

166
JANUARY
2017

SHAPES OF A UNION: from ever closer union to flexible differentiation after Brexit

Pol Morillas, Research Fellow in European Affairs, CIDOB

Farewell, “ever closer union”

The logic behind “ever closer union” was gone well before the Brexit referendum. When negotiating a definitive opt-out from the clause, David Cameron revealed how the growing trend towards integration had reached a symbolic limit, regardless of the referendum result. In that European Council of February 2016, it became clear that the Lisbon Treaty had been the last attempt at pursuing the logic of ever deeper integration and that member states were no longer united in the desire for “more Europe”. Ever closer union reached its peak with the euro and the discussions on the constitutional treaty and survived the French and Dutch “no” via the Lisbon Treaty, but since the mid-2000s it has been shrinking back.

The accession of the central and eastern European states in 2004 probably signalled the first wave of enlargement that understood the EU more

in terms of a cost-benefit analysis than a political project with a unity of purpose. When accessing the union, these countries encountered an EU that was already a long way from

the ideas of the founding fathers and that had adapted to the renationalisation dynamics put forward by the Maastricht Treaty. In their view, cooperation in international organisations should follow the utilitarian premise of amplifying national goals rather than surrendering sovereignty and building a post-modern entity that ends the primacy of the state in world politics.¹

A few years later, the euro crisis also fostered divisions across the EU along pragmatic lines. Debtor and creditor countries were pursuing opposing recipes with regards to fiscal consolidation, debt mutualisation and the final shape of the Economic and Monetary Union. But the bottom line of their argu-

The ever closer union has been shrinking back since the mid-2000s. Brexit was the just latest nail in the coffin for ever closer union, albeit a highly symbolic one.

“More Europe” is unlikely to provide a solution to the democratic malaise and anti-establishment feelings. And “better Europe” will not work either if it does not address the fundamental legitimacy problems at EU level.

For the central and eastern European states, cooperation in international organisations should follow the premise of amplifying national goals rather than surrendering sovereignty and building a post-modern entity that ends the primacy of the state in world politics.

The Brexit is certainly to blame, but the disintegration dynamics are present in many other national landscapes, with Euroscepticism, populism and political disaffection on the rise.

Negotiations are used as a bargaining tool between member states, which pursue national goals in crisis scenarios up to dangerous levels of political brinkmanship.

Today, differentiated integration is the rule rather than the exception in the EU.

To emerge from the current impasse, a strategic reflection should be built on a new understanding of differentiated integration, based on flexible differentiation.

1. This idea is embodied in Cooper, Robert. *The Postmodern State and the World Order*, London: DEMOS (1996).

ments was that the euro should benefit national goals, both in Berlin and Athens. Renationalisation of the priorities of EU member states reached a new landmark with the refugee crisis, which revealed notable differences between eastern and western Europe and between states and EU institutions.

Brexit was the just latest nail in the coffin for ever closer union, albeit a highly symbolic one. Since the Brexit referendum, for the first time the EU has become a project that both enlarges and shrinks simultaneously; that deepens integration in some policy areas and risk disintegration in others. The UK's exit from the EU is certainly to blame, but the disintegration dynamics are present in many other national landscapes, with Euroscepticism, populism and political disaffection on the rise.

But shared though the roots of these developments are, Brexit should be considered a turning point for the future of the European project. Leaders are right to point out that treaty change and the subsequent national referendums would be a mistake today, since any attempt at comprehensive reform would probably face fierce opposition in the polls. Even if the need for changing the EU structures is outstanding, new referendums would be an opportunity for expressing disarray and disaffection towards national and European politics.

Yet as dangerous as triggering a process of treaty change is the belief that a few "quick fixes" will do to reform the EU

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project. The challenge is simply too big for that, given the symbolic blow to ever closer union that the British departure represents. The following sections will analyse the shape of the reform proposals put forward so far and the ideas that could be part of a process of strategic reflection for the EU's institutional reform, moving from the logic of ever closer integration to one of flexible differentiation.

Shapes of a union: current responses to the EU crises

Back to the classics: "more Europe, better Europe"

The first response to the EU's crises has been to go back to the idea that the union makes progress through crisis. EU member states always struggle for their own interests, but they end up promoting the ties that bind in a complex international environment, trumping national divergences.² In this logic "more Europe" is the way to strengthen European integration and "better Europe" is the refining mechanism for the EU's institutional shortcomings. But classic recipes rarely work in times of unprecedented crisis, either nation-

ally or continentally. "More Europe" is unlikely to provide a solution to the democratic malaise and anti-establishment feelings in many national landscapes. And "better Europe" will not work either if it does not address the fundamental legitimacy problems at EU level, where integration is perceived as an excessively top-down process.

However, an important set of responses to the recent EU crises has brought back the idea of more centralised decision-making as a way forward. The latest phases of the **Five Presidents' Report** necessitate the setting up of more centralised structures and supranational policies to build a functional economic union. The relocation scheme put forward by Jean-Claude Juncker and later ignored by member states was built on the central role of the Commission in shaping and orchestrating national responses to the refugee crisis. And Brexit was seen as an opportunity to speed up European integration, including in the field of security and defence, by removing the pressure from an awkward partner and renewing calls for the establishment of a European army.

The European Commission and the European Parliament have become the driving forces of the "integration through crisis" method. But member states have not followed and the EU still needs to deliver on the reinforcement of the Economic and Monetary Union, the reform of Schengen and the post-Brexit architecture. Particularly enlightening in this regard is the discussion on the basis of two somehow contradictory resolutions made by the Commission on Constitutional Affairs of the European Parliament (AFCO) on the way forward for EU integration.

On the one hand, a **report** presented by Guy Verhofstadt (a whole-hearted Europeanist) "on possible evolutions and adjustments of the current institutional set up of the European Union" suggests the setting up of a "constituent process" on the occasion of the 60th anniversary of the Treaty of Rome. His idea is to amend the existing treaty, to fully reform the union and to implement measures for "more democracy, transparency and accountability", "new economic governance" and stronger EU foreign policy, among other proposals.

This maximalist approach is in opposition to Elmar Brok's **report** on "improving the functioning of the European Union building on the potential of the Lisbon Treaty", which fine-tunes the institutional architecture of the EU, taking into account the difficulty of fully-fledged reform in times of rising Euroscepticism. The report argues that the Lisbon Treaty already puts forward a series of measures that could strengthen European integration in almost any policy area without the need for treaty change. It is only a matter of implementing provisions such as the appointment of a European finance minister, establishing fiscal capacity within the eurozone, increasing the use of qualified majority voting as against unanimity in decision-making, establishing a common asylum and immigration policy and making progress on common defence. The draft report nonetheless falls within the "more and better Europe" approach, noting that "intergovernmental solutions should not exist" and that the "Community method is superior to the intergovernmental method".

2. This idea is to be found in: Zielonka, Jan, *Is the EU Doomed?*, Cambridge: Polity (2014).

The practical union

Advocates of the “practical” union share with Elmar Brok the need to focus first on what could work, deliver on policy proposals and then, if necessary, reform the EU’s institutional framework. Critics, on the contrary, argue that this translates into muddling through excessively turbulent times. Many of the recent proposals emanating from Brussels and European capitals have followed the practical union logic, which underlines the need to build a functional EU on the one hand, and a project that delivers on the other. Many of these proposals are based on the reinforcement of a political centre, embodied by Germany (and France to an extent), which acts as an engine for policy proposals.

The response to the euro crisis has been characterised by a series of practical steps to keep the eurozone together under strong German leadership. These proposals have not been aimed at altering the foundations of the austerity programmes or the existence of a monetary union without fully-fledged economic and fiscal capacity. The response to the refugee crisis has also witnessed an attempt to halt the flow of refugees via the signature of an EU-Turkey agreement, very much supported by Germany. The discussions of a joint immigration and asylum policy and a comprehensive reform of Schengen have also been shelved.

Yet it is mostly in the area of the post-Brexit EU that European leaders have prioritised the practical union approach. Following the British referendum, the EU has put forward a series of initiatives to reinforce certain EU policies that are believed to be at the centre of popular and leaders’ preoccupations: the fight against terrorism and the insecurity in the bordering regions. The **Bratislava Summit** gave little indication about the shape of the post-Brexit EU and focused instead on tackling the refugee crisis via the reinforced security of external borders, the implementation of the EU-Turkey agreement, intensifying cooperation on information-sharing to prevent terrorism and moving forward on defence cooperation through the Implementation Plan on Security and Defence (the most promising area of implementation of the **EU Global Strategy** so far). No mention was made of any fully-fledged institutional reform beyond a generic statement on the need to move forward on “a common future” for the EU-27 ahead of the 60th anniversary of the Treaty of Rome.

The results of Bratislava, together with the **Implementation Plan on Security and Defence** have been closely related to the work of a “core EU” formed by Germany and France, whose foreign, defence and interior ministers have been working on joint papers, starting with Ayrault and Steinmeier’s **joint contribution**. In “a strong Europe in a world of uncertainties”, the two foreign ministers acknowledge that “neither a simple call for more Europe nor a phase of mere reflection can be an adequate answer”, so they advocate a focus “on essentials and on meeting the concrete expectations of our citizens”. Their proposals included a European security compact, which provided the basis for the Bratislava declaration and roadmap.

However, there are problems associated with this approach to EU reform. The first is that the understanding of security (or at least the main concerns of European citizens) varies across nations. Crisis-ridden countries put more weight on unemployment and the economic situation than Germany or Denmark, where immigration **tops the list**. The second problem is that recipes based on deepening security and defence cooperation have been tried before and not much progress has been made on the use of Permanent Structured Cooperation, a joint military headquarters, intelligence-sharing mechanisms or the use of battlegroups, not to mention a joint EU army. The third is that focusing on a “practical union” will hardly address the institutional deficits provoking current dysfunctions in the economic union, the issues around immigration or stronger security and defence. There is thus a risk of making the whole process derail precisely due to a lack of ambition in tackling fundamental reforms.

The intergovernmental union

Whereas the practical union focuses on results, the “intergovernmental” EU focuses on the method. The academic literature has explored the move of EU integration towards what has been termed a “new intergovernmentalism”. This theory departs from the following “integration paradox”: since the Maastricht Treaty, member states have been willing to – and indeed have – expanded cooperation in an in-

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creasing number of policy domains, but they have done so without transferring further powers to supranational institutions and empowering the role of the European Council and the Council.³

There is abundant evidence that the euro crisis has reinforced the powers of member states in the European integration process, particularly those of creditor countries. The eurozone summits marginalised the European Commission in the management of the crisis, except for an insufficient Juncker Plan. Viktor Orbán and other central and eastern European states also became primary advocates of an intergovernmental solution to the refugee crisis. Vehemently opposing the Commission’s relocation scheme, they argued that asylum policies remain national competence, so there is no obligation to implement the agreements reached. Even worse, after approving a modified refugee relocation plan at the Council, Orbán stated that his negative vote (the decision was taken by QMV, not unanimity) gave him a green light to scrap the agreement. In this intergovernmental EU, other countries followed suit.

The bottom line of the current intergovernmental union is a shared feeling of transactional politics being lost. Trans-

3. Bickerton, Christopher, Hodson, Dermot and Puetter, Uwe, “The New Intergovernmentalism: European Integration in the Post-Maastricht Era”, *Journal of Common Market Studies*, (2015), 53(4): 703-722.

actional behaviours can be seen as a negotiating tool where concessions in one policy arena are perceived as a beneficial tactic for gaining support in another negotiation. The Common Foreign and Security Policy is an area where transactional politics have often been used as a negotiation tool, for instance by agreeing on common EU threats regardless of national threat perceptions, which necessarily vary depending on whether sitting in Estonia, France or Greece.

However, in a purely intergovernmental logic in which negotiating parties only seek to pursue national goals and where the current crises have eroded the sense of a shared destiny, transactional politics are replaced by a logic of “connecting vessels”. Crisis management negotiations are dominated by zero-sum dynamics, provoking recurrent spillovers from one negotiation portfolio to another. Negotiations are used as a bargaining tool between member states, which pursue national goals in crisis scenarios up to dangerous levels of political brinkmanship.

There is enough evidence of this. When European leaders were discussing the way out of the euro crisis, they came up with the Fiscal Compact and the European Stability Mechanism as ways to tackle the sovereign debt crisis. The euro-outs, most particularly the United Kingdom, prevented the adoption of these agreements under the current EU treaty, thus forcing the adoption of an international treaty instead.

Any attempt at comprehensive reform would probably face fierce opposition in the polls.

The Fiscal Compact became another differentiated integration project, to be incorporated into EU law at a later stage.

The absence of transactional politics in the negotiations of the eurozone crisis has been reproduced in other crisis affecting the EU. Greece threatened to veto the outcomes of the European Council of February 2016 at which the terms of a pact with the United Kingdom were being negotiated before the Brexit referendum unless more realistic solutions to the refugee crisis and the management of EU borders were agreed. For his part, the former Italian prime minister, Matteo Renzi, threatened in October 2016 to block the forthcoming budget negotiations if European countries did not abide by the commitment to accept more refugees.

As a consequence, the pitfalls of the classic approaches to more integration, and the practical and intergovernmental unions mean additional reflection is required by European leaders on the way forward for European integration along the lines of what could be termed a logic of flexible differentiation.

Towards a logic of flexible differentiation

When EU member states have found difficulties in moving forward together, they have often used differentiated integration as a way to overcome stalled negotiations or to negotiate a new

agreement after failing to ratify EU treaties.⁴ The literature on differentiated integration is as prolific as the number of areas in which EU states follow distinct integration paths. Today, differentiated integration is the rule rather than the exception in the EU, and it has been studied simultaneously under the labels of a “multi-speed Europe”, “enhanced cooperation”, a “Europe à la carte”, “variable geometries” “first-class/second-class EU” and “concentric circles”, to name but a few.⁵

However, differentiated integration has more often been used as a last resort solution than as a well-structured plan for building a more flexible Europe. Specifically, it has been used as a way to grant opt-outs and to prevent vetoes from non-willing member states.⁶ Today, the key assumption that differentiation enables integration to move forward is gone, since many countries do not share the same vision vis-à-vis the final destiny: “ever closer union” is shrinking back. As a consequence of the multiple crises affecting the EU, non-euro or Schengen members are not necessarily eager to join the first-class Europe, while the risk of EU disintegration after Brexit has increased and Eurosceptic movements are on the rise all over the EU. In other words, the traditional virtue of differentiated integration as a tool for subsequent stronger integration today meets multiple obstacles, even more so when the United Kingdom is willing to withdraw its membership altogether.

If unity on the European project is lacking and differentiated integration is showing its shortcomings, it is high time for the EU to overcome the current void in strategic vision. This is unlikely to happen in the short term, due to the elections looming in the Netherlands, France and Germany in 2017 and because the immediate reform of the treaties (either to make differentiated integration the rule or to introduce any other substantial changes to the EU integration model) has been ruled out by political leaders fearing negative results in referendums. But given that treaty reform is usually a long and cumbersome process, thorough discussions should start as soon as possible to make a flexible form of differentiated integration the model rather than the exception in EU integration. The political hurdles are today higher than ever, but the post-2017 political landscape might open a window of opportunity to move forward along the following lines.

The intergovernmental union will not work

EU leaders should start by acknowledging the limits of the intergovernmental union. The current intergovernmental logic reinforces the tendency among member states to look after their national interests and poses serious governance challenges in a union of 28 or 27 member states. If the UK

4. Von Ondarza, Nicolai, “Strengthening the Core or Splitting Europe? Prospects and Pitfalls of a Strategy of Differentiated Integration”, *SWP Research Paper 2*, Berlin: Stiftung Wissenschaft und Politik (2013).

5. See for instance: Stubb, Alexander C., “A Categorization of Differentiated Integration”, *Journal of Common Market Studies*, (1996) 34(2): 283-295; and Emmanouilidis, Janis A., “Conceptualizing a Differentiated Europe”, *ELIAMEP Policy Paper 10*, Athens: Hellenic Foundation for European and Foreign Policy (2008).

6. Pirozzi, Nicoletta and Tortola, Pier Domenico, “Negotiating the European Union’s Dilemmas: Proposals on Governing Europe”, *IAI Working Papers 16*, Rome: Istituto Affari Internazionali (2016).

prevented the adoption of the Fiscal Compact and the European Stability Mechanism under the EU framework, it is unlikely that more profound reforms such as the establishment of a fiscal union would not be subject to vetoes by other euro-outs. The same applies to the reform of the Schengen Area, where a common asylum policy would necessitate an enormous dose of transactional politics, which is absent today. Reform of the treaty is the ultimate example of the current EU “institutional trap”, according to which member states will always have the possibility of blocking major decisions as long as unanimity prevails.

However, the positive sight of the multiple European crises is their diversification: while southern European countries need Germany and other creditor countries to relax their approach to austerity policies, Germany needs the support of others to find long-lasting solutions to the refugee crisis and to move forward on defence cooperation. But while the diversification of the crises should benefit transactional politics, the EU’s current functioning is subject to the tendency of national governments to be trapped in the political discourse of Eurosceptic parties. Turning the EU into a regular international organisation where veto power remains a possibility will not solve the current governance problems or provide a long-lasting solution to the union’s multiple crises. A more intergovernmental union is just destined to be the victim of a paralysing intergovernmentalism.

A process of strategic reflection

Even if immediate steps towards treaty change are politically unfeasible, Brexit has triggered a debate about the need to reform the Lisbon Treaty. Some have argued that this might be necessary to bring the contents of the Fiscal Compact back to the framework of EU law and to pursue the recommendations of the Five Presidents’ Report.⁷ The legal services in Brussels are, at the same time, working to devise a simplified procedure for treaty revision to adapt to the void left by the UK when Brexit becomes a reality, which will involve the withdrawal of the UK’s members of the European Parliament, its commissioner and the restructuring of the voting rights at the Council, among other reforms. For these, treaty change might not be necessary, but it would certainly be required in case of a fully-fledged reform of the current integration methods.

For this to happen, EU leaders need to take into account the lengthy process that every treaty reform entails. When heads of state and government decided that the Treaty of Nice of 2000 would not suit the functioning of an enlarged EU, they decided to launch a reflection process to modify the EU’s legal and political structures. This process went through the establishment of the European Convention, which ended its work in 2003, and the rejection of the European Constitution in 2004. The Nice Treaty was not reformed until 2009, when the Lisbon Treaty came into force. All in all, there was almost

7. Fabbrini, Federico, “How Brexit Opens a Window of Opportunity for Treaty Reform in the EU”, *Spotlight Europe*, Berlin: Jacques Delors Institute and Bertelsmann Stiftung (2016).

a decade of reflection before any substantial change to the EU came into force.

If the French and Dutch “no” to the constitution were considered turning points for European integration, Brexit requires kick-starting a strategic reflection about the future steps and form of EU integration. The European Council needs to overcome its tendency to micromanage crises resolution mechanisms (as has been the case during the eurozone and refugee crises) and fulfil the role that the Lisbon Treaty provides for it as a strategic reflection body. If that is not sufficient, European leaders should reconsider the establishment of a second Convention for Europe on the occasion of the 60th anniversary of the Treaty of Rome in March 2017 to facilitate strategic thinking.

Combining flexibility and differentiation

To emerge from the current impasse, this strategic reflection should be built on a new understanding of differentiated integration, based on flexible differentiation. Flexibility should be based on the coexistence of various degrees of membership, where a core group of states would reinforce cooperation in economic, mobility or defence issues. Strong levels of institutionalisation would accompany deep integration in these policy domains.

A more flexible understanding of integration would need

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to contemplate as well new forms of membership, which could be based on a “continental partnership” for the UK but would also be open to other current non-EU members such as Ukraine or Turkey.⁸ This “flexibility across” states would delimit different circles of integration, but if a country wished to be part of the inner circle, it would have to conform to the core values attached to it. Outer circles could be based on softer degrees of cooperation with fewer strings attached and in line with other current economic partnerships. The logic of flexibility across would enable the EU to move beyond the current dichotomy between “full membership” and “no membership at all” and envisage multiple destinies for EU integration.

In addition to flexibility, differentiation should apply to the level of policy cooperation. In line with the current existence of reinforced cooperation, a certain number of member states might wish to go further in their cooperation in the fields of the monetary union or Schengen. Some willing states might want to consider setting-up a “mini-eurozone” or a “mini-Schengen”, where additional sovereignty on fiscal or asylum policies would be surrendered to central authorities. This “differentiation within” would enable going beyond the current Economic and Monetary Union and Schengen, reinforcing

8. Pissani-Ferry, Jean et al., “Europe after Brexit: A proposal for a continental partnership”, Bruegel (2016). Available here: <http://bruegel.org/2016/08/europe-after-brexit-a-proposal-for-a-continental-partnership/>.

ing cooperation in the inner circle of integration. Under this scheme, legitimacy and accountability would be at the centre of policymaking from day one.

This system of flexible differentiation might face fierce criticism due to its complexity. It can be argued that it is counter-intuitive because the union is too complex already. But it is not flexible enough. After Brexit and the economic and refugee crises, the EU has entered a phase in which the integration ambitions are strikingly different among member states. The response to such dynamics is unlikely to work under the one-size-fits-all logic of ever closer union or a paralysing intergovernmentalism. Circumstances are ripe for a fully-fledged reflection on how to combine flexibility and differentiation in the EU after Brexit.