

Differentiated Integration

Funda Tekin

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Differentiated Integration, /ˌdɪfə'renʃɪeɪtɪd ɪn'tɪ'greɪʃ(ə)n/ noun
(also multi-speed Europe, core Europe, variable geometries, l'Europe à la carte)

process of integration, in which a specific group of Member States is not subject to the same union rules as the others; differentiation can be of long-, medium- or short-term nature and taking effect either in primary or secondary law of the European Union; particular forms of differentiation stretch beyond the EU's borders including non-EU states; differentiation can represent a tool for managing heterogeneity among EU Member States overcoming stalemate in the integration process – at the same time it can risk to trigger disintegration or dissolution trends within the European Union.

About the author



Funda Tekin is Vice Director of the Centre for Turkey and European Union Studies (CETEUS) at the University of Cologne and Senior Researcher at the Centre international de formation européenne. She is also Senior Research Adviser at the Institut für Europäische Politik (IEP). Her research focuses on EU-Turkey relations, EU institutions, Euroscepticism and Populism in Europe, the AFSJ and differentiated integration of the European Union. Funda Tekin is currently the Project Director of the Horizon 2020 research project “The Future of EU-Turkey Relations: Mapping Dynamics and Testing Scenarios” (FEUTURE) at the University of Cologne.

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In the crisis-ridden EU, the question regarding the possibility and necessity of the common advancement of the EU 28 is under discussion in terms of every area of the European integration process. Despite new terms such as Grexit, Brexit and Eurozone, this is, in fact, a long standing phenomenon. Forms of differentiation have been discussed and implemented ever since the start of European integration. Differentiated integration represents a possibility to compensate for the heterogeneity of the EU member states (MS) in terms of their objective ability and their political will to pool more sovereign rights at the European level. This form of integration, in which a specific group of MS is not subject to the same rules as the others, serves the consolidation between the deepening and enlargement of the EU, and has proven to be an effective instrument in the management of European diversity. When it comes to the possibility of Greece leaving the Eurozone (Grexit) or Great Britain leaving the EU (Brexit) however, it is about the reversal of integration steps that are already complete. Before this backdrop, the question is raised as to whether differentiated integration has become established as the prevailing structural attribute of European integration, and whether this will result in the strengthening of a core Europe or the atomization of the EU.

Concepts and categorization of differentiated integration

The concept of differentiated integration in the EU is the subject of an academic and political debate, the “developmental fluctuations” of which are determined by treaty reforms, rounds of enlargement and crises. In the light of the crisis in the Eurozone, and the vote by the British people to leave the EU within a referendum on 23 June 2016, it is now “back in vogue”. In this respect, the most widespread concepts are those of “multi-speed Europe”, “core Europe”,

“variable geometries” and “l’Europe à la carte”. As long as integration-related goals of this kind have been defined for all MS and only one group of MS moves ahead until the others can follow, the concept of a multi-speed Europe applies.

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This could turn into a core Europe, however, if the lagging MS are no longer able to or no longer willing to join the progressive group either over the long term or permanently, and this core group decides and implements its own integration steps and goals. A transformation of this kind from a multi-speed Europe to a core Europe is currently being discussed in the scope of Economic and Monetary Union (EMU). In the course of the crisis management, there has also been an increasing need for steps which are solely applicable to the 19 MS of the Eurozone.

In the case of the variable geometries concept, integration goals are not predefined for all MS. This means that MS with the intention to integrate can advance without the approval of the others. This results in a variety of integration groups with varying memberships that are open to all MS at all times.

In contrast to the aforementioned concepts, l’Europe à la carte breaks up the general framework of integration of the EU. While the other concepts are motivated by the goal of encouraging integration – if only for a certain number of MS – the l’Europe à la carte concept offers a wide range of policy areas and single measures from which every MS can put together their preferred menu on an individual basis.

In terms of future alternatives to the traditional enlargement process of the EU, the concept of Associate Membership is discussed. This envisages partial membership for pre-accession countries such as Turkey. At the same time, a concept of this kind could also represent a fall-back option for Great Britain.

The reality of differentiation: types and areas of differentiated integration

To categorize the reality of differentiation, it is necessary to take two attributes into account. On the one hand, the time factor which defines the form of differentiation is decisive. A differentiation can be arranged as short term, such as transitional arrangements for new MS, medium term, such as joining the Euro, or long term, such as in the case of so-called opt-outs. On the other hand, the forms of differentiated integration also differ in terms of their location in EU law. Protective clauses, transitional arrangements and minimum standards enable the differentiated application of secondary legislation in the scope of uniform primary legislation.

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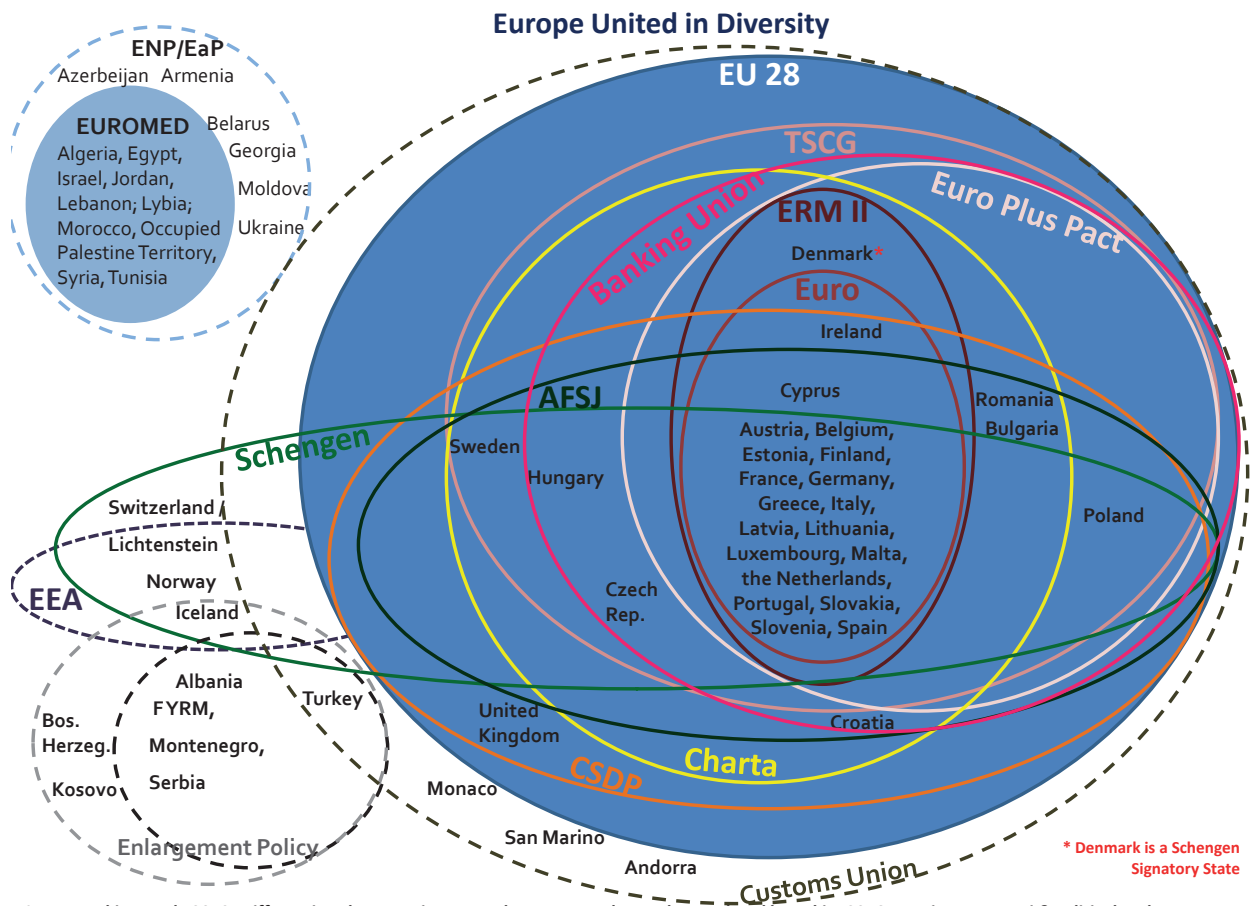
There are special arrangements, however, which are defined in the EU treaties and their protocols. EMU can be seen as an ideal example of a predefined differentiation of this kind. In this case, the treaties contain clear criteria on membership of the Euro, and at the same time, the rules for the Euro MS are differentiated from the rules for MS with a derogation

(Art. 136-144 TFEU). The so-called opt-out rules for individual MS in specific policy areas are also clearly regulated in primary legislation. Thus the reality of differentiation in the EU can be clearly delineated on the basis of the combination of the factors of time and location in EU law.

Indeed, a map of forms of differentiation in terms of primary legislation in the EU shows a highly complex picture (see fig. 1). In this context it is necessary to remember that in certain policy areas, the differentiation stretches even beyond the EU' borders. In these cases, countries that are not EU members participate.

The EU treaties envisage a process of enhanced cooperation, according to which a group of MS can decide to cooperate more closely in the scope of the integrated institutional structures and the acquis of the EU. Additional MS can join this group at any time. This process was introduced with the Treaty of Amsterdam (1999), and has been reformed and renewed with every treaty revision ever since. For a long time, the problem with enhanced cooperation was its non-use. This is attributable to the complex criteria and conditions appertaining to its application. Today, at least nine MS are required (Art. 20(2) TEU), in order to form an enhanced cooperation.

The scope of application of the enhanced cooperation does not encompass the exclusive competencies of the EU (Art. 20(1) TEU). This aims to prevent the undermining of the single market, although it limits the impact of the procedure. Before the Treaty of Lisbon, the area of Common Foreign and Security Policy (CFSP) was also excluded from this procedure. Current primary legislation still defines special rules for this policy area (Art. 326-334 TFEU). In the area of Common Security and Defence Policy (CSDP), the Treaty of Lisbon introduced permanent structured cooperation as a similar procedure (Art. 42(6) and 46 TEU).



Source: Tekin, Funda 2012, *Differentiated Integration at Work*, Nomos, Baden-Baden; updated by Tekin, 2016, *Brexit or No Brexit? Political and Institutional Implications of an EU without the UK*, IAI-Working Paper.

Fig 1: The European Union - united in diversity

“Primary legislation defines numerous special arrangements for individual MS in the form of opt-outs.”

So far, three forms of enhanced cooperation have come about: in international divorce law (2010), EU Patent (2011) and the tax on financial transactions (planned in 2013 but not yet implemented). It remains rather unlikely, however, that the enhanced cooperation can therefore establish itself as an acknowledged and effective process over the medium term for the differentiated integration at the level of secondary legislation in the future. Primary legislation defines numerous special

arrangements for individual MS in the form of opt-outs. These rules enable the corresponding MS to exempt themselves from the process of integration in certain policy areas. In this respect, Denmark and Great Britain are not obliged to join the Euro. Sweden is not formally excluded from this obligation, but on the basis of its own political will, does not fully satisfy the convergence criteria, and therefore has a de-facto opt-out. At the so-called Edinburgh Agreement (1992), Denmark negotiated an exemption in the area of the CSDP due to its reservations regarding a European Army.

In the Area of Freedom, Security and Justice (AFSJ) including the Schengen area, Great Britain, Ireland and Denmark also have special arrangements. In comparison with the other opt-out rules, however, these are more complex, because the three MS do not

completely reject this policy area. While Great Britain and Ireland are not prepared to open their borders to other MS and therefore join the Schengen area, they nonetheless have a decisive interest in the politics of the AFSJ which relate to this area without internal borders – such as asylum, immigration and visa policy. Denmark is a formal member of the Schengen area, but has only agreed to participate in it in the form of intergovernmental cooperation. Before this backdrop, a complicated system of opt-out and opt-in rights has been created which enables Great Britain and Ireland in particular to participate in certain policy measures and to opt-out from others. In this respect, the decision-making is limited to the extent that the coherence of the corresponding *acquis* must be provided.

The opt-outs of Great Britain and Ireland from Schengen are positively formulated. The Schengen Protocol enables the other MS to establish an enhanced cooperation. Both MS can apply for individual provisions, or all provisions of this *acquis* to apply to them, however, which would require unanimous approval by the other MS. The exemptions for Denmark in relation to Schengen constitute a curious status which continues to marginalize this MS. Although Denmark has signed the agreement, it is excluded from the supranational Schengen legislation. In this respect, Denmark has to implement this legislation afterwards as an object of international law without being able to exert any influence over it during the legislative procedure. According to the current legislation, Denmark's opt-out in the areas of visa, asylum and immigration and other policies related to the free movement of people, is complete and without further participatory rights. In this respect, participation is only possible on the basis of complicated negotiations on parallel agreements.

The exemptions for Great Britain and Ireland in these areas are comparably complex. They extend the menu of “à la carte” participation with the possibility of active

co-determination. In the scope of complex processes, Great Britain and Ireland have the right to already participate in the legislative processes of their interest. In this way they are able to exert an influence, if only according to strict criteria. Among others, an opt-in of this kind has to take place within three months after the European Commission has submitted its proposal. In addition to this, a legislative process may not be blocked by either of these two MS.

“The structure of these special arrangements means that despite this, no complete differentiation is evident in the AFSJ.”

In the area of police and judicial cooperation in criminal matters, when the Court of Justice of the European Union assumed its full competencies on 1st December 2014, Great Britain had the right to opt out of the pre-Lisbon Treaty *acquis* (Protocol No. 36). Great Britain has availed itself of this so-called block opt-out right, having put it to consistent use, with the exception of 35 legal acts.

The structure of these special arrangements means that despite this, no complete differentiation is evident in the AFSJ. For example, Great Britain and Ireland participate almost completely in asylum and immigration policy. Denmark is automatically part of the Schengen area. Despite this, the communitarization due to the Treaty of Lisbon has resulted in the aforementioned exclusion of Denmark from the areas of visa, asylum and immigration and other policies related to the free movement of people. Denmark had the opportunity to hold a referendum on the introduction of the flexible participation scheme which applies to Great Britain and Ireland in this policy area. However, in their national vote which was held on 3rd December 2015, 53% of Danes voted against the adoption of more flexible rules for the opt-out.

Forms of differentiation outside the framework of EU law

Differentiated integration frequently serves as a medium of progress in integration, without any revision of the EU treaties. In this case, the cooperation of a selected group of MS is subject to international law. One of the declared goals of this agreement is the medium to long term transfer into the legal framework of the EU. For this reason, a so-called laboratory effect is also spoken of in this context. A certain number of MS will test the cooperation if this is not possible within the scope of the EU. A successful cooperation is able to subsequently generate centripetal effects, so that in the ideal case scenario, at the point in time of transfer into the EU treaties, all MS participate in this integration step. In this context, differentiated integration represents a necessary intermediate step. In the previous implementation, however, it was not possible to recreate a full integration in all cases. In the Schengen Agreement dating from 1985, five MS declared themselves ready to lift the checks on their internal borders. At the point in time of the transfer of the Schengen Agreement and the Schengen Convention (1990) into primary legislation with the Treaty of Amsterdam, as described in detail above, it was necessary to find special arrangements for Great Britain, Ireland and Denmark. The Prüm Convention (2005) which is an intergovernmental treaty between eleven MS and Norway for the improved cross-border fight against terrorism and crime, was also modified during its transfer into the *acquis* of the EU.

The crisis management in the Eurozone has brought about some international treaties, in which not all

of the MS of the EU participate on an equal footing. In this respect, the European stability mechanism which entered into effect on 27th September 2012 constitutes an international treaty between the MS of the Eurozone, and Euro plus package amounts to voluntary cooperation between these nation states. In 2012, all the MS with the exception of Great Britain and the Czech Republic signed the European Fiscal Compact in the EMU – with the Czech Republic opting to sign after all in 2014. In contrast to the Schengen Agreement, this treaty, which took effect on 1st January 2013, recurs already to the EU's institutions. This prevents the high cost of doubling of the structures. Over the long term, the Fiscal Compact is set to be transferred to the legal framework of the EU in 2017.

Assessment and outlook

The different forms of integration in the EU have grown over the years. Nevertheless, despite the strengthened application of differentiated integration in recent years, neither a tendency towards the development of a dominant core Europe, nor an atomization of the EU, is evident. Differentiated integration serves as a helpful method of implementation of a pragmatic strategy of integration. In particular, this proves its value during times of crisis. In this context, differentiated integration has so far represented an effective instrument of integration management. In the event of Grexit or Brexit, this would have to be reassessed, because it would represent a reversal of European integration for individual MS. This form of differentiation could lead to disintegration tendencies in the EU.

Treaty basis: Strengthened cooperation: Art. 20 TEU; Art. 326-334 TFEU; continuously structured cooperation: Art. 42 TEU, Protocol No. 10; opt-outs: Protocol No. 14, 19, 21, 22.

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Institut für Europäische Politik e.V.

Bundesallee 23

10717 Berlin

info@iep-berlin.de

www.iep-berlin.de

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