning of this concept.

Discussion on differentiation is now influenced by an unmentionable fear, what some would call, the “big elephant in the room”: the risk of disintegration of the EU. When examining it closer, differentiation turns out to be a pragmatic management tool to protect core areas of EU integration while allowing at the same time Member States to remain outside. In this sense, differentiation is one step away from becoming a disguise for disintegration. The fact that some national leaders have found that, in order to win domestic elections, they need to question the EU membership of their countries reveals not just the unpopularity of the EU but also the habit of casting the EU as a scapegoat. For these reasons further integration is seen as national defeat and the whole EU policy-making has become more complicated.

By organising this joint conference, both the College of Europe and the European University Institute underline their willingness to take the challenge to tackle critical European issues and identify solutions. Considering whether differentiation is a new pragmatism or the end of ever closer union, is, in this sense, a path towards identifying solutions. It is because Europeans live in difficult times that it makes it all the more interesting to work on EU issues.

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<sup>1</sup> Summary prepared by **Dimitra CHRYSOMALLIS & Gil STEIN**

**Session 1**  
**Definitions and implications of “differentiation” and “flexibility”:**  
**Views from different disciplines**

**Chair:** Marise CREMONA, Professor of European Law, European University Institute, Firenze

**Speakers:**

- Sieglinde GSTÖHL, Professor and Director, Department of EU International Relations and Diplomacy Studies, College of Europe, Bruges College of Europe
- Stefano MICOSSI, Director-General ASSONIME, Rome
- Wolfgang WESSELS, Jean-Monnet Chair, University of Cologne

## SESSION 1: POSITION PAPERS

### Differentiation in the EU and in its Neighbourhood: Concepts and Implications

Sieglinde GSTÖHL

#### Concepts of differentiation in European integration

Flexible European integration takes into account the countries' varying capacity and willingness to integrate by differentiating their rights and obligations. This holds both for member states of the European Union (EU) as well as for third countries in the neighbourhood that wish to take part in the EU's internal market. Schimmelfennig, Leuffen and Rittberger (2015: 767) therefore conceptualise the EU as a system of differentiated integration. A policy area is characterised by internal differentiation if at least one member state does not participate in integration and by external differentiation if at least one non-member state participates. Differentiation thus means partial integration which may result from the countries' lack of capacity and/or willingness to fully integrate, as illustrated in Table 1.

Table 1: Typology of European countries

<i>Political will</i> <i>Capacity</i>	<b>willing</b>	<b>unwilling</b>
<b>able</b>	Europhiles (full integration)	Eurosceptics (differentiation)
<b>unable</b>	would-be members (differentiation)	outsiders (no integration)

The debate on differentiated integration has generated many concepts, ranging from 'multi-speed Europe' and 'variable geometry' in light of the stagnating integration process in the 1970s to the ideas of a 'core Europe' or 'concentric circles' (and even partial membership) in the 1990s in view of future enlargements. This debate has in recent years forcefully been revived both with regard to internal differentiation – in particular in the context of the sovereign debt crisis – and external differentiation, especially in light of the Brexit debate (see, for instance, Blockmans 2014; Jokela 2014). This short introductory paper asks which concept(s) of differentiation have in fact been used in European integration and raises some of the implications. It focuses mainly on external differentiation, which has attracted less scholarly attention, whereas the other papers deal in more detail with internal differentiation.

From an analytical perspective, differentiated integration can have a functional, spatial or temporal dimension. The concepts may partially overlap, and they have been defined and used differently in the literature (see, for instance, Stubb 1996; Wessels and Jantz 1997: 349-362; Tuytschaever 1999: 136-217; Freiburghaus 2000: 57-74, 105-121; Gstöhl 2001: 54-60). If time is the major criterion, countries which are able and willing to integrate pursue cooperation based on common goals and the assumption that the others – basically those that are currently unable to do so – will follow later. By contrast, with regard to the spatial dimension, the level of integration varies on a rather permanent basis with the countries' membership. Finally,

functional differentiation means that countries may – beyond a common core – choose their participation in the policies in which they wish to temporarily or permanently participate or not (hence, rather guided by political will than integration capacity). Table 2 classifies the most common concepts according to these three dimensions while taking into account the distinction between internal and external differentiation.

Table 2: Concepts of differentiation

<i>Criterion</i> <i>Type</i>	<b>time</b> (temporary, mainly based on capacity, would-be members)	<b>members</b> (rather permanent, based on capacity or will, Eurosceptics)	<b>policies</b> (temporary or permanent, mainly based on will, Eurosceptics)
<b>internal differentiation</b>	multi-speed Europe <i>avant-garde</i>	variable geometry core Europe permanent structured cooperation	opt-out / opt-in [ Europe à la carte / partial membership ] enhanced cooperation
<b>external differentiation</b>	(pre-)accession process	variable geometry Europe of concentric circles	external governance [ cherry picking ]

The next section briefly introduces internal differentiation in the EU, while the remainder of the paper then focuses on external differentiation.

### **Internal differentiation in the EU: multi-speed, variable geometry and opt-outs**

The European Union’s dogma of ‘an ever closer union’ implies a uniform process of deepening of the integration of all member states. However, the 1991 Maastricht Treaty established an economic and monetary union (EMU) at different speeds with currently 19 member states using the euro. Those members willing to go further can thus constitute a temporary *avant-garde*. Another example is the Schengen area which Croatia, Cyprus, Bulgaria and Romania still are to join.

The idea of a ‘core Europe’ refers to differentiated integration on a more permanent basis for a defined group of member states. By contrast, the concept of variable geometry implies a changeable participation from EU member states across policy areas. The Fiscal Compact and the Banking Union, for instance, are open to EU members outside the euro area. Membership may vary not only in primary Union law and intergovernmental agreements. In 1997 the Treaty of Amsterdam institutionalised the possibility of ‘enhanced cooperation’ – further facilitated by the Treaty of Nice in 2001 – which allows a group of member states to advance integration among themselves within EU structures. Examples of enhanced cooperation to date are rather limited in number and include the regulations on divorce law, the unitary patent and the financial transaction tax. The Lisbon Treaty introduced the possibility for certain EU countries to strengthen their cooperation in military matters by creating permanent structured cooperation in defence.

The Maastricht Treaty granted opt-outs relating to EMU (for the UK and Denmark), the Common Security and Defence Policy (Denmark) and Justice and Home Affairs (UK, Denmark and Ireland). In the latter Area of Freedom, Security and Justice, Denmark does not take part,

whereas the UK and Ireland have a flexible opt-out which allows them to opt in or out of legislation and legislative initiatives on a case-by-case basis. The Lisbon Treaty introduced a special arrangement for the UK and Poland in relation to the Charter of Fundamental Rights. However, these exceptions are still far from a Europe *à la carte*.

It is worth mentioning that the longstanding debate of what should come first, deepening or widening, faded away since the beginning of the 1990s (Gstöhl 1998). It has become clear that after the completion of the internal market both processes – a further deepening of integration and an enlargement of the EU – can occur at the same time. Deepening has in the past triggered both further deepening (functional spill-over) and widening (geographical spill-over), while widening has led to further deepening (through reforms) and further enlargement (via ‘domino effects’). In addition, allowing for flexibility has promoted partial deepening, but it has not generated any ‘second class’ or partial members of the EU.

### **External differentiation in the neighbourhood: variable geometry and external governance**

In contrast to internal differentiation, external differentiation refers to the forms of integration that non-members have with the EU and in particular its core project: the internal market with the free movement of goods, services, capital and persons. Third countries with ‘a stake’ in the internal market subscribe to deep economic integration which involves ‘behind-the-border’ integration. In the EU’s neighbourhood relations, deep economic integration normally entails legal approximation to and often the adoption of parts of the *acquis*. In other words, external differentiation implies that neighbouring countries follow EU rules to differing degrees.

The most obvious case of a temporal external differentiation, the pre-accession process, requires a gradual alignment and taking over of *acquis* by the (potential) candidate countries. The enlargement process has not really allowed for any differentiated integration beyond transitional periods. Candidate countries are expected to fully take on the entire *acquis*.

The main spatial and functional models of external differentiation, based on a close association with the internal market, are the European Economic Area (EEA), Switzerland’s sectoral approach, the customs union agreements with Turkey, Andorra and San Marino, and the evolving European Neighbourhood Policy (ENP) with the new Association Agreements including Deep and Comprehensive Free Trade Areas (DCFTAs).

Several layers or circles around the EU can be identified in terms of an extension of the EU’s regulatory and organisational boundaries to its neighbours (Lavenex 2011). As the notion of concentric circles implies, the intensity of rule export diminishes with the growing distance to the EU. Since membership varies in each case of association and since the circles are far from being ‘concentric’, the concept of variable geometry appears fruitful. Furthermore, the policies covered are not identical either across groups of neighbours. This leads to a system of EU ‘external governance’ where parts of the *acquis* are extended to non-member states without an equivalent parallel inclusion in EU policy-making (Lavenex 2004: 683).

#### *The EEA: broad, multilateral and dynamic two-pillar model*

As the most far-reaching, inner circle around the EU, the EEA extends since 1994 the

internal market's four freedoms as well as horizontal and flanking policies to the countries of the European Free Trade Association (EFTA), except for Switzerland. Excluded are the common agricultural and fisheries policies, budget contributions, regional policy, taxation, economic and monetary policy as well as the EU's external relations. The EFTA states are associated with the Schengen area and they contribute to cohesion in the EU through special financial cooperation mechanisms. In return for internal market access the EU has sought bilateral agreements in areas of its own interest such as taxation of savings, fight against fraud and tax information exchange.

The EEA's institutional set-up is a complex, 'quasi-supranational' system of two pillars, the EU and EFTA, which generates the incorporation of more than 300 new EU legal acts per year. The main discussion of new law takes place within the EEA Joint Committee in the so-called 'decision-shaping phase' after the Commission has transmitted its proposals to the Council and the European Parliament as well as to the three EEA EFTA states Norway, Iceland and Liechtenstein. The EEA Joint Committee decides by consensus as closely as possible in time to the EU's adoption of new *acquis*. In the EEA EFTA countries, enforcement is carried out by the independent EFTA Surveillance Authority in Brussels and the EFTA Court in Luxembourg. If these countries, which need to 'speak with one voice', were to 'opt out' from new rules, the EU could suspend the related parts of the EEA Agreement. This has so far not yet happened. Overall, the EEA attempts to reconcile the principles of internal market homogeneity and EU decision-making autonomy, with the result that EFTA lacks a real right of co-decision.

#### *EU-Switzerland: broad, bilateral and still mainly static sectoral model*

Instead of the EEA, EFTA member Switzerland pursued a bilateral approach, building on its 1972 free trade agreement with the European Communities. In two package deals in 1999 and 2004 it concluded 16 sectoral agreements with the EU (free movement of persons, technical barriers to trade, public procurement, civil aviation, overland transport, agriculture, research, Schengen and Dublin association, taxation of savings, fight against fraud, processed agricultural products, environment, statistics, media, education, and pensions). A few more agreements have followed since and some are still under negotiations. In order to avoid 'cherry picking', the 1999 package is bound by a so-called 'guillotine clause' which means that it could be unravelled if one of the agreements is terminated.

Most of these 'bilaterals' are based on the notion of equivalence of laws between the EU and Switzerland and any changes need to be negotiated, albeit with two exceptions where Switzerland accepts the EU *acquis*: in civil aviation, where the Commission and the Court of Justice of the EU (CJEU) have competences in surveillance and arbitration in specified areas; and with regard to Schengen and the Dublin Convention, where Swiss adoption of any new acts requires approval from the Swiss legislature. In the latter case, if new acts are not adopted, the relevant bilateral agreement could be terminated. This sectoral approach lacks so far an overarching structure to deal with the ca. 20 main agreements, most of which are at a technical level run by a consensus-based Joint Committee, and the more than 100 secondary agreements.

The EU has in recent years insisted on the limits of such a static approach and on finding a more efficient institutional solution for taking over relevant new EU acts and case law and for ensuring the surveillance and enforcement of existing agreements. In 2012, the Swiss Federal

Council accepted, in principle, the overall objective of homogeneity and the incorporation of future changes to the *acquis*, provided that this was not automatic and that Switzerland could in turn participate in the decision-shaping process. However, the EU did not approve a two-pillar model, whereby each party would retain responsibility for ensuring the application and interpretation of the common rules on its territory (that is, Swiss national surveillance). In 2013, the EU and the Swiss Federal Council agreed as a negotiation basis that the CJEU should interpret the EU *acquis* adopted by Switzerland to strengthen legal certainty. Yet, the talks have been stalled as a result of the Swiss acceptance in February 2014 of a popular initiative requiring the introduction of immigration quotas. Quotas are not compatible with the agreement on the free movement of persons.

#### *EU customs union: narrow, bilateral and partly dynamic models*

Turkey has been associated with the EU since 1963 and in 2005 commenced accession negotiations. Turkey's (incomplete) customs union with the EU, established in 1996 as a step towards membership, allows all industrial goods and partially processed agricultural products that comply with EU norms to be traded freely in the EU. For this purpose, Turkey adopted the EU's common external tariff and the relevant *acquis* in the area of technical barriers to trade. Turkey also aligns its legislation in other essential internal market areas, notably competition policy and protection of intellectual property rights. Moreover, in order to ensure the proper functioning of the customs union, Turkey is expected to interpret provisions which are identical in substance to the corresponding EU treaty provisions in conformity with the relevant EU case law. An EU-Turkey Association Council tries to find a solution to any conflict and may unanimously decide to submit a dispute to the CJEU, another court or an arbitration tribunal. The Commission informally consults Turkish experts when drafting relevant new *acquis*, and further consultations may take place in the Joint Committee. Such input opportunities are less developed compared to those offered in the EEA.

The customs union binds Turkey to the EU's common commercial policy without offering it proper means of influence. Also, the EU's trade agreements have opened up third markets for EU exports but not for Turkish exports – despite granting the partners access to the Turkish market. Turkey is expected to follow suit by conducting parallel negotiations on free trade agreements. In May 2015 the EU and Turkey announced the updating of the customs union by including new areas such as services, public procurement and a further liberalisation in agriculture.

Andorra, San Marino and Monaco are part of the EU's customs territory. Whereas Andorra and San Marino have concluded bilateral cooperation and customs union agreements with the EU, Monaco still relies on its close relationship with France. The three countries have virtually no participatory rights in the EU's decision-making processes, but have to implement the relevant *acquis*. They have also concluded bilateral monetary agreements which allow them to use the Euro and grant competence to the CJEU. All three countries have in 2015 opened negotiations with the EU on – a multilateral or several bilateral – framework association agreement(s) in order to improve their internal market access. The negotiations envisage special governance and consultation arrangements as well as independent monitoring and enforcement of the *acquis*, possibly by the EU institutions.

## *ENP DCFTAs: narrow, bilateral and mainly static models*

The new Association Agreements which the EU negotiates in the framework of the ‘outer circle’ of the ENP encourage the approximation of legislation to the *acquis*. Tailor-made bilateral Action Plans define jointly agreed reform priorities, encouraged by political conditionality, and the EU supports the implementation process with technical and financial assistance. The Association Agreements are complemented by DCFTAs which cover substantially all trade in goods and services as well as ‘behind-the-border’ issues such as standards, competition policy or intellectual property rights. They require the partners’ capacity to approximate to EU rules. In particular, the countries commit to the relevant *acquis* regarding technical barriers to trade and certain services. Since there is no agreed *finalité*, the ENP’s ‘more-for-more’ approach can, however, not be interpreted as a multi-speed concept.

The 2014 Association Agreements with Ukraine, Moldova and Georgia contain different legislative approximation mechanisms with varying degrees of obligation and various procedures to amend the incorporated rules. The Commission has to notify these ENP countries of relevant changes. The Association Council or Association Committee may modify the annexes to take into account the evolution of EU law, and in some sectors of the DCFTA a dynamic procedure to update the *acquis* is foreseen. Dispute settlement arrangements vary across sectors from consultation, arbitration or mediation to rulings by the CJEU. Unlike the EEA, the DCFTAs do not, unlike the EEA, aim at the creation of a homogeneous and dynamic legal space but are instead based on more pragmatic market access conditionality, which links additional access to the internal market to progress in implementation (see Van der Loo 2016). They thus entail a shift from narrow, static soft law to a broader and binding hard law approach.

### **Conclusions: some implications**

Internal differentiation still presupposes EU membership with a seat at the table and voting rights on the occasion of treaty revisions or for differentiation in EU secondary law, respectively. Despite a few limited opt-outs of EU member states and a certain degree of flexible integration, there is no Europe *à la carte*. Yet, in view of mounting Euroscepticism the question can be asked whether differentiated integration will increase and to what extent there (still) is in fact a potential core Europe.

Whereas the temporal dimension is important in the (pre-)accession policy, the spatial and functional dimensions define the pattern of external differentiation which the concept of ‘variable geometry’ appears to fit best, although some (non-concentric) ‘circles’ around the EU can be distinguished as well. Moreover, ‘cherry picking’ is not an option as the EU does not grant non-members any *à la carte* integration with its internal market. This is not surprising given that a Europe *à la carte* is not on offer either for internal differentiation.

When it comes to the institutional aspects of EU external governance, the EU’s neighbourhood relations take different forms (see Gstöhl 2015): First, the breadth (or scope) of integration varies with regard to the membership (bi- or multilateral models) and the level of integration (narrow or broad coverage of internal market issues). A multilateral model may involve a pooling of sovereignty, like in the EEA, requiring the partner countries to ‘speak with one voice’ vis-à-vis the EU. Second, the depth of integration varies according to the mechanisms in place for the adoption and for the enforcement of *acquis*. These mechanisms may not only

rely on legal obligations, but also on incentives and persuasion. The *acquis* import can be static as defined at the time of an agreement or (partly) dynamic in terms of an additional incorporation of future *acquis*. Moreover, the surveillance and enforcement of imported *acquis* can be based on a single pillar or a two-pillar system, depending on whether the EU institutions are entrusted with these functions or whether the neighbours implement an own pillar on their side.

The current trend – as shown in the EU-Swiss relations regarding the search for an institutional umbrella agreement, the small states' association negotiations or the ENP DCFTAs, and possibly the upcoming modernisation of Turkey's customs union – clearly moves in the direction of broader and more dynamic external differentiated integration. The EU increasingly attempts to ensure the homogeneity of its internal market by concluding agreements which allow for a dynamic adaptation to the evolving *acquis*, its uniform interpretation and for independent surveillance and judicial enforcement. Yet, there is an inherent trade-off for the neighbouring countries between the benefits resulting from the internal market and the lack of participation in the EU law-making process. For the EU, the price for extending its reach in the neighbourhood is a proliferation of rather complex arrangements, which carry the risk that third countries fail to follow the *acquis*, leading to legal and political fragmentation. In the end, internal and external differentiation face similar challenges.

Finally, regarding the post-Brexit options for the United Kingdom, the lessons to be drawn are that a 'hard' Brexit would constitute in a (DC)FTA at best, whereas a 'soft' Brexit would have to search for a new bespoke arrangement rather than adopting any existing form of external differentiation.

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## Differentiated integration within the Treaties

Stefano MICOSSI and Aurora SAIJA<sup>1</sup>

The Treaties provide various instrument aimed to move forward with the EU integration process by creating different sets of obligations and rights for different states or groups of states.<sup>1</sup> Some of these instruments date back to the EEC and are related to the establishment and the functioning of the single market (e.g. derogations from the fundamental freedoms principles in articles 36 and 52 TFEU). Others have been progressively introduced, in coincidence with the expansion of both membership and competences of the Union: *i)* the Maastricht Treaty provided an opt-out from the single currency; *ii)* the Treaty of Amsterdam introduced additional opt-outs for a number of areas (Schengen *acquis* and external border controls; freedom, security and justice; defence policy) and moreover the enhanced cooperation mechanism applicable in the former first and third pillars (fields covered by the EC Treaty and areas of judicial cooperation on criminal matters); *iii)* the Treaty of Nice extended the scope of enhanced cooperation to the common foreign and security policy; *iv)* finally, new flexibility mechanisms (passerelle clauses, brake clauses, accelerator clauses) were introduced by the Lisbon Treaty.

Although “the list is almost endless with regard to the various possibilities for differentiated integration within the current framework of the treaties”,<sup>2</sup> the main flexibility instruments may be grouped as follows.

### 1. Opt-outs

Derogations from Treaty obligations for specific member states; usually formalised in Protocols, which also define the terms for opting back in. Areas:

- Single currency: third stage of Monetary Union is characterized by the distinction between participating Member States, Member States with a derogation (committed to join the euro area as soon as they meet the convergence criteria; articles 139-144 TFEU) and MS which have opted-out (Protocols 15-UK and 16-Denmark);
- Schengen *acquis* and external border control: derogations for UK, Ireland and Denmark (Protocols 19, 20, 22);
- Freedom, security and justice (including asylum and immigration, police and judicial cooperation in civil and criminal matters): derogations for UK, Ireland and Denmark (Protocols 19, 20, 21, 36);
- Defence policy: derogation for Denmark (Protocol 22);

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<sup>1</sup> Closa Montero C., *Flexibility Mechanism in the Lisbon Treaty*, Study for the Constitutional Affairs Committee of the European Parliament, 2015.

<sup>2</sup> Blockmans S., *Introduction to the volume “Differentiated integration in the EU”*, CEPS, 2014.

- Charter of fundamental rights: partial derogation for Poland and UK (protocol 30).

## **2. Enhanced cooperation**

Possibility for a group of member states to establish advanced integration within the institutional framework of the Union. The acts adopted via enhanced cooperation bind only the participants states.

*Legal basis:* article 20 TEU and articles 326 to 334 TFEU

*Conditions* (aimed at ensuring the coherence and effectiveness of EU law and preventing a fragmentation of EU legal and political framework):

- Enhanced cooperation can only be established within the Union's non-exclusive competences (areas of exclusive competence are only those indicated in article 3.1 TFEU: customs union; establishing of the competition rules necessary for the functioning of the internal market; monetary policy for the member states whose currency is the euro; the conservation of marine biological resources under the common fisheries policy; common commercial policy).
- It shall aim to further the objectives of the Union, protect its interests and reinforce its integration process. It shall comply with the Treaties and Union law; it shall not undermine the internal market or economic, social and territorial cohesion, nor constitute a barrier to or discrimination in cross border trade, nor distort competition between member states. The Council and the Commission ensure that activities undertaken in the context of enhanced cooperation are mutually consistent and consistent with the policies of the Union.
- At least nine member states must participate.
- The decision authorizing enhanced cooperation shall be adopted by the Council as a last resort (when the objectives cannot be attained "within a reasonable period" by the Union as a whole).
- All members of the Council (also countries outside the enhanced cooperation) may participate in the deliberations, but vote is limited to those participating to cooperation. EP and Commission are involved in the decision making process in their entirety, without distinction between member states which take part in closer cooperation and those which do not.
- Any enhanced cooperation shall respect the competences, rights and obligations of not participating states. The not participating states shall not impede the implementation of the cooperation by the participating ones.
- Enhanced cooperation must be open to all member states at any time (subject to compliance with the conditions of participation laid down by the authorizing decision and, for access at a later date, with the acts already adopted within the framework of

the cooperation).

### *Procedure*

For Common foreign and security policy: member states wishing to initiate an enhanced cooperation must submit a request to the Council; the request is forwarded for opinion to the High representative of the Union for Foreign Affairs and Security Policy and the Commission; EP is informed. Authorization to proceed shall be granted by the Council by unanimity.

For the other areas covered by the Treaties: member states address their request to the Commission, which may submit a proposal to the Council. The Council decides by qualified majority, after obtaining the consent of the EP.

Note that the original discipline (Treaty of Amsterdam) contained a safeguard clause allowing any member state to prevent the launch of enhanced cooperation for important reasons of national policy. In this case the Council could refer the matter to the European Council (for third pillar) or to the Council in the shape of the heads of state or government (for first pillar), which should decide by unanimity. This mechanism was mitigated by the Treaty of Nice (right of veto limited to common foreign and security policy), but only with the Treaty of Lisbon the possibility for member states to impede the launch of enhanced cooperation was definitely eliminated. Some commentators have observed that, even in the absence of a right of veto, member states maintain the possibility to obstruct the procedure, by arguing that it impairs their competences, rights and obligations or by participating with the aim to hinder the functioning of cooperation.<sup>3</sup> In fact, according to article 333 TFEU, when enhanced cooperation concerns policy areas subject to unanimity, the switch to majority voting requires in any case unanimous agreement in the Council.

*Cases of application:* divorce law; European patent with unitary effect; financial transaction tax (still pending).

### **3. Passerelle clauses**

They allow under certain conditions to switch from the special to the ordinary legislative procedure and/or to switch from by unanimity to qualified majority for the adoption of an act in a given field.

#### **a) General passerelle clause (article 48.7 TEU)**

Applicable to all EU policies (but unanimity cannot be derogated for decisions with military implications or those in the area of defence). Activation must be authorized by a decision of the European Council acting unanimously and requires the consent of the EP by a majority of its components. The initiative must be notified to national Parliaments, that may

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<sup>3</sup> Rossolillo G., Cooperazione rafforzata e Unione economica e monetaria: modelli di flessibilità a confronto, in "Rivista di diritto internazionale", 2014, n. 97, fasc. 2.

object the initiative within six months; if any does, the initiative fails.

**b) Specific passerelle clauses**

They concern the following:

- Multiannual financial framework: the European Council may, unanimously, authorize the Council to act by qualified majority when adopting the regulations on the MFF (article 312.2 TFEU)
- Common Foreign and Security Policy: the European Council may unanimously adopt a decision stipulating that the Council shall act by a qualified majority in foreign policy matters others than those for which qualified majority voting is already provided (article 31.3 TEU)
- Judicial cooperation concerning family law with cross-border implications: the Council may unanimously decide that acts in this area will be adopted by the ordinary legislative procedure instead of the special one; national Parliaments retain a right to object (article 81.3 TFEU)
- Enhanced cooperation in the areas governed by unanimity or by a special legislative procedure: the Council may unanimously (all members of the Council participate in the deliberation but only member states participating in enhanced cooperation shall take part in vote) pass to qualified majority or to the ordinary legislative procedure (article 333 TFEU)
- Social affairs: the Council may unanimously decide to pass to the ordinary legislative procedure for acts relating to the rights of workers, which would otherwise be subject to a special legislative procedure (article 153.2 TFEU)
- Environmental matters: the Council may unanimously make the ordinary legislative procedure applicable to some matters (e.g. town and country planning, land use) which would otherwise be subject to a special legislative procedure (article 192.2 TFEU).

**4. Brake clauses**

The Lisbon Treaty has extended the scope of qualified majority to judicial cooperation in criminal matters and social protection of migrant workers. In the same areas the Lisbon Treaty has introduced brake clauses that allow a member state to block ordinary legislative procedure if it considers that the draft legislation threatens the fundamental principles of its social security system (article 48 TFEU) or its criminal justice system (articles 82 and 83 TFEU). The procedure is then suspended and the European Council shall, within four months, either:

- refer the draft back to the Council which shall continue with the ordinary legislative procedure, or
- take no action, thereby stopping the procedure (but enhanced cooperation may be

launched on criminal matters through an accelerator mechanism; see below), or request the Commission to submit a new proposal (only in relation to social security systems for migrant workers).

## **5. Accelerator clauses**

They facilitate the activation of the enhanced cooperation mechanism when the adoption of a piece of legislation via the ordinary legislative procedure has failed. It is sufficient that at least nine member states decide to establish an enhanced cooperation; they shall simply notify their intention to the EP, the Council and the Commission and the authorization is deemed to be granted. The accelerator clauses concern four areas:

- Judicial cooperation in criminal matters (article 82 TFEU);
- Establishment of common rules for certain criminal offences (article 83 TFEU);
- Creation of a European Public Prosecutor's Office (article 86 TFEU);
- Police cooperation (article 87 TFEU).

As said before, the accelerator mechanisms concerning cooperation and criminal offences directly result from the enactment of the brake clauses in these two areas. When this happens and the legislative procedure is therefore stopped, countries may turn to the accelerator clause to continue and conclude the legislative procedure via enhanced cooperation.

## **6. Towards the completion of EMU: the suitable legal instruments**

As indicated by the 2012 report of the four Presidents, the future of the EMU requires a stronger architecture, based on integrated frameworks for the financial sector, for budgetary matters and for economic policy, plus a strengthened democratic legitimacy.

While the institution of the Banking Union has largely realized a deeper financial integration, some essential steps are still needed in order to achieve an integrated framework for budgetary matters (creation of a fiscal capacity of the Union) and economic policy (introduction of common minimal standards in sensitive areas relating to the functioning of the single market or social protection issues).

As past experience has shown, the adoption of a new Treaty amending the existing ones implies a long and complicated procedure, with uncertain outcomes. Some advancements toward the completion of the EMU can already be achieved by using the instruments currently offered by the Treaties or through limited and targeted revisions of the Treaties. The choice of the proper instrument should be guided by the principle of sincere cooperation (article 4.3 TEU) and should aim to preserve the EU institutional balance. In this perspective, the internal sources of EU law should be preferred to the external ones, the general rules to the specific

ones, the secondary legislation to the (simplified) revision of the Treaties.<sup>4</sup>

The relevant TFEU provisions for secondary legislation are: article 113, for fiscal harmonization; article 114, to introduce a European Deposit Insurance Scheme; article 153.2 to adopt minimum requirements on the rights of workers; article 311 to provide the Union with taxes of its own. In the absence of the required consensus (either unanimity or qualified majority as the case may be) the EU could rely on article 136 TFEU, which empowers the Council to adopt measures specific to member states whose currency is the euro (a) to strengthen the coordination and surveillance of their budgetary discipline and (b) to set out economic policy guidelines for them.

When an *ad hoc* legal basis cannot be found in the Treaties, article 352 TFEU offers a residual clause with a general scope. According to article 352, when Union action is necessary “to attain one of the objectives set out in the Treaties” and the Treaties do not provide the necessary powers, the Council shall adopt the appropriate measures, acting unanimously with the consent of the EP. An issue that should be further explored concerns the possibility to use article 352 in conjunction with article 136. Taking into account the several conditions which govern enhanced cooperation, this possibility seems preferable to realize differentiated integration.

The simplified revision procedure under article 48.6 TEU may constitute an additional instrument for the completion of the EMU when only limited amendments of the Treaties are needed. It has been used for the introduction of a new third paragraph in article 136 TFEU, allowing the creation of the European Stability Mechanism.

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<sup>4</sup> Tosato G.L, *L'Unione economica e monetaria: evoluzione e criticità legali*, Astrid, 2015.

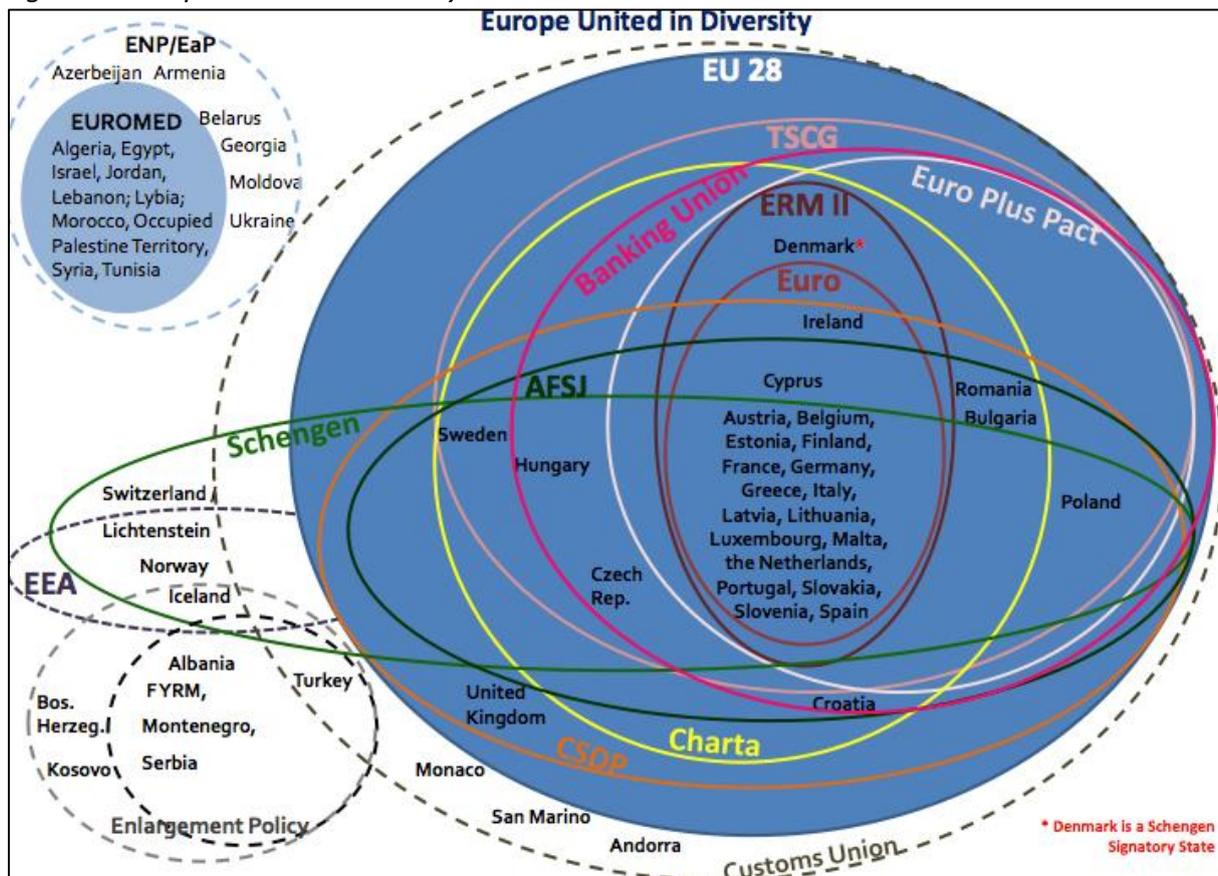
# In search of explanations for differentiated integration: The Franco-German couple as the driver in the European Council

Wolfgang WESSELS & Darius RIBBE

## A confusing map of emerging realities: an ever more differentiated Union

We are faced with growing differentiation in the political system of the European Union. Several treaties, groups and pacts besides the Lisbon treaties let us observe a highly complex and confusing map of Europe less united but more fragmented in integration.

Figure 1: Europe United in Diversity



Source: Tekin 2012; updated by Tekin 2016.

This map by Funda Tekin illustrates a reality showing a dynamic in which member states and neighbouring states are cooperation in several legal frameworks. We can observe a core – with France and Germany and all other founding countries in the centre – in which the member states cooperate in all frameworks. However this group does not necessarily offer an effective group as a driver promising a strong coherence for future steps.

One observation is clear: The original Rome treaty doctrine that each member state should have equal rights and obligations has been eroded – at the latest with the seventies. The Tindemans report (Tindemans 1975) had contested this principle of the Community orthodoxy in words and the creation and evolution of the European Monetary system (1979) has started in reality with forms of opt-outs and opt-ins.

In view of the emerging differentiation in the real world, the treaty-makers have put different forms of flexibility into the legal words of the relevant treaties – starting with the Art. 100a(4) of the Single European Act introducing derogations – even in the core area of the internal market (see also art. 27 of the Lisbon TEU). The Lisbon treaties provide the possibility of differentiation under Article 20 TEU, 326-334 TFEU (enhanced cooperation), Articles 42(6) and 46 TEU (permanent structured operation in Common Security and Defence Policy). The number of potential differentiation within the framework might seem to be “almost endless” (Blockmans 2014: 6).

In light of these efforts by treaty makers it is surprising that these articles are barely used – only twice since 1999 for enhanced cooperation. Apparently the rules of flexibility are themselves not flexible enough. (Did you ever try to describe the procedures of Art. 326 to 334 to students and explain the rational choice assumptions behind the motivations of different groups of actors who are supposed to initiate and agree on this procedure?) Apparently in case of need new forms of legal and even more real differentiation are invented. Thus, the negotiations for the Brexit again “promise” new legal and institutional forms of relations with a perhaps semi-attached neighbour. We expect additional variations of high complexity, which will offer a highly interesting area of further analyses and assessments.

### **Multiple efforts of categorization: no convincing net of catching the realities**

Academics have tried to structuralize the many ways of differentiation, as “varying patterns of integration” become the logical consequences of expansion (Stubb 1996: 294). From the Tindemans Report (Tindemans 1975) differentiated integration has emerged to a prominent and stimulating field of research on European integration. Some early conceptual categorizations of differentiation (like those of Grabitz (1984)) have been extended and reformulated.

In the following, we will recall some of the main concepts (following a classification by Stubb (1996)) briefly without the claim to present an all-inclusive report on the state of art:

**Multi-Speed Europe** – In the concept of a multi-speed Europe, the member states agree on the same policies, but pursue them at different times. Thus the differentiation is “temporal” (Deubner 2005; Holzinger and Schimmelfennig 2012: 294). It is assumed, that states, which are “able and willing”, will integrate further, the remaining will follow later (Stubb 1996: 287). This process of a leading “core” of Member States leads other members to reach the objectives in due time. As a consequence, this method only applies to new policy fields, the “acquis communautaire is to be preserved” (Stubb 1996: 287). In the end the aim is the introduction of a federal political union, a permanent differentiation is to be avoided (Grabitz 1984). Holzinger and Schimmelfennig add the closer defined concepts of an “Avantgarde Europe” (Club of Florence 1996; Holzinger and Schimmelfennig 2012: 294), “Core Europe” and “Europe of Concentric Circles” (see also Schäuble and Lamers 1994). The avant-garde is forming a fixed group of Member States, leading the integration process of the Union, similar to the inner core, where other members form a second, non-members a third circle. Fischer (2000) even pictured a federal core of the avant-garde with an own institutional architecture: government, parliament and treaties. In all cases the rest is obliged and expect to follow the “pioneer group” (Chirac 2000).

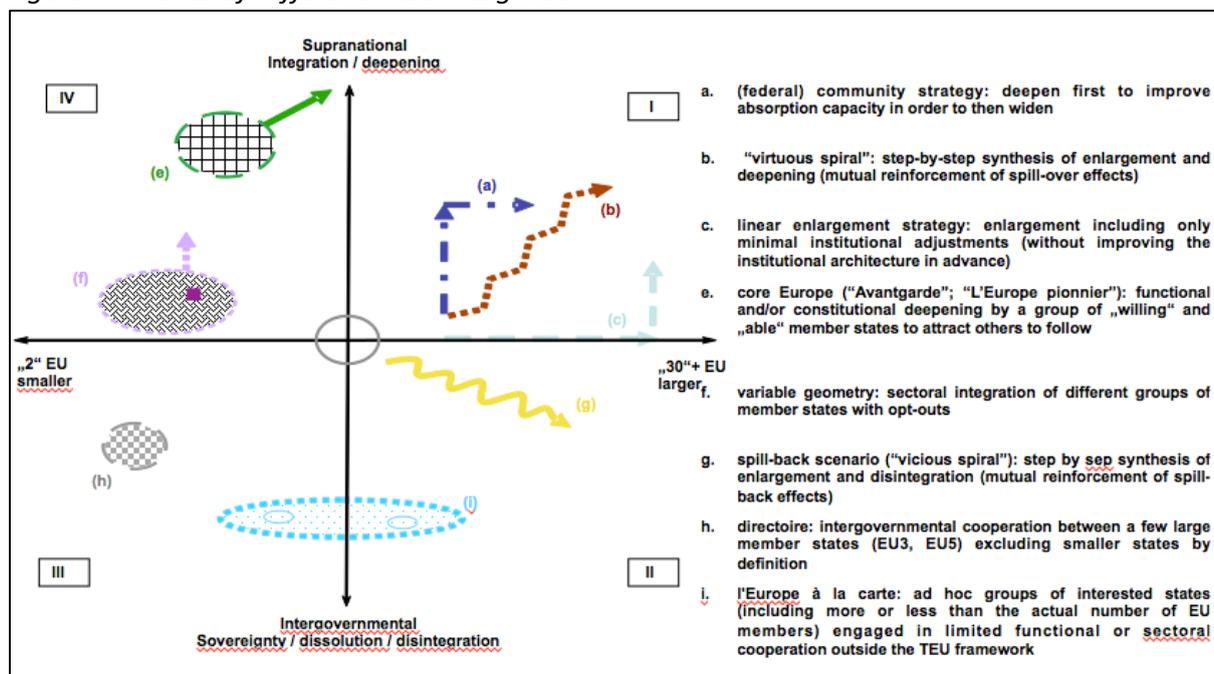
**Variable Geometry** – Whilst the progressive core in the multi-speed Europe concept is overhauled, in the approach of variable geometry a core of countries can be permanently or irreversibly separated from “lesser developed integrative units” (Stubb 1996: 287). Thus differentiation in variable geometry is further than in the multi-speed Europe, it states a set of aspiring common goals as inaccessible given the cultural, economic and political differences of Europe. Holzinger and Schimmelfennig separate within the concept between “flexible integration”, which allows only Member States to take part in the introduced concept of differentiation and “variable geometry and ‘differentiated integration’”, which include non-Member States (Holzinger and Schimmelfennig 2012: 294).

**Europa à la Carte** – The Europe à la carte model relies only on intergovernmental decision-making, where Member States can “pick-and-choose” (Stubb 1996: 288) in which areas they want to integrate and what objectives they share. Following, no full membership remains; no core can be defined because each state can define its own menu. The Member States of the Union can differentiate on each specific matter and form their regimes “outside the treaties” (Dahrendorf 1979; Holzinger and Schimmelfennig 2012: 294); in this concept the functions of cooperation should determine the legal form to be taken.

Scharpf even proposed the acceptance of a permanent separation of standards in the European Union, depending on the willingness and ability of the Member States (as cited in: Holzinger and Schimmelfennig 2012; Scharpf 1999).

In an approach we link forms of differentiated integration and the conventional categorization of European Integration in one scheme, to illustrate in one view the relations between concepts of widening and deepening which identifies a significant aspect of the discussion about differentiated integration.

Figure 2: Modes of Differentiated Integration



Source: Wessels 2016.

Albeit the many concepts of differentiated integration provide different modes and varieties of

possible differences, they have “rarely drawn on to explain the extent of differentiated integration arrangements” (Duttler 2016: 41). Duttler derives an horizontal integrated theoretical model of “intergovernmentalist, supranationalist and constructivist explanatory variables” to fill this desideratum (Duttler 2016: 217).

### **The search for an explanatory theory: the European Council in the focus**

Researchers have focussed on how to describe these phenomena and how to characterize it in legal and institutional terms. Cost and benefits of different forms of coherence of the EU are discussed intensively. How far do forms of differentiated integration offer opportunities for ‘more Europe’, or harm fundamental pre-conditions for a Union and thus lead to ‘less Europe’?

Many researchers also examined several explanations for differentiated integration. Whilst some see the political motives as main explanans, others focus more on economic or normative arguments for differentiated integration. Furthermore, the mode of differentiated integration is seen to depend on the situation it is applied in (Advisory Council on International Affairs AIV 2015: 11).

In our view we should discuss why and how differentiated integration has been concluded. Forms of differentiated integration are not something that takes place by chance. As integration per se, decision makers on EU- or on national level – depending on the instruments chosen – must agree upon differentiated integration. If a decision is required, it is worth asking: “who takes this decision?”

As the driver for these decisions we focus on a closer look at the European Council. The heads of state or government represent the “masters of the treaties” (Bundesverfassungsgericht 2009: par. 150), they are political leaders for their country. Thus we see the European Council as a “key institution” and “constitutional architect” (Wessels 2016) in the institutional framework of the European Union.

Regarding differentiated integration, the European Council has come to dissimilar decisions on diverse matters. In general, the chief executives have implicitly or even explicitly acknowledged “different paths” to an ever closer union in their Conclusion of the June Summit 2014 (European Council 2014: 11, see also European Council 2016). Thereby, the members of the European Council have opened the possibility for member states, which are willing and able to deepen integration in the EU framework, whilst countries that do not want to integrate further are allowed to opt out. Article 50 of the TEU dealing with the withdrawal of member states confirms once more such a leading role, as the European Council shall provide the guidelines for the exit negotiation. Even more: It would be a total upheaval of the Union’s political decision making of the last decades, if the political leaders would not also take de facto the final decisions on the agreement with the United Kingdom leaving it to the Council to put their consensus into the proper legal form as Art. 50 TEU demands.

In the large majority of cases these opt-outs of some member states have been agreed upon in the European Council. The heads of state or government have used the European Council to find a consensus on the derogations to the treaties, in which the different exceptions are specified. Most remarkable are the decisions for opt-outs, which allow the British and Irish

governments Schengen exceptions as well as the Danish and British governments to stay outside the single currency. Governments have bargained for certain exceptions as a trade-off for their approval of further integration by other member states; differentiated integration became a main alternative to stagnation or the growing use of qualified-majority voting overruling those unwilling to integrate (Kahraman 2013).

Besides some forms of differentiation inside the legal framework of the union, the European Council has initiated manifold differentiations also outside the legal framework over the time. Especially in times of crisis the heads of state or government were forced to take action, but the treaty provisions inhibited many times further steps for problem solving with a higher degree of integration. Due to the fact that not all member states agreed on the same measures for dealing with the crisis, or in general on deepening the European Union, the willing countries agreed on intergovernmental treaties. In these constellations the European Council has proven to be an important arena for the political debate on further steps of integration and thus for bringing countries together also outside the institutional framework. The original Schengen Treaty and the “Treaty on Stability, Coordination and Growth” can be noted as two of the most known examples of such differentiation. The heads of state or government of some member states, most noticeable Germany, considered the provisions of the Stability and Growth Pact as insufficient. Therefore, they introduced the new pact, equipped with stricter defaults and measures.

The European Council as the “ultimate decision maker” (Wessels 2016: 72) had to address the many problems of the union. The heads of state or government are in conflict between their “problem-solving-instinct” to tackle significant issues in the EU framework, and their “sovereignty-reflex” (Wessels 2016) to keep national autonomy; especially when challenged in highly sensible policy areas, this dilemma can lead to highly divergent positions. As a consequence, the European Council had to allow a high degree of flexibility.

If the European Council is the key institution in the decision-making process, then we need to study the internal processes within the European Council. With a view to the recorded evidence, we see the Franco-German tandem as a driving force of European Integration for several periods of the Union (Schild 2010). Of course we need to analyse under which conditions these two states are willing and able to act as driving forces for more integration taking into account the need for differentiation. How do they motivate other member states to accept or even to demand steps that lead – perhaps implicitly – to a high level of transferred competences and instruments by following the Monnet method? Which factors can we analyse to have motivated or forced the political leaders of these two countries and other members of the core group to advance in smaller groups? How is the package deal constructed? The Brexit process will offer high potential to test several hypotheses to answer these questions.

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## SESSION 1: SUMMARY<sup>1</sup>

The objectives pursued by this panel were first to provide for definition of useful concepts, second to highlight the differences and links between internal & external aspects of differentiation and third to debate the possible arrangements to move forward in relation to the Brexit context.

In order to introduce the overall topic of this panel, the concepts and implications of differentiation in the EU and in its neighbourhood were presented. In the European integration process a flexible approach was adopted, leaving to the Member States the capacity to integrate following their own capacity and willingness based on differentiated rights and obligations. Thus, the EU has been conceptualised by some as a system of differentiated integration (Schimmelfennig, Leuffen and Rittberger, 2015:767). Within this concept, internal differentiation is understood as a system within which at least one member states does not participate in integration while external differentiation encompasses the situation where at least one non-member state participates in this process.

When looking at this concept of differentiated integration (both for internal and external), three dimensions can be highlighted:

- With time as a major criterion, there are differences between the states that can take part in integration now and those that cannot and will follow later. Examples of such dimension can be found in the accession process which may correspond to a certain kind of external differentiation. Regarding internal differentiation, it can be described as multi-speed Europe.
- When membership is the variable, the level of integration will vary on a rather permanent basis with the countries' membership.
- When policies are the variable, functional differentiation takes place. Countries may choose which policies they wish to temporarily or permanently participate to. The question would rather be of political will than integration capacity. It can lead to an Europe *à la carte*, with possibilities for enhanced cooperation (internal differentiation) or cherry picking (external differentiation).

External differentiation was understood here and contrasted with internal differentiation as the form of integration that non-EU members have with the EU and in particular its core project, i.e. the internal market and the freedom of movement it encompasses. Participation of 3<sup>rd</sup> countries to the internal market normally implies deep economic integration and therefore a legislative rapprochement with the EU and its *acquis*.

An obvious case of temporal external differentiation is the pre-accession process which requires a gradual alignment and taking over of the EU *acquis* by the candidate countries. Regarding the spatial (membership) and functional (policies) models, the EEA, Switzerland's sectoral approach, the customs union agreement with Turkey, Andorra and San Marino, and the evolving ENP are mere examples of an external differentiation based on the internal market.

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<sup>1</sup> Summary prepared by Sarah KOLF & Florent LE DIVELEC.

It was argued that one can identify several layers or circles around the EU in terms of regulatory and organisational boundaries' extension to EU's neighbours. Thus, the notion of concentric circles which implies a diminution of intensity in rule export with the growing distance to the EU can appear as a fruitful notion. However, it must be taken into account that since membership varies in each case of association with the EU and since the circles are often far from being 'concentric', the concept of variable geometry appears pertinent.

Moreover, the variation of policies covered across group of neighbours make the EU system of 'external governance' a system within which parts of the *acquis* are extended to non-member states without a parallel inclusion in EU policy-making (Lavenex 2004:683).

Within such circles, the inner-circle defined by its dynamic nature is the EEA which has been extending since 1994 the internal market's four freedoms, as well as horizontal and flanking policies to the EFTA members to the exception of Switzerland and to the exception of sectoral fields such as common agricultural and fishery policies, regional taxation and economic and monetary policy (etc.). The EEA is characterised by a complex institutional set-up based on two pillars - the EU and EFTA - which generates as a "quasi-supranational complex" a vast number of EU legal acts incorporation every year.

A second layer is found with the broad, bilateral and mainly static sectoral model of EU-Switzerland cooperation. Here, the relation built since 1972 is mostly based on sectoral agreements concluded between the two parties based on the notion of equivalence of law between the two legal orders. Any changes require negotiation. Here it was argued that the EU has tried to limit such a static approach and tried to find more efficient institutional solution.

Finally a third and fourth layers were put forward regarding the EU customs Union and the ENP DCFTAs (European Neighbourhood Policy Deep Comprehensive Free Trade Areas). Though these two models were argued as being narrow in scope and based on bilateral solutions.

In conclusion, several models of external differentiation are to be found within the EU relation to third countries. The current trend clearly moves in the direction of broader and more dynamic external differentiated integration. However, the case of Brexit and the future EU-UK relations fit hardly within any model of external differentiation as they exist today.

The panel then focused on the mechanism of enhanced cooperation as a source for differentiated integration. This tool is designed to overcome a blockage in the Council on specific decisions. Until now, this tool has been used three time in practice: on divorce law, on the European patent and on the financial transaction tax (FTT). This instrument has to be used as a last resort, after all member states have, for some time, tried to reach a consensus but were not able to do so. Enhanced cooperation shall not be used in the field of exclusive competences of the Union and it has to be based on a community competence. It shall, moreover, not hinder economic, social and territorial cohesion. In addition, the principle of institutional unity of the Union shall be respected. The participating member states rely on the institutions of the Union, and the non-participating member states may take part to the deliberations in the Council, even if they have no right to vote.

The European Monetary Union is another story. It breaches institutional unity of the Union and covers a large range of activities, some of them are not even mentioned in the Treaty. The EMU was seen as temporary, but it is now a subsystem in the Union with its own institutions and decision-making procedures. If an outsider want to join, the insiders will judge if it can do so, and the requirements can become more and more demanding. In terms of procedures, the Council will be informed of decisions adopted by the Eurogroup. Today, the EMU seems to be fairly stuck in various ways. For instance, a common instrument of financial capacity is needed but would require a change in primary law. However, the variety of instruments existing in the treaties to lead to more integration are overlooked. Thus, there seems to be a need for changes in the Treaties. The simplified revision procedure provided for in article 48 TEU could be used to amend the Treaty.

Differentiated integration in the light of the role of the Franco-German couple was presented. An early illustration of differentiation in practice has been the Elysée Treaty of 1963 between Charles de Gaulle and Konrad Adenauer. The idea that each member state should have equal rights and obligations started being eroded in the doctrine in the 1970's with the Tindermans proposal and then in practice with the European Monetary system. The treaty-makers started to introduce elements of differentiation in the treaties. Article 100 a (4) of the Single European Act is the first treaty provision providing for derogations, even in core area such as internal market. Suddenly, some kind of exceptions were legally made possible. Afterwards, always more flexibility provisions were added to the Treaties (see in particular the Lisbon Treaty), leading to a very complex and confusing legal system.

The panel shifted its focal point from categorising the several forms of differentiation to trying to answer the following question: How and why does differentiation occur ? First of all, who are the drivers of this process? France and Germany, it was argued, have been crucial actors. The Franco-German tandem could on several occasions be seen as a driving force towards further European integration. This is why it would be difficult to imagine a "Southern Europe" (including France) as opposed to a "Northern Europe" (including Germany). It appears that the European Council is a key institution in this regards. This is where most of the decisions leading to differentiation happen. This has for instance been the case with reference to the Monetary Union, crated to follow up on internal market integration.

Another question is the following one: why would France and Germany agree on differentiation? It was argued that this phenomenon should not be seen as an hegemonic attempt to impose further integration to other Member States, but rather as a tool to find a consensus that other Member States can fit in. Practice has shown that some member states even sometimes urge France and Germany to find a consensus on some issues.

## **Session 2**

**What have we learned from the negotiations between the UK and the EU on the feasibility and side-effects of seeking differentiation? And, first indications on the likely process and outcome of the withdrawal negotiations.**

### **Speaker:**

Jonathan FAULL, Director-General, European Solidarity Corps, former Director- General of the Task Force for Strategic Issues related to the UK Referendum, European Commission

## SESSION 2: POSITION PAPER

### Outline of contribution by Jonathan Faull<sup>1</sup>

It seems most useful, given my recent experience with the negotiations leading to the UK referendum on membership of the EU, that I dwell on the now defunct “New Settlement for the United Kingdom within the European Union”<sup>2</sup>.

The set of arrangements approved at the European Council on 18-19 February 2016 “ceased to exist” when the British electorate voted to leave the EU in the referendum on 23 June 2016. However dead and buried<sup>3</sup> the text may be, it does nevertheless represent what the leaders of the European Union’s countries and institutions believed was appropriate and lawful (*à traités constants*<sup>4</sup>) in February 2016 to keep the UK in the EU. That the referendum produced another result and what will or should happen next are not addressed in this paper.

The “DECISION OF THE HEADS OF STATE OR GOVERNMENT<sup>5</sup>, MEETING WITHIN THE EUROPEAN COUNCIL, CONCERNING A NEW SETTLEMENT FOR THE UNITED KINGDOM WITHIN THE EUROPEAN UNION” and its accompanying texts were divided into four categories, three of which relate directly to the issue of differentiation to which this conference is devoted. The fourth (Section B in the Decision), Competitiveness, need not detain us here, which is not to deny its great importance.

The first category, Section A in the Decision, was entitled Economic Governance and dealt with the relations between Member States whose currency is the euro and the others. It built on legislative provisions and other arrangements already agreed in the establishment of the banking union<sup>6</sup>, in particular the single supervisory and resolution mechanisms and case law on the location of derivatives clearing<sup>7</sup>.

Section C dealt with Sovereignty, recognising that *“the United Kingdom, in the light of the specific situation it has under the Treaties, is not committed to further political integration into the European Union. The substance of this will be incorporated into the Treaties at the time of their next revision in accordance with the relevant provisions of the Treaties and the respective constitutional requirements of the Member States, so as to make it clear that the references to ever closer union do not apply to the United Kingdom.”*

The section went on to consider the notion of ever closer union. Note the absence of capitals. The word union is distinct from Union – indeed in some official languages a different word is used altogether<sup>8</sup>. Ever closer union had already been clarified at the request of the

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<sup>1</sup> Director General, European Commission, expressing his personal views.

<sup>2</sup> OJ C 69 I, 23 February 2016.

<sup>3</sup> It was placed in the UN depository of treaties in New York. I do not know if it has been withdrawn.

<sup>4</sup> Notwithstanding the commitment to incorporate certain provisions into the EU Treaties at a later date.

<sup>5</sup> Hereinafter HOSG.

<sup>6</sup> [http://ec.europa.eu/finance/general-policy/banking-union/index\\_en.htm](http://ec.europa.eu/finance/general-policy/banking-union/index_en.htm)

<sup>7</sup> Case T-496/11, *UK v. ECB*, <http://curia.europa.eu/juris/document/document.jsf?docid=162667&doclang=EN>

<sup>8</sup> Eg Polish, in which European Union is *Unia Europejska*, whereas ever closer union among the peoples of Europe is *coraz ściślejszy związek między narodami Europy*.

British Government at the European Council in 2014<sup>9</sup>: “The UK raised some concerns related to the future development of the EU. These concerns will need to be addressed. In this context, the European Council noted that the concept of ever closer union allows for different paths of integration for different countries, allowing those that want to deepen integration to move ahead, while respecting the wish of those who do not want to deepen any further.”

In 2016, the HOSG went further:

*“The references in the Treaties and their preambles to the process of creating an ever closer union among the peoples of Europe do not offer a legal basis for extending the scope of any provision of the Treaties or of EU secondary legislation. They should not be used either to support an extensive interpretation of the competences of the Union or of the powers of its institutions as set out in the Treaties. These references do not alter the limits of Union competence governed by the principle of conferral, or the use of Union competence governed by the principles of subsidiarity and proportionality. They do not require that further competences be conferred upon the European Union or that the European Union must exercise its existing competences, or that competences conferred on the Union could not be reduced and thereby returned to the Member States. The competences conferred by the Member States on the Union can be modified, whether to increase or reduce them, only through a revision of the Treaties with the agreement of all Member States. The Treaties already contain specific provisions whereby some Member States are entitled not to take part in or are exempted from the application of certain provisions of Union law. The references to an ever closer union among the peoples are therefore compatible with different paths of integration being available for different Member States and do not compel all Member States to aim for a common destination. The Treaties allow an evolution towards a deeper degree of integration among the Member States that share such a vision of their common future, without this applying to other Member States.”*

Section D was entitled Social Benefits and Free Movement and responded to the concerns expressed under the heading “Immigration” by British Prime Minister David Cameron in his letter of 10 November 2015 to European Council President Donald Tusk. The Decision set out various statements of law and policy and noted the Commission’s intention to propose legislative changes.

#### For discussion

- What does it mean that the text has ceased to exist?
- What was for the UK only and what would have been of general application had the decision become effective, and so available to all Member States?
- Are all the interpretations of law and policy still valid?
- What does this tell us about the state of differentiation in the EU?
- Did pragmatism kill ever closer union? Was it already moribund? What did it mean when it was in full health? In what circumstances may one expect it to be invoked in legislation, legal argument or case law in the future?
- If the UK was in a specific situation under the Treaties, was this because it was holding a referendum on membership or because of its accumulated opt-outs, opt-ins and particular provisions? How special was its situation, was it unique?

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<sup>9</sup> European Council Conclusions (26/27 June 2014), para. 27.  
[http://www.consilium.europa.eu/uedocs/cms\\_Data/docs/pressdata/en/ec/143478.pdf](http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/ec/143478.pdf)

## SESSION 2: SUMMARY<sup>1</sup>

Following the general elections held in the United Kingdom (UK) in May 2015, Mr. David Cameron, the leader of the Tory's party, decided to renegotiate Britain's position within the EU and to organise a referendum on the UK membership to the EU, a cornerstone of his campaign manifesto. When he won the British election with an outright majority, this is exactly what he did. As Mr. Jonathan Faull explained, the Commission and the European Council requested from the UK to submit a written document laying down in an explicit form the exact concerns and requests they wished to communicate to their European counterparts. Although in the beginning Mr. Cameron rejected the idea as something unnecessary, explaining that the British requests could be well identified through a series of documents, such as the Tory's campaign manifesto, newspaper articles and the last months' public debate in the UK, he finally agreed and proceeded in submitting to the European Council such a written Letter on 10 November 2015. This allowed negotiations to kick off between the UK and the rest of Member States. These negotiations resulted in a set of arrangements approved by the European Council on 18 – 19 February 2016, named the "*Decision of the Heads of State or Government, meeting within the European Council, concerning a New Settlement for the United Kingdom within the European Union*".

The "New Settlement Agreement" was described as an international law agreement by the British and it was meant to cease to exist if the UK decided to leave the EU. It was meant to support the Remain campaign by addressing the main concerns shared by Eurosceptics in the UK. Unfortunately, it was raised, one could observe that this agreement was not convincingly communicated to the British people and was barely discussed during the UK referendum campaign.

As discussed during the session, the Agreement might have been considered by some as weak and not legally binding. This argument, however, should be dismissed taking into account it constituted the express wish of the representatives of Heads of Member States, acting in full compliance with the EU Treaties and could be interpreted by the Court of Justice. In addition, the symbolic importance of this agreement should not be underestimated since it represents the will of 27 Member States and all the EU institutions to keep the UK within the EU for various reasons. In this regard, Mr. Faull dismissed the idea that some Member States viewed Britain's exit from the EU as beneficial or that they even lobbied for it in order to facilitate cooperation between the remaining countries in areas where the UK seemed to oppose some initiatives.

As we now know the result of the UK Referendum, we can embark on a retroactive examination of what was the content and the impact of the Settlement Agreement with the UK. That is an interesting exercise, in light of the Conference subject, as a case study on how far the Member States were willing to go in allowing differentiation towards the UK while maintaining what they considered to be the core of what the EU stands for.

The "New Settlement Agreement" and its accompanying texts were divided into four

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<sup>1</sup> Summary prepared by **Danai FATI & Yuliya MIADZVETSKAYA**.

categories, three of which related directly to the issue of differentiation. These categories were the following: (1) Economic Governance (2) Sovereignty and (3) Social Benefits and Free Movement. Although in principle a sensitive issue, Economic Governance did not seem to be a major source of dispute between the two sides of the campaign in the period leading to the UK Referendum.

The second category, Sovereignty, was expressed by the British as serious cause for concern. It was dealt with in the “New Settlement Agreement”, which recognised that *“the UK is not committed to further political integration into the European Union”*. The UK had found itself in an uncomfortable position with the concept of ‘ever closer union’, a term used in the Treaty, and thus required an express abandonment of the term. The UK even required – and achieved – to have their position expressly mentioned in the Treaty on the first occasion of a next Treaty amendment. It was mentioned, however, that this amendment could only have a symbolic value as it was anyway clear from before that the term had no legal, interpretative value in the way the division of competences between Member States and the Union was understood and applied or in any other area of law. It was mentioned that the term referred to an ‘ever closer union’ of *people* and not States and this had already been clarified at the request of the British Government at a European Council in 2014 whereby *“The UK raised some concerns related to the future development of the EU. These concerns will need to be addressed. In this context, the European Council noted that the concept of even closer union allows for different paths of integration for different countries, allowing those that want to deepen integration to move ahead, while respecting the wish of those who do not wish to deepen further”*<sup>2</sup>.

In the last section of the Decision on the “New Settlement Agreement”, on Social Benefits and Free Movement, the aim was to address UK’s concerns on the free movement of people, which constitutes one of the four fundamental freedoms enshrined in the Lisbon Treaty. Even today, a few months after the Referendum and the decision to leave the EU, the discussion in the UK over ‘soft or hard Brexit’ seems to develop around the possibility to secure a future trade deal with the EU that will grant to the UK access to the Single Market while at the same time blocking the free movement of people. It was highlighted that this is of course not a possibility offered by the EU, as the four fundamental freedoms constitute the core of the EU and the participation of a country in it comes with rights and obligations that arise from a series of rules. Cherry picking is not an option. As regards the possible nature of the future relationship with the UK, the comparison with the EU –Swiss agreement is inevitable. In this context, however, one needs to pay attention to the fact that in any trade agreement signed between the EU and its counterparts, access to the Single Market is conditional upon the adoption and incorporation of the EU acquis. So this would constitute a requirement also for the UK as far as the future relationship with the EU is concerned. But isn’t this one of the British concerns? That they had to incorporate rules drafted by Brussels and not by British themselves? That is an interesting question for the British to reflect on, Mr Faull said.

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<sup>2</sup> European Council Conclusions (26-27 June 2014): <http://www.consilium.europa.eu/en/meetings/european-council/2014/06/26-27/>

**Session 3**  
**Deeper integration without discrimination of  
non-participating countries: The euro**

*Deeper integration within the Eurozone is bound to have an impact on non-Eurozone countries. Common rules or policies do not have to be discriminatory to have such an impact. What kind of assurances can be given to non-participating countries and what can be done when cross-border effects through normal market mechanisms cannot be avoided?*

**Chair:** Phedon NICOLAIDES, Professor and Director of the Department of European Economic Studies, College of Europe

**Speakers:**

- Daniel GROS, Director, Centre for European Policy Studies, Brussels
- Stefano MICOSSI, Director-General, ASSONIME, Rome

## SESSION 3: POSITION PAPERS

### **Euro and non-euro countries in policy coordination under the Treaty on the Functioning of the European Union and the Treaty on Stability, Coordination and Governance**

Stefano MICOSSI, Alexandra D'ONOFRIO and Fabrizia PEIRCE

#### **1. Economic policy coordination and surveillance and main Council formations**

The TFEU assigns a central role to the Council (**ECOFIN**) in EU economic policy coordination: the member states “shall conduct their economic policies with a view to the achievement of the objectives of the Union” (Art. 120 TFEU), and “shall regard their economic policies as a matter of common concern and shall coordinate within the Council” (Art. 121 TFEU). The TFEU also provides procedures for the macroeconomic surveillance of national economic policies, according to which the ECOFIN:

- shall adopt the “broad guidelines of the economic policies of the member states and of the Union” (BEPG Art. 121. 2),
- shall “monitor economic developments in ... the member states and in the Union” (Art.121.3)
- may address recommendations to the member state [and eventually make them public] in case the economic policies of a member state are not consistent with the BEPG or risk jeopardising the proper functioning of Economic and Monetary Union – following a warning by the Commission (Art.121.4)
- shall, on a proposal from the Commission, decide over the existence of an excessive deficit, recommend the measures to remedy the excessive deficit, set the time limits for member states to comply with those recommendations and decide to (finally) impose sanctions (Art. 126).

The adoption of the BEPG and the coercive provisions on excessive deficits would not apply to the United Kingdom (Protocol 15) or Denmark (Protocol 16) nor to countries not participating in the common currency (countries “with a derogation”, Article 139, TFEU) until they joined the euro. According to Art. 139 TFEU, a number of Council decisions and recommendations addressed to a euro area member state shall be therefore adopted only by the ECOFIN with only euro area member states voting:

- adoption of the parts of the BEPG which concern the euro area generally;
- recommendations made to euro area member states in the framework of multilateral surveillance based on Art. 121.4, including on stability programmes and warnings;
- measures relating to excessive deficits procedure and coercive means of remedying excessive deficits for euro area countries under Art. 126.

In 2009, the Lisbon Treaty introduced a new article (**Art. 136 TFEU**) to allow the Council (represented by euro countries only) to “adopt measures specific to those member states whose currency is the euro (a) to strengthen the coordination and surveillance of their budgetary discipline and (b) to set out economic policy guidelines for them, while ensuring that they are compatible with those adopted for the whole of the Union and are kept under surveillance”.

In 2011, the European Council decided to add a new paragraph to Art. 136 TFEU providing that “the member states whose currency is the euro may establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole”. The new paragraph was added under the simplified treaty revision procedure of Art. 48 TEU, reflecting the agreement within the European Council that no change was involved in Union competencies but it was rather a matter of clarifying what was already legal.

From a legal perspective, the role of the **Eurogroup** is minor compared to ECOFIN. The Eurogroup was established in 1997 by the European Council, as an informal body that brings together the finance ministers of euro area countries. In 2004 Eurogroup decided to have a permanent president, appointed for two years. But it is only with the entry into force of the Lisbon Treaty, that the Eurogroup finds its placement in the Treaty. Article 137 of the TFEU and Protocol No. 14 now provide that the Eurogroup – chaired by a two and a half years president – shall meet informally to discuss questions related to the single currency (the Commission takes part in the meetings and the ECB shall be invited). The Eurogroup is therefore a “forum for discussion”, at ministerial level and not a “decision-making body”, whose statement cannot be regarded “as a measure intended to produce legal effects with respect to third parties”.<sup>1</sup>

However, there is a growing consensus among analysts that, after the crisis, the Eurogroup has strengthened its role in the European economic decision-making process. According to Pisani-Ferry et al. (2012), the Eurogroup has been the “key body taking decisions to address programme reviews, the Greek private sector involvement and the fragility of the banking system”.<sup>2</sup> Moreover, explicit reference to the Eurogroup is made:

- in the Macroeconomic Imbalances Procedure, whereby the Eurogroup shall be informed of the European Commission measures and discuss the Commission annual report; the Commission has to take due account of those discussions when undertaking an in-depth review in a member state.<sup>3</sup>
- In the Two Pack regulation, whereby the euro area member states shall submit their draft budgetary plans and their national debt issuance plans not only to the Commission but also to the Eurogroup for monitoring and assessment. The

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<sup>1</sup> Cf. Judgment of the Court (Grand Chamber) of 20 September 2016. Konstantinos Mallis and Others v European Commission and European Central Bank (ECB). Appeals — Stability support programme for the Republic of Cyprus — Eurogroup statement concerning, in particular, the restructuring of the banking sector in Cyprus — Actions for annulment. Joined Cases C-105/15 P to C-109/15 P.

<sup>2</sup> Pisani-Ferry J., A. Sapir and G. B. Wolff, *The messy rebuilding of Europe*, Bruegel Policy Brief 2012/01, March.

<sup>3</sup> Arts. 3, 5, 6 and 7 of Regulation (EU) 1176/2011.

Commission opinion on the draft budgetary plans shall be presented to the Eurogroup, which afterwards discusses the budgetary situation in each member state. Those discussions can be made public where appropriate.<sup>4</sup>

On the other hand, one should also notice that the members of the Eurogroup (who usually meets the day before the scheduled ECOFIN meetings) are those entitled to vote in the ECOFIN Council for decisions and recommendations concerning euro area member states under the multilateral surveillance and the budgetary control procedure of articles 121 and 126 TFEU (cf. above). They are also members of the ESM Board of Governors, the body in charge of granting ESM financial assistance.

The **Euro Summit** has been established by Article 12 of the Treaty on Stability, Coordination and Governance (TSCG) with the aim to define strategic orientations for the conduct of economic policies and improved competitiveness and convergence in the euro area; it is now a permanent institution, hierarchically above the Eurogroup, with a permanent president who is appointed by the heads of state or government of euro area member states. The TSCG does not explicitly require the Euro Summit president to come from a euro area country; the fact that Polish Prime Minister Donald Tusk has been elected as both the presidency of the European Council and the Euro Summit seems to go into the direction of maintaining unity between the two bodies. Technical works are carried out by the Eurogroup Working Group, which is full-time Brussels-based; Euro Summit meetings take place regularly at least twice a year, if possible after European Council meetings. The president of the Euro Summit, the president of the Commission and the president of the Eurogroup meet regularly, at least once a month to evaluate common policies; the president of the ECB and, occasionally, supervisory agencies of financial markets may be invited to participate.

The continuing quest for enhanced economic policy coordination, following a Franco-German proposal for a 'competitiveness pact' in February 2011, led the 2011 Spring European Council to endorse the **Euro-Plus Pact**, an agreement between the heads of state and government of the euro area member states. It is a political commitment between euro area member states, but open to non-euro area member states; and indeed Denmark, Poland, Latvia, Lithuania, Bulgaria and Romania soon joined.

To strengthen economic policy coordination and convergence with the euro area, it provides for the inclusion of new policy commitments in the annual national reform and stability programmes (Art. 121.2 TFEU), that the Commission, the Council and the Eurogroup will assess under the framework of the European semester and will be subject to the regular multilateral surveillance framework.<sup>5</sup>

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<sup>4</sup> Arts. 6,7 and 8 Regulation (EU) 473/2013.

<sup>5</sup> The Pact is consistent with existing instruments with agreed timetable for implementation. Each year, based on priority policy areas, tools and common objectives will be agreed upon and will be pursued by participating member states with their own policy-mix. The implementation and progress of national commitments will be monitored politically by the heads of state or government of the participating countries. Full commitment to the completion of the Single Market. Four focus areas: i. wage developments in line with productivity; ii. labour market reforms; iii. sustainability of public finances (sustainability of pensions, health care and social benefits and

The Euro Plus Pact has since been paid little attention by member states.

## 2. The Six Pack and Two Pack

In establishing the Economic and Monetary Union, the Maastricht Treaty introduced a number of legal provisions disciplining member states' fiscal policies, notably including the prohibition of monetary financing of deficits by the ECB or national central banks (Art. 123, TFEU), the no-bail-out clause (Art. 125, TFEU) and the excessive deficit procedure (EDP, Art. 126 TFEU). The criteria for the "soundness and sustainability" of public finances were set to coincide with the convergence criteria for admission to EMU – 3% for the deficit-to-GDP ratio and 60% for the debt-to-GDP ratio – and were enshrined in Protocol 12 annexed to the Treaty.

In 1997 two Council Regulations set up the **stability and growth pact** (SGP) with the specific purposes of ensuring compliance with the Treaty's fiscal rules after inception of the Economic and Monetary Union and setting out the implementing procedure of the EDP. In 2011 the SGP was amended, with the so-called **Six Pack** legislation, to correct its perceived inability to prevent the build-up of unsustainable fiscal imbalances that were seen as an important determinant of the euro area crisis. In particular:

- i. Regulation (EU) No 1175/2011 (**preventive arm of SGP**) on the strengthening of the surveillance of budgetary positions; new rules include constraints on the growth of public expenditures.<sup>6</sup> Since 2011, the preventive arm of the SGP is part of the European Semester for economic governance. The European Semester was introduced in 2010 and was revised and streamlined in 2015. The European Semester brings national policymaking coordination together under the procedure of Art. 121 TFEU, ensuring ex ante coordination of economic policy decisions by the member states within the European Council. Under the European Semester, the Council issues its country-specific recommendations for national policies and the euro area as a whole at the end of the first semester, based on national stability (budgetary) and economic reform programmes submitted in April; the member states then adopt their national budgets and policy programmes in the second semester under close (ex ante) surveillance by the European Commission.
- ii. Council Regulation No 1177/2011 (**corrective arm of SGP**) on speeding up and clarifying the implementation of excessive deficit procedure; an operational criterion for the correction of debt/GDP ratios in excess of the 60% benchmark has been introduced.<sup>7</sup>

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commitment to translate EU fiscal rules as set out in the SGP into national legislation by the introduction of legally binding budgetary rules e.g. constitution or framework law); iv. reform of financial stability.

<sup>6</sup> Expenditure growth should not exceed a reference medium-term rate of potential GDP growth, unless the excess is matched by discretionary revenue measures (Article 1.8 of Regulation 1175/2011); and revenue windfalls should be allocated to deficit or debt reduction (whereas 18 of Regulation 1175/2011).

<sup>7</sup> The 1/20<sup>th</sup> criterion requires member states whose debt exceeds 60% of GDP to reduce the distance between the actual ratio and the 60% benchmark each year by 1/20<sup>th</sup> of the distance (Article 1.2 of Regulation 1177/2011).

- iii. Regulation No 1173/2011 (**'sanction** regulation only for euro area countries'); Commission proposals on the enforcement of the SGP may only be rejected by the Council by qualified majority (only euro area members voting), except for the decision on the final stage of sanctions in the SGP corrective arm – a shift of power designed to strengthen the credibility of the SGP after past failures to act by the Council.<sup>8</sup> Moreover, in case of repeated non compliance with Council recommendation made under EDP, possible withholding of EU's 'cohesion fund' financing for all EU countries.<sup>9</sup>
- iv. Regulation (EU) No 1176/2011 on the prevention and correction of **macroeconomic imbalances**, also applies to the whole EU; however, the alert mechanism, which is part of the regulation, is, in accordance with Art. 121.3 of the TFEU, discussed in the Eurogroup for the euro area countries. Also, the so-called Scoreboard, the basis of the alert mechanism, distinguishes between euro area and non-euro area countries.
- v. Regulation No 1174/2011 on enforcement measures to correct excessive **macroeconomic imbalances (sanctions)** is exclusively addressed to euro area countries.
- vi. Council Directive 2011/85/EU (**requirements** for **budgetary frameworks**); it is addressed to all EU members, although the United Kingdom has an exemption from a number of the directive's main provisions.

In 2013 surveillance under the SGP was completed by the adoption of the **Two Pack**:

- vii. Regulation No 473/2013 on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the euro area member states: euro area members are required to submit their draft budgets to the European Commission before they are adopted by national parliaments, and the Commission may ask for revisions if it considers that the draft breaches or is likely to breach the SGP.
- viii. Regulation No 472/2013 on the strengthening of economic and budgetary surveillance of member states in the euro area experiencing or threatened with serious difficulties with respect to their financial stability: euro countries in EDP will be required to present an economic partnership programme providing a roadmap for the structural reforms seen as instrumental to "an effective and lasting correction" of the excessive deficit.

### 3. The Treaty on Stability, Coordination and Governance

The TSCG is an intergovernmental agreement (outside the EU law) that was signed in 2012 by 25 EU member states (all but United Kingdom and Czech Republic) and entered into force on 1 January 2013. The TSCG is binding only for all euro area countries, while other member states who signed it will be bound once they adopt the euro or earlier if they wish.

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<sup>8</sup> Cf. Regulation 1173/2011. Simple majority in the Council is also sufficient to reject a Commission recommendation to adopt a decision establishing that no effective action has been taken to correct a divergence from the MTO (Article 1.13 of Regulation 1175/2011).

<sup>9</sup> Article 4 Reg. (EC) No 1084/2006 establishing a Cohesion Fund.

They are allowed to choose the provisions they wish to comply with: non-euro area signatories that declared themselves bound by the provisions of the Fiscal Compact include Denmark, Bulgaria and Romania, while Hungary, Poland and Sweden ratified the TSCG but did not opt in to the Fiscal Compact; Croatia is not a signatory of the TSCG, as it was not a member of the EU in March 2012.

The new intergovernmental treaty has three main elements.

- i. Articles 3-8 cover the so-called Fiscal Compact, which requires euro area members to adopt binding rules, preferably at constitutional level, for balanced budgets, as well as automatic corrective mechanisms in case of significant deviations from the medium-term objective.<sup>10</sup> The European Court of Justice may be called upon to judge whether a country has not properly transposed the new budget rules in national law, and eventually may impose financial sanction. At the same time, national correction mechanism shall fully respect the parliamentary prerogatives.<sup>11</sup> The Fiscal Compact requires adhering countries to support Commission's proposals or recommendations regarding a euro area country in breach of the deficit criterion – except when a qualified majority of them is opposed to the decision proposed or recommended (Article 7).
- ii. Articles 9-11 of TSCG on **economic policy coordination and convergence** require euro area member states to work jointly towards an economic policy that fosters the proper functioning of the economic and monetary union and to take all required measures to that end.
- iii. Title V (articles 12-13 of TSCG) on the **governance of the euro area** apply to all signatory member states. In particular, heads of state or governments of non-euro countries shall participate, at least once a year, in the Euro Summit meetings to discuss notably competitiveness, the modification of the global architecture of the euro area and its fundamental rules.

#### 4. Financial assistance

The possibility of granting financial assistance to a member state is already recognized explicitly in the TFEU:

- for a non-euro country, when the member state is experiencing balance-of-payments difficulties of a magnitude that may jeopardize the functioning of the internal market or the implementation of the common commercial policy (Art. 143);
- for a euro area country, resort can be made to Art. 122.2, providing that the member state “is in difficulties or seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control.” This article indeed provided

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<sup>10</sup> Article 3 of TSCG.

<sup>11</sup> Article 3.2 of TSCG.

the legal basis for granting financial assistance to Greece and for establishing the euro area emergency package in May 2010.

In order to safeguard the stability of the euro area as a whole and to overcome any ambiguity on the legality of financial assistance in March 2011, the European Council agreed on the need for euro area member to establish a permanent European Stability Mechanism (**ESM**) to grant financial assistance to member states.<sup>12</sup> The ESM was established by a treaty among euro area members “as an intergovernmental organization under public international law”. It was acknowledged that granting of financial assistance in the framework of new programmes under the ESM would have to be conditional on the ratification of the TSCG by the ESM member concerned – by now all contracting parties have ratified TSCG.

## 5. Financial supervision

The current European System of Financial Supervision (EFSF) is constituted by three **European Supervisory Authorities (ESAs)** – the European Banking Authority (EBA), the European Insurance and Occupational Pensions Authority (EIOPA), and the European Securities and Markets Authority (ESMA); the system also comprises the network of national competent authorities (NCAs), the Joint Committee of the ESAs and the European Systemic Risk Board (ESRB). They are all EU institutions with their legal basis in the TFEU.<sup>13</sup>

The three ESAs represent the evolution and strengthening of the pre-existing Lamfalussy Level 3 committees. The ESAs are responsible for micro-prudential supervision and regulation and are characterised by a multi-layered system of authorities. The various layers are divided according to three sectors: banking, insurance and securities markets. Each ESA has a Board of Supervisors, a Management Board and an Executive Director. The **EIOPA** and the **ESMA** do not raise particular issues in terms of euro and non-euro countries differentiation, since their scope of application, within the Single Market, does not overlap with any euro area institution.

Following the establishment of the banking union, a special framework for the supervision of euro area banks has been introduced involving a new allocation of responsibilities between EBA and the ECB. The **EBA** was entrusted the goal to ensure an effective and consistent implementation of the Single Rule Book of banking legislation and the Single Hand Book of banking supervision, across the European banking sector, through the adoption of Binding Technical Standards and Guidelines. It is independent, but accountable to the European Parliament, the European Council and the Commission. The EBA is also mandated to assess risk and vulnerabilities in the EU banking sector by setting the criteria for stress tests

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<sup>12</sup> The ESM has effective lending capacity of € 500 billion (paid-in and callable capital up to € 700 billion); it may raise funds by issuing euro-securities on capital markets, guaranteed by its capital and only eventually by euro area member states on a pro-rata basis; decisions on financial assistance will be taken by unanimity by the ministers of finance of the euro area member states (Board of Governors) – the executive board of the ESM only executor. The policy conditions will be monitored by a ‘troika’ made up by the Commission, the ECB and the IMF.

<sup>13</sup> Articles 26 and 114 of the TFEU; article 290 TFEU (delegated acts); article 291 TFEU (implementing acts) and article 127 (6) TFEU.

and performing them for non-SSM banks; stress tests for SSM banks are performed by the ECB.

The Banking Union comprises the **Single Supervisory Mechanism (SSM)**, the **Single Resolution Mechanism (SRM)** and a proposal for a European Deposit Insurance Scheme (EDIS). The **SSM** consists of all euro area member states plus any non-euro area member state which decides to join. The ECB is responsible for the overall functioning of the system and has direct oversight of the most significant banks. In the new supervisory framework, the EBA maintains its EU-wide powers and may exercise them also with respect to the ECB in its new role as supervisory authority in the euro area. In order to organize the interaction between the EBA and the ECB, voting arrangements within the EBA have been introduced to ensure a balanced decision-making structure, preserving the interests of all its members, whether participating in the SSM or not.<sup>14</sup> Moreover, in the context of the currently debated Two Pack legislation,<sup>15</sup> the EBA plays a special role for the euro area, as euro area members in financial difficulties area required to report additional information to the EBA.

The **SRM** Regulation establishes a centralized architecture for decision-making in the field of resolution. For the member states participating to the SSM the common rules established by the Bank Recovery and Resolution Directive (BRRD) are applied by a resolution network composed by a Union agency, the Single Resolution Board, which acts as a resolution authority for the banks directly supervised by the ECB and cross border groups, and by national resolution authorities for the other banks within the SSM. Again, member states outside the euro area that have chosen to opt in into the SSM also participate in the SRM. Moreover, all EU member states except the UK and Sweden have signed the Intergovernmental agreement (IGA) regulating the transfer of national resources to the SRM Fund.

The **European Systemic Risk Board (ESRB)** is responsible for macro-prudential oversight of the financial system and it has the objective of preventing and mitigating systemic financial stability risk in the EU in the light of macroeconomic developments. The ECB provides the secretariat for the ESRB and the President of the ECB is also the Chair of the ESRB; interestingly, the ESRB has a vice-chair from a non-euro country.<sup>16</sup> The main issue concerning the functioning of the ESRB with reference to euro and non-euro countries is related to the possibility of using macro-prudential instruments in order to mitigate the unintended consequences of a single

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<sup>14</sup> Depending on the type of decisions, it might be required a double simple majority (i.e., a simple majority of its members from competent authorities of participating member states and a simple majority of its members from competent authorities of non-participating member states) or qualified majority including double simple majority. For example, in the case of regulatory products (Technical Standards, Guidelines and Recommendations) the voting is by qualified majority following the same rules as those applied in the Council of the European Union; a double simple majority is required when voting on settlement of disagreements between competent authorities in cross-border situations.

<sup>15</sup> See Article 3 of the Regulation (EU) No 472/2013 on the strengthening of economic and budgetary surveillance of member states experiencing or threatened with serious difficulties with respect to their financial stability in the euro area.

<sup>16</sup> In particular, the ESRB will: assess macro-prudential situation; identify systemic risks, prevent or mitigate their impact, collect and analyse relevant data; develop, together with the ESAs, a set of quantitative and qualitative indicators to identify and measure systemic risks; issue early warnings and recommendations to ESAs, member states and national supervisory authorities; not legally binding, but addressees must comply or explain provide macro-prudential information to ESAs, in charge of micro supervision.

monetary policy in the euro area. The ESRB may issue macro-prudential policy recommendations to euro area countries that would not apply to non-euro area countries with an independent monetary policy.

## **A multi-level and multi-speed Union**

**Stefano MICOSSI**

The December 2012 European Council confirmed that deeper integration and reinforced solidarity within the EMU would apply first of all to euro area members (Conclusions § 3). However, it also stated that the process of completing EMU will be open and transparent towards member states not using the single currency and will fully respect the integrity of the Single Market (Conclusion §4). Therefore, not only does the door remain open for anybody wishing to join the inner circle of integration, but also the decisions and instruments of enhanced integration mustn't prejudge the rights of non-participants in the broader context of the Union.

Moreover, international agreements between some, but not all, EU member states are allowed only within the limits set by EU law, as the Court of Justice has made clear in a number of landmark judgments (De Witte, 2012); and indeed the primacy of EU law is explicitly recognised in the Fiscal Compact (Art. 2.2). Accordingly, EU law may be resorted to in order to modify the provisions of the Fiscal Compact.

Union members now fall into one of three categories: 'ins', 'pre-ins' (those wishing to join EMU but not yet able or ready to do it) and 'others' (those who do not intend to join EMU at any time). Because of the 'pre-ins', the Union is a multi-speed system (EMU as shared objective, but in a different time frame); because of the 'others', the Union is also a multi-level system (EMU not a shared objective, in any time frame). The essential point is that, as EMU progresses, the large number of 'pre-ins' makes it plausible to envisage that the eurozone may one day cover much of the Union, although not the entirety. And indeed, the long-term objective of a eurozone extended to encompass much of the Union is reflected in the European Council's determination that "the process of completing EMU will build on the EU's institutional and legal framework" (December Conclusions § 4). Similarly, in its Blueprint (November 2012), the European Commission states that "the deepening of EMU should primarily and fully exploit the potential of EU-wide instruments" (p. 13).

Thus, while the eurozone is emerging as a nucleus of enhanced economic and political integration, its future relations with non-eurozone Union members remain mired in ambiguity, as its members are not ready yet to say that they intend to build a new separate political body, while non-members oscillate between queasiness about enhanced integration within the eurozone, and an urge to participate in emerging arrangements and instruments, such as the euro-plus pact (23 members), the Fiscal Compact (25 members) and now the new Single Supervisor Mechanism (SSM, possibly with an eventual membership of 24 or 25), for fear of losing contact with the inner circle.

Enhanced integration in the eurozone does not entail insurmountable difficulties in decision-making for the European Council, which has already created within itself dedicated sub-groups (the Eurogroup and related working groups). Reinforced cooperation (Art. 20 TEU and Arts 326- 334 TFEU) provides for a modification in the voting rules of the Council in a multi-level system (which may imply *a contrario* that there should be no modification of the composition or voting rules of the Commission or Parliament). Specific rules for the eurozone (Arts 136-138 TFEU) also imply a modification of Council voting rules.

In principle, special difficulties do not arise also for the Commission, which should be able to perform the tasks mandated by the European Council for the eurozone without modifying its composition or voting rules: this, however, is predicated on strict adherence to the principle of independence of Commissioners from national authorities. The perception in the public opinion is that independence has de facto been weakened in recent years.

The question is more complex for the European Parliament, to the extent that it is occasionally called upon to deliberate on legal acts and policies affecting only the eurozone. Parliament maintains that it is entitled to intervene in these matters as a unitary democratic representative of the Union polity (see their Report on the Road Map of October 15); others maintain that only MEPs from eurozone countries could legitimately vote on eurozone matters and participate in related accountability mechanisms (e.g. the 'Westerwelle Report'). To the extent that the eurozone will gradually come to cover most of the Union, the issue may become less controversial but will not disappear: what would happen in case Parliament was called upon to vote on a given decision or recommendation linked to the eurozone, and the decision was rejected due to the determinant vote of British MEPs? Clearly, the legitimacy of the decision would be called into question. The matter could be resolved by a gentlemen's agreement, but there seems little doubt that over time a statutory solution, by means of Treaty change, will be necessary.

The strains on common institutions are also likely to intensify as these are called on to accommodate increasingly divergent policy courses, as may be the case with the Fiscal Compact or the SSM; all the more so as the eurozone solidifies its separate governance apparatus (summits, a permanent president and stable ministerial working groups), which over time could bring members' positions in Council deliberations to be increasingly aligned.

These strains may strengthen the attractiveness of the euro as the centre of gravity of the Union and the inducements for pre-ins to join. What is important, in the meantime, is to respect the unity and coherence of Union treaties. To this end, we need to fully exploit the available room – such as Arts 20 TEU (enhanced cooperation) and 136 TFEU (provisions specific to eurozone members), possibly in conjunction with 352 TFEU (action by the Union for which the treaties have not provided the necessary powers) – to accommodate different appetites for integration as well as, in due course, to bring back to the treaties those arrangements that initially were set up outside the treaty framework. It may be recalled, in

this connection, that the Fiscal Compact (unlike the ESM instruments) explicitly provides for the instrument to be brought back to the treaty framework within five years (Art. 16).

To the extent that the eurozone came to cover most of the Union, the position of those who do not envisage ever joining the euro may become increasingly uncomfortable, but this would not exclude that they stayed in the Union as full participants in the Single Market – albeit their weight in common decisions would inevitably falter. What appears more difficult is to accommodate demands to renegotiate existing treaty obligations since this would threaten the integrity of the Single Market and equal treatment of its members.

## SESSION 3: SUMMARY<sup>1</sup>

The euro is differentiation with a capital D at different levels. First, the Euro area implements its own rules, especially the EU stability and growth pack and the European stability mechanism. The main problem is to deal with the need for deeper integration within the Eurozone, which arose because of the crisis, and its impact on non-Eurozone countries.

The issue of differentiation does not have the same extent when it is applied to the Euro area rather than to others policies. The main problem linked to the Euro area is rather the lack of cohesion within the Euro area than the differentiation between the Member States which are part of it and those which are not. Indeed, they enjoy special links with the Eurozone which is the most relevant economic *ensemble* of the EU. Denmark is the typical example of a satellite country outside Euro but with a preferential treatment from the entire Euro area.

Two main initiatives underlining differentiation can be enumerated. First, it exists a differentiation as special rules are applied to countries in the Euro area as opposed to countries outside the area. The EU Fiscal compact is about coordination of the Eurozone members' fiscal policy, others countries being excluded from it.

The second initiative – the Banking Union area - gives a positive sense to differentiation. The countries inside the Banking Union area can share risk. That is the main reason why countries wish to be part of it. The financial crisis caused serious consequences within the EU, especially in the Euro area. The creation of a banking union is as technical as it is political but, since the EU economy is widely financed by its banking system, advantages are clear.

Nevertheless, two problems remain within the Euro area. Divergence between France and Germany on how the economic policy should be managed slows down a deeper integration of the Eurozone. Indeed, Germany insists on the importance of formalized rules which should govern the economic policy while France sees in politician decisional process the more efficient way to conduct the economic policy.

Besides, the Eurozone suffers from structural internal problems because of the important economic weaknesses of countries such as Greece with its governance issues or Italy and its fiscal policy. Even though both have adopted European rules as demanded, it does not have the impact expected. How can we explain that there is a zero impact on the ground? The non-implementation of rules by the administration was raised as the principal reason. A parliament can be pushed to pass a law, but control on the ground is too partial.

It was also mentioned that the deepening process of the Economic and Monetary Union (EMU) affects all European countries, and thus should be open and transparent towards all of them, and not only those which have the euro as their currency.

Currently, we can distinguish three different configurations concerning EU members'

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<sup>1</sup> Summary prepared by Célia AGOSTINI & Ariane AUMAITRE BALADO.

relationship with the common currency: these can be called the *ins*, the *pre-ins* and the *outs*. The *ins* are those countries with full membership of the Euro, the *pre-ins* those that do not fulfill the criteria yet, but that intend to join the common currency as soon as they do, while the *outs* are those countries that, being part of the European Union, have no intention of joining the Euro (such is the case of Denmark or Sweden, and was that of the UK before the referendum).

Now that the main *out* country - the UK - is leaving the European Union, the Eurozone can be strengthened: the strong members of the Union are now all members of the common currency, something that increases its power of attraction. However, for this strengthening to materialise, it is necessary to overcome the current policy paralysis.

The phenomenon of differentiation concerning the Euro is present in the ambiguity of the relationship of the *ins* with the *pre-ins* and the *outs*. On the one hand, Eurozone members keep using the EU institutions, and have not moved towards a specific governmental structure. On the other hand, the *outs* (and also some *pre-ins*) do not want to join the area (or not yet), but neither do they want to be excluded from common decisions. This ambiguity is also translated to decision-making, where all countries may deliberate, but only Euro members take the decisions.

Differentiation can also be seen in the measures taken as a response to the crisis, where the tendency towards intergovernmental agreements has allowed different membership arrangements for the different agreements. This can be illustrated by the fact that the European Stability Mechanism, the Euro Plus Pact and the Fiscal Compact all have different members.

A last example of differentiation is seen in the specific areas of tension between the internal market and the Euro. While the financial crisis has segmented financial markets and reversed integration, there is still no common agreement on a desirable level of risk-sharing, something that may end up perpetuating fragmentation. In other sectors, and because of the malfunctioning of the Euro area, the enormous imbalances between members have led to trade friction.

In spite of this, the relationship between the internal market and the Euro should be seen as an opportunity. We should spend more time looking at the potentials of the internal market, and using it to solve the problem of imbalances. Regulations are already in place, but not always translated into practice: going back to the policies of the internal market would lead us to better implementation and to solving problems in areas such as labor mobility.

There is a path forward, which is the one defined in the Five Presidents' Report<sup>2</sup>. This path shows the way towards a federal system where the coordination of policies is more centralised, including fiscal capacity and common safe assets. However, it is not possible to do any of this without political leadership and a true European minister of finances to *implement and manage* the policies. If the European Union wants to overcome its blockages, it needs political leadership to be able to do it.

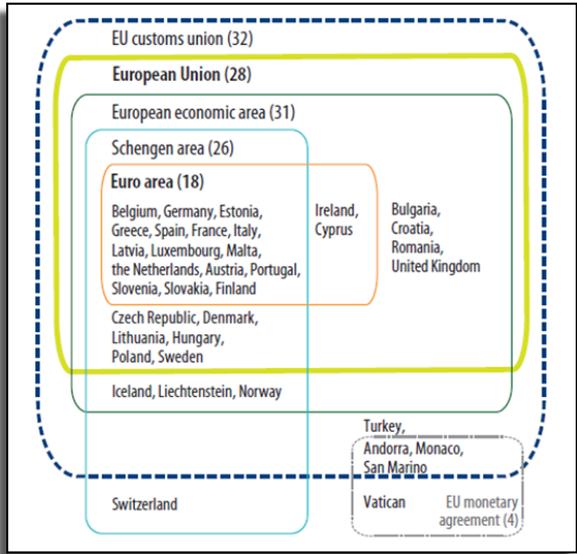
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<sup>2</sup> Five Presidents Report, 22 June 2015, [http://ec.europa.eu/priorities/publications/five-presidents-report-completing-europes-economic-and-monetary-union\\_en](http://ec.europa.eu/priorities/publications/five-presidents-report-completing-europes-economic-and-monetary-union_en)

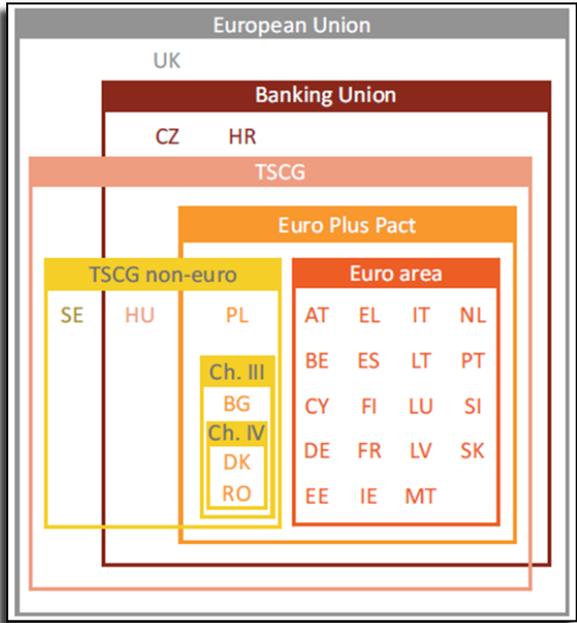
The interventions of the speakers shed light on the current problems faced by the Euro, but also on the opportunities: there seems to be a consensus on the fact that an exit of the UK may act as an incentive for third countries to join the Euro Area. The same applies to the Banking Union and the Single Supervisory Mechanism and Single Resolution Mechanism, that may attract new countries thanks to their risk-sharing components.

Differentiation is among the main challenges faced by the euro and not only between members and non- members of the common currency: one of the main current problems of the EMU is the existence of differentiation *within* Euro members. This sums up to political blockages and the lack of leadership or a proper decision-making framework. While the problem of divergence in economic performance is clear, we do not yet have a clear solution.

**Annex: A variety of institutional and policy arrangements**



Source: European Court of Auditors



Source: European Parliament

## Session 4

### Temporary suspension of fundamental freedoms: Movement of persons

*Some Member States are in favour of safeguards in the form of restrictions on movement and access to social security. Do conditional and temporary safeguards provide solutions that can apply to all Member States, establishing “temporary differentiation” that can function as a relief valve? Or, will they create permanent sources of friction and discord?*

**Chair:** Inge GOVAERE, Professor and Director, Department of European Legal Studies, College of Europe

#### **Speakers:**

- Gareth DAVIES, Professor of European Law, Free University, Amsterdam Sacha GARBEN, Professor, Department of European Legal Studies, College of Europe
- Claire KILPATRICK, Professor of International European and Social Law, European University Institute, Firenze
- Paul NEMITZ, Director, Directorate-General for Justice, Directorate Fundamental rights and Union citizenship, European Commission

## **Session 4: Positions Papers**

### **Limiting free movement in the name of the public interest**

**Gareth DAVIES**

Free movement is likely to have different impacts on different Member States at different times. Movement is not uniform, and neither is the socio-economic context in each state, the robustness and adaptability of institutions and economies depending on many factors. Sometimes the movement of one or more of the factors of production, if unrestrained, may have negative consequences for the wellbeing of the people of a state, and undermine important national policies or interests. Certainly, one must be sceptical of claims to this effect, since the incentives to exaggerate and make opportunistic political arguments are considerable, but it would be unrealistic to deny the possibility: even proponents of the classical benefits of trade and free movement accept that in an imperfect world it can lead to political and social costs. Even if these are temporary, they may be considerable while they endure. Free movement may in the long term be good for almost everyone, but in the short and medium term it is a dangerous toy.

There are two ways for any free movement regime to address this fact. It can either build in structural differentiation, allowing limitation and conditions reflecting the peculiarities and concerns of particular states or even industries or regions. However, this has the disadvantage of creating a complex regime which entrenches the very vulnerabilities that one might hope to see gradually addressed. The motivation for states to adapt to the regime of which they are a part is considerably reduced.

The alternative approach is to include general derogations, allowing for ad-hoc limitations to free movement where necessary to protect important interests. Implicitly such limitations would be limited in time to the minimum necessary, and there would be an obligation of adaptation on Member States – to pro-actively take measures to reduce their vulnerability to movement-created threats, so that free movement can be re-instated as soon as possible in its full glory.

This second approach is the one taken by the Treaty, which allows free movement to be subordinated to public policy, public security and public health, and in certain situations other concerns too. Of these, public policy is the most encompassing and imprecise derogation, and its presence in the Treaty means that a Member State may impose restrictions on free movement if this is necessary to prevent a serious negative impact on some important element of the public interest. Social, institutional, economic and political crises caused by free movement, on a local or national scale, could in principle all fall within this derogation.

It is however, not used in such a strategic way. The so-called Treaty derogations have

been used almost entirely for what one may call 'small', specific, problems: the dangerous individual who may be expelled; the infected livestock that may be refused entry; the particular industry subjected to burdensome regulation because of its association with crime; the specific aspect of the healthcare system or the particular university course whose institutions may not be able to cope with a flood of cross-border patients or students. In such situations Member States have been able to impose protective limits on movement, as exceptions to the general principle.

There is no convincing legal or principled reason why the derogations need be confined to these narrow concerns. Public policy is not an inherently narrow concern. I have argued elsewhere at length that the legal basis for a broader use of public policy exists.<sup>1</sup> This would allow the Treaty derogations to become what they were surely intended to be: a guarantee that free movement, recognized by the Member States to be generally desirable, would not in specific situations become a harmful policy.

Brexit is a prime example. The UK experienced a remarkable influx of migrant workers from other EU states, which undoubtedly created social, economic and institutional stresses. On balance it seems likely that these migrants were good for the country: they were typically young, economically active, and successful in integrating into society, and often brought life and vigor back to decaying areas of the UK, while doing jobs for which local workers had not been found. However, counter arguments are certainly possible. The sheer scale of the migration has been argued to have created a sense of alienation in already fragile and marginalized areas, to have brought down wages, and to have put enormous pressures on already inadequate social housing and other social services.

There are at least some good reasons to take some of these arguments seriously. One is the fact that they were officially recognized as persuasive by the Council and Commission, who were prepared to allow a derogation from the general requirement to treat migrant workers equally regarding social services in the event that the UK voted to remain in the EU. The Commission went to so far as to issue a statement that all the conditions for this derogation – the existence of exceptional migration and unsustainable stresses – had been met.

Another reason is the result of the referendum: arguably this shows that free movement had reached a point threatening social and political stability, even if this was partly due to the febrile and fact-free context of British politics. Is not the capacity to maintain public support for membership of the EU a question of public policy?

If the British government actually believed its own claims about the socio-political importance of restraining free movement of persons – and perhaps the tragedy of Brexit is that they didn't, but should have – then it would seem that they should have made use of the Treaty-

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<sup>1</sup> Gareth Davies 'Brexit and the Free Movement of Persons: A Plea for National Legal Self-Assertiveness' (2016) 41:6 *European Law Review* (forthcoming)

based opportunity to impose restrictions. They had no need to go and negotiate with the Council and Commission: they should have just acted, using the law that was at their disposal.

Brexit is certainly a unique situation – one hopes – but it is not necessarily the only one where a broad derogation might be justified. Limitations on capital flows might be appropriate for a state in a situation of extreme economic instability, while limitations on imports could perhaps be justified where unemployment and economic fragility reach threatening proportions. Even if such situations do not arise, the guarantee that the tools exist to address them and protect the public interest could be of importance for legitimating and explaining the EU.

This view of Treaty derogations sees them as potential means to address the large and small-scale conflicts between economic integration and other interests, means which are characterized by their inherent flexibility and openness to new and unexpected situations. Yet this understanding would be the nightmare of many a Europhile, because of the risks that it brings for European integration and EU law. In making free movement contingent to a greater extent than it is now, even after matters have been harmonized, one introduces a degree of uncertainty into the law, and into the rights of individuals and economic actors, which might discourage them from exercising those rights: investment, establishment, migration, or expansion are all less attractive if the rights they are based on could be limited by factors outside the hands of the company or person involved, factors depending primarily on domestic institutional and social capacities.

Not just this, but such a broad reading of derogations is an invitation to strategic use, and to tit-for-tat limitations by different states: if you limit our workers, we will claim that your car imports are threatening our economy and social stability. One of the keys to the effectiveness of EU law is its elimination of reciprocity as a basis for compliance, transforming it from a mere contract into law. If the national public interest is taken seriously as a constraint on the market, then the very nature of the EU risks a fundamental change.

However, neither certainty, the uniformity of the law, nor the maximization of free movement are the only good things at stake. Promoting the national public interest rebalances power between the parts and the whole, but it also makes the law as a whole more responsive, potentially more socially just, more economically rational, and it embeds the market more thoroughly in society, rather than vice versa.

Markets create winners and losers, both among individuals, regions, and potentially Member States, and as long as the EU lacks the redistributive and institutional capacity to address this alone, it is appropriate for it to respect the need of Member States to respond to their own experience of openness and integration, rather than constraining them within an abstract theory in which the real-life particularities of states and communities are polished away and unfettered free movement is presented as always a good thing for all. The introduction of the constitutional identity clause into the Treaties reminds us of the commitment that the EU has made not just to its market, but also to respect for the essence,

values, institutions and particularities of the Member States, even if these do not correspond to the ideals of a Commission economist.

Why then does the practice of the law not correspond to its potential? There are many actors, from national governments to those within the EU who would be fearful of letting this particular beast out of its cage. However, the most immediate cause is probably the Court of Justice. Any significant restriction of free movement is litigated, and the perception might be that the Court would not allow it. That perception is open to doubt – the mere fact that such situations have arisen does not mean they are excluded – but, perhaps more importantly, it over-states the role of the Court in adjudicating the issue. The scope of permissible restrictions is not, and cannot, be exclusively in its hands.

Partly this is because when free movement threatens the public interest, the adjudication of this raises issues of both law and fact: what are the relevant principles, and what is the evidence concerning the conflict? Such questions are resolved, within the preliminary reference procedure, by national courts and the Court of Justice in co-operation, with the national judge having the last word. The EU legal system provides space for national judges to assess evidence and interpret EU law independently and assertively, and it is their obligation, not just their opportunity, to do so, for they have understanding of the national context which is essential to intelligent resolution of conflicts between national and EU policies.

Yet even more fundamentally than this, whatever the nuances of the EU legal system, as a matter of deepest principle the Court can never be fully autonomous in determining the scope of legitimate restrictions on free movement. For the EU is a creature of limited and conferred powers, a fact reflected more explicitly and prominently in the Treaties than any notions of supremacy, direct effect, or the interpretative primacy of the Court. Yet it is fundamentally incompatible with the idea of conferral that the EU should be able to determine its own powers, and hence that the Court should be able to independently determine the scope of EU law as it must be applied within the Member States. Either the scope of EU law is negotiated between the Court of Justice and national courts, or, if the Court wishes to maintain the idea that EU law is an autonomous and independent legal system over which it has interpretative primacy, then it follows that the extent to which EU law applies in national legal systems must be ceded to a certain extent to those legal systems themselves. The Court and the EU cannot have their cake and eat it.

Of course, it is equally unacceptable as a matter of both practice and principle that Member States should independently determine what EU law means for them, for then the very essence of a binding Treaty or contract is undone. On the contrary, we are condemned to ongoing negotiation between the levels of law, compromise, and unresolved hierarchy – what some like to call pluralism. This messy state of affairs is the only one compatible with the promises of the Treaty. It is, to paraphrase the Court, inherent in the system of EU law.

One of Europe's greatest needs, at the current stage of integration, is for a clear and

assertive voicing of the national interests, concerns, and experiences of EU law, those matters to which the ECJ, like other EU institutions, has limited access. The process of litigation can be a part of this, and national courts, in their role as European courts, have an obligation to make EU law their own, and use and interpret it not just in slavish obedience to the rhetoric of the Court, but as independent judges whose national expertise is invaluable. This is of course easier in a state with a strong constitution, that provides support for all the standpoints argued above. It is no coincidence that Germany's Constitutional Court has most clearly expressed the limits on the Court of Justice and EU law. It is perhaps also no co-incidence that it is one of the most law-abiding Member States, where the legal tradition insists on obedience to higher courts and provides no constitutional resources for resistance, that has felt itself most constrained and oppressed by the EU. Perhaps if the UK had a domestic constitution that allowed it to set limits, even theoretical ones, to the EU, membership would have seemed different. If only, one might think, it had realized earlier that the possibilities for such principled resistance are embodied within EU law itself.

## **Conclusion**

The Treaty is unambiguous in placing the national public interest higher in the normative hierarchy than free movement. Yet free movement continues to create minor, occasionally major, crises and often to be perceived as a threat to wellbeing. Part of the answer lies in national governments and national judges, who need to make EU law their own, and take their role in the EU legal system seriously. They need to think seriously and independently about what the right balance between free movement and other interests is, and apply, explain, and defend their judgments to the full extent that the law allows.

Some will cry that this will be the end of the EU. Free movement is an all or nothing deal, in which every state accepts the good along with the bad, because if each one has a differentiated membership of the internal market the whole will become unmanageably complex and politically untenable. Yet slippery slope arguments are themselves a slippery slope: if the risk of going too far is used as an argument against making any concessions at all then that will be the end of the EU too. For if free movement is perceived to conflict with the public interest, and EU law is perceived to deny any means of responding to this, then more and more states will ask why they would want to be part of such an absolutist regime.

# Differentiation, repatriation or democratization in times of crisis?

Sacha GARBEN

## 1. Unprecedented crisis?

While ever since the early days of European integration the EU has had to face challenges and crises, and some may say that crisis-management is its bread-and-butter, there seems to be a certain consensus that the EU currently finds itself in *extraordinarily* difficult times, that may be jeopardizing its future existence. Not to acknowledge this would seem naïve and unwise, politically speaking.

However, as a preliminary note, we have to be careful not to equate political contestation of specific policies or measures (such as austerity measures taken in the EURO-zone, or international trade agreements) to an overall political failure of the EU. Every issue and area of contestation merits detailed analysis and cannot, without evidence, simply be thrown onto the ‘anti-EU sentiment’ pile. Equally, we should prevent turning the idea of ‘unprecedented crisis’ into a self-fulfilling prophecy by repeating it without critical nuance.

EU scholarship has a responsibility to faithfully analyze all that is wrong, but also all that is right, in all the necessary nuance and detail, in order to formulate a correct diagnosis and useful advice. I would argue that to think critically in these times, is to avoid jumping on the ‘EU is in demise’-bandwagon. This should not be mistaken for a case for ‘business as usual’, but understood as an argument for constructive and ambitious thinking about the future of the integration process.

## 2. Brexit and the future of the EU

That process is likely to continue without the UK as a Member State. The UK has voted to leave the EU in a hotly contested referendum and even if it is not entirely clear that the secession clause will actually be triggered, as the government’s authority to do so without parliamentary participation is currently contested in the UK courts, at present we should probably assume that “Brexit” will go through.

The EU will, whatever that outcome, in all likelihood also go on. And while the loss of the UK as a Member State is certainly an important symbolic, political and economic setback, it is not so certain that the integration process will suffer from UK secession in the longer term. With the most vocal and influential break on further integration out of the picture, it may very well be that the EU can proceed more effectively and easily with both its existing, and new, policies.

A spill-over effect to other Member States is not entirely impossible, but the Brexit referendum and UK Euro-skepticism should not too easily be extrapolated to the EU’s other Member States. The UK has arguably always been the most reluctant participant, coming to the project from a fundamentally different historical experience and cultural perspective, and has always had a *sui generis* settlement within the EU.

### 3. Repatriation and differentiation?

As such, there seems no reason to advocate a fundamental constitutional reconfiguration to accommodate calls for repatriation of competences and further differentiation in terms of opt-outs and derogations for the remaining Member States at this stage. Indeed, I would like to challenge the notion that on the basis of the Brexit experience, (temporary) differentiation and repatriation of competences/tasks should be welcomed as a possible relief valve in current 'Euro-sceptic' times.

In fact, as regards Brexit, I would argue that if anything, it proves the opposite. **The UK possesses the most extensive range of opt-outs and is thereby the most 'differentiated' EU Member State,<sup>1</sup> and this still could not prevent its deep Euro-skepticism and eventual vote to leave.** The "settlement agreement" that was reached and that would have entered into force in case of a vote to remain, did contain further promises for UK differentiation. The "ever closer union" paradigm would no longer apply to the UK: the agreement recognized that the United Kingdom, *"in the light of the specific situation it has under the Treaties, is not committed to further political integration into the European Union"*. Furthermore, it specifically contained concessions on the free movement of persons, most notably in the form of a safeguard mechanism that would allow Member States to limit the access of newly arriving EU workers to in-work benefits for a total period of up to four years from the start of employment. This did not sway voters, and it is entirely uncertain that any further concessions would have.

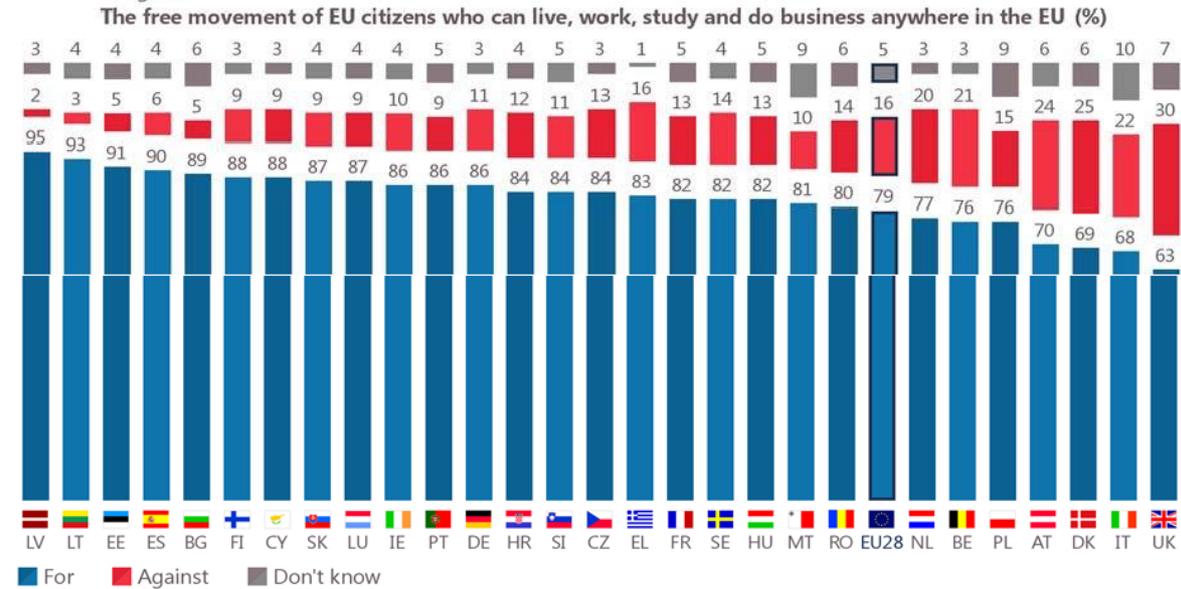
The implicit idea underlying this notion that we should need further differentiation seems to be that Euro-skepticism is the result of too much European integration in too many domains (and specifically too much intra-EU migration). This is however questionable, and has to my knowledge not been empirically proven. It clearly is a discourse heard from certain national politicians, and rather carelessly bought into by some European ones. However, actual Euro- barometer data as recent as 2016 suggests something quite different on the part of individual citizens

Perhaps most strikingly, **80% support "the free movement of EU citizens who can live, work study and do business anywhere in the EU"**. This is an absolute majority in all Member States, ranging from 63% in the UK to 95% in Latvia. Incidentally, the majority of Europeans also find free movement the EU's biggest achievement.

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<sup>1</sup> The Maastricht Treaty provided for a potentially permanent opt-out from Economic and Monetary Union (EMU) for the UK (and Denmark), in the area of Justice and Home Affairs the Amsterdam Treaty provided that the UK (and Ireland and Denmark) did not have to participate in the rules regarding civil cooperation, immigration and asylum. The UK (and Ireland) were permitted to apply to opt in to only part of the Schengen rules. The Treaty of Lisbon inserted a new Article 136 TFEU, providing for the adoption of measures concerning economic governance that would only apply to the euro-zone Member States. As regards JHA, it extended the opt-outs of the UK (and Ireland and Denmark) to include also police and criminal law cooperation, and gave the UK the power to opt-out of pre-existing police and criminal law measures as of 1 December 2014.

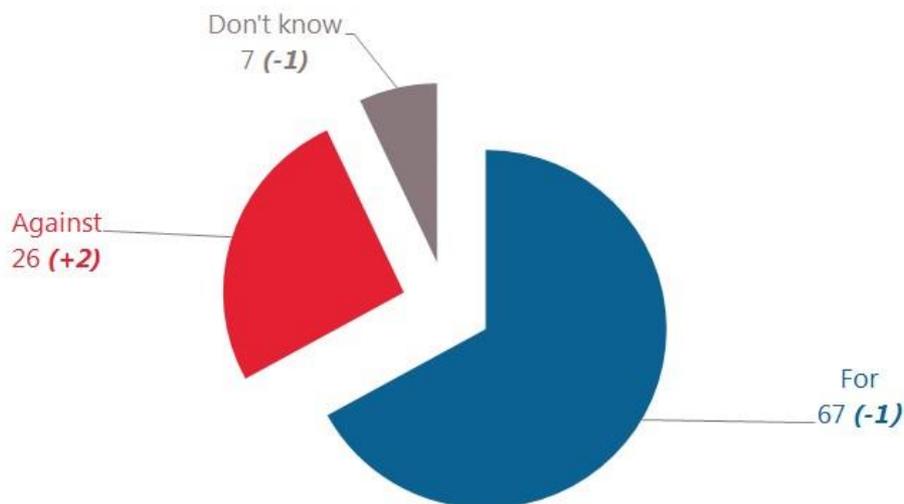
**QA17.9** What is your opinion on each of the following statements? Please tell me for each statement, whether you are for it or against it.



Further majorities support a range of EU policies and priorities. For instance, an overwhelming 70% of Europeans are in favor of a common energy policy by the EU (absolute majorities in all MS). Similarly, Europeans support a “common European policy on migration”, with 67%. These and other figures do not suggest that the EU should retreat, especially not in the area of free movement.

**QA17.6** What is your opinion on each of the following statements? Please tell me for each statement, whether you are for it or against it.

**A common European policy on migration (% - EU)**



(Spring 2016 - Autumn 2015)

What emerges is a picture that is distorted by the national level, where national politicians play into Euro-skepticism to gain leverage in the EU context, and use the EU context to gain leverage in the national context. **These two-level games by national political actors are as old as international cooperation itself, and probably present the most**

**existential, structural threat to the European Union.** It would seem that somehow, the EU has to connect more directly with its citizens.

#### 4. Democratization

What this same Eurobarometer data does indicate, is that **fewer than 4 in 10 Europeans feel that their voice counts in the EU.** 55% feel that it does not. In a few Member States (Denmark, Sweden, Croatia, the Netherlands, Belgium, Austria and Finland) a majority does say that their voice counts, but in all the others less than 50% feel that way.

It is interesting that in the Member States in which citizens feel the least that their voice counts, such as Greece, Cyprus, Italy and the UK, **the level of identification with the EU is also the lowest.** This identification is usually a strong predictor of support for EU membership and integration.

Rather than regression and differentiation, **this implies a call for democratization of the EU.**

If the EU and its output are more closely aligned with the citizens this is not only more legitimate, but it will, based on these insights, support further integration, and in a virtuous circle, encourage further identification with, and support for, the EU.

It is not unlikely that the sense of alienation felt in many Western societies at the moment is due to an erosion of structural democratic decision-making in light of globalization. If it is not felt that a vote for a representative will ensure influence on actual decisions, then elections and referendums become protest platforms where the entire system is dismissed rather than where policies are debated.

The national level will not be able to cope with these challenges on its own, as national democratic decision-making is arguably circumscribed more by global capitalism/globalization than by EU law.

As also a majority of EU citizens seem to agree, the European platform should therefore, if anything, be strengthened. The key is, however, that the use of this platform, the determination of its outcomes, should be more democratic than is currently the case. As I have argued elsewhere<sup>2</sup>, in this context European legislation is not the problem, but rather less democratic forms of integration such as the case law of the CJEU, 'soft' processes such as the European Semester, and parallel integration such as through the ESM.

#### 5. Indivisibility of the internal market freedoms

The above has challenged the notion that on the basis of the Brexit experience, differentiation and repatriation of competences/tasks, such as concerning the free -

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<sup>2</sup> S. Garben, The constitutional (im)balance between 'the market' and 'the social' in the European Union, *European Constitutional Law Review*, 2017, Vol. 13(1), forthcoming; S. Garben, Confronting the Competence Conundrum: Democratising the European Union through an Expansion of its Legislative Powers, *Oxford Journal of Legal Studies*, 2015, Vol. 35(1), p. 55 – 89.

movement of persons, should be welcomed as a possible relief valve in current 'Euro sceptic' times in the remaining EU Member States. **For the future relationship between the EU and the UK, this question nevertheless remains topical and relevant.** It is likely that the UK will seek an agreement that somehow allows it to participate in the internal market but with limitations on the free movement of persons and without having to apply EU labor law such as the Working Time Directive.

While this is in the first place a political decision, there are some comments to be made from a legal perspective, even when leaving the obvious difficulty of dealing with the acquired rights of EU citizens in the UK and vice-versa aside.

On the one hand, while the notion of **differentiation between EU Member States, especially on a core EU area such as the free movement rights, raises constitutional difficulties** (the autonomy of the EU legal order, the fundamental status of EU citizenship and connected free movement rights, the uniformity of EU law, the rule of law, etc.), **this may not necessarily be the case for an association agreement with the UK as a non-Member State.**

**On the other hand, it seems that it would be very difficult to disentangle the free movement of persons from the other internal market provisions** as it is closely intertwined therewith. It encompasses the free movement of workers, but also that of EU citizens more generally (thus including the economically inactive such as students) as well as the freedom of establishment and services (the self-employed such as 'Polish plumbers', service-recipients such as tourists and patients, workers temporarily posted under home State conditions, etc.). It is not at all clear from the discourse exactly what part of the free movement of persons would be sought to be dis-applied (temporarily or permanently), but it is clear that it would imply more than simply the non-application of 1 market freedom. While the provisions of EU citizenship could potentially not apply to a non-Member State, these have informed the case law on workers, services and establishment all the same, and will continue to do so. The UK is likely to seek access to the services market and the freedom of establishment, which would be very hard to disentangle from free movement of persons.

Even the free movement of goods, which has a less direct connection with the free movement of persons, does not stand alone. The adoption of a wide range of flanking measures (some adopted on the internal market legal basis of Article 114 TFEU, some on other more specific legal bases) has been considered necessary to avoid a lowering of standards and social dumping through a liberalized trade in goods in the EU (as well as the other internal market provisions). This includes EU labor laws (occupational health and safety, working time, information and consultation, protection of workers following restructuring), which the UK has always hotly contested and the application of which it will probably precisely seek to avoid with Brexit. Apart from the legal difficulty of separating the free movement 'negative freedoms' from the positive flanking measures in a wide range of policy areas, it is unlikely that EU Member States will allow the UK to gain a competitive advantage through giving access to goods circulation without the application such flanking measures.

# The Accession Transitional Restrictions as a solution for Free Movement of the Economically Active under Brexit?

Claire KILPATRICK

Central to the Brexit negotiations is how the freedoms connect. Hence Chancellor Merkel said in October 2016 (6 October, Speech at Day of German Industry):

"If we don't say that full access to the internal market is linked to full acceptance of the four fundamental freedoms, a process will spread in Europe in which everyone does what they want" and similar statements have been made by other EU leaders.

## A. *What we can take from the Accession TRs in relation to free movement of the economically active Brexit*

1. **the acceptance of transitional restrictions on free movement of persons in both the Southern enlargements of the 1980s in Greece, Spain and Portugal and the Eastern enlargements of the EU in 2004, 2007 and 2011**
2. **the more extensive scope of the TRs accorded to Germany and Austria**

'In order to address serious disturbances or the threat thereof in specific sensitive service sectors in the labour markets of Germany and Austria, [which could arise from posting] Germany and Austria may, after notifying the Commission, derogate from the first paragraph of Art 56 TFEU with a view to limiting in the context of the provision of services by companies established in [Accession states], the temporary movement of workers whose right to take up work in Germany and Austria is subject to national measures.'

3. **the further extended scope made clear in Court of Justice litigation on the transitional restrictions (C-307/09 to 309/09 *Vicoplus*, C-586/13 *Martin Meat*)**
4. **the *telos* of the TRs as expressed by the Court of Justice**

The purpose of the transitional restrictions ....is to prevent following accession disturbances on the employment market of the old Member States due to the immediate arrival of a large number of accession state workers.

5. **A *fairness* argument for UK underpinned by (a) the extensive utilisation of the TRs in the first large 2004 enlargement round by all existing states *except the UK and Sweden* and (b) the reciprocity clause in the TRs**
6. **A further *symmetry* argument for TRs for the UK, separate from the fairness argument**
7. **A way to soften the impact on UK businesses and workplaces and EU citizens economically active in the UK: relevant features of the TRs**
8. **A possible element of a number of different/interim Brexit options**
9. **A need to modify features of the Accession TRs to make them fit for Brexit**

Stand-still clause could not be included as the position of EU nationals in the UK will be worsened by the application of TRs.

***B. Difficulties with TRs as element of a long-term settlement***

1. Their *transitional* nature
2. It can be countered that no fairness argument applies due to the design of TRs
3. TRs do not limit free movement of the self-employed
4. Might the principle of Union preference in the TRs be a problem?
5. Fairness argument underpinning the future UK application of TRs would make questions about their personal scope particularly complex and difficult to agree.
6. This means the symmetry argument for TRs may be more appealing or in any event politically viable.

## SESSION 4: SUMMARY<sup>1</sup>

The issue of temporary suspension of fundamental freedoms has been described as highly sensitive, especially so following the referendum on Brexit held in the United Kingdom on the 23<sup>rd</sup> of June 2016. The recent comment in a press conference by Boris Johnson, British Minister of Foreign Affairs, arguing that the free movement of persons was “nonsense” and “not enshrined in the Treaties as a fundamental freedom”, was put forward as an example of this controversy.

Introduced and contextualised in this way, the issue of temporary suspension of fundamental rights was considered as encompassing two main lines of reflection. First, the question of the eventuality of a suspension of fundamental freedoms *per se* and, secondly, the possible incorporation of a different regime applicable in cases similar to Brexit.

The role of the perceptions and preferences of the public as a limit to free movement in EU Law was highlighted. It was argued that movement is not uniform and can generate benefits as much as negative consequences for the wellbeing of the people due to the socio-economic context of a given country. Therefore, national interests might be undermined by the exercise of free movement. Therefore, it was put forward how limitations to free movement might be indeed needed. Such limitations of free movement can be conducted in two ways. One option to do this would be through structural differentiation encompassing limitations and derogations based on the particularities of one state, industry or region thereby creating a highly complex structure. A second possibility is the inclusion of general derogations allowing for strict limitations to free movement where important interests require so. This second option is the one adopted by the Treaty through its derogation on the basis of public policy, public security and public health.

It was discussed how the UK could have turned the issue of mass arrival of migrants into a public policy argument. It was affirmed that such argument had good chances of being taken seriously as the *accord de principe* given by the Council and the Commission regarding a derogation from the general requirement to treat migrant workers equally regarding social services in the event that the UK voted to remain in the EU). It was submitted that the position of the Court towards this potential situation remains unclear.

It was then put forward how the use of Treaty derogations may be a good technique for dealing with the “stress periods”. And though some had advanced that the Court would have perhaps rejected such public policy/threat justification, good arguments were on favour of the British government. Thus, if the British government had believed in its argumentation based on the socio-political importance of restraining free movement of persons, the use of treaty-based derogations should have been used as a tool for restriction.

It was argued that here lays perhaps the difficulty. If one can see Treaty derogations as a potential mean to address large and small-scale conflicts between economic integration -

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<sup>1</sup> Summary prepared by Lucía LÓPEZ ZURITA & FLORENT LE DIVELEC.

through the exercise of Internal Market freedoms - and other interests, European integration and EU law itself could be jeopardised by national interests and the uncertainty that would revolve around its application to individuals and economic actors. Thus, if the rights on which fundamental freedoms are based could be limited by factors outside of the hands of a company or a person involved these in turn might be deterred from exercising those rights. On the other hand, promoting national interest makes the law as a whole more responsive and potentially more socially just and economically rational.

Even if the possibility is to be found in EU law, the practise seems to speak differently. In this sense, the role played in this issue by the Court of Justice was highlighted. Any significant restriction of free movement is litigated and the perception might be that such a restriction will not be allowed. This presumption is linked to one major error of perception: the permissible restrictions do not and cannot rest exclusively in the ECJ's hands. Thus, it must be born in mind that when a free movement principle threatens the public interests, questions of both law and facts are raised and their appreciation rests as much in the hands of the national courts than the one of the ECJ's, who should therefore work in a co-operative manner. EU Law leaves to national judges enough space to assess evidence and interpret EU law independently in the light of the national context in order to resolve conflicts between national and EU policies. Therefore, the ECJ, on the one hand, can never be fully autonomous in the determination of the scope of legitimate restrictions on free movement due to the principle of conferred powers while, in the other hand, it is equally unacceptable to leave Member States to independently determine what EU Law means for them.

Derogations are about fact; they are not only about principle. Consequences and the harm should be taken into account. In general, it is always a question in which the National Member State need to take part to the full extent allowed by EU law.

The question of the free movement of the economically active was at the heart of the Brexit negotiations. In this frame, another analysis put forward was that accession transitional restrictions (TRs) have been considered among other pre-existing legal tools as a solution for the free movement of the economically active under Brexit. This panel considered a series of arguments and difficulties pertaining to the recourse to such instrument.

A first argument is linked to the increasing use of TRs in the EU context. Indeed, moving away from the idea that TRs were impossible, they now form an integral part of the European system, as the Southern and Eastern enlargements illustrate. These restrictions are possible and relatively broad. Another argument supporting TRs would be their direct advantages. They are, for instance, a way to soften the impact on UK businesses and workplaces and EU citizens economically active in the UK by protecting anyone who has already been working in the UK and providing different/interim Brexit option.

However, a certain number of difficulties regarding transactional restrictions as element of a long-term settlement were raised. First, considering their transitional nature, Member States always have the possibility to use them during a limited predefined period of time. Secondly, and unlike for instance the Swiss agreement, TRs do not limit the free movement of the self-employed.

Another argument is the 'fairness' one, which is, first that there are reciprocity clauses

along TRs and second that there already has been an extensive usage of the restrictions in 2004 by all Member state (MS), except the UK and Sweden. We can then add the ‘symmetry argument’: a state exiting the EU has a special relation towards the remaining MS, as it and they have when accessing it. To conclude, TRs, as a pragmatic proposal, give the UK the chance to say that they have regained control.

Three other points for reflection were then introduced: firstly, the notion that somehow Brexit shows that we need to consider regressive differentiation as the way forward was challenged. It can show precisely the contrary: differentiation does not seem to work. As a proof, the UK is the most differentiated EU Member State, even more after the points contained in the Settlement Agreement, from constitutional or symbolic ones to concessions on free movement.

Secondly, it was suggested to consider the need for strengthening EU action in the “post-Brexit” era, as opposed to further fragmentation. The data of a recent Eurobarometer<sup>2</sup> was brought about, showing that 80% of EU citizens support the right of EU citizens to live, move and pursue business all around the EU. It was explained how this represents absolute majorities in each Member States. The figures do not seem to suggest that the EU should retreat, and certainly not on the issue of free movement. In addition, according to the barometer, free movement is what the majority of EU citizens consider as the most important achievement of the EU. However, it was also expressed that the same barometer shows that citizens feel that their voices do not count in the EU. It was put forward how this seems to present a case for further integration and democratisation rather than for regression.

Finally, free movement of persons in any potential agreement between the EU and the UK was briefly discussed. It was explained that the UK is very likely to ask for limitations. The question on the extent to which the internal market is a package deal was asked. On the one hand, within an EU context, differentiation in the core area of the internal market poses some problems: fundamental status of EU citizenship or the autonomy of EU law were mentioned as examples of this. This is the reason for the difficulties experienced by enhanced cooperation. It was argued how the initial leeway in the Settlement Agreement does not exist for a future deal with the UK. The point was made of how it is unclear what the UK wants to limit. If it is all of the movement of persons, it seems hard to imagine how to make it compatible with the rest of the freedoms. If it only seeks for a partial curb out of persons, they would need to still accept a high number of EU citizens. Additionally, if the UK still wants to participate in the internal market, it was expressed how it would need to comply with much EU legislation against which they have consistently argued. The UK cannot get all at once.

A fourth perspective on the issue of Brexit under the prism of free movement of people was presented at the end of this panel. It was firstly argued that, looking at the Citizens’ rights directive, it can be concluded that the legislator was of the opinion that one can derive a right for free movement of people from the Treaty. When looking at the limitations offered by primary law, the ground of public security, policy (etc.), it was argued that such Treaty derogations can only be invoked with respect to prior behaviour of the individual and not as ground for further limitations. The restrictions to free movement under EU Law are therefore limited. In turn, it was therefore argued that the issue of free movement of people in the frame

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<sup>2</sup> The Spring 2016 Standard Eurobarometer of July 2016

of the Brexit does not rest on existing law but on future political choices.

It was put forward that the UK has a great history of integrating communities from other countries and that the UK was one of the leading country in conferring UK citizenship to foreigners. In many regards, the UK can therefore be considered as being much more open than many other member states regarding migration and movement of people from inside and outside the Union. Thus, it seems that the case of the Brexit debate contradicts the *de facto* status quo in the UK. In turn, it was argued that nobody in the Brexit case, neither the Member states nor the Commission brought facts to the table about the reality of free movement and the advantages it offers to Union citizens and their national economies. Therefore, one action required would be to put forward the positive facts about free movement.

Secondly, Brexit was here seen as a chance to go to more integration and more solidarity among MS rather than more differentiation. Thus, one should clearly defend the argument that the management of migration and of the economic crisis are better handled at EU level. The remedies would therefore not be to grant more powers to the member states, but rather to address the problems that restraint the capacity of the EU to take action.

Granting the UK a position outside the EU and the benefits of market access without free movement of persons would have very high costs in the Union as differentiation would be a source of discredit for the Union. A situation where the UK would be out of the EU and out of the “ever closer Union” would risk to turn the EU into an ever “differentiating” Union. As to the economic perspective, more movement is required rather than less. Indeed, the EU internal market requires more geographic mobility in order to answer the balance of offer and demand on national labour markets. EU policies should be based on what is economically rational.

It was concluded that in times of the world coming closer together, it could not be advisable to give special deals to countries attacking values upon which the EU has been built but to rather find ways to uphold them and to ensure that such values gain in visibility for EU citizens.

**Session 5**  
**Applying a brake to deeper integration:**  
**Democratic legitimacy and greater involvement of national parliaments**

*It is often claimed that the EU suffers from a democratic deficit that fuels disaffection among its citizens. Will the concerns of EU citizens be allayed by greater involvement of national parliaments? What is the likely impact of greater involvement of national parliaments on the EU's decision-making efficiency?*

**Chair:** Olivier COSTA, Professor and Director, Department of Political and Administrative Studies, College of Europe, Bruges

**Speakers:**

- Michele CHANG, Professor, Department of Political and Administrative Studies, College of Europe, Bruges
- Thomas CHRISTIANSEN, Chair in European Institutional Politics, University of Maastricht
- Adrienne HÉRITIER, Emeritus Professor, European University Institute, Firenze

## SESSION 5: POSITION PAPERS

### **Democratic legitimacy and greater involvement of national parliaments: Reform and renewal of euro area governance**

**Michele CHANG**

Economic and monetary union (EMU) has been accused of suffering from a democratic deficit from its inception and provided few avenues for the involvement of national parliaments. When EMU was initially developed in the late 1980s, it was during the waning days of the “permissive consensus” during which European elites made policy with little input from the public. The most developed pillar of EMU was the monetary pillar in which responsibility for monetary policy-making was delegated to a supranational institution, the European Central Bank (ECB). It is one of the most powerful central banks in the world as well as one of its most independent. Although central bank independence was widely acknowledged to be a vital component of the euro area’s governance architecture, the lack of an accompanying fiscal or political union constrained the ECB in taking actions that had potential fiscal implications. Lacking a consensus on the institutional structure and fiscal implications of integration in finance, fiscal policy and economic policy, EMU provided a rules-based framework in which member states were expected to keep their own house in order. While monetary and fiscal policy have very different governance structures, neither offers a substantial role for national parliaments in policy-making. This note will sketch out how the democratic deficit has affected these two central pillars of euro area governance, the European Central Bank and fiscal policy cooperation, noting that the euro area governance reforms enacted since the global financial crisis do little to change this situation. This situation is untenable in the long-run, as the legitimacy of EMU has been challenged and requires a renewed political commitment that will be impossible to attain without addressing these concerns.

#### **European Central Bank**

The ECB faces numerous critics for its expanding role during the sovereign debt crisis, particularly in Germany. The rationale for the high level of the ECB’s independence rested on the acceptance that its function was largely a technocratic one. Moreover, monetary policy was not typically debated in parliaments due to their “low electoral salience.”<sup>1</sup> The ECB’s actions in battling market speculation during the sovereign debt crisis, however, potentially had fiscal implications. In the case of its state bond-buying programs, several potential conflicts arose. First, in the purchase of the sovereign bonds the ECB could be viewed as violating the prohibition against monetary financing, as some of the bond purchases were in support of faltering euro area countries. This presents the prospect of moral hazard. Second, the ECB became a major holder of sovereign bonds and could be in a position of deciding if a default by that country is admissible in its role as the Single Supervisory Mechanism (SSM) that directly supervises the euro area’s largest banks. Finally, the decisions made by the ECB in monetary policymaking could run counter to the interests of the ECB as the SSM, creating a further conflict of interest.

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<sup>1</sup> Moravcsik, A. (2002). "In Defense of the “Democratic Deficit”": Reassessing Legitimacy in the European Union." *Journal of Common Market Studies* 40(4): p.603.

As the ECB's prominence and responsibilities grew, so did criticisms regarding its accountability structure.<sup>2</sup> In addition to engaging in nonconventional monetary policy, it has become an outspoken adviser to national governments, both informally and as part of the troika (ECB, European Commission, and International Monetary Fund) supervising euro area bailout programmes. As noted above, it also directly supervises the largest euro area banks. The ECB participates in regular hearings with the European Parliament, but currently no formal role for national parliaments exists. Nevertheless, ECB President Mario Draghi has courted national parliaments on several occasions. On 28 September 2016, for example, Draghi accepted an invitation to meet with the Committee on the Affairs of the European Union in Berlin where the ECB policies of negative interest rates and quantitative easing were particularly controversial. Draghi had also recently visited other national parliaments in Spain (2013), France (2013), Finland (2014) and Italy (2015).<sup>3</sup>

A more formal role for national parliaments in the ECB's affairs would go against the accepted conventional wisdom on the need for central bank independence and is highly unlikely, despite the criticisms lodged against the ECB. The courts, European and national, are a better arbiter of the ECB's adherence to its statutory obligations. ECB actions have come under the scrutiny of the German constitutional court, for example, where claimants argued that the ECB's outright monetary transactions (OMT) plan exceeded its mandate over monetary policy, breaching the prohibition against monetary financing and encroaching on the powers of member states. The German court ruled in favor of the ECB, but accusations that the ECB's policies exceed its mandate continue. While its accountability has remained unchanged since the start of the crisis, the ECB has made efforts to increase its transparency. For example, the ECB began publishing the minutes of its Governing Council meetings in 2015. The ECB's actions merit close scrutiny given how much its powers have accrued over the last decade and further consideration regarding its accountability structure.

### **Fiscal policy cooperation**

Fiscal policy coordination has been comparatively weak in it lacks a supranational institution like the ECB that could be akin to a European finance ministry. Indeed, EMU has favored the use of fiscal rules to control government spending levels rather than the development of a fiscal capacity that would give the EU more financial resources that could be redistributed.<sup>4</sup> Both academics<sup>5</sup> and EU institutions<sup>6</sup> have made the case for either fiscal

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<sup>2</sup> A.-L. Hogenauer and Howarth, D. (2016). "Unconventional Monetary Policies and the ECB's problematic democratic legitimacy." Paper presented at the International Studies Association Conference. Philadelphia, PA. 14-16 April.

<sup>3</sup> Tom Fairless (2016). ECB chief to address German lawmakers amid mounting criticism. *Wall Street Journal*. 3 September 2016. Available at <http://www.wsj.com/articles/ecb-chief-to-address-german-lawmakers-later-this-month-1472924699>, accessed on 5 November 2016

<sup>4</sup> Hallerberg, M. (2014). Why Is There Fiscal Capacity but Little Regulation in the US, but Regulation and Little Fiscal Capacity in Europe? The Global Financial Crisis as a Test Case. *Beyond the Regulatory Polity? The European Integration of Core State Powers*. P. Genschel and M. Jachtenfuchs. Oxford, Oxford University Press: 87-104.

<sup>5</sup> See da Costa Cabral, N. (2016). "Which Budgetary Union for the E(M)U?" *JCMS: Journal of Common Market Studies* 54(6): 1280-1295 for a recent review

<sup>6</sup> MacDougall, D., Biehl, D., Brown, A., Forte, F., Fréville, Y., O'Donoghue, M. and Peeters, T. (1977) Report of the Study Group on the Role of Public Finance in European Integration. Volume I: General Report (Brussels: Commission of the European Communities); Marjolin, R. (1975) Report of the Study Group "Economic and Monetary Union 1980" (Brussels: Commission of the European Communities); Padoa-Schioppa,

federalism or some method of fiscal transfers, but aside from the creation of the European Stability Mechanism (ESM) to help governments and banks in distress, little progress has been made to expand the EU's fiscal capacity.

Instead, fiscal policy governance has been organized according to a set of rules designed to limit the buildup of government deficits and debt. These budgetary rules were first introduced in the Maastricht Treaty as part of the economic convergence criteria that member states were expected to fulfill before joining the euro area. The Stability and Growth Pact (SGP) extended the deficit rule into an annual check on fiscal sustainability. No specific role was envisaged for national parliaments; governments were free to run their own budgetary policies so long as the overall deficit and debt limits remained below 3 percent of GDP and 60 percent of GDP, respectively. Even then, flexibility could be shown upon the discretion of the Council.

When Germany and France fell foul of the SGP in 2003, it was watered down in the 2005 reform. The possibility of the so-called "corrective arm" of the SGP ever being used to punish fiscal policy transgressions seemed quite remote. To the extent that national parliaments were involved, it was limited to their ability to influence government spending decision but not to have any direct influence over the SGP's rules.

The sovereign debt crisis reinvigorated efforts to control burgeoning budget deficits. The case of Greece quickly served as the narrative for the cause being mainly fiscal, though other causes like deteriorating competitiveness and overleveraged financial systems also deserve as much, if not more, of the blame in some cases. Although there was no single cause for the crisis, the EU quickly doubled down on the construction of fiscal rules through the strengthening of the Stability and Growth Pact through the six-pack (entry into force December 2011) and two-pack (entry into force May 2013), as well as the Treaty on Stability, Coordination, and Governance (TSCG), commonly referred to as the "fiscal compact."

In an attempt to learn from its previous mistakes in institutional design that had allowed France and Germany to escape censure, the fiscal policy reforms featured several innovations that shifted authority from the member states to supranational actors on the assumption that the latter would be more likely to enforce the fiscal rules. Reverse qualified majority voting (RQMV) was introduced for the corrective arm of the SGP so that Commission recommendations to fine a government for breaking the fiscal rules would be approved automatically unless a qualified majority of member states overturned it. Moreover, the two-pack allows national parliaments to convene a Commissioner to present its opinion on a draft budgetary plan or the Commission's recommendation to a member state in the Excessive Deficit Procedure of the SGP.

Finally, the European Semester introduced inter-parliamentary cooperation between the European Parliament in cooperation with national parliaments during European Parliamentary Week, allowing national parliaments to be involved in the adoption of National Reform and Stability Programmes during the European Semester. This takes place from March to July, the period during which member states can consult national parliaments and civil

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T. (1987) *Efficiency, Stability and Equity: A Strategy for the Evolution of the Economic System of the European Community* (Oxford: Oxford University Press); Emerson, M. (1990) *One Market, One Money – An Evaluation of the Potential Benefits and Costs of Forming an Economic and Monetary Union* (Brussels: European Economy)

society to consider domestic priorities before releasing national budgets. Substantial variation has emerged among the EU member states in this regard, and national parliamentary participation is not systematic. For example, the Danish Folketing has introduced a “national semester” that corresponds to the three main stages of the European Semester: the Annual Growth Survey; preparation of Stability or Convergence Programmes and National Reform Programmes; and the scrutiny of the country-specific recommendations. On the other end of the spectrum, many national parliaments have not altered their operations to accommodate the European Semester.<sup>7</sup>

While the SGP reforms were done through the community method,<sup>8</sup> the TSCG (entry into force in January 2013 with 25 signatory countries) was an intergovernmental treaty that required ratification by each signatory state. The UK and the Czech Republic declined to sign the treaty. In the case of Ireland, this required a referendum, while for the other member states it required parliamentary ratification. In this context, national parliaments had the opportunity to debate the TSCG’s fiscal rules that would reinforce the newly-adopted six-pack reforms.

The treaty also creates space for national parliamentary participation; TSCG Article 13 provides for a conference of MEPs and representatives from national parliaments “in order to discuss budgetary policies and other issues.” Maurer optimistically argued that such a committee “could help to create mutual trust and understanding between parliamentarians, and provide a platform for empowering “weak” parliaments.”<sup>9</sup>

The fiscal compact, however, has been criticized as an affront to national sovereignty, particularly that of debtor member states. Its signatories “agree to introduce into their national constitutions budgetary rules that do *not* result from national democratic deliberation.”<sup>10</sup> Moreover, ratification of the TSCG was required in order to access funds from the European Stability Mechanism. National “parliaments in bailout countries could neither reject the Fiscal Compact nor delay the ratification process. Otherwise they risked losing financial aid.”<sup>11</sup> Therefore, both the ratification process of the TSCG as well as the treaty’s content actually disempower national parliaments of countries experiencing financial difficulty.

Despite the fanfare that had greeted the adoption of the TSCG (a Financial Times search on the fiscal compact yielded 408 results<sup>12</sup>), “all this legal apparatus seems to have had little impact on actual fiscal policy-making”<sup>13</sup>; although only 5 of the 25 signatory countries enjoyed

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<sup>7</sup> Kreilinger, V. and M. Larhang (2016). "Does the Eurozone need a Parliament?" Jacques Delors Institut Policy Paper.

<sup>8</sup> Chang, M. (2013). "Fiscal Policy Coordination and the Future of the Community Method." Journal of European Integration 35(3): 255-269.

<sup>9</sup> Maurer, A. (2013). "From EMU to DEMU: The Democratic Legitimacy of the EU and the European Parliament " IAI Working Paper 13, p.14.

<sup>10</sup> Kocharov, A. (2012). The Fiscal Compact Treaty disempowers national parliaments and undermines trust between the peoples of Europe. EUROPP. London, LSE. Available at <http://bit.ly/INKMYm>. Last accessed on 5 January 2017.

<sup>11</sup> Maatsch, A. (2016). Parliaments and the Economic Governance of the European Union: Talking Shops or Deliberative Bodies? New York, Routledge, p.53

<sup>12</sup> Laffan, B. and P. Schlosser (2016). "Public finances in Europe: fortifying EU economic governance in the shadow of the crisis." Journal of European Integration 38(3): 237-249.

<sup>13</sup> Gros, D. and C. Alcidi (2014). "The case of the disappearing Fiscal Compact." CEPS Commentaries. 5 November, p.1

a fiscal deficit above the 0.5% of GDP allowed by the treaty in 2015, “no debate is taking place around the Fiscal Compact.”<sup>14</sup> Regarding the interparliamentary cooperation of MEPs and national parliamentarians, since October 2013 representatives have met twice a year but have little to show for it, as participants remain “in search of its identity.”<sup>15</sup>

## Conclusion

EMU was created without a role envisaged for national parliaments. Despite longstanding criticisms on its need for more legitimacy and accountability, euro area reforms have done little to change this situation. The role of national parliaments in euro area governance generally tends to be minimal and discretionary. In the case of the ECB, this is broadly in line with what we see in other countries and there is little scope for including national parliaments. In fiscal policy coordination, substantial authority is delegated to the Council. Although Council members have an indirect mandate as government representatives, they can appear quite distant from national level politics and priorities. National parliaments may be able to express views and convene the Commission, but the impact of the former is questionable and the use of the latter is infrequent. A more systematic involvement of national parliaments could boost the level of participation and hence improve legitimacy. Both the Four Presidents’ Report<sup>16</sup> and Five Presidents’ Report<sup>17</sup> acknowledge the need to increase legitimacy. But thus far, priority continues to be given to the adherence to rules than innovations to alleviate the democratic deficit.

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<sup>14</sup> Gros and Alcidi (2014), *op. cit.*, p.2

<sup>15</sup> Krelinger and Larhang (2016), *op. cit.*, p. 6

<sup>16</sup> Van Rompuy, H. et al. (2012). Towards a Genuine Economic and Monetary Union. Brussels. 5 December. Available at [http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/ec/134069.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/134069.pdf). Last accessed on 5 January 2017.

<sup>17</sup> Juncker, J.-C., et al. (2015). Completing Europe's Economic and Monetary Union. Brussels. Available at [https://ec.europa.eu/priorities/sites/beta-political/files/5-presidents-report\\_en.pdf](https://ec.europa.eu/priorities/sites/beta-political/files/5-presidents-report_en.pdf). Last accessed on 5 January 2017.

# Democratic Legitimation in a Differentiated European Union: The Problematical Contribution of National Parliaments

Thomas CHRISTIANSEN\*

## Introduction

Over the past 25 years, there has been no shortage of attempts to enhance the democratic legitimacy of EU decision-making, but in the context of an ever more complex polity such efforts often seem like a *fata morgana*: as one approaches a potential solution to the problem, its promise evaporates in a mist of unforeseen complications or unintended complications. The EU's putative 'democratic deficit' has been around for almost a quarter of a century, yet despite much debate and far-reaching reforms the democratic legitimacy of the EU decision-making has not improved. If anything, it has declined further as trust in state institutions and governing elites has fallen more generally, and anti-European populist parties succeed at the ballot box. The permissive consensus has ended, but the resultant void has not been filled by a reliable mechanism facilitating input legitimation for EU decision-making.

In the current phase of European integration, two trends are relevant in this respect: the increasing differentiation of the European polity and the growing efforts to involve national parliaments in the scrutiny of EU decision-making. To some extent, these developments feed into one another: national parliaments are seen as a way to provide much needed legitimacy for the European project, in addition to that provided by the European Parliament. At the same time, differentiation offers the promise of a European Union that is more responsive to variations in popular support for, or opposition to, deeper integration across the different member states, providing governments with the flexibility to opt in or out of the transfer of specific policy domains depending on national preferences.

However, differentiation also raises fundamental questions in terms of democratic legitimacy, and there are also serious obstacles in the way of national parliaments addressing these concerns. This paper highlights six particular problems arising in this context, and cautions against too high expectations concerning the contribution that national parliaments can make to the legitimation of decision-making in a more differentiated European Union.

## 1. The Problem of Congruity

For most of the history of European integration, achieving greater democratic legitimacy equalled giving more powers to the European Parliament. This rise of the EP as an equal co-legislator to the Council is one of the more remarkable aspects of the

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integration project, and more recently we have also witnessed the influence the EP has over the Union's external agreements and over its executive appointments.

We are about to witness the power of the EP vis-à-vis a member state seeking to negotiate its withdrawal from the Union.

The rise of the EP as a powerful legislature made sense in the context of an expectation that the EU would evolve not only as an "ever closer union", but that it would become ever more state-like, and that accountability structures familiar from the experience of representative democracy at the national level could be replicated at the European level. The EP would always remain a very special kind of parliament, and in fact the EU's political system with its checks and balances is more similar to the United States than any European democracy. But in an evolving polity, with an increasing share of competences shifting to the European level, the reflex to allocate the EP greater legislative and accountability functions to the EP is plausible.

However, the EU has not been evolving into an ever more state-like structure – rather the opposite. Paradoxically, the Maastricht Treaty which constituted a watershed for the powers of the EP with the introduction of the co-decision procedure also laid the foundations for a differentiated union through the adoption of the pillar structure and the opportunities for opt-outs from various policy areas it facilitated. Since Maastricht, there have been efforts to bring the various pillars together, not least in the Lisbon Treaty, but the secular trend has been towards further differentiation.

With differentiation comes a problem of congruity for democratic legitimation of policy-making: as new policy-spaces are being created that individual member states may opt in or out of, the European Parliament, elected from and for the whole of the Union territory, is not the appropriate forum to hold the executive decision-makers to account – the spaces for executive action and for democratic representation are not congruent under such circumstances.

The problem is most apparent with regard to the Eurozone where there are dedicated executive bodies like the ECB and the Eurogroup taking policy-decisions only for the member states that have adopted the single currency, yet the democratic accountability rests with the European Parliament that represents all of the European electorate, including citizens in non-Eurozone member states. For some time, the problem was masked by the fact that EU monetary policy was conceived of as being 'independent', and thus removed from democratic scrutiny. However, since in the course of the Eurozone crisis it became apparent that a single currency would also require a degree of fiscal cooperation and harmonization, the issue of democratic legitimacy became apparent, and with it the problem of congruity.

The involvement of national parliaments was seen as a solution to the problem, since it would permit bringing together MPs from the affected countries only in order to provide scrutiny for fiscal policy. The inter-parliamentary cooperation under Art.13 of the Fiscal Compact introduced this kind of multi- level cooperation, creating an ad hoc body along

the lines of the previous IPC on foreign and defence policy. While this has had a troubled history of establishing itself, and remains a purely advisory body, it is a recognition that relying purely on the EP is not the way forward.

However, IPCs of this kind – and more sector-specific bodies are planned in the field of internal security – do not neatly address the problem of incongruous jurisdictions. For a start, waters are muddied by the inclusion of MEPs as equal partners in these arrangements – certainly a good idea from a number of perspectives, but not when it comes to the desire to match differentiated policy spaces with dedicated bodies providing democratic control of the representatives of *those* citizens affected by such policies.

Furthermore, the Art.13 conference also does not match the territory of the Eurozone, even if only the national MPs are considered, since it involves parliamentarians of several non-Eurozone member states – which is why there are continuing calls for a dedicated “Eurozone Assembly” to address the congruity problem permanently. Yet, the nature of policy-making in this field is that there has been a proliferation of measures applying to different spaces – Eurozone, ERM members, Fiscal Compact members, EU member states – that a constantly changing membership of a dedicated scrutiny body would be required, depending on the actual measure under discussion.

Such a constantly variable geometry of parliamentary control is not impossible to imagine or even to arrange, as specific proposals have demonstrated. But it will be cumbersome, costly and complex, and this creating a different set of problems. In the meanwhile, the problem of congruity – the difficulty of aligning spaces for executive policy-making with corresponding spaces for parliamentary scrutiny - remains an obstacle for a deeper and more convincing involvement of national parliaments in a differentiated Union.

## **2. The Problem of Competition**

The previous section already alluded to the fact that several of the sector-specific IPCs that have been established in recent years, or that have been proposed for the future, bring together European and national parliamentarians. While there is indeed a long history of cooperation between the EP and national parliaments, there is also evidence for a difficult relationship between parliamentarians across the national/European divide.

Ever since the EP has been directly elected, and thus its members were not any more drawn exclusively from the membership of national parliaments, it has regarded itself as the champion of EU democracy and persevered in a decade-long struggle to become the powerful legislature it is today. At this point, when the debate increasingly revolves around a greater involvement of national parliaments, and the *sharing* of scrutiny powers among these different actors, cooperation is often tinged with competition as where the centre of gravity of democratic control in the European Union should lie.

The EP has been resisting handing over scrutiny powers of its own to hybrid IPCs, or

even to new bodies representing solely national parliaments. The position of the EP is likely to remain that the EP itself is the appropriate institution to provide democratic control, rather than seeing this fragment across a multitude of sectoral IPCs or loose cooperation mechanism among dozens of individual national chambers.

Competition can be healthy for business, of course, and might therefore also improve the quality of scrutiny overall. However, it can also be damaging in a number of ways. First of all, given its elevated position at the European summit, the EP might oppose, delay or otherwise hinder new institutional innovations that would address problems such as the one discussed above. Second, one can also imagine that competition between the EP and (some) national parliaments might lead to blockages in the process of EU decision-making that are not warranted by the substance of what is being proposed, but are motivated merely by a desire of one actor or the other to be seen as being active.

### **3. The Problem of Complexity**

The first problem mentioned above, and the solutions discussed that might help to address this, already hinted at the problem of an ever-greater complexity in the constructions of democratic control. There, depending on the method of calculation, between 30 and 40 different policy-spaces in the European Union, given the various forms of opt-outs, opt-ins and enhanced cooperation mechanism. Matching these with dedicated parliamentary bodies might be technically possible, but would be likely to be intelligible to the wider public.

There are ways in which executive agencies can work together to make policy that involve high degrees of institutional complexity – for parliaments to match such structures might facilitate proper and effective scrutiny, but such a replication of institutional complexity risks in turn to alienate parliamentarians from their respective electorates. Arrangements under which parliamentarians elected by in a particular member state end up having multiplying responsibilities in a variety of coordinating bodies or IPCs would create an ever-greater distance between voters and their representatives who might be seen as ‘moonlighting’ and potentially neglecting their ‘day job’ of holding national governments to account.

Alternatively, if one goes down the road of creating genuinely new parliamentary assemblies for specific scrutiny tasks within a differentiated EU, then this would create the need for numerous elections, be it direct or indirect. In the light of the stagnating voter turnout for EP elections, the risk here is – apart from problems of comprehension on the part of voters – that participation in such a proliferation supranational ballots could be expected to be low, perhaps damagingly so. Furthermore, once elected, MPs in such sector-specific bodies will have very narrowly defined tasks, not necessarily unimportant but potentially infrequent and far removed from the public eye. Media attention, to the extent to which there might be any, would be patchy and selective. Citizens would be less likely to know who ‘their’ representative is, let alone what his or her voting record or debating performance might be.

The consequence of such complex arrangements would ultimately be a greater distance between voters and representatives, and the risk that parliamentarians, rather than being seen as representative of the people holding executive decision-makers to account, might in fact be seen as part of a technocratic and unaccountable EU elite. Under such a scenario, the foundations for a number of adverse developments would be laid: opportunities for lobbyists to exert undue influence over policy, voter disenchantment with incomprehensible arrangements and ultimately electoral backlash, possibly in other fora.

#### **4. The Problem of (Electoral) Consequences**

These concerns over the negative impact of institutional complexity also relate to another, more fundamental problem with the involvement of national MPs in the scrutiny of EU affairs, namely the limited electoral stakes involved for them. Much of the debate about the involvement of national parliaments in EU affairs considers these as institutional actors, which is of course correct. However, any institutional action from parliaments ultimately depends to a large extent on the willingness of individual MPs to concern themselves with EU affairs. Yes, parliaments are more than the sum of their MPs – political parties and parliamentary officials also play their part in defining the response of parliaments to developments on the European level. But a lack of electoral incentives for MPs to get involved, parliamentary responses to European challenges will remain uneven and limited.

The problem of electoral consequences is that in many cases there is little to gain from national MPs devoting their scarce time to EU affairs. Within the domestic context, opposition MPs still have incentives to scrutinise government ministers concerning their performance in the Council, but for MPs from governmental majority parties the incentives often run in the opposite direction, depending on the nature of party political hierarchies. Horizontal coordination, participation in IPCs and other EU-level activities are distraction from the domestic activities which promise greater exposure and hence have more prospect of rewards within political parties and ultimately at the ballot box. Domestic political careers are made in the context of national politics, and those who concern themselves with EU affairs will probably seek their parliamentary advancement in the EP rather than in potentially obscure IPC arrangements.

There are exceptions to this sceptical scenario, of course. MPs might enter the limelight when (successfully) opposing certain high-profile EU initiatives, and will then reap the electoral benefits from such 'defence' of popular interests. However, the problem with this proposition is that as long as scrutiny powers of national parliaments remain advisory and non-binding, chances of *successful* opposition are slim (as the three 'yellow cards' under the EWS have demonstrated). If such powers were to become more effective – as foreseen in proposals for a 'red card' – then there may well be greater incentives for EU involvement of national MPs, but these incentives would be entirely negative, i.e. geared towards blocking rather than facilitating EU decision-making. Recent developments with regard to external trade agreements demonstrate the potential electoral benefits, but also

the destructive nature of such an incentive structure – in this respect, national parliaments become another step in the development towards what *The Economist* has called a “vetocracy” in Europe. Positive powers for national parliaments, as foreseen for example in proposals to introduce ‘green cards’, might reverse this argument, and indeed promise greater electoral rewards for constructive engagement with Europe. However, for the time being the overarching problem for the involvement of MPs in EU affairs is the lack of visibility, the indirect – and often intransparent – nature of such involvement, and the complexity of many of the existing and proposed arrangements (see above). Under such conditions, with little to motivate of elected representatives to devote time and other scarce resources to these matters other than their personal interest in any given subject-matter, the democratic control of EU policy-making is built on inherently weak foundations.

## 5. The Problem of Capacity

The previous point was concerned with the political costs and benefits of an involvement in EU affairs, pointing to the (lack of) motivation from elected members as an important variable in determining the degree to which national parliament make effective use of any opportunities provided to them within the EU. Another aspect in this regard is the institutional capacity of parliaments to positively engage with EU decision-making. The two aspects – motivation of MPs and institutional capacity of parliamentary chambers – are linked, in that a high degree of motivation among MPs will allow them to channel resources towards EU scrutiny tasks, but capacity also depends on a host of other factors related to the size, budgetary constraints, administrative culture and historical choices.

As a matter of fact, any kind of democratic control requires a degree of institutional capacity to give it effect. Parliaments, in order to make effective use of their constitutional standing and their formal- legal powers, also need to manage their affairs well, and that in turn requires institutional resources such as legal advice, independent scientific advice, research services and general administrative support. Given that parliaments in the legislative process regularly find themselves pitched vis-à-vis well-resourced ministries and executive agencies, any shortcomings with regard to such capacity is bound to put these at a disadvantage, meaning that they will not be able to fully exercise their formal powers.

The particular problem in this context is that an effective engagement with EU affairs implies specific challenges for national parliaments. For one, there is a need for a particular kind of expertise, both with regard to the substance of EU dossiers that come under scrutiny and the procedural aspects of dealing with these. An informed response to legislative proposals from the European Commission, for example, would require not only knowledge about the issue at hand, but will also benefit from an awareness about the regulatory, political and societal background to this issue in the other 27 member states. This is true especially if the effective response from parliaments hinges on their cooperation as *collective* actors (as for example in making use of the Early Warning System).

In addition to the inherently more complex nature of policy-making in a differentiated EU, there are a number of procedural and practical aspects to parliamentary involvement

that can also have a crucial influence on their effectiveness. The first of these is language: parliaments are not used to work in a multilingual environment, and foreign language proficiency of elected members is bound to be limited. Therefore, in order to relate to one another through horizontal cooperation in the context of inter-parliamentary cooperation, there is a need for interpretation and translation facilities for MPs as well as the presence of skilled officials who are familiar with the preferences of their own and of other parliaments, and who are capable of maintaining regular contact with one another. Indeed, it is arguably the latter – a well-functioning network of parliamentary administrators across the EU – that constitutes the foundation of a meaningful scrutiny system.

A second administrative challenge is time, or rather the lack of it. Under current arrangements, national parliaments have rarely more than eight weeks to respond to legislative initiatives from Brussels, which is a very short period in which to conduct both internal assessments, party-political preference formation and inter-parliamentary coordination. In many cases it is impossible to go through these motions and effectively scrutinise EU affairs, in the context of many other demands on the time of parliamentary business. This speaks in part to the need set political priorities (and thus brings us back to the previous point about the motivation of elected members to focus on EU affairs), but also adds emphasis on the need for officials to facilitate the process, e.g. by screening incoming proposals, shepherding dossiers through the parliamentary process, providing expert advice, managing horizontal exchanges with other parliaments and feeding possible objections back to the EU.

These particular demands for substantive as well as procedural expertise connected to EU affairs implies the need for a kind of administrative support that goes beyond that what is usually available to parliaments, and thus puts additional strains on their services and/or budgets. In order to be effective *European* actors national parliaments need to be well equipped with administrators who possess the expertise, contacts and skills to turn the formal-legal powers of MPs into actual political influence. Or, to put it differently, without sufficient institutional support, the contribution that national parliaments can make to the democratic legitimacy of the EU will ring hollow.

## **6. The Problem of Contestation**

The previous points have all raised issues arising from a perspective that still assumes that, in principle, parliaments are the answer to questions of democratic legitimacy in the European Union. However, a problem of a different kind arises from the observation that we are witnessing a wider crisis of representative democracy in Europe, if not in the liberal West more generally. There has been a latent rise of anti-establishment parties and movements across much of Europe, and a parallel trend towards non-parliamentary opposition and extremist populism.

Often, such anti-establishment sentiments are strongly tinged with Euroscepticism, if not all-out opposition to the EU. Mainstream elites in many countries have been associated with support for the integration process, and frequently with unpopular policy choices that membership in the EU is being held responsible for, be it austerity programmes

in some member states, or migration in others. Consequently, the EU has become a target for fringe opposition movements, and in some cases it is *the* target for populist revolts.

The problem in the current context is that such anti-EU sentiments are increasingly channelled *outside* traditional parliamentary structures. Parliamentary engagement with the EU is seen, by these critics, as part of the problem, and the real response to perceived interference from Europe is to operate outside the mechanisms of representative democracy. Referendums have become an increasingly popular tool in this process, and the effects of this trend have been seen in a number of member states, and across a variety of policy areas.

In the past, referendums in the EU context constituted occasional attempts by governing elites to legitimise treaty change they had already supported (or were constitutionally required). More recently, however, referendums have become a tools for anti-European mobilisation, as was the case in the Netherlands, Britain and Hungary. Marine Le Pen's call for an EU exit referendum in France is only the latest development in this regard.

Whatever one's opinion concerning the ultimate impact of increasing popular contestation of the European project, it implies a weakening of the role that parliaments can play in this process. The Brexit experience in particular has demonstrated that even in a system of parliamentary sovereignty the popular vote trumps the role of elected representatives. This trend, if it continues to take hold across the EU, will have far-reaching consequences for liberal democracy more generally. But in the process, it will also make it more difficult to rely on national parliaments to provide the democratic legitimacy for EU decision-making. In an era of rising populism, there is increasing pressure to let "the people" make direct choices regarding EU affairs, rather than to continue trusting parliaments, dominated by mainstream parties, to represent their citizens.

## **Differentiation: A new pragmatism or the end of an ever closer union? Four scenarios and their plausibility**

**Adrienne HÉRITIER**

### **Introduction**

In the following I will ask which of four possible scenarios in the immediate and mid-term future of the European Union, are most likely to unfold or persist: (i) an ever closer union, (ii) a two tier or more differentiated union, (iii) deepening integration through covert, incremental mechanisms, and (iv) disintegration. The four developments constitute different features of the explanandum. I will argue that the likeliness of the respective scenarios happening depends on the following factors which I will scrutinize in order to gauge possible outcomes. The relevant factors are (a) the most important actors', i.e. member states and European institutions, preferences over outcomes, i.e. a specific scenario; (b) important external factors of the environment, such as the financial and economic crisis or a high/low influx of refugees; and (c) the decision-making rules applied when deciding over outcomes such as unanimity, QMV and the use of referenda.

### **Scenario 1: An ever closer political union**

A political union defined as a federal state is characterized by a concentration of decision competences for all policies and budgetary issues with institutions at the supranational level. Even more, the competence to allocate competences, the "Kompetenz-Kompetenz" rests with supranational institutions. Member states would be left with implementing powers of the legislative decisions taken at the central level. A European federal state would have a federal parliament which elects a government accountable to the parliament, possibly a second chamber consisting of representatives of member states.

Actors' preferences over outcomes: Which are the main actors', i.e. large member states' and institutions' preferences over the outcome of a political union which would mean moving from a federation of states to a federal state? The large member states', i.e. Germany, France, Italy, Spain and Poland, preferences for a political union at the cost of national sovereignty, are assumed to be against such a political union that would imply a substantial additional up-loading of national competences. This appears all the more unlikely in view of the increasing weight of right and left-wing anti-European and anti-immigration parties in many member states. Thus with the imminent referendum in Italy, upcoming elections in the Netherlands, France, and Germany, mainstream parties see themselves under pressure from populist parties using voters' discontent and anti-elite sentiments to build their strengths, to adjust their agendas against an ever closer union (if ever they favoured one).<sup>1</sup> Thus, except for a few small member states such as Belgium and Luxemburg which tend to favour a closer union, there is

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<sup>1</sup> In Finland the right wing populists are part of the governing coalition. In Denmark they supported the governing coalition for 10 years, as was the case in the Netherlands although over a shorter period; in Poland and Hungary they dominate the governments (Hutter, Grande and Kriesi 2016)

very little support for a political union from most national governments. In contrast, the supranational institutions, i.e. the Commission and the European Parliament, as to judge from the Four and Five Presidents Reports support, hold preferences for a political union, at least for the Eurozone countries. In short actors' preferences over outcomes are diverse.

External conditions: The main external conditions influencing actors' preferences over outcomes are the handling of the Eurozone crisis and the refugee crisis, both ongoing processes. Overall, both crises have not reinforced the political will of member states to support a political union, but rather strengthened centrifugal tendencies. This is because both conflicts imply redistributive issues. In the course of the crises the unwillingness to redistribute financial capacity and refugees across the members of the Union emerged very quickly. Thus, the interventions to solve the Eurozone, sovereign debt and banking crisis led to a cleavage between creditor and debtor states.

Decision making rules: A treaty change to reform institutions in the sense of a deepening of the Union would require a unanimity vote of all member states. Since member states have diverse (if mostly anti political union) preferences over outcomes as described above, a comprehensive treaty change in favour of a deepening union is unlikely to happen. Even if governments had the same preferences for a political union, the institution of referenda to be held at the national level in case of a treaty reform introduces an element of uncertainty which in the light of populist anti - European public opinion in an increasing number of member states would render the adoption of such a treaty change highly unlikely. Another institutional restriction to be taken into account are the rulings of national constitutional courts such as the German Constitutional Court which request that the national parliament has to confirm an uploading of national competences to the European level.

In conclusion, given actors' diverse preferences over outcomes, the negative influence of redistributive crisis hanging over Europe with its centrifugal impact and the requirement to adopt a treaty change by unanimity and submit it to referenda in some member states, render this first scenario extremely unlikely.

## **Scenario 2: Differentiation/ two speed Europe**

Differentiation or two-speed/two-tier Europe is defined as a differentiation as to individual member states participating in joint policy making in specific areas, i.e. being offered opt-ins and opt-outs; a second feature is the designed cooperation of some member states in joint policy making and joint institutions across various policy areas (core Europe), while others locate themselves around this core participating only in a free trade area, or a common market area with specific freedoms. A third feature of differentiation along the political/bureaucratic expert divide consists in the delegation of important policy decisions to non-majoritarian actors, such as the ECJ, the ECB and independent regulatory authorities. These decisions are, as it were, taken out of the central political arenas and delegated to technocratic expert bureaucracies.

Actors preferences: It is assumed that actors' preferences over how to shape the European polity are diverse, ranging from a few small member states favouring a political union, over a sizable number of large and small member states favouring a more differentiated, two tier development path of development. The Commission and the Parliament are assumed to favour

a deepening of a political union and to be skeptical vis a vis a differentiated Union.

External conditions: The external conditions, as under scenario one, are assumed to be a persisting impact of the financial/ Eurozone crisis and resulting economic recession except in a few member states and the persisting refugee/migration crisis. Both, given the diverse preferences over outcomes tend to deepen the conflicts and increase the difficulties of finding common solutions to redistributive problems.

Decision making rules: Since unanimity is required to adopt a treaty reform and such reforms would need to be corroborated by national parliaments or in national referenda, in the light of diverse preferences over outcomes, only incremental changes or a decision-making deadlock can be expected. As regards policy measures in which co-decision and qualified majority vote are required, pressure to accommodate diverse interests more than ever lead to incremental changes and compromises in the form of opt outs, increased voluntary cooperation, but also a shifting of decision making out of the political arena and a delegation to non-majoritarian bodies, e.g the ECB, the ECJ, or independent regulatory agencies. Thus, in reaction to the Eurozone crisis, we did not experience a big leap towards a political union. Rather the Six Pack und Two Pack, the Fiscal Compact, the European Stability Mechanism, and Banking Union, Open Monetary Transactions, reflect a mixed picture of deepening cooperation or centralization on the one hand and a strengthening of intergovernmental governance on the other. While the Eurozone group strengthened its own power of crisis management, Germany and other Northern creditor states, resisted further centralization in the form of common bond issuance or other measures to mutualize sovereign debt (Barber 2016) ). By contrast, when Germany tried to lead in a redistributive solution of the refugee crisis, it failed. What emerged is the notion of "flexible solidarity", where a solution of a redistributive problem offers different options in which to contribute, e.g. instead of taking in refugees to contribute to border control capacity etc. Or, in the case of external trade the potential rejection of the CETA agreement with Canada by Belgium gave rise to a proposed solution that Belgium could be excluded from the parts of the agreement which go beyond common competences while keeping it as a member under common competences (Bubrowski 2016). As Commission President recently proposed to separate between trade agreement components falling under exclusive community competences and components falling under national competences.

In conclusion, given actors' diverse preferences over outcomes, the influence of redistributive crises with their centrifugal impact hanging over Europe, and given the need to adopt a treaty change by unanimity and submit it to referenda in some member states, makes it more likely that compromises are found in small steps. These small steps result in differentiated integration, such as opt-out clauses, a re-definition of solidarity, voluntary cooperation in some areas, but also delegation to non-majoritarian actors, in short, a more flexible union with diverse degrees of association which are not irreversible (Schmid, 2016).

### **Scenario 3: Continuous, covert, incremental integration**

Covert integration is defined as a deepening of integration in terms of uploading of policy making competences and a definition of more stringent common policy solutions that take place *outside* of the main formal democratic political decision making arenas, Council, European Council and European Parliament.

Actors preferences: As under scenarios one and two actors preferences as regards a deepening, a more differentiated integration of the EU are assumed to diverge.

External conditions: The external conditions, as under scenario one and two, are assumed to be the persistent pressure of the financial/ Eurozone crisis and resulting economic recession except in a few member states and the on-going refugee/migration crisis. Both, given the diverse preferences over outcomes tend to deepen the conflicts and increase the difficulties of finding common solutions to redistributive problems. As opposed to scenario two under which differentiated solutions of integration are chosen in a process of designed and negotiated treaty revision in the central political arenas, under scenario three external shocks are expected to lead to a strategy of covert integration measures or incremental policy and institutional changes invisible to the wider public.

Decision-making rules: Decision-making under unanimity rule increases the likeliness of vague formulations. Even under QMV given diverse preferences and the prevalent consensus practice, decision outcomes often are a compromises containing vague formulations. This in turn allows for a re-bargaining of the specifics of a policy or an institutional rule in the course of their implementation. If actors in favour of deepening integration prevail in renegotiations, covert integration takes place outside of the public attention of the open arenas (Héritier 1999; 2016). Typical paths of covert of integration are a delegation to independent regulatory authorities acting outside the political arena<sup>2</sup>; the specification of vague framework decisions through executive or judicial actors with preferences for deepening integration; formulating policy changes in highly technical details, or cutting big salient controversial issues into small, technical, low salience issues; the use of soft modes of integration based on voluntariness and/or including private actors in public policy making; the introduction of parallel options of regulation, European and national, leading to a crowding out of national regulations. A considerable part of deepening European policy integration evolved through these multiple, covert paths. Covert integration ‘through the back door’, raises obvious problems of democratic legitimation of European policy making once citizens realize that the extent of integration has progressed without their being aware of it.

In conclusion, given actors’ diversity of preferences of outcomes of future shape of Union, and given demanding decision-making rules of unanimity or consensus, covert integration is a likely path to be chosen and in fact has been used frequently in the past decades. The status quo of policy making is changed invisibly and without explicit democratic confirmation in the central political arenas, a circumstance which may trigger an anti-European backlash (Hobolt and Tilley 2014)

#### **Scenario 4: Disintegration**

Features of disintegration are defined as a repatriation of specific policy making competences to the national level, the opting out of member states of specific joint policy areas and the exit of individual member states of the Monetary Union or/and the European Union entirely, such as decided in the Brexit vote of June 2016.

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<sup>2</sup> Or what Bickerton et al. under their notion of New Intergovernmentalism call ‘de novo bodies’(Bickerton et al. 2015).

Actors' preferences: Actors' preferences are assumed not to favour a dissolution of the union. This holds for all member states and for the Commission and the European Parliament. Referenda over exit of the European Union as such are, as in Britain, are unlikely to be launched in other member states. Nor have explicit governmental positions calling for referendum over an exit from the monetary union been put forward. Nevertheless, with Brexit exit has become a real option.

External conditions: The external conditions, as under scenario one, two, and three are assumed to be a persistent impact of the financial/ Eurozone crisis and resulting economic recession except in a few member states and the on-going refugee/migration crisis. Both, given the diverse preferences over outcomes tend to deepen the conflicts and increase the difficulties of finding common solutions to redistributive problems.

Decision making rule: A treaty change with the intention of abolishing of the Union requires actors' unanimous decision. Given the above described preferences it is unlikely to happen. Individual national referenda over an exit from the union are more easily organized. Incentives to resort to such referenda would depend on the relative gain a country would draw economically from an exit, the specific trade deal negotiated with Britain in the next years, on distributional economic and refugee issues, on geopolitical factors, and the contentedness with the own national policies and institutions (de Vries 2016). In conclusion, the scenario of disintegration, given diverse preferences, and the lack of unanimity, is unlikely to materialize.

### **Conclusion: "Fluctuat nec mergitur"**

From the analysis of the political dynamics resulting from actors preferences, external conditions and given institutional rules, it is concluded that of the four possible scenarios, the scenario two of differentiated integration, multi-tier Europe and scenario three of a continuing covert incremental integration, rather than political union or disintegration, are the most likely to happen. It appears, therefore plausible to expect that the EU will continue 'to be tossed, but will not sink' (*fluctuat nec mergitur*) and will continue to be a 'half-way house between intergovernmental cooperation and supranational powers' (Barber 2016).

Yet, floating along may not be enough, and in the case of scenario 3, risky. Going beyond the analysis of what might plausibly happen, a normative view would argue that piecemeal interventions as a reaction to multiple crises tend to reinforce executive and non-majoritarian actors because they incur less coordination costs as compared to legislative actors. It also means that overall considerations of 'reinventing the union' are not tackled. Although there are multiple voices to the effect of "for heaven's sake...no institutional debate" (Frankenberger FAZ, 17.9.2016), there are also strong views that a re-building, instead of a deepening and enlarging of the union should be considered. In other words, some competences should be pooled where there is an urgent need of joint action, such as in foreign and security policy as well as migration and asylum policy, to some extent fiscal policies. By contrast, other tasks with no trans-border effects such as some areas in environmental law, health, consumer policy, as

well as labour law could be repatriated (Papier 2016).<sup>3</sup> The principle of an ever closer union would be reversed to a need for a compelling legitimation of further communitarization. However, a discussion of such a recomposition of the union as a partial devolution of competences with simultaneous communitarization of crucial competences might fall prey to a false ‘moralizing dichotomy’ (Roedder 2016), of “if the Euro fails, Europe fails”, or “Europe or nationalism” .

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<sup>3</sup> Such options were discussed at the Bratislava Summit emphasizing that policy delivery was the order of the day, focusing on the economy/employment, security, i.e. fighting terrorism; protecting outside borders, digitalization (Herszenkron, 2016).

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## SESSION 5: SUMMARY<sup>1</sup>

The session started on the observation that the EU has finally become a central issue of political life, not as the federalists anticipated it though, but probably more as a reaction to the crisis and the austerity measures. There is high criticism, notably from national leaders, on the capacity of the EU to present itself as a democratic regime. At this year's opening ceremony of the College of Europe, Jean-Claude Juncker himself insisted that the EU will never gain its legitimacy in state-like capacity and that going back to the national channel may be the only way to regain legitimacy.

There are 4 potential scenarios on the table in the short to mid-term future: (1) federal EU, (2) differentiation, (3) covered integration, and (4) disintegration. They rely on 3 factors: (1) main actors' preferences, (2) the external environment and (3) institutional rules which govern the decision making process.

Scenario A: the EU as a federal state. At the moment, very few voices from national governments favour this scenario. However some voices from the Commission and the European Parliament do support it. The most salient issues in the present day are the aftermath of the financial crisis and the migration/asylum issues. Both of them lead to diverging opinions from Member states. In addition there are redistributive processes which distinguish, for each (new) policy, between those who (would) pay and those who (would) benefit. Therefore, the lack of common preferences makes this scenario unlikely to happen.

Scenario B: differentiation. This is a very likely outcome, already ongoing. It can take various forms (opt outs, two-speed Europe...) As very diverse preferences are expressed regarding EU policies, differentiations is an easy way to come to a compromise, hence its strong development.

Scenario C: covered integration. This is a way to deepen integration not very visible to all of the actors and to the public. With diverse preferences and the need for compromise, vague formulations are eventually adopted. Assuming that actors have preferences for integration, then this process makes it happen. A clear example is the competition between regulatory arenas, e.g. civil law.

Scenario D: disintegration. It can be either incremental, i.e. step by step, or a comprehensively designed dissolution. It appears that there is no preference for the second scenario. More realistic is a succession of decisions, referenda, with Member States willing to run the disintegration risk.

To sum up, scenarios B and C are likely to happen, A and D are more unlikely, yet "reinvention" talks should be on the table to avoid the risks of options B & C. It would include security, defence, migration, fiscal capacity and also repatriation of some competences which

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<sup>1</sup> Summary prepared by Brice CRISTOFORRETTI & Lara QUERTON.

have no trans-border impact.

The discussion then moved to the issue of national parliaments' involvement. It was stressed that we should analyse with a critical look the proposals made for a greater role for national Parliaments. It is not a silver bullet and six main problems - six C's - can be identified:

-Congruity. Spaces of policy making do not match spaces of legitimacy, with the Eurozone being a prime candidate. It is not just about having members "in" and "out". The EP is not the obvious body to provide accountability for the Eurozone. The article 13 on "inter-parliamentary conference" of the Fiscal compact provides for an imperfect discussion space. MEPs and MPs in joint meetings are a nice idea but the MEPs still represent the whole EU, not just the Eurozone countries. Yet it is difficult to imagine the alternatives.

-Competition. The EP is keen to be the champion of EU democracy, and there is sometimes an unfriendly cooperation with national parliaments. If you create bodies with more than advisory powers, the competition will be even fiercer.

-Complexity. Plugging more parliaments into the system is not ideal, as you still need to find out which representatives, in which bodies, are holding who to account. It may lead to possible counter-productive results. Citizens will be lost in the process and further loss of trust will ensue. The EP itself has a problem of being far away from citizens.

-Electoral Consequences. How can MPs participate in this obscure arrangement? If we have advisory bodies, many MPs think they have more important things to do. If such bodies do have binding powers, then risk of "vetocracy" with non-constructive power.

-Capacity. To hold such a new task, MPs need administrative, legal support from specific staff. The EP is fairly well staffed, many national parliaments are not.

-Contestation. National parliaments themselves are contested. To what extent are they still a reliable channel of accountability? They might be seen as part of the problem by the public.

Issues surrounding the European Central bank were then tackled. Due to its logic of independence enshrined in the Treaties, the ECB has long been criticised for not being accountable. In the 1990s there was a broad agreement that this independence was the best tool, yet already some questions on the accountability. What happens if you change your mind, support other policy measures, want a change of the monetary policy? It is very hard to change the Treaties. Besides, since the crisis the ECB has seen an expansion of its powers.

In this regard, the role of national parliaments is symbolic. If they do receive officials from the ECB, it is under the banner of transparency, not accountability. The ECB publishes numerous documents and answers to the media and the EP. The President of the ECB regularly appears before the EP, yet is that real accountability? If the EP does not like the policies pursued, what can it do, besides suggestions?

The speakers followed this up with the issue of fiscal policy coordination. This is a rules-based cooperation, with limits set on the governments deficits levels. National parliaments

decide on the policies, yet the governments handles the rules. There has been a continuous process of reforms: 6-pack, 2-pack and Treaty on Stability, Coordination and Governance (TSCG). Article 13 of the TSCG on “inter-parliamentary conference” foresees meetings twice a year between representatives from relevant committees of the EP and national parliaments of the Member States.

The role of national parliaments is central in principle, but not systematic across the euro area. One can examine for example the parliamentary votes on the third rescue package for Greece (July and August 2015).<sup>2</sup>

At the end of the session, there were debates on the B and C scenario exposed above. According to one speaker, differentiation is a process of fragmentation. Linking mechanisms, “blackmailing” mechanisms could link policy offer to conditions of participation in another policy offer or area, which is not done at EU level by the country yet, e.g. in state subsidies.

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<sup>2</sup> Cf. the report of the Jacques Delors Institute “Does the Eurozone need a Parliament”, 14 November 2016

## **Session 6**

### **External differentiation: Foreign policy**

Integration progresses through spill-overs from one policy to another. Is the reverse process also possible? Given that Member States have widely divergent interests in areas of EU external action, how does internal differentiation spill- over to external differentiation?

#### **Chair:**

Simon SCHUNZ, Professor, Department of EU International Relations and Diplomacy Studies, College of Europe, Bruges

#### **Speakers:**

- Marise CREMONA, Professor of European Law, European University Institute, Firenze
- Simon DUKE, Professor, European Institute of Public Administration Maastricht
- David PHINNEMORE, Professor of European Politics, Queen's University Belfast
- Frank SCHIMMELFENNIG, Professor of European Politics, ETH Zürich

## SESSION 6: POSITION PAPERS

### Internal differentiation and external unity

Marise CREMONA

1. The new Global Strategy for the Union's Foreign and Security Policy (EUGS),<sup>1</sup> presented by High Representative Federica Mogherini to the European Council on 28 June 2016, places unity as the first of four governing principles which are to guide the Union's pursuit of 'principled pragmatism'.<sup>2</sup> The Global Strategy declares that

In a more complex world of global power shifts and power diffusion, the EU must stand united.... Our shared interests can only be served by standing and acting together.... The interests of our citizens are best served through unity of purpose between Member States and across institutions, and unity in action by implementing together coherent policies.<sup>3</sup>

Later, comparing EU foreign policy to an orchestra playing from the same score, the Global Strategy echoes the EU leitmotif, 'unity in diversity': 'Our diversity is a tremendous asset provided we stand united and work in a coordinated way'.<sup>4</sup>

The importance of external unity has long been recognised by the Court of Justice. It is the basis for its development of the theory of exclusive external competence, first launched in the *AETR* judgment<sup>5</sup> and now enshrined in the Lisbon Treaties. And 'the principle of unity of international representation' has been identified as the basis for necessary cooperation in the context of shared competence and mixed agreements.<sup>6</sup> In a thoughtful reflection on the significance of the *AETR* case, Robert Post makes a crucial connection between internal policy-making and external unity. He defines internal politics as the creation of a political space that allows for the emergence of common commitments through the engagement of a plurality of actors in a process founded on trust and reciprocity. External politics in contrast is based on the expression of collective unity enabling the polity to act in an outside world that (may) lack trust and reciprocity. He argues that there is a need to safeguard internal political discourse with its reliance on mutual trust (the 'internal agora') through unified external action. In *AETR* the Court appreciated this need for external unity in order to safeguard the internal legislative process, basing exclusive external competence on the existence of internal rules and their pre-emptive effect.<sup>7</sup>

Thus 'unity of international representation' is linked, in this view, with internal action and debate; on the one hand external unity safeguards the internal policy space, on the other

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<sup>1</sup> 'Shared Vision, Common Action: A Stronger Europe: A Global Strategy for the European Union's Foreign and Security Policy', 28 June 2016.

<sup>2</sup> EUGS p. 16. The other principles are engagement, responsibility and partnership.

<sup>3</sup> EUGS p.16.

<sup>4</sup> EUGS p. 46.

<sup>5</sup> Case 22/70 *Commission v Council (AETR/ERTA)*, EU:C:1971:32; Opinion 1/75, EU:C:1975:145.

<sup>6</sup> Case C-246/07 *Commission v Sweden*, EU:C:2010:203, paras 103-104.

<sup>7</sup> Case 22/70 *Commission v Council (AETR/ERTA)*, EU:C:1971:32. 'Wherever a matter forms the subject of a common policy, the Member States are bound in every case to act jointly in defence of the interests of the Com

hand the trust and reciprocity that emerge in the formation of a specific internal policy provide the basis for the transfer of powers (pre-emption) necessary to achieve external unity.

But of course the picture is not one of simple unity, either externally or internally. Externally, the EU's foreign policy is characterised by the continuing presence on the international stage of both the EU and its Member States. The EU has not displaced the Member States, who remain sovereign external actors, and mixed agreements are in practice common (even in the context of trade policy a traditional bastion of exclusivity), requiring in some cases the agreement of sub-national as well as national parliaments. And internally, we see a substantial degree of differentiation, of variable geometry, from economic and monetary union to Schengen and the area of freedom, security and justice (AFSJ). How problematic is this internal differentiation for external unity? What legal problems arise and how are they resolved? I want to take the AFSJ (JHA) as an example of internal differentiation so as to explore this relationship, and I want to suggest that in fact the flexibility that characterises the EU's external unity (allowing the EU and its Member States to coexist) allows for the possibility of accommodating internal differentiation in external action. The AFSJ is an example, but similar issues will arise in other cases of differentiation or flexibility.

Three Member States have opt-outs from the AFSJ, the UK and Ireland (Protocol 21) and Denmark (Protocol 22). According to Art. 2 of Protocol 21:

none of the provisions of Title V of Part Three of the Treaty on the Functioning of the European Union, no measure adopted pursuant to that Title, no provision of any international agreement concluded by the Union pursuant to that Title, and no decision of the Court of Justice interpreting any such provision or measure shall be binding upon or applicable in the United Kingdom or Ireland ...

The AFSJ contains chapters on borders, asylum and immigration; on civil justice, criminal justice and police cooperation. EU external action in the JHA field ranges from readmission and visa facilitation agreements to private internal law conventions, from agreements extending the Schengen regime to neighbouring countries, to agreements on the exchange of airline passenger name records and data on financial transfers in the context of counter-terrorism. It is a shared competence, subject to the possibility of exclusive external competence on the basis of Art. 3(2) TFEU, established case-by-case. It is also very largely an implied external competence, so the link between internal and external is especially strong (see Art. 216(1) TFEU).

2. How do Protocols 21 and 22 apply to external AFSJ action? In the simplest case, the UK, Ireland and Denmark will not participate in the Council decisions signing and concluding an international agreement and will not be bound by it.<sup>8</sup> Thus, for example, we may find in the Preamble to the Council decision concluding an EU Readmission Agreement a paragraph stating that the UK, Ireland or Denmark 'does not take part in the adoption of this Decision and is not bound by it or subject to its application', or on the contrary that the UK or Ireland 'has notified its wish to take part in the adoption and application of this Decision'.<sup>9</sup>

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<sup>8</sup> Member States are bound, as a matter of Union law, by an international agreement concluded by the EU: Article 216(2) TFEU.

<sup>9</sup> Ireland and the UK both have opt-in rights to AFSJ measures, whereas Denmark is always excluded.

3. The agreement themselves will generally indicate in the Preamble that the agreement does not apply to Denmark; practice varies as to whether the position of Ireland and the UK is specified in the agreement, but Protocol 21 allows these two states to notify an intention to accept a measure at any time following its adoption, so the position of those states may change after the agreement comes into force.

4. These are relatively simple cases, relating to single-issue agreements that clearly fall within the scope of the AFSJ. What of the case where it is not so clear that the Protocols apply?

In choosing legal basis, according to the Court of Justice, a single legal basis should be identified where possible based on the so-called predominant purpose test. Incidental or ancillary purposes do not need their own separate legal basis and the use of a second or third legal basis is exceptional, only to be used where multiple purposes are inseparable and equally important (and even then, only as long as the different legal bases are not incompatible).

This means that the sectoral elements (including AFSJ elements) of a broader agreement such as a development agreement or an association agreement will tend to be subsumed by the broader legal basis. The AFSJ will tend to be used as a legal basis only for those international agreements which are clearly sectoral in nature (e.g. private international law, readmission agreements, mutual legal assistance in criminal matters). In this way the operation of Protocols 21 and 22 will be confined to agreements which clearly and on their face fall within the AFSJ. For example, the Court held in case C-377/12 that the Partnership and Cooperation Agreement with the Philippines could be concluded on a development cooperation legal basis and did not need to include a separate legal basis to cover the provision on readmission (despite the fact that an explicit external competence for readmission now exists). External unity is preserved, although with the result that a Member State with an opt-out is bound by provisions of an agreement which relate to the AFSJ.

But it might not be so easy to identify a predominant purpose. This is one of the issues before the Court in Opinion 1/15 (pending), in the context of the envisaged PNR agreement with Canada. AG Mengozzi has taken the view that the two objectives of the agreement – the transfer and use of PNR data for the prevention and detection of terrorist offences and serious transnational crime, and the protection of personal data – are equally important and inseparably linked.<sup>10</sup> Thus in his view two legal bases are needed, Article 16 TFEU to cover data protection and Article 87 TFEU to cover criminal (police) cooperation. If the Court agrees, Protocols 21 and 22 will apply since Art 87 is part of the AFSJ and according to Art 2a of Protocol 22 this means that Denmark will also not be bound by those aspects of the agreement which relate to data protection.<sup>11</sup> The AFSJ opt-out effectively spills over into an opt-out from data protection insofar as it relates to AFSJ-related measures.

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<sup>10</sup> Opinion of AG Mengozzi in Opinion 1/15, 8 September 2016, EU:C:2016:656.

<sup>11</sup> The same provision exists in Art 6a of Protocol 21 but the UK and Ireland have said they will opt-in to the agreement.

5. All this assumes that legal basis is the key to the application of the Protocol. Indeed, it refers to measures adopted and agreements concluded 'pursuant to' Title V (the AFSJ Title). The UK has disputed the meaning of this phrase, arguing that the Protocol should apply whenever there is AFSJ content, and one can see why, when one considers the rules relating to choice of legal basis just outlined. But it seems clear that 'adopted pursuant to' Title V refers precisely to legal basis in the sense of the source of the power pursuant to which the EU can act. 'Pursuant to' is not a synonym for 'relevant to' or 'related to',<sup>12</sup> and legal basis is not intended to be a description of the content of an act. The application of the Protocol in a specific case cannot be simply a matter of individual judgment as to whether there is some (enough) AFSJ content. Choice of legal basis is subject to political as well as legal debate but once decided (and the Court has the last word), it is at least clear.

In a number of cases Protocol 21 has been raised, either (by the UK) as a Member State prerogative which should be defended, or (by the Commission) as a potential cause of confusion for third countries whose application should be avoided. Overall the Court has rejected both these arguments as not relevant to the choice of legal basis. It has insisted (consistently with other cases where arguments based on institutional prerogative or practical difficulty have been used) that the first question is to identify the appropriate legal basis using its normal criteria and only then should the implications of that choice be considered as regards the application of Protocol 21. Thus the Protocol sets out the legal consequences of choosing a particular legal basis, but does not itself determine that choice. This was the approach taken in C-656/11 (Swiss FMP) where the Court said

Nor is the legality of the choice of the legal basis for a European Union measure affected by the consequence that the choice may have as regards whether Protocol No 21, and Protocol No 22 on the position of Denmark annexed to the EU and FEU Treaties, apply. (para 49)

And in C-137/12 (conditional access services) the Court said unequivocally that 'it is the legal basis for a measure ... which determines the protocols to be applied, and not vice versa'. The only case where some recognition of the effects of the Protocol was demonstrated by the Court is C-431/11 (EEA) on the amendment of the EEA Annexes to ensure that they keep pace with developments in EU law. Here the Court starts by stressing that the decision in question concerns the EEA, which aims to extend the internal market to the EFTA states. The decision thus concerned the continuation and indeed fulfilment of a pre-existing commitment to maintain homogeneity between the EU and EEA regimes:

the possibility cannot be discounted that recourse to Article 79(2) TFEU, entailing an opt-out clause for the United Kingdom and/or Ireland, would in practice be liable, in breach of Article 3 of the EEA Agreement referred to in paragraph 52 above, to undermine the realisation of the objectives pursued by that agreement. In particular, in the event that no agreement were to be concluded between those Member States and the EFTA States concerned, such recourse would give rise to two parallel regimes for the coordination of social security systems. (para 65)

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<sup>12</sup> The French version of Protocol 21 is perhaps even clearer by referring to measures and international agreements adopted or concluded '*en application de ce titre*'. The Italian uses '*a norma di detto titolo*' which like the French clearly expresses the concept of being 'based on' or adopted 'according to'.

And the Court upheld a choice of legal basis which preserved external unity, and thus did not threaten homogeneity.

6. But does this external unity simply paper over the cracks of internal differentiation? In a sense, yes. An association or development agreement may contain a clause on readmission, and clauses on JHA cooperation are now standard. The agreement as a whole, if concluded with a single non-JHA legal basis, will bind the UK, Ireland and Denmark in EU law. But this single legal basis applies to the *conclusion*, not the *implementation* of the agreement. It is well established that the implementation of specific obligations in the agreement may require a different, sectoral, legal basis, and here the Protocols will apply. So the EU commits externally to obligations towards a third state which in some respects and for some Member States it may not be able to enforce.

7. What about third states? Differentiation may pose problems in negotiations, as illustrated by what happened to the Swiss agreement on free movement of persons (FMP agreement). When the Annexes needed to be updated to include new EU legislation on social security coordination, there was a dispute as to the legal basis for this (as with the EEA case mentioned above). A Commission proposal referred to Article 48 TFEU (coordination of social security systems) as the substantive legal basis. The decision was however adopted by the Council with a legal basis of Article 79 TFEU (i.e. a JHA legal basis on the treatment of third country nationals, to which Protocol 21 would apply). But the decision based on Article 79 TFEU and with a UK opt-out was not acceptable to Switzerland (the UK had proposed to conclude a separate agreement with Switzerland the coverage of which would have been different from the proposed amended Annex), and so the Commission presented a proposal for a new decision on the legal basis of Article 48 TFEU which was adopted by QMV, and which would bind the UK. This decision was challenged by the UK in case C-656/11, the Court holding that Article 48 was indeed the correct legal basis, as it had done in the EEA case. The sequence of events thus illustrates the reaction of a third country to a proposal to amend an existing mixed agreement in such a way as to create a differential application of the agreement among the EU Member States, and the response by the Commission and the Council to this third country position.

Sometimes the Council will agree to the use of an additional JHA legal basis and the third country will not object. For example, a separate decision on the signing of a single provision (Art 17) of the Association Agreement with Ukraine was adopted on the basis of Art 79(2)(b) TFEU; the UK, Ireland and Denmark did not participate in this decision. The preamble notes that 'The aim and content of those provisions is distinct from and independent of the aim and content of the other provisions of the Agreement to establish an association between the Parties.'

8. The Ukraine Association Agreement is a mixed agreement, meaning that the Member States are parties alongside the EU. This can cause difficulties with the ratification of the Agreement (witness the negative referendum on the Ukraine agreement in the Netherlands, or the Walloon brinkmanship over the signing of CETA). But mixed agreements have this advantage: they can offer the flexibility to accommodate externally the internal differentiation of the AFSJ opt-outs. The final paragraph of the long Preamble to the EU-Ukraine Association Agreement explains that for parts of the Agreement that fall within the AFSJ, The UK, Ireland and Denmark are bound as separate Contracting Parties in their own right rather than as members of the EU.<sup>13</sup> What difference does this make? It means that

those Member States do not have an EU-law obligation with respect to those parts of the agreement, but only an international law obligation; a breach of those clauses cannot be the subject of infringement proceedings before the Court of Justice; the Court does not have jurisdiction to interpret those clauses for those Member States (so in theory the interpretation may diverge); the decision as to whether those clauses do or do not create directly effective rights enforceable by national courts is not for the Court of Justice but for the national courts of those Member States.

Such an approach allows the EU and its Member States to jointly agree an international agreement notwithstanding the differentiation of the AFSJ Protocols. We have preserved a degree of external unity. But the differentiation is maintained internally, with the same clause in an agreement having a different legal status in different Member States.

9. The same solution has been adopted for multilateral conventions. For example, the Protocol on Trafficking to the Palermo Convention on Transnational Organized Crime has been signed and/or ratified by the EU and all Member States (a mixed agreement). As far as the EU is concerned, the Protocol was concluded by way of two Decisions. One of the decisions concluded the Protocol in so far as its provisions fall within the scope of the AFSJ, and does not bind the UK, Ireland or Denmark. Those Member States are therefore bound by those elements of the Protocol as Contracting Parties in their own right, under international law.

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<sup>13</sup> 'CONFIRMING that the provisions of this Agreement that fall within the scope of Part III, Title V of the Treaty on the Functioning of the European Union bind the United Kingdom and Ireland as separate Contracting Parties, and not as part of the European Union, unless the European Union together with the United Kingdom and/or Ireland jointly notify Ukraine that the United Kingdom or Ireland is bound as part of the European Union in accordance with Protocol No. 21 on the position of the United Kingdom and Ireland in respect of the area of Freedom, Security and Justice annexed to the Treaty on the Functioning of the European Union. If the United Kingdom and/or Ireland ceases to be bound as part of the European Union in accordance with Article 4a of Protocol No. 21 or in accordance with Article 10 of Protocol No. 36 on transitional provisions annexed to the Treaties, the European Union together with the United Kingdom and/or Ireland shall immediately inform Ukraine of any change in their position, in which case they shall remain bound by the provisions of the Agreement in their own right. The same applies to Denmark, in accordance with Protocol No. 22 on the position of Denmark, annexed to the Treaties.'

Exclusivity is regarded as the epitome of external unity, precluding the Member States from acting. But the techniques just outlined apply even where the competence to conclude an AFSJ agreement has become exclusive (as a result of the operation of Article 3(2) TFEU, or via case law before the Lisbon Treaty). The Lugano II Convention on private international law – a JHA measure – was held by the Court to be a matter of exclusive competence (Opinion 1/03). The UK and Ireland opted-in and are thus bound by the EU conclusion of the agreement. But the agreement remains in a sense ‘mixed’, as Denmark is a party alongside the EU, Iceland, Norway and Switzerland.<sup>14</sup> The opt-out Member States cannot in such cases be compelled to ratify the treaty individually, and may not do so.<sup>15</sup>

10. Conclusions. The Union accommodates a wide variety of modes of participation in its external action, by both Member States and third countries. Although the EU has placed a high value on external unity, both legally and politically, internal differentiation spills over into external policy-making as the relevant Protocols also apply to external action. Differentiation is minimised where elements subject to opt-outs (such as AFSJ) appear in wide-ranging agreements, but sector-specific agreements do not offer this possibility, and decisions on the application of the Protocols may lead to legal basis disputes as well as tricky negotiations with partner states. However the fact that the Member States still operate alongside the Union in foreign policy, while posing challenges for external unity, also allows for flexible handling of the external dimension to internal policy differentiation. Member States who do not take part in internal policies such as the AFSJ may participate alongside the EU in international agreements covering those policy fields – even where EU competence is exclusive. A degree of external unity is preserved, but differentiation is still manifest in the implementation of the agreement and its legal status for the Member States concerned.

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<sup>14</sup> This use of international law to bridge the gap caused by differentiation may also operate at the internal level. Denmark does not participate in the Brussels I Regulation but an international agreement has been concluded between the EU and Denmark, which extends the Brussels I regime to Denmark under international law (Council Decision 2006/325/ OJ 2006 L 120/22).

<sup>15</sup> See e.g. the Protocol on the Law Applicable to Maintenance Obligations, concluded by the EC in 2009 (Council Decision 2009/941/EC OJ 2009 L 331/ 17); Ireland has opted-in; neither the UK nor Denmark have (yet) become parties

## Differentiation: A new pragmatism or the end of ever closer union? A Security and Defence perspective

Simon DUKE

The EU has been aptly described as a ‘system of differentiated integration’ (Schimmelfennig *et al.*: 2015). Using the typologies suggested by Schimmelfennig *et al.* I shall consider the nature and implications of differentiation specifically in the security and defence aspects of the EU’s policies and actions. It will do so in three sections. The first considers the nature of current differentiation in security and defence and suggests that there are at least four types of differentiation (structural, operational, internal and external). The second section considers the role of differentiation in the implementation of the EU Global Strategy (EUGS). The final section will consider whether a ‘hard Brexit’ is either desirable or sustainable in security and defence terms and how various forms of association might impact upon any further differentiation.

### ***The nature of differentiation in EU security and defence***

This contribution accepts that differentiation in the Common Security and Defence Policy (CSDP) is part of broader vertical (differing levels of centralization between policy areas) and horizontal (geographical involvement) differentiation within the EU (Schimmelfennig and Rittberger: 2015, 34). Building on this, this contribution argues that there are at least four aspects of differentiation within CSDP: the internal, structural, operational and those that are external.

Internal differentiation occurs when at least one member state does not participate in the policy area.

The most obvious cases of internal differentiation are *structural* in nature. This includes either opt-outs or treaty-based provisions for differentiation. On the former Denmark, under the terms of a protocol attached to the Treaty of Amsterdam, is not obliged to participate in the elaboration or implementation of decisions and actions of the Union which have defence implications, or to participate in the European Defence Agency (EDA). More generally, CFSP remains distinct, or differentiated, from the other external actions of the Union (Article 24 TEU makes it clear that CFSP is ‘subject to specific rule and procedures’). This includes ‘constructive abstention’ (Article 31 TEU) and the introduction of greater scope for qualified majority voting in CFSP (Article 31.2) both of which are derogations from the need for unanimity for CFSP decisions.

A second form of internal differentiation can be found at the *operational* level, as in Article 44 TEU, which makes provision for entrusting CSDP missions to groups of Member States ‘who are willing and have the necessary capability for such a task’, while Article 46 refers to Member States ‘which fulfil the criteria and have made the commitments on military capabilities’ who may engage in Permanent Structured Cooperation (PESCO). The first article clearly envisages more *ad hoc* and mission specific scenarios with either existing groups or specially constituted groups of interested Member States. The latter implies a more structured and semi-permanent form of cooperation that is unique to CSDP. Finally, the ‘lead nation’ concept serves to ensure that action is possible, normally through the provision of the majority

of the resources and personnel required for an operation, (as in Chad with France or EUTM Somalia with Spain). The same concept exists within the EU battlegroups which designate specific nations with prime responsibilities (see Major and Mölling: 2014).

The entreaties falling upon the Member States to do more in the face of generally static or declining defence budgets has prompted the emergence of regional multinational defence cooperation (MDCs). This includes the Nordic Defence Cooperation, the bilateral UK-France Lancaster House Agreement, the Central European Defence Cooperation group, Baltic, Benelux and the Visegrad cooperation. MDCs may prove a further form of differentiation since they are steered by national defence ministries, are not well connected, and tend to exhibit strong regional rather than European (or transatlantic) orientation. This can, however, be avoided if the MDCs are linked through common goals, projects and contributions of the type that the European Defence Agency (EDA) has long been advocating.

Finally, differentiation also has an *external* form where third parties will associate with EU actions with no expectation of membership. In CSDP this often takes the form of Framework Participation Agreements (FPA) with third parties. All told, around forty-five non-EU states have contributed to CSDP operations since 2003 (some subsequently became EU members, so the number is nearer thirty) (Tardy: 2014).<sup>1</sup> All non-EU states contributing to CSDP operations have the same 'rights and obligations in terms of day-to-day management of the operation' and, generally speaking, they pay for most of their contributions (Tardy: 2014). The motives for contributing vary from country to country, ranging from the wish to impress the EU and to familiarize themselves with the EU's procedures in the case of candidates, to the desire to influence the EU and raise their international profile and, in the case of NATO members, to demonstrate solidarity.

The various manifestations of differentiation identified above can be seen as a way of enabling CSDP in a highly intergovernmental policy area where insistence upon unanimity in action throughout (not only decision-making) could stymie EU action. There is the risk, however, that these various forms of differentiation may undermine the 'C' in CSDP and lead to fragmentation (Chopin and Lequesne: 2016). This is especially important since the use of military force implies the need for a unanimous (political) decision, but with no such requirement when it comes to the actual provision of personnel and resources. This means that in some cases those with the resources can prompt strategic agendas and subsequent EU involvement (as was the case with France in the DRC or Mali).

The enabling benefits of differentiation have to be balanced against the attendant risks of fragmentation. For this reason, there are a number of centripetal elements at play that attempt to counter the potentially centrifugal dangers of differentiation. At the level of the treaties this includes the stipulation that the Union 'shall uphold and promote its values and interests and contribute to the protection of its citizens' (TEU, Article 3.5). In a similar vein, Article 21 TEU states that the 'Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement ...'. Article 24 obliges the Member States to 'support the Union's external and security actively and unreservedly in a spirit of loyalty and mutual solidarity and shall comply with the Union's action

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<sup>1</sup> They include all non-EU European NATO states and all EU candidate countries. Brazil, Russia and South Africa have also contributed, as has the U.S. (but limited to civilian personnel and assets).

in this area'. They are also obliged to refrain from any action which is contrary to the Union's interests in their national policies.

Article 42.7, which is often referred to as the EU's Article 5 (based on equivalent from the NATO Treaty), is a mutual defence clause that gives Member States 'an obligation of aid and assistance' in the event of armed aggression against another member. But, the implementation of any such clause, 'shall not prejudice the specific character of the security and defence policy of certain Member States' (i.e. the neutral and non-aligned and those who prefer to see their defence obligations and guarantees secured through NATO).<sup>2</sup> Hence, there is differentiation between those EU members who are NATO members and the six neutral and non-aligned EU members who are not NATO members which combines elements of internal and external differentiation in a horizontal manner.<sup>3</sup>

Awareness of the potentially divergent forces explains why CSDP has been marked by the tendency to approach CFSP 'from the perspective of 'coherence': joining up different strands of external policies and delivering a single message, in spite of the underlying differentiation' (Blockmans: 2014, 2). In a more recent echo of this phenomenon the EU Global Strategy (EUGS) places considerable emphasis upon the importance of investing in a 'credible, responsive and joined-up Union' (Global Strategy: 2016). The question of whether the Union can simultaneously pursue more kinds of 'joined-up' external action, while also recognizing the *de facto* differentiation of CSDP, has moved to the fore of high-level political debate.

### ***Flexibility, differentiation and joined-up approaches: squaring the circle?***

Perhaps surprisingly, given the history of security and defence integration in the EU, it is precisely these domains that are being promoted at the core of efforts to revive the flagging European integration process. A slew of recent proposals, such as the French and German Foreign Ministers advocacy for a 'European Security Compact, the Italian Foreign and Defence Ministers calling for a joint permanent multinational military force and an ambitious 'Schengen for defence', along with the EPP's calls for a European Defence Union, have not only put CSDP under the spotlight, but also the issue of how to balance the centripetal and centrifugal elements at play within and around CSDP.

Part of the implementation of the EUGS, mentioned in several of the proposals above, will involve resuscitating hitherto moribund aspects of the Lisbon Treaty (such as Articles 42 and 46 TEU). As has already been argued, both articles rest upon recognition of a certain level of differentiation. But, there is the risk that this will be at variance with the desire for a 'credible, responsive and joined-up Union' (EUGS: 2016, 10). Credibility will rest upon the ability to act as a Union. If responsiveness lies primarily on the shoulders of a few, the likelihood of burden-sharing debates or allegations of free-riding will come to the fore, as they have in the NATO context. 'Joining-up' implies not only greater practical commitments to the development of joint platforms and capabilities, but also greater specialization at the national level (like Estonia's development of cyber-security capacities) but this will have implications for national defence postures and budgets.

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<sup>2</sup> The clause has only been activated once by France, but in ways that were not anticipated since the request was to alleviate French burdens associated with overseas military commitments, so that national resources could be devoted to reinforcing domestic security following the Bataclan bombings in November 2015.

<sup>3</sup> Austria, Cyprus, Finland, Ireland, Malta and Sweden.

Ironically, the call for more joined-up security and defence has the potential to lead to further differentiation. This could include the notion that ‘some states could specialize in out-of-area operations, others could undertake the collective defence of Europe’ (Schilde: 2016, 13). Others have suggested specialisation (a division of labour) and pooling (the development of joint assets) as a necessity, using the pragmatic cooperation between Belgium and the Netherlands as inspiration (Biscop: 2016). Although specialisation and pooling are not conceptually contradictory, the implicit appeal to economic rationale is more open to debate since defence expenditure, pooling or the provision of niche capabilities are issues that often go to the core of national sovereignty.

A further challenge to the implementation of the EUGS is to address the division between the internal and external aspects of security emanating from hybrid threats, terrorism, cyber and energy security and organized crime. This, however, presupposes that the EU can be strengthened as a ‘security community’ (EUGS: 2016, 20). The reference to Karl Deutsch’s 1957 term reminds us that the idea of ‘community’ is an essential prerequisite for stable peace. External events, notably the election of Donald Trump as U.S. President, may shock the EU into projecting a more coherent voice on the global stage but it may also have the opposite effect as EU (and NATO) members adjust in an uncoordinated manner to the prospect of an administration that anticipates that its allies will assume greater responsibility for their own security and stability.

In this regard the ‘ambition of strategic autonomy for the European Union’ becomes more relevant than ever (EUGS: 2016, 4). Autonomy is deemed necessary for Europe’s ‘ability to foster peace and safeguard security within and beyond its borders’ (EUGS: 2016, 19). The EUGS also notes that, ‘Full spectrum defence capabilities are necessary to respond to external crises, build our partners’ capacities, and to guarantee Europe’s safety’. The specific reference to ‘defence’, rather than generic security, is not only significant but also something of a gamble. Objections from staunch Atlanticists, like Denmark, or the concerns of the six neutral or non-aligned EU members are predictable. The Baltic States are also reticent, for fear of upsetting recent NATO pledges to step-up military assistance as a deterrent against possible Russian military adventurism. The core of any such autonomous EU defence guarantee would, presumably, rest primarily upon Franco-German guarantees. It remains to be seen how credible this is.

The EUGS has to be read as presenting both a vision, with the emphasis on unity, ‘joined-up’ approaches, a permanent operations headquarters and even common military assets, whilst also pragmatically recognizing the need for continued differentiation, such as the activation of the mutual defence clause, PESCO and greater reliance upon groups of Member States. These are not necessarily incompatible, but any differentiation has to be built upon shared goals.

### ***Brexit and differentiation***

The various proposals for a Security Compact, a Schengen for Defence or a European Defence Union rest upon the common assumption that the British foot is, at long last, off the brake (or soon will be). For some Brexit will make little difference, given the UK’s low participation in CSDP missions for much of the last decade. Even if it is assumed that a formal Brexit will enhance collaboration, and possibly diminish differentiation among the 27 in security and defence, it is unlikely that the UK will have no association with CSDP. The capabilities and

experience of the UK's civilian and military will remain a valuable (potential) asset to the EU and, even if out of the EU, it is difficult to envisage a European Defence Technological and Industrial Base without the UK's involvement since it will still have the largest defence sector when compared to the 27.

There are various ways in which the UK could be associated with CSDP, but this will imply further forms of creative differentiation (of the type that Norway and Turkey already enjoy with the EDA). It is unlikely that the UK will accept being just a contributor to CSDP missions, nor is it necessarily in the interests of the remaining EU members to place the UK in Committee of Contributors if some form of privileged partnership can be negotiated that gives the EU access to UK know-how and capabilities.

The UK's association with CSDP will be more challenging in the event of more integrated structures, dedicated headquarters, common funding and research, multi-national forces and battlegroups. It may even lead to competition not only with the UK and the EU, but also between the EU and NATO as the UK champions closer security and defence through the latter and not the former. In this regard the UK may not be alone, but may anticipate support from Denmark, Poland and perhaps the Baltic States. A less joined-up and more differentiated CSDP, one that maintains its predominantly intergovernmental character, would certainly hold more potential for bilateral arrangements.

Franco-German led efforts to promote greater defence collaboration amongst the more willing and able may yet provide the necessary differentiation for the UK to associate with the EU at different levels and depths. It would also facilitate the continuation of existing bilateral relations between EU members and the UK in this domain, most notably with France. The alternative is for Germany to assume a far more active role in CSDP, while a more integrated and exclusive CSDP will only encourage the UK to place NATO as a firm priority. The inability of the UK to influence the EU in this context, may lead to further questioning of U.S. security guarantees to its European allies.

The reality is that EU autonomy will often rest upon access to NATO (not U.S.) assets. There is of course the possibility that semi-structured cooperation will continue outside EU and NATO, in the shape of more use of 'coalitions of the willing', which would avoid the potential for direct clashes between the EU and NATO and could also accommodate the UK. But, it is also likely that the emergence of more like-minded security perspectives within the EU would be reflected in NATO as well, to the possible consternation of the UK. The EU will also continue to assume main part of longer-term post-crisis stabilisation which is the essential follow-on to any physical intervention, armed or otherwise. Even if the UK privileges NATO as the primary European security forum, it will still have to accommodate the EU and CSDP for longer-term stabilisation and security – without its legs under the table.

The above points assume, of course, that there is a *United* Kingdom. An *untied* kingdom, the most dramatic form of differentiation, would have severe knock-on effects for the rump UK and the EU. Opposition from an independent Scotland towards the *Successor* generation of ballistic missile submarines would immediately pose logistical challenges of where to relocate them – something that cannot be done in a hurry. The possibility of more instability in Northern Ireland (where 55% voted remain) in the event of the unravelling of the Good Friday Agreement would demand greater attention to internal security issues and less on external security.

An analysis written before the June Brexit vote suggested that security and defence ‘is an area in which the impact of a vote to leave the EU would be relatively marginal’ and that, due to CSDP’s intergovernmental nature, ‘disentangling the UK would be relatively straightforward’ (Whitman: 2016, 256). This post referendum perspective suggests that reaching accommodation may not be as straightforward as assumed (although CSDP is hardly the most difficult policy area in which to imagine pragmatic arrangements with the UK). The UK may choose to build upon existing bilateral security arrangements (like those with France), like-minded allies (the Netherlands) or even groups (like Nordic Defence Cooperation), which could imply more differentiation for the EU. The advent of a European Defence Union, Defence Community or Schengen for Defence, would make *ad hoc* cooperation more difficult for the UK and other third parties to associate with CSDP missions and operations and at the cost of potential access to considerable expertise and resources for the EU.

### **Conclusions**

CSDP is replete with various types of differentiation. Four types (structural, operational, internal and external) have been identified. They illustrate that, as a highly intergovernmental policy area, differentiation is in CSDP’s genetic make-up. Differentiation can be seen as positive, even necessary, in order to allow progress and action where insistence on unanimity might risk stifling action. But, the negatives also need to be acknowledged, notably in the implied diminution of the ‘Common’ element in CSDP. A differentiated CSDP carries *both* the potential for pragmatic forms of action as well as the attendant risk of fragmentation.

The advent of the EUGS was intended to give strategic direction to the EU’s external actions, including security and defence. Here too, the same general point arises since the EUGS advocates more centripetal elements, while at the same time endorsing the (potentially) centrifugal elements that may be necessary to avoid inaction. The emergence of the EUGS coincided with the acknowledgement within the EU that it is facing an existential crisis. The EUGS notes that, ‘Our European project, which has brought unprecedented peace, prosperity and democracy, is being questioned’ (EUGS: 2016, 7 see also European Commission: 2016). The future relevance of differentiation as a positive and accommodating notion depends upon the continued growth of interdependence. In its absence, differentiation is more likely to be the prequel to more fracturing.

The unveiling of the EUGS was, unfortunately, overshadowed by the seismic shocks following the outcome of the Brexit vote. The conclusions in this section are broadly similar to those above. Various forms of mutual differentiation will be necessary to involve the UK in CSDP. The possibility of tighter security and defence integration at the European level, as has been mooted by several high-level proposals, would make it more difficult for the UK to associate with CSDP. This might further complicate relations between the EU and NATO and continue a long, and largely futile, competition for security primacy. The desire for EU autonomy rests for the time being upon access to NATO assets and the UK could usefully promote this line of thinking, rather than divisions.

Differentiation is certainly not new to CSDP and, as we look to the future, the test will be how to balance ‘principled pragmatism’ with the appeals for a more ‘credible, responsive and joined-up Union’ (EUGS: 2016, 13). Differentiation has, until now, enjoyed a mainly positive connotation, in the sense that it is an enabler in a policy area where consensus is notoriously

difficult to attain. The challenge for the future will be to hold the fragmentation inherent in differentiation in check with opposing coalescing tendencies since, in their absence, differentiation is likely to enhance the tendency to rely upon *ad hoc* coalitions of the willing beyond the EU which will only lead to a deepening of the EU's security dilemma (Snyder: 1984). This explains why the appeal to a common defence, as an integrative impulse, has risen to the top of the EU's political agenda. It is also a high stakes gamble in a domain that has traditionally relied on differentiation for its political palatability.

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## **Differentiation and Brexit: Towards a Bespoke Arrangement for [Northern] Ireland**

**David PHINNEMORE**

The result of the EU referendum on 23 June 2016 and the UK government's commitment to respect the overall 'leave' result raises the prospect of the UK withdrawing from and, as a non-member state, establishing a new relationship with the EU. The absence of any clear UK government or 'leave' campaign plans for 'Brexit' means there is considerable uncertainty about what shape a future UK-EU relationship will take. Tensions clearly exist within the UK government between advocates of a 'hard' Brexit and future relations based on some form of free trade agreement and supporters of a 'soft' Brexit where the UK would have continued participation in the single market (e.g. via the European Economic Area (EEA)), possibly remain in the EU's customs union and retain involvement in an extensive range of areas of cooperation.

There is also the question of what form of relationship the EU will be willing to negotiate with the UK. The clear line that leaders of the other 27 member states and the EU institutions have taken to date is that there will be no negotiations, formal or informal, until the UK government has notified its intention to withdraw from the EU under Article 50 of the Treaty on European Union (TEU). This does not mean that the EU does not have a position. Numerous statements have been issued by EU leaders and by senior voices in the European Commission and the European Parliament (EP) stressing that UK cannot expect simply to 'pick and choose' those aspects of single market access, cooperation and integration it wants as part of a post-Brexit relationship. Particular attention has been focused on the single market's four freedoms – the free movement of goods, services, capital and people – which are widely viewed as an indivisible package. Importantly, therefore, access to the single market for goods requires acceptance of the free movement of people.

The EU's position should not surprise. It reflects established principles and practice (Phinnemore, 2016). It also points towards any future UK-EU relationship being modelled on an existing relationship, hence the attention that is has been paid to the EEA option, Switzerland's bilateral agreements, Turkey's customs union agreement and the recently concluded Comprehensive Economic and Trade Agreement (CETA) with Canada.

The UK government has to date been unable to reduce the uncertainty surrounding its preferred option beyond stating that it will be seeking the conclusion of a 'bespoke' relationship with the EU. What form this might take is far from clear. Evidently, and understandably, the UK does not wish the form of a future post-Brexit relationship with the EU to be constrained by reference to existing arrangements. A more flexible approach on the part of the EU also has its supporters. Others see Brexit as offering the possibility of the EU more flexible forms of integration within the EU (Gillespie, 2016). Such a dynamic would facilitate a bespoke arrangement for the UK. So too would proposals for a staged approach to a new relationship via an interim arrangement (Chalmers and Menon, 2016)

### A bespoke arrangement for [Northern] Ireland – the supporting case

Within these discussions only very limited consideration has so far been given to the possibility of differentiated arrangements for the constituent parts of the UK, notably those

– Northern Ireland and Scotland – that returned ‘remain’ majorities (56% and 62% respectively).<sup>1</sup>

In both cases the idea of some form of differentiated status respecting the outcome of the vote is under consideration even if thinking around options is a very early stage.

The case of Northern Ireland stands apart given, first, its geographical location and the fact that it shares a land border with another EU member state and that land border will, post-Brexit, cease to be simply the ‘Irish’ border and instead become the external border of the EU as much as the external border of the UK. This raises a whole range of practical as well as political and other challenges. How extensive those challenges will be will depend on the nature and substance of the post-Brexit UK-EU relationship and the extent not least to which the UK remains in the single market and engaged in the free movement of goods, services, capital and people and whether it is inside or outside the EU’s customs union. Each of these will affect the nature of the 499km unmarked border on the island of Ireland. If the border is to remain as ‘soft’ as it has become, then [Northern] Ireland cannot afford to see a change in current arrangements regarding the free movement of goods, services, capital or people. For these reasons alone, it is generally recognized that within the UK-EU relationship some form of special or bespoke arrangement for [Northern] Ireland will be needed (e.g. Niblett, 2016).

A second argument relates to the future of the Common Travel Area (CTA) and how its continuation can be reconciled with the prospect of the two parties – Ireland and the United Kingdom – no longer both being either outside (pre-1973) or inside (post-1973) the EU. In the absence of both states being party to the same set of rules governing free movement, especially of people, and of both having full control over their own borders, it will not necessarily be possible for all current arrangements that form part of the CTA to be maintained unaffected. Again, a key issue here is that post-Brexit the border will cease to be ‘simply’ the Irish border but instead be the international border between the UK and the EU.

A further argument relates to the Belfast/Good Friday Agreement under which anybody born in Northern Ireland has the right to choose Irish over British citizenship. Concerns exist that Brexit could undermine the rights of Irish citizenship holders resident in Northern Ireland and the rest of the United Kingdom. More generally, implementation of various aspects of the Belfast/Good Friday Agreement could be compromised by the absence of an overarching EU legal framework. With Brexit, key EU laws could be repealed and not replaced thus undermining the functioning of the Agreement.

That a UK withdrawal from the EU poses particular challenges for [Northern] Ireland has been made clear in the letter of the First Minister and Deputy First Minister to Theresa May on 10 August 2016. It noted Northern Ireland’s ‘unique’ position in that it is the only region of the UK with a land border with an EU member state. It also recalled the UK Prime Minister’s commitment that ‘the border will not become an impediment to the movement of people, goods and services’ (The Executive Office, 2016). In this context, and with a range of issues notably concerning labour mobility, energy, and trade in agricultural goods, highlighted in the letter, there was recognition at least that bespoke arrangements for Northern Ireland within the context of a new UK-EU relationship might need to be sought.

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<sup>1</sup> There is also the situation of Gibraltar where 95.9% of voters opted to ‘remain’ in the EU.

The positions adopted by EU leaders and institutions do not bode well for a bespoke UK arrangement that deviates significantly from one of the existing models, e.g. EEA, customs union, CETA or a Deep and Comprehensive Free Trade Area. EU leaders and senior voices in the European Commission and the EP have downplayed the idea that the UK can expect to ‘pick and choose’ those aspects of market access, cooperation and integration it wants as part of a post-Brexit relationship. The German Chancellor, Angela Merkel, has stated quite emphatically that ‘negotiations will not be run on the principle of cherry-picking ... Whoever wants to get out of [the EU] family cannot expect that all the obligations fall away but the privileges continue to remain in place’ (Financial Times, 2016a). A joint statement from the EU’s main institutions in the immediate aftermath of the referendum result was equally clear: ‘Any agreement, which will be concluded with the United Kingdom as a third country, will have to reflect the interests of both sides and be balanced in terms of rights and obligations’ (European Council – The President, 2016a). Donald Tusk, the President of the European Council, was even more specific and emphatic: ‘Leaders made it clear that access to the single market requires acceptance of all four freedoms, including the freedom of movement. There will be no single market à la carte’ (Tusk, 2016).

Whereas the prospects for a radically bespoke post-Brexit UK-EU relationship are not positive, the prospects within the new relationship for a bespoke arrangement that addresses some if not all of the challenges facing [Northern] Ireland are more encouraging. In part this reflects the willingness of the EU to engage specifically in Northern Ireland, notably for example through Peace funding and the Barroso Task Force. Many of the challenges Northern Ireland faces are challenges that Ireland as an EU member state either faces itself or are ones in which it has a stake. Furthermore, Northern Ireland’s geographical situation is more conducive to bespoke arrangements. The ‘remain’ vote in Northern Ireland is also noted by some protagonists, and there is some willingness within EU circles to support the Irish government in minimizing the impact for Ireland of the UK referendum.

Importantly, from a Northern Ireland perspective, the EU is not averse as part of its external relations to developing or at least considering special arrangements for particular regions of non-member states. Precedents exist for bespoke arrangements for specific regions. These are noted below. Whether a bespoke arrangement for Northern Ireland will be necessary, sought and achieved and what form or forms that arrangement or those arrangements might take will be to a large extent determined by the content of the post-Brexit UK-EU relationship.

For example, UK participation in the EEA would involve far less disruption at the border and for the CTA than other options. Free movement of people would continue. However, even if the UK did opt for the EEA,<sup>2</sup> there would need to be some form of customs controls between Northern Ireland and Ireland given the EEA does not include participation in the EU customs union. There would also need to be capacity to monitor and control trade in agricultural products since these are not automatically covered by the EEA. Continued participation in the customs union – of which Turkey is part – would address the customs issue albeit with the exception of agricultural products.

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<sup>2</sup>To join the EEA as currently constituted, the UK would need the agreement of all EU member states; it would also have to re-join the European Free Trade Association (EFTA), a process that would require the agreement of its existing members: the three EEA participants as well as Switzerland.

## Options for a Bespoke Status for [Northern] Ireland

Ensuring, in the words of the First Minister and Deputy First Minister, that the border ‘will not become an impediment to the movement of people, goods and services’ (The Executive Office, 2016) is a major challenge in the context a new post-Brexit UK-EU relationship. Each of the options discussed compromises the current status of the border; with the probable exception of the EEA they also threaten to undermine the ability of the UK and Irish governments to maintain the CTA. And for ‘remain’ voters, each falls short of providing the range of integration and cooperation activities and access to institutional representation and decision-making that membership affords.

This then raises the question of whether there are options for maintaining the *status quo* as far as Northern Ireland is concerned while respecting the ‘leave’ vote elsewhere in the UK. Two options have already been identified. A first is the Reverse Greenland option which draws its inspiration from the departure of Greenland from the then European Communities in 1985 with Denmark remaining a member. The idea of a ‘reverse Greenland’ envisages the UK remaining in the EU, but not all of its constituent parts doing so (Gad, 2016). Scotland and Northern Ireland – as constituent elements of the UK who voted ‘remain’ would, as was the case with Denmark, remain in the EU while England and Wales, following Greenland’s example, would leave. Formally, the ‘reverse Greenland’ option would see the UK remain an EU member state, yet with England and Wales – and so the bulk of the population – exempted from the obligations of membership. The rest of the UK – Scotland and Northern Ireland (plus Gibraltar) – would continue as members of the EU, albeit with reduced voting [??] powers and fewer MEPs. The exact status of England and Wales in terms of market access, involvement in the single market etc., would have to be negotiated.

A second option is contained in The Dalriada Document (O’Leary, 2016) and has been developed specifically in response to the different votes in England, Northern Ireland, Scotland and Wales in what was formally an advisory referendum on 23 June 2016. As with the reverse Greenland option, ‘Dalriada’ envisages the bulk of the UK moving outside the EU and some parts remaining within the EU. The option is predicated on the fact that the UK comprises two existing unions, that of Great Britain and that of Great Britain and Northern Ireland. In each of these unions one partner has expressed their desire to remain in the EU. It envisages a situation where England and Wales secede from, but Northern Ireland and Scotland remain in the EU.

Both options, following O’Leary (2016), would have some significant implications, not least a customs border of sorts in the Irish Sea and between England and Scotland. How intrusive this would be would depend on the extent of free movement retained in a post-Brexit UK-EU relationship. In effect, the two options would relocate the challenges of Brexit raised by the land border on island of Ireland to the Irish Sea. Rather than north-south trade and movement of people on the island of Ireland being disrupted by Brexit, the disruption would be between the island and England/Wales.

Moving the border effectively wholesale to the Irish Sea would clearly be a radical step. Radical thinking may be needed in the context of Brexit which after all has the potential to see a radical change to the economic and political *status quo* depending on how ‘soft’ or ‘hard’ Brexit proves to be, particularly where post-conflict Northern Ireland is concerned. Particular challenges relate to the free movement of people across the border and the maintenance of the CTA, at least as far as the island of Ireland is concerned, and especially in a context of an

immigration-control-driven hardening of the UK border. One option is to ‘hard border’ Great Britain (McCall, 2016).

Such an arrangement would require agreement within the context of a post-Brexit UK-EU relationship for the free movement of people to extend beyond the border of the EU into but not across the entire territory of a non-member state. This would be unprecedented, but it would not be unprecedented for special or bespoke integration and cooperation arrangements to be put in place for particular regions or territories of non-member states.

Svalbard enjoys special status within the context of Norway’s participation in the EEA. The EU has also granted some restricted concessions to the Russian exclave of Kaliningrad which is situated between two EU member states (Lithuania and Poland).

Neither of these arrangements are particularly substantial and none involves a significantly closer relationship with the EU than that held by the non-member state. However, precedents for extraterritorial differentiation in the EU’s external relations do exist, just as precedents for territorial differentiation exist within and at the borders of the EU. The case of Greenland has already been noted. In terms of differentiation at the borders of the EU, special arrangements were in place for East Germany throughout the Cold War. There are also the special arrangements in place governing the position of northern Cyprus in the context of Cyprus’s membership of the EU (Skoutaris, 2016). The particular status of European micro-states (e.g. Monaco, Andorra) should also be considered (see Forster and Mallin, 2014), as should the ‘opt-outs’ within the EEA and the ‘special solution’ on free movement of workers that Liechtenstein has (see Gstöhl, 2016). Within the EU, territorial differentiation can be seen in the special arrangements in place for: the Åland islands; Akrotiri and Dhekelia, the two British Overseas Territories and ‘Sovereign Base Areas’ on Cyprus; Mount Athos in Greece; the Faroe Islands; and Ceuta and Melilla.

So, precedents exist for special or bespoke arrangements. Precedents also exist for the EU to extend to non-members often extensive involvement in its integration activities. The EEA involves participation in the single market; Turkey’s association with the EU involves participation in the customs union. Various arrangements involve participation in EU policies and programmes, although no non-member state enjoys any form of participation in the EU’s institutions or in its decision-making procedures. There are limits to integration. No non-member state participates in the Common Agricultural Policy or the Common Fisheries Policy, for example.<sup>3</sup>

The challenge for Northern Ireland and Ireland is to establish their priorities for a post-Brexit UK-EU relationship and identify ways in which they can be accommodated in the arrangements governing the UK’s withdrawal and more significantly in the case of Northern Ireland in the new UK-EU relationship that will ensue. Key priorities have been noted, namely ensuring the border will not become an impediment to free movement of people, goods and services and maintenance of the CTA. These are high level issues, however. Due consideration must also be given to the detailed components of these freedoms mindful of challenges that each option available poses for a part of the UK with its own particular social, economic and political challenges and a land border with an EU member state.

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<sup>3</sup> Prior to joining the then European Economic Community (EEC), Greek-EEC relations were regulated by an association agreement. This envisaged the harmonization of Greek agricultural policy with the CAP and some decision-making role

The First Minister and Deputy First Minister drew attention to challenges around ensuring energy supplies and lowering costs, for the agricultural sector in terms of market access and financial support, for the fishing industry (presumably in terms of fishing rights and financial support), for cross-border workers in terms of movement and for private and public sector in terms of access to migrant labour. These reflected 'initial thoughts'. To this list can be added cross-border police and security cooperation including the European arrest warrant, access to public procurement, social and environmental partnerships of a cross-border nature, access to health care, cross-border infrastructure projects, access to research funding. The list could continue.

Some, possibly most, *could* be addressed in a new post-Brexit UK-EU relationship. Much will depend on the nature of that relationship; whether there is a 'soft' or a 'hard' Brexit. The EU is characterized by differentiated forms of integrations. Differentiation can also be found in its external relations. Principle may limit the opportunities for a bespoke UK-EU relationship, but at the regional level, reflecting not least the challenges that geography poses for Northern Ireland as part of the departing UK and Ireland as the EU member state with the land border with the new non-member state, the need for bespoke arrangements clearly exist. What is needed next is creative thinking about how the principle of differentiated integration can be exploited to solve in a potentially highly politicized context some regionally-specific and very practical problems.

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# External Differentiation in the European Union: Developments and Patterns

Frank SCHIMMELFENNIG

## External differentiation

External differentiation refers to the selective participation in or adoption of EU policies by formal nonmember states. It is a dimension of differentiated European integration, which contrasts with internal differentiation, i.e. the selective non-participation of member states in EU policies (Schimmelfennig et al. 2015). According to this definition, external differentiation does not cover the selective participation of member states in the external policies of the EU (such as the formal Danish defense opt-out). Rather, it is related to the concept of “external governance”, which pertains to EU institutional arrangements with non-member countries designed to territorially extend its internal institutions and policies (Lavenex and Schimmelfennig 2009). Whereas the study of external governance is, however, mainly concerned with modes of governance, types of regulatory and organizational inclusion, and Europeanization effects beyond the EU’s borders (Lavenex and Schimmelfennig 2009; Lavenex 2011), the analysis of external differentiation is focused on grades of membership and the level and scope of non-member integration in the EU.

## Causes of external differentiation

External differentiation has emerged in the context of the enlargement or widening of the EU and its predecessor organizations. The major widening decisions of the EU come in the form of treaties between the EU and a non-member state; they require unanimous intergovernmental agreement and domestic ratification by both sides. Because of the unanimity requirement, veto threats loom large, and failures are likely. States may refuse, or be refused, (further) integration. Non-member states may decline membership in the organization – just as Norwegians have rejected accession treaties twice in 1972 and 1994. Alternatively, member states may reject the accession of a non-member state – the French veto against British membership in 1963 was an early example. If differentiation was not an option, the outcome of such refusals would be the status quo. Graded membership provides an alternative to the stark choice between the no and full membership. States that do not wish to become full members can ask for a lower grade of membership that allows for limited participation in the integrated policies. Conversely, member states opposed to widening can offer the non-member some form of association below membership. The EU creates external differentiation options under the condition that it is in the common interest of the member and non-member states. To a large extent, differentiated membership is an emergent phenomenon in the sense that it is generally not the outcome intended by the actors – and not even part of the set of outcomes on which the governments initially negotiate. Rather, it comes up as an option during the negotiations or after their failure, e.g. as a result of individual vetoes or ratification failures. The free trade and EEA agreements that the EU concluded with Norway after the negative referendums are cases in point.

Why do states reject, or are refused, membership? Why do they move up and down the grades of external differentiation? Most explanations are based on some kind of distance to the members of the EU. The smaller the geographical, cultural, economic, cultural, or political distance between a non-member state and the EU, the closer the state will be to membership. We need to take into account, however, that the causes of refusing closer integration may be different from the causes of being refused.

First, external differentiation may simply be a function of *geography*. Geographical proximity generally increases positive and negative interdependence as well as familiarity. For both reasons, the closer that a country is to the EU, the more likely is the mutual interest of the country and the EU in closer integration.

Second, external differentiation may result from *cultural* distance. If the EU is characterized as a “(Western) Christian club”, countries with an Orthodox or Muslim majority population will more likely find themselves at different stages of external differentiation. Moreover, exclusive national identity creates distance to European integration (Carey 2002; Hooghe and Marks 2005). So do conceptions of national identity based on political norms that are difficult to reconcile with European integration (Gstöhl 2002) – such as, for instance, neutrality and direct democracy in the Swiss case. These explanations cannot clearly distinguish refuser countries and refused countries. Yet it has been observed that refuser countries often have a Protestant cultural background (Theiler 2004). This may be a negative reaction to the predominantly Catholic founding members of the EU. Conversely, Orthodox and Muslim countries would be found predominantly among the refused.

Third, external differentiation can be explained by *wealth* and growth differentials. Poorer countries can be assumed to seek integration in order to gain access to the EU market and EU subsidies, attract foreign investment, and improve their competitiveness; at the same time, they encounter resistance by members because they would become net beneficiaries of the EU budget, exacerbate competition for EU subsidies, and increase migratory pressure on the wealthier member states (Plümper and Schneider 2007; Schimmelfennig and Winzen 2014). Accordingly, the lower a country’s wealth, the lower the grade of membership at which it will be refused further integration. Conversely, wealthy countries are reluctant to integrate for fear of regional redistribution. In addition, they can afford to refuse integration and preserve their national sovereignty and policy-making autonomy. According to Mattli (1999), they only seek more integration when their economic growth falls behind the growth of EU members.

Finally, external differentiation may result from *political* distance. According to Schimmelfennig (2016), the more a European state’s political regime and governance standards are aligned with the democracy and good governance standards of the EU, the higher its membership grade is likely to be. The refusers are characterized by better governance: they outperform the core on governance capacity and democratic quality. Because such countries would strengthen the EU’s democratic standards and governance capacity, the core would welcome them as full members. Yet they have both the reasons and the means to decline full membership. High-quality domestic governance makes elites and

citizens sceptical of, and/or reduces their need for, European integration. The larger the gap between domestic governance and core EU governance, the earlier in the process states refuse to integrate further. Conversely, the refused countries are characterized by worse governance: they fall short of the core's standards of liberal democracy and governance capacity. The core fears, however, that the integration of worse-governance countries will dilute its standards of liberal democracy and weaken the Union's policy-making capacity. EU citizens place more trust in democratic and well-governed countries (Delhey 2007). The core has the institutional power to refuse these countries further integration, and it will do so the earlier, the less democratic they are and the lower their governance capacity is. In order to move towards the core, the refused countries need to democratize or improve their democratic quality, and they need to strengthen their governance capacity (Mattli and Plümpert 2002). This explanation holds when controlling for wealth, geography, and cultural background.

### **Development of external differentiation**

External differentiation has started in the early days of European integration and has developed further over a period of several decades.

- (1) The Treaties of Rome establishing the European Economic Community (EEC) in 1958 provided for the *association* of third countries (Art. 238) below the membership threshold.
- (2) In the early 1960s, the Spanish government expressed its interest in joining concluding an association agreement. The member state governments were initially favourable to the Spanish request but eventually rejected it after strong protests against the association of a non-democratic state (Thomas 2006). As a consolation prize, Spain became the first European country to start negotiations on a preferential *trade agreement* in 1967.
- (3) When accession negotiations with Britain, Denmark, Ireland, and Norway were launched in 1970, other member states of the European Free Trade Association (EFTA) – Austria, Finland, Sweden, and Switzerland – were opposed to both full membership and association with the EEC, mainly in order to uphold their neutral or non-aligned status in the Cold War. Yet they also sought to preserve the free trade regime they had established within EFTA. For this reason, a preferential trade agreement was considered insufficient and negotiations on *free trade agreements* with the EEC were launched.
- (4) After the EEC had signed a trade agreement with Yugoslavia in 1970, both sides decided to expand their cooperation beyond trade later in the decade. Yet the EU ruled out association or free trade because Yugoslavia was neither democratic nor a market economy. Instead, a comprehensive *Cooperation Agreement* covering a large number of policy areas was signed in 1980.
- (5) In the Single European Act of 1986, the EC prepared the ground for establishing a single market until 1993. Fearing economic loss from trade and investment diversion, the free trade partners of the EC strove to secure a place in the internal market. With the exception of Austria, they did not initially seek full membership, however. On its part, the EC wanted to avoid admitting new members while it was busy implementing the internal

market program. In 1989, Commission President Jacques Delors therefore proposed the creation of the European Economic Area (EEA), providing for *market integration* without formal EC membership.

- (6) In Switzerland, the referendum on the EEA Treaty failed in December 1992. Because the country sought access to the internal market, however, it started negotiations on a series of bilateral international agreements – devoid of the EEA’s supranational institutional mechanisms – in 1994.
- (7) Finally, the EU invented the formal status of *candidate country* in 1997 when it decided to open the accession process with ten Central and Eastern European applicants but to start actual negotiations only with those five that fulfilled the political accession criteria best. Since then, the EU has used the candidate status to reward countries seeking membership for progress on good governance, while deferring the decision to open accession negotiations.

Since 1997, no new membership grades for non-members have been invented. At the same time, almost all grades of external differentiation created earlier have continuously remained in use. Thus, for the past 20 years, the EU has had an institutionally rather stable system of external differentiation. Note, however, that the regulatory and organizational details of the specific differentiation arrangements have varied over time and across non-member states. Table 1 gives an overview of the current situation in external differentiation. Except for “candidacy”, refuser and refused countries occupy different grades of membership – but this need not be the case. “Free trade” is currently the only empty category – but, given the recent signing of the CETA with Canada, only among European countries. It also one of the options for the UK position in external differentiation in the case of a “hard” Brexit.

**Table 1 External Differentiation (2015)**

Grade of external differentiation	Refuser countries	Refused countries
Accession negotiations		Montenegro, Serbia, Turkey
Candidacy	Iceland	Albania, Macedonia
Internal market	Liechtenstein, Norway	
Association		Bosnia-Herzegovina, Georgia, Moldavia, Ukraine
Bilateralism	Switzerland	
Free trade		
Cooperation	Armenia, Azerbaijan*	
Trade		Belarus, Kosovo

\* Refused countries are those that are in their category because the EU has so far blocked their accession to a higher category; refuser countries are in their category because they refused more integration at some point. Armenia and Azerbaijan have originally been in the “refused” category but have recently rejected association. Kosovo is on the association track but has not signed an association agreement yet.

## Assessment of external differentiation

To paraphrase the title of the workshop, external differentiation constitutes a pragmatic instrument of European integration – but not a new one. And rather than spelling the “end of ever closer union”, it has generally helped to promote more regional integration.

External differentiation was an early invention of European integration – much earlier than internal differentiation. Whereas external differentiation has been around since 1958, internal differentiation only started in the mid-1980s (apart from transitional arrangements to be found in the accession treaties). External differentiation has several distinct advantages.

- (1) External differentiation allows the EU to tailor relations with non-member countries. In overcoming the stark binary distinction of membership and non-membership, it provides for agreements that reflect the preferences of member states and non-member states more precisely.
- (2) External differentiation has produced a higher level of regional integration in Europe than would have been possible in its absence. The EU is now at the hub of a region, in which all countries have some kind of institutionalized arrangement with the EU.
- (3) External differentiation is also a highly upwardly mobile arrangement. While non-member countries occasionally move down the ladder of graded membership (e.g. Iceland decided to stop accession negotiations and the EU decided to suspend the Partnership and Cooperation agreement with Belarus), movement has been upward for the great majority of non-member countries. Overall, the EU's system of differentiated integration has trended towards more integration over time.
- (4) External differentiation has allowed the EU to extend its policies and rules beyond its borders without granting membership. Generally, external differentiation agreements are based on EU policy regimes and rules. This has to do with the fact that the EU generally wields superior bargaining power over its partners in external differentiation arrangements. Not only does it have the power to refuse the further integration of countries it does not want to advance. It also has the power to shape the selective integration arrangements of refuser countries that do not seek full membership.
- (5) External differentiation enables the EU to provide intermediate rewards in applying membership conditionality. For countries that seek membership but find it difficult to meet the EU's conditions in a foreseeable period of time, intermediate rewards with less demanding conditions (such as association or candidacy status) motivate governments to work towards fulfilling EU requirements.
- (6) External differentiation is in principle in danger of cherry-picking behaviour by non-member states as well as discriminatory behaviour by member states. On the one hand, refuser countries may seek to benefit from the advantages of selective integration while shunning the obligations of membership. On the other hand, the EU may refuse membership to countries while benefiting from the selective export of EU policies and opening up of markets. In practice, these risks should not be overstated, however. The superior bargaining power of the EU in concluding agreements with refuser countries, and the individual veto power of each member states, is a strong safeguard against

cherry-picking – as Switzerland learned after its citizens narrowly voted in favour of the Mass Immigration Initiative and as the UK will experience during the Brexit negotiations. Moreover, EU norms and institutions act as a safeguard against discriminatory behaviour by the EU. Examples are the enlargement norms of the EU that link accession primarily to democracy and good governance conditions and the agenda-setting role of the Commission that works in favour of a rules-based and impartial accession process.

- (7) External differentiation is not in danger of being crowded out by enlargement. The remaining European non-member states are either unwilling to join the EU or increasingly unfit. Even current candidates for EU membership face strong domestic challenges of democratic consolidation and economic transformation and are unlikely to join soon – if ever. In addition, the public mood in member states has turned against a further enlargement of the EU. In this constellation, external differentiation is likely to remain a durable feature of European integration – and a way to attain at least some of the achievements of enlargement.

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## SESSION 6: SUMMARY<sup>1</sup>

Differentiation in the framework of the EU's external relations can be conceived in two ways: firstly, internal differentiation's impact on the external action of the EU and, secondly, forms of external differentiation per se.

External unity is an important target for the EU: it ranks first among the four governing principles identified by the new Global Strategy for the Union's Foreign and Security Policy (EUGS). The European Court of Justice also affirmed the principle of unity in the international representation of the EU. However, the EU acts side by side with the MSs and internal differentiation might undermine the unity of the EU's external action. The Area of Freedom Security and Justice (AFSJ) provides a clear example of the internal differentiation's impact on the external policies of the EU.

Three MSs have opt-outs from the AFSJ, namely the UK and Ireland, according to Protocol 21, and Denmark, according to Protocol 22. How do those protocols apply to external AFSJ action?

If an agreement purely based on AFSJ is negotiated, the UK and Ireland could decide whether to participate or not according to the provisions of Protocol 21, allowing the two MSs to notify the intention to accept an AFSJ measure, while Denmark will not participate as Protocol 22 does not envisage this option.

However, the nature of the agreement is not always obvious. According to the ECJ, what makes the difference in terms of applicability of Protocols 21 & 22 is the legal provision on which the agreement is based. Does the readmission clause in a broader agreement require a specific legal basis? The ECJ stated that the entire agreement can be based on one unique broad legal base, unrelated to AFSJ, and therefore the protocols do not apply. The UK's counter-argument that the content of the agreement should be taken into account was rejected.

In other words, a superficial unity in the EU's external action covers the extent of internal differentiation. Nevertheless, the single, non-JHA (Justice and Home Affairs) legal basis applies to the conclusion of the agreement, but not to the implementation of its clauses, which may require, on the contrary, a sectoral legal basis (triggering the Protocols). In other words, the EU commits internationally to obligations that it may not be able to enforce.

An option to avoid this kind of deadlock is the mixed agreement, if the third country does not object. In the case of the EU-Ukraine DCFTA, two distinct Conclusions were adopted by the Council: one for the movement of workers in the MSs (with an AFSJ legal basis) and another for the rest of the agreement. This solution will be applied even in the case of exclusive competences.

To conclude, the EU law allows for elements of flexibility (such as the mixed agreements), minimising the impact of internal differentiation. A degree of external unity is thus preserved, although differentiation is still manifest in the implementation of the agreements.

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<sup>1</sup> Summary prepared by **Giorgio BASSOTTI & Aurore LOSTE**.

Security and defence are crucial to revive the interest in the EU and they might represent the base of a 'new social contract with EU citizens'. Differentiation is in the DNA of the Common Security and Defense Policy (CSDP), but what forms does it take in this policy field?

Structural internal differentiation is the first form of differentiation in CSDP. Denmark's opt-out in the framework of the Treaty of Amsterdam, the 'constructive abstention' (Art. 31 TEU) and the greater scope for qualified majority voting in CFSP are all examples of structural differentiation.

A second dimension of internal differentiation can be found at the operational level: according to Art. 44 TEU, groups of MSs can be entrusted for CSDP missions; Art. 46 TEU envisages a Permanent Structured Cooperation between some MSs and the treaties also refer to the notion of a 'leading nation' providing for the majority of resources and personnel for a specific CSDP mission.

Finally, differentiation also takes an external form, as proved by the broad multinational support provided to the EU's CSDP missions. Forty-five non-EU States contributed to CSDP missions and all but one of the EU's CSDP missions were supported by third countries.

Are those forms of differentiation instrumental to the CSDP, or do they undermine it? It depends on centrifugal and centripetal factors: differentiation must not become fragmentation. The continuous reference to the principle of unity of the EU's external action in the recent Global Strategy of the EU is intended to prevent the centrifugal side-effects of differentiation, which is nonetheless necessary to avoid inaction.

The EUGS also states the EU's ambition for strategic autonomy, with a specific reference to defense rather than security. This ambitious target might be particularly controversial, raising the concerns of those MSs who are particularly committed to NATO, as well as of those MSs who have a neutral stance. It would be up to France and Germany to bear the burden of an autonomous EU defence policy.

Finally, the consequences of Brexit on security and defence have been largely overlooked so far. A potential European Defence Union will be confronted with the need to somehow coordinate with the UK. This might require new forms of differentiation and might undermine the efforts to build tighter security integration at the European level, fomenting the competition between the EU and NATO for security primacy.

To conclude, so far we have seen differentiation as an instrumental approach to CSDP, but it implies a risk of fragmentation. A balance must be reached between pragmatism and the need for a more credible EU.

The debate then moved to the specific case of arrangements with [Northern] Ireland. Since Brexit, only limited consideration has been given to the possibility of differentiated arrangements for Northern Ireland and Scotland, of which the majority of constituents voted to remain in the European Union. Post-Brexit territorial differentiation however creates political, geographical and other practical challenges for both the United Kingdom and the European Union that need to be considered. Those are particularly illustrated by the case of

[Northern] Ireland.

Post-Brexit political challenges have been highlighted during and since the EU referendum by the ongoing debates on Scotland's independence and the UK's ability to negotiate its exit from the European Union which have emphasized political preferences that cannot be forgotten. To this new political reality must be added a geographic reality that has to be considered. Gibraltar and Northern Ireland's vote to remain in the European Union has revived the issue of contested borders with Ireland and Spain that will need to be addressed. Finally, the redefinition of borders between Ireland and the United Kingdom raises other practical issues. Brexit will have serious implications for trade with Ireland, especially in agricultural goods. It may also have a psychological and political impact as it puts into question the softening of borders that has been key to the peace process between the two countries.

Those challenges raise the question of the flexibility of external differentiation. Are some new forms of pragmatism needed to solve the problems encountered by the United Kingdom and the European Union, especially in the case of a 'hard' Brexit? The option that would consist in maintaining the Common Travel Area arrangements that coexisted before the entry of the United Kingdom and Ireland is still uncertain. In any case, a post-Brexit bespoke bilateral arrangement on the movement of people must be considered.

The last part of the session was devoted to the different aspects of external differentiation. External differentiation can be defined as the selective integration of formal non-members of the European Union. A distinction must be made between external differentiation resulting from non-members refusing to join or to climb the ladder of integration and external differentiation resulting from nonmembers not being able to enter the European Union because some member states refuse to admit them.

External differentiation is not new. It has been sometimes used as an instrument for an ever closer Union aimed at fostering regional integration. Two logics of external differentiation reveal that there are some repeated patterns of how this has come about.

In each of these cases, pragmatism comes when members or non-members find that integration does not suit their interest but that they are ways to be integrated differently and therefore better satisfy their interests. New categories that would suit nonmembers have been therefore created, thus resulting in different phases of external differentiation. In most cases, the European Union and non-member states have negotiated on new categories and new types of external differentiation. This is reflected in Switzerland's acquisition of a special status following its decision not to enter the Union and in the negotiation of 'association light' agreements with Armenia and Azerbaijan. In all those cases, the European Union has been open and pragmatic in finding ways to integrate these countries.

Over time, it appears that there has been a process of increasing external differentiation. New categories have been constantly added as the old ones did not fit the joint interests of the increasing number of member states. Categories that have been integrated have not just been transitory and are still used to a large extent. This shows an increase in the use of external differentiation, even despite the EU's enlargement. External differentiation is therefore a process that is widening and deepening at the same time.

After discussing the cases of external differentiation, it is important to account for states' positions in external differentiation. Why do specific countries occupy their current position in the system of differentiated integration? Do they move up or down? The distance between members and non-members can be explained by several factors such as geography, culture, wealth, growth and governance. While geography and culture account for some initial positions, they do not explain why some countries move and others do not. Wealth and growth provide more interesting insights. The poorer the non-members that are compared to core members, the more likely their accession to the Union will be refused. Now looking at governance, which appears as the most comprehensive explanatory factor, it is found that since member states have certain standards of governance, they will not accept non-members that do not comply with those. Overall, if each of those factors is controlled, the more closer a non-member is, the more likely it will move up and vice versa.

To conclude, the external differentiation system has some advantages that should be considered. It first reflects and helps understanding states' preferences. It also provides for a high level scope of EU integration and is an upwardly mobile system. More interestingly, it enhances the credibility of conditionality and lowers the risk of free riding by outsiders.

## Summary of conclusions<sup>1</sup>

In the last part of the conference, the chairs of the different sessions summarised some of the key elements that were debated in each session.

### **A. Definitions and implications of “differentiation” and “flexibility”**

The conclusions of the first panel were:

There are two dimensions in the area of differentiation: external and internal. Internal differentiation is the extent to which a given country participates in the EU procedures, mainly related with the internal market, but also with security and defense. The main element of internal differentiation is enhanced cooperation.

The dynamics of differentiation are driven by the need to find compromises between member States. Brexit could bring the idea of simplifying the differentiation procedures, although there are some rejections in the areas of internal market and external relationships.

Differentiation should also be extended to countries that are potential candidates. In addition, an environment with variable geometry is already there, mainly in areas such as customs unions and neighbourhood agreements. This differentiation must be structured and accommodated to a more complex reality.

The difficulty that may exist in this process is how to balance the variable geometry and its different interrelations with the EU acquis. In addition, a balance must be sought between the European integration, the national autonomy and the enlargement process. We must not forget also the need to minimise the occurrences of cherry picking.

### **B. Deeper integration without discrimination of non-participating countries: The euro**

Three conclusions can be highlighted:

1. The establishment of the Eurozone is the most important example of differentiation that is adequate, effective – i.e. required for the functioning of the Internal Market –, that complies with the EU law and that does not harm member States outside the Euro area.
2. The recent crisis and the current economic situation represent a good opportunity to strengthen economic integration. There were recent initiatives to strengthen the euro, namely the Single Supervisory Mechanism and the Single Resolution Mechanism.
3. There is a governance problem in the European Union characterised by differences in the regulatory implementation at national level and weak accountability process at the EU level. In both cases, there are fundamental political disagreements about how to proceed.

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<sup>1</sup> Summary prepared by **Nicolò BOMPIERI & Victor RUIZ SALGADO**.

We do not currently have a clear mechanism to identify who is behind the definition and implementation of the economic policy in the EU. The “*Five Presidents’ Report*” partially helps to address this issue and make economic and financial authorities more responsible towards the European Parliament, but this institution also needs to solve its accountability problems. For this purpose, there were discussions during the session about how to improve the participation of National Parliaments.

### **C. Temporary suspension of fundamental freedoms: Movement of persons**

The panel agreed that free movement of people has been a central theme during the Brexit campaign. The treatment of fundamental freedoms is a controversial subject and agreements are difficult to achieve, given the ideological differences.

There is currently a paradoxical situation. The United Kingdom is one of the most open and multicultural countries in the EU, but the population's negative perceptions of migration and the calls for border control are highly visible.

During the debate two possible solutions were proposed:

1. To accommodate Member States' concerns about free movement of people. Comments in this area were: (1) the Treaties have been underused, there are some opportunities in the EU law to accommodate to Member States' interest while maintaining control when need be; (2) Temporary restrictions could be a tool to prevent further and deeper ruptures.
2. The refusal to give concessions to Member States: fundamental freedoms are non-negotiable, so it is therefore necessary to seek greater democratisation and integration. Opt-outs have not helped to convince the UK to stay in the EU.

In any case, it would be a positive step to make the voice of the citizens of the EU count even more. In addition, citizens should feel that they have been heard and considered. Moreover, to face populism we must explain the rationality behind each policy, defend European values and respond with facts and figures rather than just with opinions.

Regarding the Brexit process, it is difficult to believe that a country that has been driving the European policy for so long is now going to sit at the back and accept that the EU extends its rules without the possibility to frame the answers.

### **D. Applying a brake to deeper integration: Democratic legitimacy and greater involvement of national parliaments**

The panel agreed that there are few paths that can be walked in order to deepen integration in the European Union. It is possible to continue differentiating or to proceed with covert integration.

Some of the main problems coming with further integration are:

- accountability problems;

- congruity problems;
- problems related to the rising complexity of the cooperation mechanisms.

An example of when these problems were revealed is the creation of the EMU and the foundation of the ECB. During this process policy making was delegated to an independent regulatory authority, raising a lot of transparency and accountability concerns. The (lack) of accountability of the ECB may still be a major issue. There are initiatives to answer these concerns.

#### **E. External differentiation: Foreign policy**

This last panel conclusion started with some assessment on the impact of internal differentiation on the external unity of the European Union, and with the consideration that despite its internal differentiation, the Union manages to show a fairly united face to the world.

The discussion then moved to the sphere of security and defense. The nature of these fields is deeply intergovernmental, making elements of differentiation necessary in every agreement. Nevertheless there could be a more pro-Community approach based on specialisation and coalitions.

Talking again about external differentiation, it was agreed that it is a first step that precedes internal differentiation in the sense that tailor-made relationships are the means by which the Union attracts external members and brings them into its sphere of influence.

Finally, discussing the relationship with the United Kingdom after Brexit, it was stated that the EU might have different sorts of relationships with different constituencies of the United Kingdom. For such a solution, creativity will be necessary.