Articles

Differentiated Integration—Farewell to the EU-27?

By Matej Avbelj[*]

A. Introduction

In light of the persisting economic crisis, momentum has been building in the European Union to embark, once again, on a path towards a more differentiated integration. The calls in favor of the so-called *two-speed Europe* have sounded increasingly loud and have come from diverse, but highly influential corners of European socio-political life. Against this backdrop, and with an eye to the historical experience with differentiated integration in the EU, this article examines the following: Just how plausible the emergence of a more differentiated Union actually is at this time; if plausible, what form such differentiated Union could take; and whether this development is normatively attractive or not.

During the last few extremely turbulent months for the European Union, several ideas and proposals have been advanced to combat the current economic crisis and to chart a way out of it. The most prominent among these, calls for a (more) differentiated integration. Notably, this is proposed by influential figures in European socio-political life. The former French president Nicolas Sarkozy thus openly spoke in favor of creating a *two-speed Europe*, composed of an *avant-garde*, represented by those countries currently participating in the euro zone, and then all other states would be drawn into a loose confederation attached to the core.[1] He was soon joined by Joschka Fischer, the former German Minister of Foreign Affairs, who is still an influential European voice. Fischer bluntly proclaimed that the present EU-27 should simply be forgotten, and called for its complete reconstruction.[2] He too believes that the EU should be transformed into an *avant-garde* of seventeen states, while the conditions and depth of involvement of the other states would be based on their interest and capacity to integrate, to be spelled out in separate and distinct treaties.[3] These ideas were taken up and fleshed out further, in more

[*] PhD European University Institute, Florence; LL.M. NYU School of Law; Assistant Professor of European Law, Graduate School of Government and European Studies, Kranj, Slovenia.

[1] *See The Future of the EU: Two-speed Europe, or Two Europes?*, THE ECONOMIST, Nov. 10, 2011, *available at* http://www.economist.com/blogs/charlemagne/2011/11/future-eu (quoting a speech delivered by Nicolas Sarkozy on November 8, 2011).

[2] *See* Tina Hildebrandt & Heinrich Wefing, *Vergesst Diese EU*, ZEIT ONLINE, Nov. 11, 2011, http://www.zeit.de/2011/46/Interview-Fischer (quoting an interview with Joschka Fischer).

[3] *Id.*

https://doi.org/10.1017/S2071832200001760 Published online by Cambridge University Press

academic terms, by a long-standing institutional insider, Jean-Claude Piris.[4] Finally, as a result of the political and intellectual summits, the idea of differentiated integration has spilled over into the European media as well. The media reaction has not been unanimous on the appeal of the present developments,[5] but they have equally recognized that a *two-speed Europe* is in the making,[6] some are even arguing that it has already arrived.[7]

What is one to make of these resounding speeches and catchy media headlines? For starters, they certainly indicate that a momentum is building in favor of a more differentiated European Union. But is that really the direction in which we are heading? Are we really going to witness the emergence of a two, perhaps even multi-speed, Europe? Will there finally be deeds, or just words—as the history of a non-project of differentiation[8] in the EU attests? If the answer is indeed affirmative, what kind of European Union can we be expected to see come out of this development? And finally, is the evolution towards more differentiation normatively attractive? Or, conversely, does it signify the defeat of the European Union, marking the demise of the original European idea(l)? In what follows we shall attempt to find answers to these troubling questions.

B. The Elusive Meaning(s) of Differentiation

The subject of differentiation in the European Union has been surrounded by a great degree of conceptual ambiguity, even confusion, and as a result we first need to clarify our understanding of it. Differentiation has not carried a single name, nor has it meant the same thing even to those who agree on the same terminology.[9] Like many other elements of European integration, differentiation has lacked coherence and, as argued by one commentator, it has been guided by contingency, ambiguity, and disagreement.[10] Several different labels have been used to describe it. It has been described as a two or multi-

[4] JEAN-CLAUDE PIRIS, THE FUTURE OF EUROPE: TOWARDS A TWO-SPEED EU? (2012).

[5] *See* Débat: Une Europe à Deux Vitesses?, LE MONDE, Nov. 4, 2011, *available at* http://www.lemonde.fr/idees/ensemble/2011/11/04/vers-une-europe-a-deux-vitesses_1598213_3232.html (containing different perspectives presented in a special debate section of the Le Monde).

[6] *Fear of a Two-Speed Europe: Britain Vetoes Changes to EU Treaties*, DER SPIEGEL ONLINE, Dec. 9, 2011, http://www.spiegel.de/international/europe/0,1518,802674,00.html.

[7] Jonathan Freedland, *The Two-Speed Europe Is Here, with UK Alone in the Slow Lane*, THE GUARDIAN, December 9, 2011), http://www.guardian.co.uk/world/2011/dec/09/jonathan-freedland-two-speed-europe.

[8] Neil Walker, *Sovereignty and Differentiated Integration in the European Union*, 4 EUR. L.J. 355, 374 (Dec. 1998).

[9] *See* HELEN WALLACE & WILLIAM WALLACE, FLYING TOGETHER IN A LARGER AND MORE DIVERSE EUROPEAN UNION 27 (1995) (providing a comprehensive view of denominations of this phenomenon).

[10] *See* Walker, *supra* note 8, at 374; Sandra Marco Colino, *Towards Greater Flexibility or Deadlock? The Progress of European Integration Since the Introduction of Enhanced Cooperation*, The Federal Trust for Education and Research, Online Paper 24/04, at 7 (Sept. 1, 2004).

speed, a differentiated, a variegated, or a graduated Europe, as well as a Europe of concentric circles or variable geometry.[11] Add to the *à la carte* model of integration, the models of enhanced or closer cooperation, and the rich list of typologies remains yet to be exhausted.[12] The fact that the process of differentiation has been characterized by an inflation of equivocal terms, and many identically named models have been understood very differently, makes the already complex picture even worse.

To get around this confusion, it is suggested that these denominations and models of differentiation nevertheless share a minimum common denominator. That is the situation in which, within the scope of EU competences, not all Member States are subject to the same or uniform EU rules. The models of differentiation, as we have argued elsewhere,[13] are therefore best theorized as a continuum of three orders of differentiation, stretching from the least to the most differentiated legal arrangement.[14]

Within the first order, differentiation stands for the range of both formal and semi-formal legislative, executive, and judicial techniques of regulation, whose regulatory outcomes (intentionally) fall short of requiring and establishing uniformity. They are normally explicitly authorized on the level of primary EU law—[15]though they can be authorized implicitly—and are usually executed in the form of secondary EU law,[16] sometimes following specific legislative techniques known as minimum or partial harmonization.[17] In

---

[11] *See* Alexander C-G. Stubb, A *Categorization of Differentiated Integration*, 34 J. COMMON MKT. STUDS. 283, 283 (1996) (providing an overview of a variety of conceptions of differentiated integration).

[12] *Id.* at 285; *see also* Wallace & Wallace, *supra* note 9, at 27.

[13] Matej Avbelj, *Revisiting Flexible Integration in Times of Post-Enlargement and the Lustration of EU Constitutionalism*, 4 CROAT. Y.B. EUR. L. & POL'Y 132, 132 (2008).

[14] *Id.*

[15] Those explicitly authorized by the primary EU law comprise, first, legislative acts of different regulatory intensity, regulations and directives, whose purpose is either unification or merely harmonization of national laws.

[16] Consolidated Version of The Treaty on the Functioning of the European Union Art. 288, Mar. 30, 2010, 2010 O.J. (C 83) 171 [hereinafter TFEU].

[17] S*ee* Ellen Vos, *Differentiation, Harmonisation and Governance*, *in* THE MANY FACES OF DIFFERENTIATION IN EU LAW 145, 147–49 (Bruno De Witte, Dominik Hanf & Ellen Vos eds., 2001) (providing an overview); Francesco de Cecco, *Room to Move? Minimum Harmonization and Fundamental Rights*, 43 COMMON MKT. L. REV. 9, 9 n.1 (2006). Minimum harmonization is provided for in the EC Treaty art. 137(5) (as in effect 2002) (now TFEU art. 153) (pertaining to social policy); EC Treaty art. 153(3) (as in effect 2002) (now TFEU art. 169) (pertaining to consumer protection); EC Treaty art. 174–176 (as in effect 2002) (now TFEU art. 191–193) (pertaining to environmental protection); and in—a rather different—EC Treaty art. 95(4)–(9) (as in effect 2002) (now TFEU art. 114(4)–(9)) (pertaining to Internal Market). Minimum harmonization may also be based on a Community secondary legislation, either expressly or by implication. S*ee* Case C-11/92, The Queen v. Sec'y of State for Health, ex parte Gallaher Ltd. et al., 1993 E.C.R. I-3545 (discussing the latter possibility).

secondary EU law, there have also been other means of differentiation, such as options,[18] derogation clauses,[19] and different transitional periods of implementation for different member states,[20] always within the limits and hence under implicit authorization of primary EU law. These formal regulatory techniques of differentiation also include both legislative and judicial interpretative solutions, whereby a construction of a particular term in EU legislation is left to the Member States.[21] Finally, the so-called "soft law" could also be quoted as an example of first order differentiation.[22]

Second order differentiation encompasses more pronounced differentiated legal arrangements which occur on the level of primary EU law in the form of derogations from it. It comprises the so-called *safeguard clauses*, instances of various opt-outs with potential opt-ins, and other, usually protocol-based, derogations in favor of a selected member state.[23] Drawing on Tuytschaever's categorization of differentiation,[24] instances of second order differentiation can be defined as specific in the subjective sense (*ratione personae*) and the objective sense (*ratione materiae*), and are usually permanent. As an exception to the uniformity rule, they are normally established in favor of not more than one Member State, in a single and narrowly specified policy field, for an unlimited period of time. Finally, second order differentiation always arises out of intergovernmental negotiations as the Treaties do not contain any legal basis for its creation.

---

[18] *See* Stephen Weatherill, *Pre-emption and Competence in a Wider and Deeper Union*, *in* LAW AND INTEGRATION IN THE EUROPEAN UNION 135, 161 (1995) (discussing product-liability directive 85/374 as an example of a directive with an option, where the member states are allowed to recognize, or not, the "development-risk defense" in addition to directive 94/33 on the protection of young people at work); Vos, *supra* note 17, at 148 (noting, as well, directive 94/33 on the protection of young people at work as another example of such a directive).

[19] *See* Vos, *supra* note 17, at 149 (referring to Council Directive 92/81/EEC as an example).

[20] *Id.* at 150.

[21] Directive 95/46, of the European Parliament and of the Council of 24 Oct. 1995 on the Protection of Individuals With Regard to the Processing of Personal Data and on the Free Movement of Such Data, 1995 O.J. (L 281) 31 can be quoted as an example of this form of differentiation. *See* Stephen A. Oxman, *Exemptions to the European Union Personal Data Privacy Directive: Will They Swallow the Directive?*, 24 B.C. INT'L & COMP. L. REV. 191, 191 (2000), *available at* http://www.bc.edu/dam/files/schools/law/lawreviews/journals/bciclr/24_1/07_FMS.htm (noting a concern that the aforementioned directive might be already too flexible: allowing for too many exemptions); Gráinne de Búrca, *Legal Principles as an Instrument of Differentiation? The Principles of Proportionality and Subsidiarity*, *in* THE MANY FACES OF DIFFERENTIATION IN EU LAW 131, 142 (Bruno De Witte, Dominik Hanf & Ellen Vos eds., 2001).

[22] LINDA SENDEN, SOFT LAW IN EUROPEAN COMMUNITY LAW (2004); Linda Senden & Sacha Prechal, *Differentiation in and Through Community Soft Law*, *in* THE MANY FACES OF DIFFERENTIATION IN EU LAW 181, 181 (Bruno De Witte, Dominik Hanf & Ellen Vos eds., 2001).

[23] It is important to note that these are present not only in the existing EU Treaties, but also in the Accession Treaties. For example, they are in Council Directive 00/36, 2000 O.J. (L. 197) 19—the Maltese derogation—and the Polish declaration relating to abortion. *See* Chris Hilson, *The Unpatriotism of the Economic Constitution? Rights to Free Movement and Their Impact on National and European Identity*, 14 EUR. L.J. 186, 193 (2008).

[24] FILIP TUYTSCHAEVER, THE CHANGING CONCEPTION OF DIFFERENTIATION IN EUROPEAN UNION LAW (1998).

Lastly, third order differentiation encompasses the most differentiated legal solutions for the European Union. These have been developed into several models: the *à la carte* model,[25] the multi-speed Europe,[26] the Europe of concentric circles,[27] and the model of enhanced cooperation, which is currently institutionalized in the Treaty of Lisbon.[28] These models integrate the means of differentiation that are more general in the subjective and the objective sense, as they are envisaged for more Member States, in broader policy sectors. In contrast to second order differentiation, which is always considered exceptional, third order differentiation is not so. The enhanced cooperation is perceived as an opportunity to achieve more integration with those Member States that are willing and ready. It is for this reason that it has been laid down in the Treaties and is therefore endowed with a juris-generative capacity, rather than being purely dependent on the outcome of the intergovernmental bargaining processes.

However, the models constituting a third order differentiation are fairly heterogeneous and differ at least to the following three criteria: the scope of differentiation—narrow or wide; the content of differentiation—state-based or sector based; and the duration of differentiation—permanent or temporary. The *à la carte* model is known for subjecting the Member States to a very limited number of uniform legal regulations and leaving them a lot of room to pursue other policies independently. Conversely, the other models insist on a much broader scope of uniform rules. The multi-speed and concentric circles models differentiate between the states, whereas the enhanced cooperation model differs by policy sector. Finally, regarding the duration of a differentiated regime the concentric circles model is set up as permanent, whereas the multi-speed and the enhanced cooperation models are in principle envisaged as temporary solutions, with the latter being more lasting than the former.

C. Differentiation in the History of European Integration

These orders of differentiation did not emerge all at once, rather, they have been developing incrementally as integration has been deepening and widening. Differentiation is therefore not a recent phenomenon. While it has indeed grown more prominent in the last decade or two, its presence has been constant throughout the process of integration, although often overshadowed by the prevailing focus on achieving an ever closer union

[25] *See* Stubb, *supra* note 11, at 285.

[26] *Id.*

[27] *Id.*

[28] Consolidated Version of the Treaty on European Union, title IV, May 9, 2008, 2008 O.J. (C 115) 13, 27 [hereinafter Treaty on EU].

https://doi.org/10.1017/S2071832200001760 Published online by Cambridge University Press

and hence uniformity.[29] In fact, the Treaty of Rome contained several safeguard clauses and at least six of the ten protocols annexed to it dealt with derogations.[30] These were, admittedly, limited to very specific national trade-based peculiarities,[31] leaving differentiated integration without much importance. This is understandable though in light of the fact that the majority of policy sectors were still in the hands of the states. The EU was therefore highly differentiated, not because of a formal means of differentiation, but due to the initial rudimentary phase of integration.

However, at the beginning of the 1970s the initiatives for more differentiation within the Union were already in full swing. The Union was enlarged for the first time, which increased the number of divergent political and economic interests and consequently made the then still, by and large, unanimous decision-making more arduous. As a result, political stalemates and protracted negotiations became increasingly more common. It was in 1974, during one of the particularly fierce standoffs caused by staunch British opposition to the harmonization of banking legislation and company law,[32] that the first open political call for the strongest means of differentiated integration was launched by the then German Chancellor, Willy Brandt. He introduced the idea of a multi-speed Europe: The Union would divide into two groups, those more advanced and those less advanced, in order to enable the former to achieve their common objectives more quickly and easily, while the latter would follow when ready or willing to do so.[33] A year later, the proposal was taken up by Leo Tindemans, the then Prime Minister of Belgium, who, being mindful of differentiation's potential contentiousness, pointed to the growing social and economic differences between the Member States and cautioned against their mindlessly consequent insistence on a synchronized pace of integration, lest the overall process of integration be put into peril.[34]

Neither of these two political appeals for differentiation had any immediate practical effect. The idea of differentiation was thus set aside until its resurgence in the 1980s. In the middle of that decade, only some of the Member States ratified an international agreement whose purpose was to abandon controls on internal frontiers and to increase

[29] *See* Avbelj, *supra* note 13, at 134–38 (providing the following historical overview).

[30] Dominik Hanf, *Flexibility Clauses in the Founding Treaties, from Rome to Nice*, *in* THE MANY FACES OF DIFFERENTIATION IN EU LAW 3, 7 (Bruno De Witte, Dominik Hanf & Ellen Vos eds., 2001).

[31] *Id.* at 8. These, for example, included the Protocol on German Internal Trade, which absolved what was then Western Germany from instituting a required EU customs regime with Eastern Germany; Banana Protocol, Protocol on Luxembourg, etc. *Id.*

[32] CLAUS-DIETER EHLERMANN, DIFFERENTIATION, FLEXIBILITY, CLOSER COOPERATION: THE NEW PROVISIONS OF THE AMSTERDAM TREATY (1998); Colino, *supra* note 10, at 4.

[33] *See* Walker, *supra* note 8, at 364; Colino, *supra* note 10, at 8 n.8 (referring to Nomden 1998).

[34] Colino, *supra* note 10, at 4.

the surveillance on the external borders. The Schengen Agreement, as it has since been known, institutionalized an important degree of differentiation between the EU countries inside the Schengen regime and those outside the regime. But because the Schengen Agreement came into being under international rather than EU law, strictly speaking, this was not an instance of EU differentiation. Nevertheless, first order differentiation saw an important boost with the adoption of the Single European Act,[35] which preceded another wave of enlargement.[36] Several new differentiating legislative techniques were included in the Treaty,[37] most importantly Articles 100a(4) and 130t TEC,[38] which allowed for the Member States' separate regulatory standards, even in the already harmonized fields.[39]

However, no matter how modest this development of differentiation may have been originally, it soon turned out to be a harbinger of what followed in the 1990s. With the adoption of the Treaty of Maastricht[40] (ToM) in 1993, the EU integration witnessed differentiation on an unprecedented scale. First, the pillar structure was introduced, giving rise to the so-called structural variability,[41] whereby different policy sectors are governed by different decision-making rules. Although this did not lead to differentiation between the Member States, it created differentiation within the overall political structure, differentiating between the Community supranational regime and the intergovernmental regime(s) of the Union. Secondly, the ToM added new instances of second order differentiation[42] and, thirdly, it even laid grounds for third order differentiation. The creation of the European Monetary Union (EMU), which some Member States chose not to participate in, coupled with the design of increasingly important EU social policies without the inclusion of Britain,[43] began the foundation for separate regulatory regimes in larger policy fields with appropriately adjusted institutional solutions.

---

[35] *Single European Act,* Feb. 17, 1986, 1987 O.J. (L 169) 1 [hereinafter SEA]. The SEA came into force in July 1987. *Id.*

[36] *Countries*, EUROPEAN UNION, http://europa.eu/about-eu/countries/index_en.htm (last visited Jan. 4, 2013) (noting that Greece joined the European Union in 1981, whereas Spain and Portugal followed five years later in 1986).

[37] *See* Hanf, *supra* note 30, at 10–11.

[38] EC Treaty art. 130t (as in effect 2002) (now TFEU art. 150).

[39] *See* Hanf, *supra* note 30, at 10.

[40] The Maastricht Treaty, Feb. 7, 1992, 1992 O.J. (C 191) 1 [hereinafter ToM].

[41] Robert Harmsen, *A European Union of Variable Geometry: Problems and Perspectives*, 45 N. IR. LEGAL Q. 109, 110 (1994).

[42] *See* Hanf, *supra* note 30, at 16–18. The most notorious were the protocols on the acquisition of second homes in Denmark and the Irish abortion protocol. *Id.*

[43] ToM, Protocol on Social Policy, 1992 O.J. (C 191) 1, 90 (stating, for example, that the United Kingdom is not participating).

This ignited a fresh political debate on differentiation, which the present debate largely parallels. Several political visions of third order differentiation were laid on the table. The Lamers-Schäuble initiative took the lead by proposing the concentric circles model: Some Member States would form the core, the avant-garde of integration, which could presumably be closed to those delegated to the periphery.[44] The French Prime Minister reacted by arguing in favor of the concentric circles model, but unlike the German initiative, the French imagined it much more open and formed around policy sectors rather than states.[45] While these two proposals had much in common, especially their presumption of a substantive common core of uniform EU policies, the British proposal was very different. In Britain's Europe *à la carte*, all of the Member States would be involved in only a small number of EU policies, beyond which they would be free to opt in to other policy fields in which they wished to participate.[46]

The outcome of these debates was a joint Franco-German proposal to incorporate a general clause into the new Treaty of Amsterdam (ToA) opening the possibility for differentiation in some policy fields.[47] The proposal was met with approval and a new title on closer cooperation was introduced into the ToA, thereby institutionalizing a model of third order differentiation for the first time. This led some to announce that differentiation had become an intrinsic part of Europe's constitutional structure.[48] This conclusion was reinforced by the fact that the Schengen regime, which was now incorporated into EU law, preserved its original differentiated structure. In the lead up to the Treaty of Nice, and with enlargement looming on the horizon, the debate on the need for differentiation flared up again. The Dehaene Report commissioned by the Prodi Commission suggested easing the conditions for closer cooperation in the Treaty and, in turn, permitting more differentiation.[49] Joschka Fischer's call for differentiation[50] provoked reactions by both

---

[44] Wolfgang Schäuble & Karl Lamers, *Reflections on European Policy*, *in* BUILDING EUROPEAN UNION: A DOCUMENTARY HISTORY AND ANALYSIS 255 (Trevor Salmon & Sir William Nicolle eds., 1997). *Compare* Ehlermann, *supra* note 32 (noting that academics differ as to whether their proposal was an example of variable geometry); *with* Walker, *supra* note 8 (noting that their proposal was an example of concentric circles).

[45] Paul Gillespie, *The Promise and Practice of Flexibility*, *in* AMSTERDAM: WHAT THE TREATY MEANS ch. 3 (Ben Tonra ed., 1997).

[46] SIR STEPHEN WALL ET AL., FLEXIBILITY AND THE FUTURE OF THE EUROPEAN UNION, A FEDERAL TRUST REPORT ON FLEXIBLE INTEGRATION IN THE EUROPEAN UNION 9 (Oct. 2005), *available at* http://mayapur.securesites.net/fedtrust/filepool/FedT_Flexibility_report.pdf.

[47] EHLERMANN, *supra* note 32, at 250.

[48] Hanf, *supra* note 30, at n.88.

[49] RICHARD VON WEIZSÄCKER, JEAN-LUC DEHAENE & DAVID SIMON, THE INSTITUTIONAL IMPLICATIONS OF ENLARGEMENT, REPORT TO THE EUROPEAN COMMISSION (Oct. 18, 1999), *available at* http://www.esi2.us.es/~mbilbao/pdffiles/repigc99.pdf. The previously referenced report is also known as the Wise Men or Dehaene report. *European Union: Wise Men Recommend that Commission Table Draft Treaty*, EUROPOLITICS, Oct. 20, 1999, *available at*

https://doi.org/10.1017/S2071832200001760 Published online by Cambridge University Press

Jacques Chirac, speaking approvingly of creating a pioneer group with a flexible coordination mechanism,[51] and Tony Blair, voicing his principled supported for enhanced cooperation under stringent conditions, to prevent the emergence of the core or an exclusionary multi-tiered Europe.[52] However, the actual changes introduced into the Treaty of Nice were minor, only slightly relaxing the conditions to launch enhanced cooperation, although the latter was also extended in the field of the common foreign and security policy.[53]

Lastly, the Treaty of Lisbon, which replaced the aborted Constitutional Treaty, has both diminished and increased differentiation. It has dispensed with the structural variability by merging the pillar structure and the previously separate Community and Union into the single legal and institutional framework of the European Union. At the same time it has reinforced a second order differentiation, introducing it into the spheres where exceptions to one-size-fits-all solutions would have previously been hard to imagine, most notably in the Charter of Fundamental Rights.[54] This, and other exceptions in favor of Britain, provoked fears that a critical mass of opt-outs has perhaps already been (over)reached.[55] At the same time, however, no major changes have been introduced into the clauses on third order differentiation, which continued to exist as a dead letter in the Treaty.

---

http://www.europolitics.info/european-union-wise-men-recommend-that-commission-table-draft-treaty-artr150332-32.html.

[50] Joschka Fischer, Vice Chancellor and Foreign Minister, Germany, Quo vadis Europa?, Address at Humboldt University (May 12, 2000).

[51] Jacques Chirac, President, France, Our Europe, Address Before the German Bundestag (June 27, 2000).

[52] Tony Blair, Prime Minister, Great Britain and Northern Ireland, Europe's Political Future, Address to the Polish Stock Exchange, Warsaw (Oct. 6, 2000).

[53] Treaty of Nice Amending the Treaty on European Union, The Treaties Establishing the European Communities and Certain Related Acts, Mar. 10, 2001, arts. 11 & 11(a), 2001 O.J. (C 80) 1, 13–14, 36–37 [hereinafter the Treaty of Nice].

[54] Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Communities, Dec. 13, 2007, Protocol on the Application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom, 2007 O.J. (C 306) 1, 156 [hereinafter Treaty of Lisbon]; *see also* Julio Baquero Cruz, *What's Left of the Charter? Reflections on Law and Political Mythology*, 15 MAASTRICHT J. EUR. & COMP. L. 65 (2008).

[55] Honor Mahony, *EU Treaty Negotiations Proceed Slowly,* EUOBSERVER.COM, Sept. 19, 2007, http://euobserver.com/institutional/24783; Michael Dougan, *The Treaty of Lisbon 2007: Winning Minds, Not Hearts*, 45 COMMON MKT. L. REV. 617, 680–87 (2008) (noting that the UK, in the Area of Freedom Security and Justice, in particular police and judicial cooperation in criminal matters, but also in the Schengen acquis, reserved itself the right to opt-out of rules already binding on it).

Indeed, having been laid down more than a decade ago, these provisions on enhanced cooperation remained unused[56] until July 2010 when the Council approved the use of enhanced cooperation in the area of law applicable to divorce and legal separation.[57] The procedure was used for the second time regarding the EU patent in March 2011.[58] The overall enthusiasm about third order differentiation notwithstanding, use of enhanced cooperation has been fairly limited and, before 2010, basically non-existent. This obvious disconnect between ambitions to create a more differentiated Union and the actual practices calls for an explanation. Why it has been so hard to differentiate, in particular on the level of a third order differentiation?

D. The Aversion to Differentiation Explained

Positive EU law may be the most obvious place to find answers. The conditions laid down in the Treaty in order to launch the enhanced cooperation are (too) hard to meet. The procedure of enhanced cooperation is subject to demanding substantive conditions, both positive—stating what it ought to achieve—and negative—proscribing certain consequences that it might entail. Pursuant to the positive conditions, every enhanced cooperation must further the objectives of the Union, protect its interests, and reinforce the process of integration.[59] It must respect the competences, rights and obligations of non-participating Member States, and they are not to impede its implementation.[60] On the other hand, the negative conditions exclude enhanced cooperation from the field of exclusive EU competences. They proscribe any encroachment on the common market, economic, social, or territorial cohesion of the Union,[61] as well as imposing any barrier to or discrimination in trade, or distortion of competition between the Member States.[62] While these substantive conditions are obviously anything but negligible, the greatest

[56] There were two ultimately unsuccessful attempts to implement the enhanced cooperation: One in 1999 at the Cologne European Council aimed at overcoming Spain's opposition to the European Company Statute, and another in 2001 targeting the Italian reluctance to support the framework decision on the European Arrest Warrant. *See* José M. de Areilza, *The Reform of Enhanced Co-operation Rules: Towards Less Flexibility?*, *in* THE MANY FACES OF DIFFERENTIATION IN EU LAW 27, 33 (Bruno De Witte, Dominik Hanf & Ellen Vos eds., 2001); Daniel Thym, *"United in Diversity"—The Integration of Enhanced Cooperation into the European Constitutional Order*, 6 GERMAN L.J. 1731, 1737 (2005).

[57] Council Decision 210/405, 2010 O.J. (L 189) 12 (EU), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:189:0012:0013:EN:PDF.

[58] Commission Proposal for a Council Regulation Implementing Enhanced Cooperation in the Area of the Creation of Unitary Patent Protection with Regard to the Applicable Translation Arrangements, COM (2011) 216 final (Apr. 13, 2011).

[59] Treaty on European Union art. 20.1, July 29, 1992, 1992 O.J. (C 191) 1, 83 [hereinafter TEU].

[60] TFEU art. 327.

[61] TFEU art. 326.

[62] TFEU art. 326.

https://doi.org/10.1017/S2071832200001760 Published online by Cambridge University Press

obstacles are procedural hurdles: Initiating enhanced cooperation requires approval by two institutions, the Commission and the European Parliament. Both institutions have always had a very strong supranational orientation, which has tilted them against any sort of differentiated solutions, perceiving them as a digression from the communitarian uniformity pursuing path.

Although the positivist answer is the most obvious one, it actually reveals fairly little about aversion. In particular, it fails to explain the deeper reasons that led the Member States to formulate those conditions so strictly in the first place. The explanation for this behavior must be traced back to the context in which the decision for starting up the enhanced cooperation is first made. This is always a contentious situation, in which the ordinary decision-making process is blocked because of the insurmountable disagreement between Member States and the necessity of proceeding in a differentiated manner is consequently revealed. Finding an agreement against a backdrop of a deep disagreement is a challenge in itself, and this is only exacerbated further by the uncertainty provoked by differentiation. This uncertainty eliminates the stable, albeit inefficient, status quo and trades it for a differentiated regime where some countries are moving forward and others are staying behind, without any idea how this new regime will actually benefit or disadvantage Member States.

Another possible reason for aversion is that differentiation can cause institutional dilemmas. Should the newly created differentiated regime be executed inside the existing institutional framework? If so, how does this affect the composition of the institutions, in particular the representation and participation of those Member States not involved in a differentiated scheme? These and similar practical queries have worked as a strong disincentive for enhanced cooperation on a larger scale.[63] They have also been joined by issues of a more theoretical character. One is the prevailing normative vision of European integration, which has been couched in constitutional polity terms. Constitutionalism—an empire of uniformity, as described by one author[64]—has, however, never worked in favor of differentiation. Rather it has been used to steer integration towards an ever closer union, where uniformity is the rule, and differentiation the exception. Finally, even if the process of integration had not been driven by the constitutional agenda, achieving differentiation would not have been any easier due to the prevailing bi-dimensional perspective on European integration and the corresponding theoretical incapacity to think in multi-dimensional terms, a perquisite for a differentiated Union.[65]

---

[63] *See* PIRIS, *supra* note 4, at 121.

[64] JAMES TULLY, STRANGE MULTIPLICITY: CONSTITUTIONALISM IN AN AGE OF DIVERSITY ch. 3 (1995).

[65] *See* Walker, *supra* note 8, at 382.

https://doi.org/10.1017/S2071832200001760 Published online by Cambridge University Press

E. New Wave of Differentiation: What is Different Now?

Because it has traditionally been so hard to put third order differentiation into practice, and considering that the above-defined reasons for such difficulty largely continue to exist, is there something different in the present wave of initiatives that might make them more successful than before? To answer this question we must first inquire into the reasons for which those instances of differentiation, which are currently instantiated in the EU, have come about. They have been triggered by three factors: the widening of integration; the deepening of integration; and the change in the decision-making process—from one requiring unanimity, to a qualified majority voting.[66] Widening has introduced more diversity into integration, burdening the decision-making process and causing a single-pace Union that is becoming increasingly inefficient. Deepening has augmented the scope of competencies of the Union, impinging on increasingly sensitive national policy issues, which has made uniform and synchronized development much harder. Finally, the loss of veto power has prompted some Member States to demand opt-outs on the level of primary law in order to avoid the risk of being outvoted in the ordinary decision-making process. All these triggers of differentiation were present to an unprecedented degree after the Big Bang enlargement. They received an additional boost though with the demise of the Constitutional Treaty, which marked the decline of EU constitutionalism and its accompanying dogma of uniformity. Nevertheless, and at odds with our expectations back then,[67] we have yet to see any breakthrough in differentiation.

What about today? Is the present situation any different from what we saw previously? For one, the triggers have remained in place and some of them have even been accentuated. Qualified majority voting, in particular, has been extended further. It has replaced unanimous voting even in the value-sensitive Area of freedom, security, and justice, and has thus become a rule. The continuing presence of triggers of differentiation therefore speaks in favor of its proliferation, as does the current public discourse in the EU public sphere. This has never been as blunt as it is today. Never before have we been told that the present Union of 27 should simply be forgotten,[68] and that a viable European project can only be built around the Eurozone countries. This discourse, of course, has its roots in, and is a reaction to, the unprecedented crisis that the European Union has now been stuck in for a couple of years.

Although, from the start, the project of European integration has been conceived of as a crisis management project, and has also always functioned as such, this particular crisis is unlike any other. It is different in several respects. First, both its scope and depth are unprecedented. The crisis started as a financial crisis but it has grown into an economic

[66] *See* Avbelj, *supra* note 13, at 139–40.

[67] *See id.* at 142.

[68] *See* Hildebrandt & Wefing, *supra* note 2.

https://doi.org/10.1017/S2071832200001760 Published online by Cambridge University Press

crisis, and it is now affecting the real sector. The states that are at the verge of bankruptcy and whose people are in the midst of growing poverty put up with increasingly strict austerity measures. Secondly, the actors of this crisis are different than before. While the source of the crisis lies within the EU countries themselves, the key to resolving it is, perhaps for the first time in history, not exclusively in the hands of the states, but also in the control of non-statist, non-governmental, private, and transnational actors. As a result, the states, and EU states in particular, have not, since the end of the WWII, appeared, and indeed been, so fragile. Thirdly, this crisis also presents an unprecedented blow to the Union symbolically. It has shattered the euro, which is not just an economic means of exchange, but also a symbol of the EU's power and unity, at present, and hopefully in the future as well. Finally, as the crisis has severely undermined the EU economic foundations on which all other social dimensions of the Union depend, the present status quo in the Union is clearly unsustainable and something must be done about it fairly quickly.[69]

Among several proposals and political initiatives that were on the table to meet this end, it was finally the Fiscal compact that came through.[70] Its aim is to legally bind the Member States to keep their budgets in balance, thus preventing the continuing erosion of the common currency and the perpetuation of the present economic turmoil in the Union. However, the Fiscal compact was originally conceived as an amendment to the Treaty of Lisbon, but, together, the strong British objection and the pragmatic Czech euro-skepticism killed the plan to make it an integral part of EU primary law. In the absence of a consensus, the twenty-five willing Member States were in turn forced to conclude the Fiscal agreement as an international law treaty, outside the EU legal framework. The Union has thus split between the Euro-17 states, the pioneers of the new fiscal regime, who are joined by 8 non-eurozone Member States, whereas the aforementioned two have opted out.

Laying the grounds for the creation of a fiscal union primarily among the seventeen Euro Group countries, without the UK, has inflamed the calls for the differentiation referred to in the introduction, and has prompted many observers to declare a *two-speed Europe* as a *fait accompli*. However, this conclusion might be premature. The history of European integration demonstrates that a lack of unanimity among the Member States, which in turn leads to the establishment of an agreement outside EU law, between only some Member States, is anything but unknown to the Union. Yet, previous experiences also

[69] *See* José Manuel Durão Barroso, President of the European Commission, State of the Union 2012 Address, Address to the Plenary Session of the European Parliament (Sept. 12, 2012), *available at* http://europa.eu/rapid/press-release_SPEECH-12-596_en.htm (stating, in a somewhat dramatic way: "To me, it is this reality that is not realistic. This reality cannot go on.").

[70] Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, Jan. 1, 2013, *available at* http://www.european-council.europa.eu/media/639235/st00tscg26_en12.pdf [hereinafter the Fiscal Compact].

prove that these extra-EU differentiated agreements almost always eventually end up integrated into uniform EU law.[71] The Fiscal compact is expected to follow the same path.[72] This, however, is doubtful given the severity of both the subjective and the objective obstacles it must face.

On the subjective side, the UK has made it more than clear that its interest in preserving the global financial competitive edge of its City concretely, and its more abstract, but no less important, reservation to the federalization of Europe, which the fiscal union is allegedly a function of, speak strongly against it joining the Fiscal compact and allowing it to be a part of the EU legal and institutional framework. Even if the strength of this objection wanes in the future with change in the British and probably the Czech governments, the so-called objective obstacles in the sense of economic incapacity of meeting the requirements laid down in the Fiscal compact, will remain. Some of the Member States, unable to meet the economic benchmarks, will be forced to remain outside of the new fiscal union, their opposing wishes notwithstanding; while those staying inside will predominantly be the states whose currency is euro. The latter will thus gradually emerge as a formal core of the new Union.

Its shapes have already been drawn. Since the outbreak of the economic crisis, the center of gravity of EU reform initiatives has been in the increasingly formalized Euro Group,[73] relegating the other Member States to a secondary status beyond the core.[74] The Fiscal

---

[71] *See* Thierry Balzacq et al., *Security and the Two-Level Game: The Treaty of Prüm, the EU and the Management of Threats* 1 (Ctr. for Eur. Policy Studies, Working Document No. 234, 2006) (noting that on 27 May 2005, seven EU Member States—"Belgium, Germany, Spain, France, Luxembourg, the Netherlands and Austria"—signed the Treaty of Prüm to establish the "highest possible standard of cooperation . . . [for] combating terrorism, cross-border crime and illegal migration" as well as several informal groups to combat terrorism, organized crime, and drug abuse such as the TREVI and Pompidou group).

[72] *See t*he Fiscal Compact art. 16:

> Within five years, at most, of the date of entry into force of this Treaty, on the basis of an assessment of the experience with its implementation, the necessary steps shall be taken, in accordance with the Treaty on the European Union and the Treaty on the Functioning of the European Union, with the aim of incorporating the substance of this Treaty into the legal framework of the European Union.

Id.

[73] *See About the Eurogroup*, The Eurogroup, EUROZONE PORTAL, http://eurozone.europa.eu/eurogroup/about-the-eurogroup?lang=en ("Eurogroup meetings are attended by the Eurogroup President, the Finance Minister of each Member State of the euro area, the Commissioner for economic and monetary affairs, and the President of the European Central Bank."). Additionally "[t]he Chairman of the Economic and Financial Committee's Eurogroup Working Group also attends, to present the preparatory work done in that Group." *Id.*

[74] *See* European Council Conclusions, Brussels European Council 13 (Apr. 20, 2011), *available at* http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/120296.pdf (including The Euro Plus

compact goes another step forward. Officially speaking, it does not introduce more differentiation into the Union, as it creates a special regime outside EU law. Nevertheless, this special regime will be composed of the core EU policies: the monetary and fiscal union. The regime will integrate the leading Member States, and it will be permitted to rely upon the EU institutions. In that way, the core will actually be located outside the Union-27, and this will, by means of international law (first de facto, but then perhaps also de jure), become of secondary importance. The Fiscal compact therefore introduces differentiation in disguise: By moving the core from the Union to international law, thereby creating a new EU-17, this could replace the increasingly weak original EU-27, leaving it behind as an empty shell.

The present push for differentiation can thus be distinguished from those prior in at least two important respects. First, under pressure from objective economic circumstances exerted by the non-statist transnational actors, there is much less room, if any at all, for political discretion regarding whether to differentiate. The present status quo is thus unsustainable and requires immediate action. Secondly, differentiation is taking place at the heart of the Union—the euro. The latter is already subject to differentiation, as not all Member States participate in the monetary union. However, the monetary union is nevertheless part of the Union framework, an element of the accession *acquis*, with an inbuilt commitment that all Member States will accede in a foreseeable future. But this is increasingly unlikely, precisely due to the objective economic reasons referred above; the heart might be transplanted into a new, less populated and therefore more homogeneous organism, leaving the old body to a slow, but definite decay.

F. After Differentiation—A Better Union or Not?

Provided that a scenario envisaged by the proponents of differentiation translated into practice by way of the Fiscal compact, what kind of Union would we get then? With some speculation, it appears that the end result would be a much leaner, less numerous federal Union. It would preferably be composed of only the Euro Group countries, with the other countries outside the federal core, spread into several concentric circles based on their preferences and capacities for integration in specific policy fields. The federal core would stand for a complete economic (*i.e.*, fiscal and monetary), political, security and defense union. Those countries not willing to participate in all of these policy fields would be located in the corresponding external concentric circles. Those willing to integrate more would be located in the policy circles closer to the core, the others further away. This conception of a federal union with loose confederate alliances would also allow room for the EEA countries and Switzerland; for the countries of the Western Balkans and Turkey, if and when they do accede; as well as for other regional alliances currently occupying the EU

Pact which applies to "the euro area Heads of State or government and . . . Bulgaria, Denmark, Latvia, Lithuania, Poland, Romania . . . .").

https://doi.org/10.1017/S2071832200001760 Published online by Cambridge University Press

neighborhood policy.[75] The latter would be located at the outermost concentric circle of the Union.

How exactly this federal-confederal conglomerate would function in practice, of course, remains an open question. It is particularly hard to imagine a concrete institutional set up tailored to it, especially if it is to remain single and therefore shared by all the concentric circles. Alternatively, if more institutional frameworks are to emerge, with different institutions for different concentric circles, then it is equally hard to see how, or even why, the conglomerate's unity is to be ensured. Why not, given its probability, simply agree to have the present Union broken down into various independent entities? Although doing so would certainly signal the end of European integration as originally conceptualized. Either way, even if our political imagination and institutional ingenuity work to the best of their abilities, what is going to emerge out of this process is a Union that is very different from the current one.

Whether this development in the Union would be for better or for worse is something that only time will tell. The developing normative attitude to the emerging differentiation, whether it is more or less favorable of it, depends on the perspective one harbors of the European Union today. It goes without saying that these perspectives are manifold. We should pause briefly to elucidate the perspectives of the Member States, the EU institutions—in particular, the Commission—and the EU scholarly perspective.

Taking up the Member States' perspective first, two main divisions have evolved between them. The first is between the Euro Group countries and the rest, the so-called periphery. The second is between the countries that have acted as a driving force behind the Euro Group: the Franco-German couple on the one hand, and the United Kingdom on the other. Differentiation obviously enjoys support by the Euro Group countries, with France and Germany as its frontrunners, but it breeds reluctance and even hostility in the other countries, particularly in the UK. These countries are most afraid of losing their influence as a result of exclusion from the process of forming more integrated policies, that they have either declined or are unable to participate in, but which might, through a perhaps inevitable spill-over effect, impact those policies pursued by all. This was especially visible in British domestic politics, which were weary of the prime minister's decision not to take part in the fiscal compact for fear that by excluding itself from this compact, Britain may also forfeit other means of influencing the development and functioning of the single market, which is at the heart of the British EU economic interest.[76] Other countries, particularly Poland, have also been anxious about their exclusion from the Euro Group, and

[75] Most notably, the Mediterranean Union.

[76] *See Cameron Comes Under Fire for 'Phantom Veto'*, EURACTIV.COM, Feb. 1, 2012, http://www.euractiv.com/uk-europe/cameron-comes-fire-phantom-veto-news-510498; *In Quotes: Timeline of Reaction to UK's EU Treaty veto*, BBC NEWS, Dec. 13, 2011, http://www.bbc.co.uk/news/uk-politics-16137256.

feel that they should be involved in, or at least informed about, the conclusions of the European Council meeting in the formation of the heads of states whose currency is euro.[77]

Behind the obvious and understandable insider-outsider divide, there also lurks a deeper clash of the EU paradigms. France and Germany tend to subscribe to the vision of a strong federal Union, integrated in a growing number of policy fields and thus composed of relatively homogeneous countries, which would, as a whole, function in the image of a Franco-German couple, acting as the Union's engine.[78] The UK has always been opposed to this: Concerned primarily with reaping the benefits of the single market, it has tried to halt the integration processes from going beyond the single market by favoring enlargement of the Union, including to Turkey, in order to increase heterogeneity inside the Union and thereby make federalization less likely. Thus, differentiation inside the Union appears to be economically beneficial for the countries with the euro, and also politically advantageous in particular for Germany and France, which could regain their influence, having been diluted by a wider, more diverse Union. This scenario has never been supported by Britain and such a scenario is not in favor of non-euro countries in general. It is worth nothing that these countries, unlike the UK, might, when ready or willing, join the more integrated club, and thus leave the UK relatively isolated. In that way, the division between the core and the periphery would remain, but the core would grow at the expense of the periphery.

As far as the EU institutions are concerned, the process of differentiation has never really been viewed favorably by them. This is particularly true and understandable in case of the European Commission and the European Parliament, which are charged with representing the supranational interests of the Union and EU citizens respectively. These two institutions have had to work from the perspective of and with concern for the whole. They have therefore been occupied with cultivating centripetal forces and preventing the centrifugal ones. Recently, however, the trend has been changing. We have seen two successful uses of the enhanced cooperation procedure, which could not have taken place without the Parliament's and the Commission's consent. Furthermore, the latter has not objected to the adoption of the Fiscal compact, despite the fact that it will be binding for only 25 states, and that it has been concluded as an international law instrument outside the EU legal framework. An explanation for this probably lies in the fact that, despite its

---

[77] *See* Andrew Rettman, *Poland Renews Attack on Eurozone-only Summits*, EUOBSERVER.COM (Jan. 19, 2012), http://euobserver.com/19/114945.

[78] *See Paris, Berlin Hasten Plans for 'two-speed Europe'*, EURACTIV.COM (Nov. 28, 2011), http://www.euractiv.com/euro-finance/paris-berlin-hasten-plans-speed-europe-news-509243; *The Future of the EU: Two-speed Europe, or Two Europes?*, THE ECONOMIST (Nov. 10, 2011), *available at* http://www.economist.com/blogs/charlemagne/2011/11/future-eu; Quentin Peel, *Germany and Europe: A very Federal Formula*, FINANCIAL TIMES (Feb. 9, 2012), *available at*: http://www.ft.com/intl/cms/s/0/31519b4a-5307-11e1-950d-00144feabdc0.html#axzz1uM74FfD8.

extra-EU law status, the Commission has managed to preserve its influence and plays an active role in monitoring compliance with the emerging fiscal regime. This indicates that at least the Commission, and probably the European Parliament as well, is ready to adopt a pragmatic stance even with differentiation, and to be supportive, or at least tolerant of it, so long as its institutional standing and powers are not affected.

Among scholars of EU law, the idea of differentiation has also struck different chords. In general, they have not been very supportive of it. The degree of aversion to differentiation, however, is varied among scholars according to their theoretical visions of the Union. Supporters of the intergovernmental Union have found the pressure for differentiation self-explanatory in light of Member States craving for power and the desire to enhance their positions.[79] The advocates of the supranational Union have, conversely, perceived it as an expression of national selfishness, which presents a regression in the process of integration.[80] By breaking the chain of virtuous spill-over effects differentiation is also anything but compatible with the neo-functionalist understanding of the Union. At the same time, it does not fit well with the ordo-liberal perspective either, because of its potential to erect new obstacles to trade where there should not be any.[81] Finally, differentiation understandably may not appeal to EU constitutional scholars, who view it as colliding with not only the very *telos* of integration,[82] but also with the essential character of constitutionalism as a unity-furthering discourse.[83]

Against this backdrop one would not expect that the present move towards differentiation would win much scholarly approval from academics other than those inter-governmentally oriented. Yet, this might not necessarily be so. If the present proposals for differentiation could be understood as being motivated by creating a core of more homogeneous states,

---

[79] Angelos Sepos, *Differentiated Integration in the EU: The Position of Small Member States* 2 (Eur. Univ. Inst. Robert Schuman Ctr. for Advanced Stud., Working Paper No. 2005/17, 2005), *available at* http://www.eui.eu/RSCAS/WP-Texts/05_17.pdf.

[80] Pierre Pescatore, *International law and Community law—a Comparative Analysis*, 7 COMMON MKT. L. REV. 167, 181 (1970); José M. de Areilza, *Enhanced Cooperation in the Treaty of Amsterdam: Some Critical Remarks* 2 (Harvard Jean Monnet Working Paper No. 13/98, 1998) (characterizing flexibility as a statal grab for power).

[81] *See* ERNST B. HAAS, THE OBSOLESCENCE OF REGIONAL INTEGRATION THEORY (1975) (Univ. of California, Berkeley Inst. of Int'l Studies Ser. No. 25, 1975).

[82] Allegedly defined as an ever closer union between the peoples of Europe, whose nature it is that it should proceed only one way. *See* Deirdre Curtin, *The Constitutional Structure of the Union: A Europe of Bits and Pieces*, 30 COMMON MKT. L. REV. 17 (1993). For an even more radical view, see Pierre Pescatore, *Aspects Judiciaires de l'Acquis Communautaire*, 17 REV. TRIMESTRIELLE DE DROIT EUR. 617, 623 (1981) (arguing that the European Community is inherently bound to progress, presumably to more integration, and that the way back is inconceivable).

[83] Miguel Poiares Maduro, *How Constitutional Can the European Union Be? The Tension Between Intergovernamentalism and Constitutionalism in the European Union* (Jean Monnet Working Paper No. 5/04, 2004), *available at* centers.law.nyu.edu/jeanmonnet/archive/papers/04/040501-18.rtf.

this would be welcomed by the proponents of the constitutional as well as proponents of federal accounts of the European Union. The constitutional and federal visions of the Union, which turned out to be impossible in the Union of 27, could possibly be revived in an environment of the EU-17. In other words, an ever closer, federal and constitutional Union could be achieved not by means of further integration, but by differentiation.

Nevertheless, conceptually this runs contrary to ideal differentiation. We have always understood differentiation as a reaction to the growing number of legitimate differences between the Member States that are worth preserving. In this way, differentiation has been envisaged as a means of managing diversity between the Member States. As such, it could engender several positive effects for the Union. By recognizing diversity between the Member States as something worth saving, differentiation could strengthen legitimacy in identity terms. Differentiation, which would permit the Member States to decide which policy sectors to participate in, would also enhance democracy. It would remove the need for the national majority, fearful of being outvoted as a European minority by the European majority, to block the latter.

Differentiation would thus facilitate the decision-making process in the Union by reducing the need to use the veto power, and the need to resort to untidy compromises, made behind the scenes, after protracted negotiations, which result in quid pro quo, incompletely theorized agreements.[84] In that way, the output legitimacy of the Union would be enhanced and its transparency strengthened.[85] By allowing differentiation inside the Union, there would be no need for the Member States to seek refuge in international law, as they now must with the Fiscal compact. Differentiation—as a vehicle of change—would also introduce the internal evolutionary dynamics that the EU is in desperate need of.[86] Finally, theoretically, differentiation would also force us to try harder to produce more imaginative solutions, and to switch from the present two-dimensional mode of thinking about integration, to a multidimensional one. In so doing, new concepts would be devised to escape the narrow confines of a conceptually undernourished apparatus as they currently exist, typically consisting of the binary alternatives that the Union has traditionally been couched in: federal and confederal, constitutional and international, unity and differentiation.

And yet, none of these advantages associated with differentiation are likely to happen. What is at stake here are two different conceptions of differentiation. The one proposed by us is differentiation as a diversity management mechanism, while the one recurring in dominant discourse, furthered by stakeholders is differentiation as a means of achieving

[84] *See* Avbelj, *supra* note 13, at 149.

[85] *Id.* at 144–45.

[86] Filip Tuytschaever, *EMU and the Catch-22 of EU Constitution-Making*, *in* CONSTITUTIONAL CHANGE IN THE EU: FROM UNIFORMITY TO FLEXIBILITY 173, 195 (Gráinne De Búrca & Joanne Scott eds., 2000).

https://doi.org/10.1017/S2071832200001760 Published online by Cambridge University Press

more uniformity. The former has the potential to bring something new into the process of integration, and to stir it up by introducing innovative integrative approaches, which are necessary when the conventional one-size-fits-all, ever-closer union has failed to deliver. On the other hand, differentiation in service of more uniformity perpetuates the old model of development, albeit with fewer Member States, where achieving desired goals would be more likely because of a greater degree of homogeneity among the states. But, not only has this not worked in the past, there is even less likelihood that it would function in the present situation. Achieving the desired homogeneity would require rolling integration back in time.

Calls for an EU-17 and an outright abandonment of the EU-27 could be understood as a (hidden) desire to eradicate the consequences of enlargement, and to recreate the Union that previously existed. This is, of course, impossible in practice, because enlargement and thus a new and more heterogeneous Union are simply given facts. Moreover, even the mere desire to return to the status quo ante is a sign of defeat. This has many faces. First of all, it exhibits the EU's incapacity to adapt to new circumstances: A system that cannot adjust to the new and yearns for the old has fallen prey to decay. Trying to de facto reverse the enlargement also demonstrates that, in the eyes of those who set forth these proposals, this was not a success, but a failure. Given that enlargement was not merely an economic, political, and strategic project, but also a deeply symbolic event imbued with hope of liberation and reunification of the unjustly divided continent, this would not be just any failure. It would be a failure that would leave a deep cut in the very idea of Union. Furthermore, one might speculate about even more sinister motives behind the present differentiation proposals. One could say that the proposed core countries simply seized the opportunities of an economy of scale, of the markets found in the new Member States, but now, when the economy has contracted and when the economic benefits are either lacking or are exhausted, they are shutting the door in order to have the old club reestablished. And, of course, this smaller club would once again be much easier to control and to steer into the direction preferred by its two biggest members.

Be that as it may, our aim here is not to argue that any such adverse motives are indeed lurking behind the present differentiation initiatives—that is unlikely. We believe that the proposals for differentiation are a genuine attempt to improve the functioning of the European Union which is, indisputably, far from optimal.[87] We are, however, also convinced that these solutions are not being looked for in the right place. A federal state, resembling a Union, of an EU-17 has already been turned down, at least implicitly, with the refusal of the Constitutional Treaty. That path, which is effectively a back way, is therefore closed. Even if it was open, there is no reason to believe that a federal Union of EU-17 would contribute anything to solving the economic meltdown that currently pesters the EU-27. This is because the economic crisis did not start here in a *sui generis*, proto-federal,

[87] *See* PIRIS *supra* note 4, at 143–48.

https://doi.org/10.1017/S2071832200001760 Published online by Cambridge University Press

semi-international EU, but, rather, in a proper federal state—the United States. This shows that if the key to unlocking the present crisis can be found anywhere, it certainly does not lie in a more statist-federal form.

Amidst all this uncertainty, we are nevertheless convinced that if the EU wants to ensure its long- term viability, it must learn to live with and manage its differences. In that respect, differentiation, when conceived of as a diversity management mechanism, offers a helping hand. It demonstrates that a commitment to the common whole, to the EU-27, makes a whole variety of structural and institutional solutions available inside this common framework. So far, as the history of differentiation demonstrates, these have only been partly used. There is therefore still much scope for experimenting with differentiation, but only if done for valid reasons. And until now, this has not been the case. Differentiation has not been employed to recognize and institutionalize diversity inside the Union, but, rather, to achieve the opposite: More uniformity between more homogeneous states, to the exclusion of others that do not fit into this picture. But, differentiation as homogenization in the absence of commitment to the EU common whole is not the answer. This would work to the EU's disadvantage and, thus, it should not be carried out. What should therefore be forgotten is not the present EU-27, but any model of differentiation that proposes to further uniformity.

https://doi.org/10.1017/S2071832200001760 Published online by Cambridge University Press