EUI ROBERT SCHUMAN CENTRE

POLICY BRIEF

Integrating Diversity in the European Union (InDivEU)

Legal Conditions and Constraints for Differentiated Integration Projects

1. Thinking about the Legal Scenarios for Future Differentiation Projects

In recent years, leading political actors and institutions have suggested further differentiation as a plausible scenario for the EU's future, in fields such as economic governance, social Europe, migration, tax harmonisation, and defence. One central question is whether such scenarios would require a prior revision of the current EU Treaties or whether, on the contrary, they could be implemented under the current Treaty rules – à traités constants, as the Brussels jargon puts it. Despite the recent launch of a Conference on the Future of the Union, it is very unlikely that a formal Treaty revision is going to happen any time soon. Therefore, this policy brief deals with the options for future differentiated integration projects under the current Treaty rules.

Under those current rules, the various forms of differentiated integration offer different costs and benefits due, in part, to the legal conditions and constraints applying to them. For example, enhanced cooperation (wherein a group of member states can 'use' the EU institutions) does not allow for self-selection of participating countries and can only be undertaken for specific

Issue 2022/23
April 2022

http://indiveu.eui.eu

Author
Bruno De Witte, EUI

The project has received funding from the European Union's Horizon 2020 research and innovation programme under grant agreement No 822304

projects and as a 'last resort'. By contrast, separate agreements concluded under international law between 'willing and able' member states do allow for self-selection of the participants, but are less effective tools as they cannot use the legal instruments of EU law.

Please note that this policy brief is limited to differentiated integration of the variable geometry type, that is, policies in which less than all the member states participate in the decision-making, and where only the participating states are bound by those decisions. It does not deal with the differential application of common EU rules that, as this lighter form of flexibility does not raise major issues of legal acceptability.

2. The Evolving Agenda of Differentiated Integration

The European Commission published a White Paper on the Future of Europe on 1 March 2017.[1] Among the five possible scenarios for the EU's future, one was identified by the Commission as: 'Those who want more do more'. This scenario envisages the creation of several 'coalitions of the willing' that would carry forward new cooperation projects in areas such as defence, security and justice, taxation and social policy; and the other member states would be able to join those projects at a later stage, as soon as they would be ready or willing to do so. The Commission did not add further detail, for example on the legal form that those cooperation projects would take. Indeed, the White Paper states that the scenarios 'deliberately make no mention of legal or institutional processes – the form will follow the function'.

The newly elected French president Macron gave a fresh political boost to the idea of variable geometry in speeches held in Athens[2] and at the Sorbonne[3] in September 2017. In calling more generally for a refondation of the European Union, he advocated a decisive turn towards more differentiation. His Athens speech did not go into much institutional detail, but he did advocate the creation of separate budget of the Eurozone, as well as a single executive organ and a separate parliamentary assembly for that Eurozone. At the same time, he generally pleaded for more differentiation and considered it necessary to create a vanguard of states willing to take the integration project forward.

Since 2017, no concrete steps were taken towards new forms of differentiated integration, except for a rather modest (and so far not implemented) project to create a 'budgetary capacity for the euro area' that would be fed by financial contributions from those euro area states. The European Parliament, in its resolution of 2019 on this subject,[4] expressed considerable reluctance to move towards more differentiated integration. It is particularly hostile to the idea of separate international treaties between groups of member states, in which parliamentary participation seems, almost by definition, to be limited or inexistent.

The year 2020 marked a halt to differentiated integration projects. In fact, the ambitious European Union's post-covid recovery plan (known as Next Generation EU or NGEU), which was adopted in December 2020, is marked by the absence of differentiated integration.[5] The entire plan was enacted within the bounds of the EU legal order, and thus, unlike what happened during the euro crisis, without recourse to intergovernmental agreements between the member states. The plan will be implemented by the member states in cooperation with the EU's main institutions, and all the 27 states participate in it on the same legal terms. As the NGEU programme is limited in time, the question will arise, towards the end of it, whether there is still a case for a euro-area specific reform instrument or whether the recovery plan has marked a decline of the trend towards differentiated integration in the economic policy domain. For sure, the development of the Eurozone into an autonomous organization, separate from the European Union, was halted by the legal and political evolution of 2020.

That being said, differentiated integration scenarios may soon reappear in other policy areas than that of economic governance. After all, the Commission's White Paper of 2017 referred to other policy domains, namely defence, security and justice, taxation and social policy. Also, the growing tension between the governments of Hungary and Poland

1 European Commission, *White Paper on the Future of Europe – Reflections and scenarios for the EU27 by 2025,* COM(2017) 2025 of 1 March 2017.

2 *Discours du Président de la République, Emmanuel Macron, à la Pnyx, Athènes le jeudi 7 septembre 2017.* The texts of this speech and of the one mentioned in the next footnote are available on www.elysee.fr.

3 *Initiative pour l'Europe – Discours d'Emmanuel Macron pour une Europe souveraine, unie et démocratique*, 26 September 2017.

4 European Parliament resolution of 17 January 2019 on differentiated integration, P8_TA-PROV(2019)0044.

5 See, for a larger discussion of the legal characteristics of the Recovery Plan: Bruno De Witte, 'The European Union's COVID-19 Recovery Plan: The Legal Engineering of an Economic Policy Shift', 58 *Common Market Law Review* (2021) 635.

and the rest of the EU may, in turn, encourage recourse to differentiated integration solutions to side-line or neutralize the 'awkward' governments in a number of policy domains. In this perspective, the following pages briefly rehearse the legal conditions (and therefore also the political feasibility) of the two instruments that are available under the current Treaties for launching new projects of differentiated integration: enhanced cooperation (whereby EU policy projects are adopted by a group of member states and apply only to those states) and the conclusion of international 'side agreements' (whereby a group of states act outside the EU legal order in order to realize an EU-related project, as they did with the Schengen Convention back in the 1990s and the Treaty establishing the European Stability Mechanism in 2012).

3. Enhanced cooperation

The main attraction of the general mechanism of enhanced cooperation, which is provided by the EU Treaties, is its open-ended nature, namely the fact that it is available in any area of EU shared competence and, thus, in most EU policy domains. It was used, until now, only for piecemeal projects, where a shift to enhanced cooperation served to overcome the opposition of one or more countries in the course of the legislative process. Enhanced cooperation has thus been used, so far, as veto-avoidance instrument. We are likely to see more such cases of single-project enhanced cooperation in the future.

Can enhanced cooperation also be used in a more systemic and strategic way? Given the rather open-ended formulation of the relevant Treaty articles, it has sometimes been suggested that enhanced cooperation should not be limited to single-project cases. It could also be used in a more systematic way by a group of same-minded member states so as to constitute a true 'pioneer group' that operates together in a whole range of policy areas, as was suggested in president Macron's speeches and, more implicitly, in the Commission's White paper of 2017.

However, the rules on enhanced cooperation contain a number of legal constraints making it rather unlikely that this mechanism could serve for the construction of a closed and coherent pioneer group operating across a whole range of policy areas. The conditions and procedures for enhanced cooperation operations have been spelled out in rather great detail in the text of the TEU and the TFEU. The first procedural constraint is the 'last resort' rule, which is taken rather seriously since all cases of enhanced cooperation so far were preceded by genuine attempts to achieve the desired result through legislation applicable to all states. A second constraint is that the authorization for launching an enhanced cooperation project must be given by the Council acting by qualified majority, so that any pioneer group initiatives should receive the blessing of a large part of EU membership, as well as the active support of the Commission and the European Parliament. A third constraint is the right for every member state to join an enhanced cooperation project, so that a self-defined pioneer group cannot exclude states that do not form part of the group. If one takes together these procedural constraints, it is clear that a self-appointed vanguard cannot engage in a broad cross-policy cooperation project whilst ignoring the other member states. The enhanced cooperation mechanism was, from the start in the 1990s, conceived as antithetical to the core Europe idea, and it remains so today.

Finally, it should be mentioned that enhanced cooperation operates within the existing limits of EU competences: it cannot be used to extend EU competences beyond the domains currently defined by the Treaties. In addition, laws adopted under enhanced cooperation laws cannot modify existing EU legislation, because that would affect the rights of the non-participating states.

4. International side agreements

Whereas the legal constraints for enhanced cooperation are listed in the text of the TEU and the TFEU, the constraints that limit recourse to international side agreements cannot be found in the Treaty text; they rather result from the inherent primacy of EU law over the national law of the member states. Indeed, it has always been clear that a group of EU states cannot resort to the conclusion of a separate inter se treaty in order to escape from their obligations under EU law. Side agreements may not contain norms conflicting with EU law proper; they cannot derogate from either primary or secondary EU law. In its case law, the Court of Justice has consistently held that the primacy of EU law extends not only to measures of national law but also to agreements between two or more member states, which must be disapplied by national courts if they are inconsistent with EU law. This is entirely logical. It would otherwise be easy for the member states to escape from their EU law obligations by concluding a treaty with each other.

That being said, this still leaves the possibility for a group of member states to engage in international law cooperation in order to add to existing EU law and even to extend European cooperation beyond the current limits of EU competences. This possibility to extend the scope of European cooperation is an advantage compared to enhanced cooperation, which, as was recalled above, can only be used within the limits of currently existing EU competences. A further advantage is that the participants to the cooperation project can freely choose their partners to the agreement: a self-proclaimed core group can indeed decide to act together without having to offer (as is the case with enhanced cooperation) a standing invitation to the other EU states to join at any time. Despite these apparent advantages, the member states have, so far, not made a massive use of this mechanism. Apart from the legal constraint mentioned before, a clear disadvantage is that they face the extra transaction costs of setting up a little diplomatic conference instead of being able to discuss within the tried and tested institutional framework offered by the EU system which most national governments prefer to use, and that the content of their cooperation does not have the firmly binding character that EU law norms possess.

5. Conclusion

For areas such as taxation, migration and criminal justice, where the TFEU provides clear and rather broad legal bases, enhanced cooperation would seem the most appropriate tool. It would allow for the circumvention of the unanimity requirement where it is still in place (especially for taxation), and more generally would allow like-minded states to take forward their cooperation, using the instruments of EU law and side lining the acrimonious resistance of other states. In the field of social law, the scope for enhanced cooperation is more problematic, as some of the most frequently invoked reform measures, such as the creation of a European minimum wage system, or of a European minimum income benefit, possibly fall outside the scope of EU competences.[6] In that case, the tool of enhanced cooperation would not be available, and the conclusion of a separate international agreement by socially minded states would be the only available option for a joint initiative in this domain.

Some among the many reform ideas that have been proposed and discussed in recent years will not fly because they would require a revision of the Treaties that will not be forthcoming any time soon. Other ideas may be successful, if they gather the political support of a sufficiently large group of member states, and they might take the form of either intra-EU enhanced cooperation or extra-EU international agreements, the choice among these two instruments depending mainly, though not exclusively, on the competence resources offered by the European Treaties. As we mentioned, the European Parliament is hostile towards the conclusion of separate international treaties in which its participation is excluded or marginal at most. However, faced with the impossibility of formal treaty reforms, and with limits of EU competence under the current Treaties, the conclusion of a separate international agreement among a group of 'willing and able' member states may, under certain conditions, be an appropriate solution of last resort. Complementary parliamentary control would then have to be ensured at the level of the national parliaments of the participating countries.

6 The Commission proposed a directive on a European minimum wages in October 2020 (COM(2020) 682), but it is met with strong opposition from a number of member states, and with claims that it exceeds the Union's competences. See discussion of the competence question by Ane Aranguiz and Sacha Garben, 'Combating Income Inequality in the EU: A Legal Assessment of a Potential EU Minimum Wage Directive', 46 *European law Review* (2021) 156.

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 is coordinated by the Robert Schuman Centre at the European University Institute, where it is hosted by the European Governance and Politics Programme. The project comprises a consortium of 14 partner institutions and runs from January 2019 to December 2021. The scientific coordinators are Brigid Laffan (Robert Schuman Centre) and Frank Schimmelfennig (ETH Zürich).

Published by
European University Institute (EUI)
Via dei Roccettini 9, I-50014
San Domenico di Fiesole (FI)
Italy

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doi:10.2870/107465
ISBN:978-92-9466-199-9
ISSN:2467-4540
QM-AX-22-023-EN-N

The project has received funding from the European Union's Horizon 2020 research and innovation programme under grant agreement No 822304