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Robert Schuman Centre for Advanced Studies
Integrating Diversity in the European Union
(InDivEU)

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**Practitioners Report on
External Differentiation**

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Simon Hix and Meltem Müftüler-Baç

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Robert Schuman Centre for Advanced Studies

The Robert Schuman Centre for Advanced Studies, created in 1992 and currently directed by Professor Erik Jones, aims to develop inter-disciplinary and comparative research on the major issues facing the process of European integration, European societies and Europe's place in 21st century global politics.

The Centre is home to a large post-doctoral programme and hosts major research programmes, projects and data sets, in addition to a range of working groups and *ad hoc* initiatives. The research agenda is organised around a set of core themes and is continuously evolving, reflecting the changing agenda of European integration, the expanding membership of the European Union, developments in Europe's neighbourhood and the wider world.

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Integrating Diversity in the European Union (InDivEU) is a Horizon 2020 funded research project aimed at contributing concretely to the current debate on the 'Future of Europe' by assessing, developing and testing a range of models and scenarios for different levels of integration among EU member states. InDivEU begins from the assumption that managing heterogeneity and deep diversity is a continuous and growing challenge in the evolution of the EU and the dynamic of European integration.

The objective of InDivEU is to maximize the knowledge of Differentiated Integration (DI) on the basis of a theoretically robust conceptual foundations accompanied by an innovative and integrated analytical framework, and to provide Europe's policy makers with a knowledge hub on DI. InDivEU combines rigorous academic research with the capacity to translate research findings into policy design and advice.

InDivEU comprises a consortium of 14 partner institutions coordinated by the Robert Schuman Centre at the European University Institute, where the project is hosted by the European Governance and Politics Programme (EGPP). The scientific coordinators of InDivEU are Brigid Laffan (Robert Schuman Centre) and Frank Schimmelfennig (ETH Zürich).

For more information: <http://indiveu.eui.eu/>

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**Integrating
Diversity in the
European Union**

Abstract

According to the Interlaken principles, relations with third countries should not slow down the process of integration; compromise the EU's decision-making autonomy; or share power with non-members. Access to the benefits of the EU Internal Market is conditional, with partner states expected to assume key elements of the *acquis communautaire*. In practice, there is not a linear relationship. The EU prefers structured, institutionalised arrangements conforming to existing models and encompassing all aspects of the relationship. Yet the existing models themselves, including those in Michel Barnier's 'ladder' are themselves the product of *ad hoc* deals and often far from comprehensive.

Keywords

Differentiated integration, European Union, external differentiation, EEA, Turkey.

Summary Practitioners' Report

This part of the project explored external differentiation, which refers to the various relationships the EU has with neighbouring countries with which it has a formal agreement including acceptance of at least some of the EU's institutions, regulations and policies.

The EU position

The EU's position is stated in the Interlaken principles. Relations with third countries should not slow down the process of European integration. They should not compromise the EU's own decision-making autonomy and not share power with non-members. There should be a balance of benefits and obligations. This means that access to the benefits of the EU Internal Market will be conditional, with partner states expected to assume key elements of the *acquis communautaire*, notably on product regulation. During the Brexit negotiations, EU representative Michel Barnier produced a 'ladder' of the various agreements the EU had, demonstrating how conformity with EU standards was directly related to the degree of market access. The UK was invited to choose from this menu. Our findings show that, in practice, there is not a linear relationship but multiple ways of managing the relationship. The EU prefers structured, institutionalised arrangements conforming to existing models and encompassing all aspects of the relationship and does not like 'cherry picking'. Yet the examples in Barnier's ladder are themselves the product of *ad hoc* deals and often far from comprehensive.

The Cases

We examine the issue through the experience of four cases: the European Economic Area (EEA) consisting of Norway, Iceland and Liechtenstein; Switzerland; Turkey; and the United Kingdom. These are all alternatives to EU membership, but the partners have different reasons for not being in the EU. The EEA states and Switzerland are eligible to join but have chosen not to. Turkey would like to join but is not yet eligible. The United Kingdom has been a member but chose to leave. The dynamics can be portrayed as those of stable relationships (EEA and Switzerland); moving towards membership (Turkey) and leaving the EU (the United Kingdom). That, however, is a simplification because in practice the Swiss relationship is not stable, Turkey is not going to join any time soon, and we do not yet know what the trajectory of the UK will be and how far it will depart from the EU's orbit. All these cases highlight different modalities of external differentiated integration, with non-members opting into the EU policies.

Sovereignty

For the partner countries, a key issue is preserving national sovereignty, but this means different things in different contexts. Sovereignty may be an abstract principle so that even member states can claim that they still have it as long as they could leave the EU. For others, it means that laws must be made by national legislatures and interpreted by national judges. That could be satisfied by a requirement for national ratification of EU measures and interpretation by national courts. Others object that this does not safeguard sovereignty as long as these measures are obligatory within the agreement and courts must follow the lead of the Court of Justice of the European Union.

Sovereignty arguments can be provoked by many different issues, depending on the political context. It became highly salient during the negotiations over the UK relationship with the EU as the UK Government increasingly stressed a very strong interpretation of sovereignty which precluded regulatory alignment or any role for the CJEU. In the other cases, it has proved possible to depoliticise

many policy areas and regulations by presenting them as technical matters. This may be possible in the future for the UK, but not in the political climate created by Brexit.

Some partner states have constitutional provisions concerning sovereignty, such as the Norwegian prohibition on transferring powers to international organisations of which the country is not a member, and Swiss provisions requiring popular referendums and cantonal approval. Turkish political dynamics play a critical role in shaping its relations with the EU, with sovereignty and internal political affairs emphasized as areas where the EU's jurisdiction can not be accepted.

Access

Access to the European Internal Market is dependent on alignment with the relevant regulatory rules and mechanisms for their enforcement. The various relationships can thus be seen as ways of trading off sovereignty for market access. Key factors here are interpretations of sovereignty and national regulatory cultures. There are also political conditions.

EEA

The freest trade and closest alignment is in the EEA, which consists of a single framework and set of rules. This gives EFTA states full access to the Internal Market, with some exceptions including agriculture. In return, those states have to maintain dynamic alignment with EU rules. This represents a clear trade-off of effective sovereignty in return for access and has been criticised for undermining domestic democracy. Formal sovereignty is preserved by requiring domestic transposition of EU rules but this is never actually denied. There is judicial enforcement of the rules via the EFTA Court, which itself follows the case law of the CJEU.

There is no big gap between the regulatory culture of the EFTA states and the EU. Differences on the scope of regulation are therefore infrequent although there are some conflicts over individual regulations. The EFTA states have never refused to transpose and EU rule but there is a certain amount of discretion for flexibility within the rules and delay is sometimes used to cope with domestic opposition to regulations.

Apart from the main EEA there are sectoral agreements, which have more complex mechanisms.

Switzerland

The Swiss relationship consists in over 100 sectoral treaties. Switzerland has access to the EU Internal Market rather than membership of it across all sectors. Enforcement is for the CJEU and the Swiss courts, respectively, although the latter do follow the precedents of the latter. Alignment with EU regulation is governed by the principle of equivalence under which Swiss regulations have to be agreed to have the same effect as EU rules but sometimes have a distinct Swiss 'finish'. In the case of non-compliance, the aggrieved party can suspend the agreement or other agreements in retaliation.

Differences in regulatory culture between the EU and Switzerland are reduced by leaving certain matters outside the scope of the agreements. There is no general agreement on services and financial services are a critical issue for Switzerland. There have been clashes between EU rules and Swiss domestic politics and referendums, notably on free movement of people.

The Swiss agreements were signed after Switzerland had voted in a referendum not to join the EEA and, consequently, provide less access to the EU market than does the EEA. The EU has not been satisfied with the arrangement, which is too complex, has weak enforcement mechanisms and does not ensure dynamic alignment with EU regulations. Negotiations to reform the agreements

have not, so far, succeeded and their future is in doubt. This precedent has made the EU less favourable to more *ad hoc* agreements, including in the case of Brexit.

Turkey

Turkey's relationship with the EU has been conducted from an accession perspective, given the legal documents that paved this process. Turkey has a progressive access to the EU market, with a customs union dating from 1995, driven by its 1963 Association Agreement. This was followed by gradual Turkish adaptation to the *acquis communautaire*. Because the aim was official accession to the EU, no special machinery was established to manage these agreements. The opening of accession negotiations in 2005 enabled Turkey to comply with multiple EU rules and regulations in various components of the EU *acquis*, but the de facto freeze on the negotiations since 2013 effectively stopped further progress. While it has been possible to incorporate a lot of EU regulations by depoliticization with technical forums, there have been increasing tensions with the EU's insistence on democratic norms, a matter that does not arise in the other cases. As the prospect of Turkish accession retreats, the future of the arrangement remains uncertain and ambivalent.

The United Kingdom

Those campaigning for the UK's withdrawal from the EU offered no alternative model although campaigners variously talked about the World Trade Organisation, EFTA, the Swiss model or a special bespoke deal. In the immediate aftermath of the referendum of 2016, the new Prime Minister declared that the EU would leave both the Single Market and the Customs Union, so ruling out the EEA and Turkish models. The EU's position was that it would not accept the Swiss model of multiple agreements or a bespoke agreement. No 'middle ground' position between the EEA or no partnership agreement could be reached within the UK Government, within Parliament or with the EU until after two general elections. The eventual Withdrawal Agreement then made reference to a broad and ambitious partnership. In practice, the insistence on a strict definition of sovereignty made this impossible and the Trade and Cooperation Agreement (TCA) was largely limited to free trade in goods.

There is no requirement for regulatory harmonisation in the TCA but if one side feels it has been harmed by regulations in the other, there is provision for arbitration, retaliation or partial suspension of the agreement. This is weaker than the other arrangements and, correspondingly, gives weaker guarantees of market access.

Differences in regulatory culture were a strong factor in Brexit. On the political right, the EU was long denounced as over-regulated, stifling British business. On the left, an older tradition presented it as a bastion of neo-liberal deregulation. By 2010, the rightist critique had taken root within the Conservative Party. The Brexit vote, however, was won with the critical support of working class voters in post-industrial areas, who had to be accommodated. Subsequently, the Conservative Government abandoned the deregulatory rhetoric and promised to retain social and environmental protections while refusing alignment with the EU.

Conclusion

There is an underlying logic to the EU's relations with its neighbours. Access to the EU market is conditioned by acceptance of EU rules on trade and flanking measures and thus a loss of autonomy. This is more problematic for some states than others, depending on how they see sovereignty, whether they accept the EU regulatory culture and the degree to which matters are politicised. After the experience with Switzerland, the EU is reluctant to negotiate complex, sectorally specific deals

with unclear enforcement. Yet, as both Turkey and the UK show, there is not a standard menu of alternatives from which to choose. Each arrangement corresponds to the dynamics of the case, the balance of power and the priorities of each side. None of the partnerships is completely stable or fixed. Even the EEA is challenged by the issue of dynamic alignment, the loss of national control and the growth of other agreements beyond its scope. The Swiss arrangement is in crisis. A decision has to be taken as to whether Turkey really is on the path to membership. We do not know how far the UK really means to diverge from EU regulations or merely shadow them and ask for equivalence decisions. Like the EU itself, its relations with its near neighbours are continually being negotiated and adjusted.

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