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Policy Recommendations for a Differentiated Union: Ensuring Effectiveness, Sustainability and Democracy

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Policy Recommendations for a Differentiated Union: Ensuring Effectiveness, Sustainability and Democracy

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Abstract

This policy brief aims to present to policy-shapers and policy-makers at the national and European level some selected recommendations based on the main outcomes of EU IDEA – Integration and Differentiation for Effectiveness and Accountability. We found that differentiated integration and cooperation have been and will remain a necessity in Europe in order to allow the resilience and functioning of the EU system, but a number of corrective actions should be taken to make it not only compatible with, but also conducive to a more effective, sustainable and democratic Union.

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Introduction

The many crises the European Union has had to face in the last decade, culminating in the Covid-19 pandemic, showed the capacity to adapt but also the shortcomings of the European construction, paving the way for further adjustments and reforms. Divergences of interests and socio-economic inequalities within the EU, together with the menaces of disintegration propelled from Brexit, have highlighted a persistent need for flexibility in order to overcome stalemates in the decision-making process and ensure the functioning of common policies, thereby preserving the integrity of the EU system. EU institutions and member states had already recognised this evolution, as witnessed by the European Commission's White Paper on the future of Europe (European Commission 2017) and by the Rome Declaration (European Council 2017) adopted in March 2017.

Most of the corrections introduced in the past few years were the results of closed-door bargaining and consensus-building among the representatives of national governments in intergovernmental settings, in particular the European Council, where the decision-making system of the EU has proved its inadequacy, as it has been often hostage to the unanimity rule and the veto threat. At the same time, the European Commission has shown greater ambition to take the lead in fields such as international trade, digital, climate transition and health, by both reinforcing its powers and expanding the remit of its competences. These developments have spread fears of a widening democratic deficit, especially on the side of the European Parliament and civil society. The Conference on the Future of Europe, conceived to give European citizens the opportunity to express their preferences on the direction and substance of the European integration process, represents a good opportunity to shape the reform season that lies ahead for the Union in a more open and democratic way.

The time is ripe to advance some proposals for the way forward. The ambition of this policy brief is to present to policy-shapers and policy-makers at the national and European level some selected recommendations based on the main outcomes of EU IDEA – Integration and Differentiation for Effectiveness and Accountability, conducted since 2019 by a group of research institutions within and outside the EU and coordinated by Istituto Affari Internazionali in Rome, funded by the Horizon 2020 programme of the European Union.

We rely on an exceptional amount of data and analysis that investigated the legal, organisational, philosophical and constitutional aspects of differentiation in the Union, in its both internal and external dimensions. We also assessed the practice of differentiation in different policy fields (from the Economic and Monetary Union and Internal Market, to the Common Foreign, Security and Defence Policy (CFSDP) and the Justice and Home Affairs, including migration) and well as the case of Brexit, and compared them in order to evaluate their impact on EU governance today and in a 2035 horizon. Finally, we collected data on perceptions and preferences of both citizens – in EU members, candidate and partner countries – and decision-makers in national capitals and Brussels about integration and differentiation in the EU.

We found that differentiated integration and cooperation have been and will remain a necessity in Europe in order to allow the resilience and functioning of the EU system, but a number of corrective actions should be taken to make it not only compatible with, but also conducive to a more effective, sustainable and democratic Union (Pirozzi and

Bonomi 2021).

1. The challenge of effectiveness

Introducing a certain degree of differentiation can produce a relative improvement in policy making and policy implementation both in single policy sectors and for the EU overall, but there is no one-size-fits-all solution in terms of institutional set-up (Eisl and Rubio 2021).

In Community policy areas, both internal such as in the cases of the Economic and Monetary Union, and internal/external such as the European Economic Area and the Energy Community, differentiation paths should continue to be realised through Treaty-based schemes and provided with stringent institutional frameworks (Lavenex and Križić 2019). In fact, such schemes are best suited to lead to better policy performance, as they are more likely to ensure members' compliance with agreed rules. In the aftermath of the Covid-19 crisis, differentiation still represents a useful means to address emerging cleavages and promote further integration, for example by completing the Banking Union project through the creation of a European Deposit Insurance Scheme. Other differentiation patterns such as enhanced cooperation (Art. 20 TEU) should also be taken into consideration in critical areas like taxation, social policy and labour policy (Emmanouilidis 2021).

In purely intergovernmental EU policy areas such as the CFSDP, looser forms of differentiation should be privileged to ensure effective implementation, as they proved to be best suited for their specific policy objectives, including the need to circumvent the shortcomings of unanimity-based decision-making to take timely and targeted actions. Therefore, effective differentiation in CFSDP should occur through forms of cooperation among sub-sets of member states, such as regional groupings, contact and lead groups, as well as various defence initiatives (Grevi et al. 2020).

In the field of migration, the situation is more complex as it is situated at the intersection between internal/external and intergovernmental/supranational dimensions. Differentiated cooperation based on solidarity among a group of member states could be established within or outside the EU Treaties, but it would not prove effective without an obligatory system of rule-compliance, for example in terms of relocation of migrants, and strict sanctioning mechanisms.

In addition, forms of sub-national differentiated cooperation such as the Covenant of Mayors and similar networks should be promoted and supported with a view to favour the exchange of best practices and policy learning in different policy sectors (Tortola and Couperus 2020).

Clarity of objectives is therefore determinant in identifying the right form of governance and should be pursued in each differentiation project. The lack of clarity between the two objectives of territorial defence and expeditionary projection has been one of the key factors jeopardising the effectiveness of the differentiation scheme of

Permanent Structured Cooperation in the field of defence (Biscop 2020).

But the degree of effectiveness can also be influenced by other factors. For example, differentiation arrangements should include mechanisms that provide for their adaptability to evolving circumstances and policy priorities. This is particularly relevant for third-country access to the Single Market, as the difficulties of the EU-Swiss agreement have proved, and pending an assessment in the implementation of the Trade and Cooperation Agreement between the EU and the UK (Eisl 2020).

2. The challenge of sustainability

At the same time, an excessive recourse to flexibility should be avoided, as it can produce centrifugal dynamics and have a negative impact on EU political unity and normative consistency, thus leading to fragmentation and even disintegration in the long run.

In order to mitigate these risks, it is crucial to identify mechanisms that provide coherence of various differentiated formats among them and with shared EU goals and decisions. Therefore, when intergovernmental differentiation initiatives are established outside the Treaties, their connection with the EU's institutional framework should be ensured. The role of EU institutions can take the form of reviewing and monitoring powers, as in the case of the European Commission for the Fiscal Compact, or be based on consultation and cooperation mechanisms, as happened with the Iran nuclear deal, where the office of the High Representative was closely associated with the initiative of the lead group formed by France, Germany and the United Kingdom.

Moreover, the cleavages between ins and outs of differentiated integration projects should be addressed and the negative effects on non-members should be limited, for example through members' formal commitment to non-discrimination and through formal and informal mechanisms allowing the participation of non-members in the decision-shaping process of differentiated policies and institutions. In the field of Economic and Monetary Union, this means for example that the Eurogroup and the Euro Summits should always be held in an inclusive format, thus allowing non-EMU countries to participate as observers with the right of speech, while maintaining their exclusion from voting rights (Eisl and Rubio 2021).

Red lines should be identified in order to safeguard the EU's constitutional integrity. Therefore, if a certain degree of heterogeneity in judicial governance can be allowed both internally among the member states and externally in relations to the candidate countries (Damjanovski et al. 2020), the EU's fundamental values such as rule of law cannot be compromised if we want to ensure the survival of the EU project, and should not be subject to differentiated implementation.

Similarly, if we look at the field of external migration policy, differentiated cooperation frameworks with third countries aimed at reducing migratory pressure at the EU

external borders cannot result in the reduction of the EU's internal legal standards on issues such as rule of law and human rights. Oversight by the European courts as well as the European Parliament should be ensured.

Brexit has also hardened the boundaries for external differentiated integration by making the EU more constitutionally sensitive to the risks of fragmentation. In terms of external differentiation, the Brexit experience might suggest a more hard-line approach towards non-EU members, both third countries (no cherry-picked access to the Single Market) and candidate countries (setting the bar to get in even higher) (Wachowiak and Zuleeg 2021).

3. The challenge of democracy

Finally, it is clear how differentiation challenges the accountability and the legitimacy of EU governance as it creates incongruences between those who take decisions and those who are affected by them (Nguyen 2020, Herrmann and Leuffen 2020, Fossum 2015). Indeed, when differentiation occurs, citizens and governments might have only marginal or no control over policies that affect them. Thus, differentiation offers neither clear-cut solutions to address the EU democratic deficit nor simple ways to reassert the democratic identity between the authors and subjects of a political decision.

In the European Monetary Union, for instance, the European Parliament represents more citizens than those who are directly affected by eurozone measures, whereas the Eurogroup and Euro summits exclude the representatives of those member states that may be indirectly affected by their decisions (Nguyen 2020). Such an incongruence between authors and subjects of political decisions is also present in external across several policy fields.

Furthermore, over the last decade there has been a proliferation of new governance arrangements outside the EU Treaties, in almost every policy field. As a matter of fact, the eurozone and the (so-called) migration crises strengthened national executives within the European Council, while leading to the adoption of measures outside the EU legal framework and exacerbating problems of accountability.

Against this backdrop, there is an urgent need to improve EU democratic accountability through parliamentary oversight, at both the national and the EU level. Added to this, the unfolding of EU governance over the past years has put the spotlight on the need to grant jurisdiction to the European Court of Justice in areas and situations where its role is either limited or absent, starting from EU informal deals with third countries in the field of migration.

In principle, promoting forms of direct democratic participation, such as the Conference on the Future of Europe, may be crucial to empower EU citizens, as well as to generate a sense of solidarity and European identity. Nonetheless, the limited democratic control remains a structural feature of a differentiated polity which

must be tempered through agreed institutional mechanisms. Among others, such mechanisms may include administrative or judicial accountability arrangements; or the selective participation of representatives of the excluded constituencies in the preparatory and implementation phases of the governance cycle. In the European Stability Mechanism, for instance, control is provided through the Board of Auditors' administrative accountability (Nguyen 2020, Mack 2020); or the members of the European Economic Area can participate in the relevant decision-shaping process (Eisl 2020, Lavenex and Križić 2019).

Finally, as for any polity, EU legitimacy is necessarily linked to its ability to deliver, and thus to its efficiency. Differentiation allows EU member states to cooperate when their preferences are not uniform, and thus allows the EU to avoid stalemates. As such, it is also likely to increase the EU's output legitimacy.

10 points to make a differentiated Union effective, sustainable and democratic

- 1) Differentiation represents a way forward in policy fields within the Union where uniformity is undesirable or unattainable, as well as in the design of the EU's external action within an increasingly unstable global environment, offering manifold models of cooperation between the EU and candidate and partner countries.
- 2) There is no one-size-fits-all solution in terms of institutional set-up of differentiation projects, as such projects have to be designed on the basis of the objectives pursued.
- 3) Differentiation arrangements should include mechanisms that provide for their adaptability to evolving circumstances and policy priorities.
- 4) An excessive recourse to flexibility should be avoided, as it can produce centrifugal dynamics and have a negative impact on EU political unity and normative consistency, thus leading to fragmentation and even disintegration in the long run.
- 5) A direct link with the EU institutional framework should be established even when differentiated cooperation is realised outside the EU Treaties, as a way to ensure coherence of various differentiated formats among them and with shared EU goals and decisions.
- 6) The cleavages between ins and outs of differentiated integration projects should be addressed, and the negative effects on non-members should be limited.
- 7) Red lines should be identified in the safeguard of the Union's founding values such as rule of law and human rights, as well as in the integrity of the Union's legal order, as they are the basis of the EU's constitutional identity.

8) Need to improve democratic accountability through parliamentary oversight and direct democratic participation (i.e., Conference on the Future of Europe).

9) The lack of accountability mechanisms can be tempered through administrative or judicial accountability mechanisms; or by enabling the selective participation of representatives of the excluded constituencies in the preparatory and implementation phases of relevant policies in differentiated regimes.

10) Differentiation allows EU member states to cooperate when their preferences are not uniform. While it should be acknowledged that, under these circumstances, differentiation is likely to increase the EU's *output* legitimacy, the EU's *input* legitimacy in differentiated regimes is still not sufficient.

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EU Integration and Differentiation
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Differentiation has become the new normal in the European Union (EU) and one of the most crucial matters in defining its future. A certain degree of differentiation has always been part of the European integration project since its early days. The Eurozone and the Schengen area have further consolidated this trend into long-term projects of differentiated integration among EU Member States.

A number of unprecedented internal and external challenges to the EU, however, including the financial and economic crisis, the migration phenomenon, renewed geopolitical tensions and Brexit, have reinforced today the belief that **more flexibility is needed within the complex EU machinery**. A Permanent Structured Cooperation, for example, has been launched in the field of defence, enabling groups of willing and able Member States to join forces through new, flexible arrangements. Differentiation could offer a way forward also in many other key policy fields within the Union, where uniformity is undesirable or unattainable, as well as in the design of EU external action within an increasingly unstable global environment, offering manifold models of cooperation between the EU and candidate countries, potential accession countries and associated third countries.

EU IDEA's key goal is to address **whether, how much and what form of differentiation is not only compatible with, but is also conducive to a more effective, cohesive and democratic EU**. The basic claim of the project is that differentiation is not only necessary to address current challenges more effectively, by making the Union more resilient and responsive to citizens. Differentiation is also desirable as long as such flexibility is compatible with the core principles of the EU's constitutionalism and identity, sustainable in terms of governance, and acceptable to EU citizens, Member States and affected third partners.



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