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The Impact of Differentiation on EU Governance: Effectiveness, Sustainability and Accountability

*Nicoletta Pirozzi
and Matteo Bonomi*



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The Impact of Differentiation on EU Governance: Effectiveness, Sustainability and Accountability

Nicoletta Pirozzi and Matteo Bonomi

Abstract

This research paper aims to offer an innovative and comprehensive assessment of the impact of differentiation on EU governance. It addresses the organizational, constitutional and socio-political factors affecting differentiation and integration in the EU in order to assess the effectiveness, sustainability, accountability and legitimacy of differentiated arrangements within the EU and between the EU and participating third countries. The ultimate aim is to provide an overall appraisal of how much and what form of differentiation propels European integration forward – as a whole and for specific policy areas – and what kinds of differentiation should be avoided to prevent disintegration in the future. The empirical research shows that formal arrangements of differentiation are not only compatible with, but also conducive to a more effective, cohesive and democratic Union when they have a direct link to EU institutions, are established with clear objectives in line with EU core values, and are equipped with adequate mechanisms to ensure accountability and to connect ins and outs. On the contrary, excessive flexibility entailed in looser forms of differentiated cooperation that are established outside the EU Treaties are likely to produce fragmentation dynamics and ultimately jeopardise the EU's political unity and normative consistency.

Nicoletta Pirozzi is Head of the “EU, Politics and Institutions” programme and Institutional Relations Manager at the Istituto Affari Internazionali (IAI), Scientific Coordinator of EU IDEA project and Associate of European Governance and Politics Programme at the European University Institute (EUI). Matteo Bonomi is Research Fellow at the Istituto Affari Internazionali (IAI) and member of the Balkans in Europe Policy Advisory Group (BiEPAG). The authors would like to thank Janis Emmanouilidis (EPC), Ian Bond (CER) and Sandra Lavenex (University of Geneva) for their thoughtful comments and efforts towards improving this paper.

Introduction

A certain level of differentiation has always marked the EU's system of governance, with a view to accommodating diversity as the Union's competences have been enhanced and its membership has grown. Once differentiation is a reality, it tends to persist. That has been the case with the Economic and Monetary Union (EMU) and Schengen. Subsequent crises have led to the development of new kinds of differentiation. Brexit is a unique example of differentiation by disintegration. It is therefore crucial to develop a research approach that adopts a broad definition of differentiation and is able to evaluate fully the impact of different forms of differentiation on the functioning, resilience and legitimacy of the integration process.

In this contribution, we aim to offer an innovative and comprehensive assessment of the impact of differentiation on EU governance. This assessment encompasses the constitutional, social, local and external aspects of differentiation, and addresses different degrees and types of differentiation according to both their legal and organizational dimensions, including accountability mechanisms in differentiated integration. The final aim is to provide an overall appraisal of *how much* and *what form* of differentiation propels European integration forward – as a whole and for specific policy areas – and what kinds of differentiation should be avoided to prevent disintegration in future.

For our analysis, we rely on an impressive amount of empirical research conducted in the framework of the EU IDEA – Integration and Differentiation for Effectiveness and Accountability project funded by the European Commission under the Horizon 2020 programme, and on the contributions collected in this special issue. In particular, we look at differentiation both as policy practice in the different sectors – EMU and the internal market; foreign, security and defence policy; and justice and home affairs, including migration – and as a policy choice based on the preferences of policy makers and citizens in EU member states that participate in a differentiated policy or institution, in EU member states that have opted out, and in differentiated non-member states (i.e., non-EU members that have opted in).

In the first part, we deconstruct differentiation and discuss three factors to be considered beyond the traditional legalistic approach: the organizational factor, the constitutional factor and the socio-political factor. In the second part, we conduct a comparative analysis of current and prospective forms of differentiation implemented in the different policy areas based on three main criteria: effectiveness, sustainability and accountability/legitimacy. Finally, in the conclusion we identify some key elements to assess *how much* and *what form* of differentiation is *desirable* (introduces a useful degree of flexibility that facilitates policy making, policy implementation and problem solving), *sustainable* (preserves the homogeneity required to avoid disintegration) and *legitimate* (is recognized as appropriate by EU citizens, member states and affected third partners).

1. Deconstructing differentiation: Factors that affect its impact on EU governance

Previous scholarship has made significant progress in theorizing and operationalizing the legal dimension of differentiated integration (Holzinger and Schimmelfennig 2012, Leuffen et al. 2013). In contrast, the organizational dimension of differentiation has received much less attention (Lavenex et al. 2009, Lavenex and Schimmelfennig 2009, Lavenex 2011). To provide a comprehensive assessment on the impact of differentiation on EU governance, we should go beyond the legalistic approach and enquire into the main factors affecting differentiation. To do so we should first address differentiation at the level of organizational involvement in EU governance and its interplay with legal commitments. Secondly, we will look at constitutional factors affecting differentiation dynamics, referring to foundational elements of EU constitutionalism. Lastly, we will take into consideration the socio-political factor, namely how preferences of policy makers and citizens affect integration and differentiation patterns.

1.1 The organizational factor

In this paper we use a broad definition of differentiation that refers to any modality of integration or cooperation that allows states (members of the European Union and non-members) and sub-state entities to work together in non-homogeneous and flexible ways (Lavenex and Križić 2019). This broad definition combines the attention of traditional approaches to the regulatory dimension of differentiation (Leuffen et al. 2013) with a focus on organizational aspects and the interplay between the two. Thus, such a definition allows for a comprehensive multi-dimensional approach that is key for assessing how the dynamics of differentiation impact on EU governance.

By the “regulatory dimension” of differentiation, we mean the traditional focus on the legal aspects of differentiation, which literally define who is bound by which policies and how (Lavenex and Križić 2019). In relation to the “organizational” aspects, we look at the procedural dimension of differentiation, namely who participates in the production and implementation of differentiated policies and how (Lavenex and Križić 2019).

From a regulatory point of view, different models of differentiation can be distinguished on the basis of the scope and quality of the legal act. The scope includes full participation, partial opt-out, selective opt-in and no participation. The quality ranges from the community method, which uses the ordinary legislative procedure (article 294 of the TFEU), to intergovernmental cooperation, where the European Council generally acts unanimously and the European Parliament has a purely consultative role, and transnational cooperation, under international law.



Traditional (regulatory) approaches do not grasp the different actors involved and the entirety of the process, however. Through the organizational dimension, by contrast, we can capture the non-homogenous participation of different actors (EU members, non-EU members, sub-national actors) in multiple institutional venues where EU-related policies are designed and implemented. The analysis thus includes different stages of the policy cycle, from policy shaping (agenda setting) and policy making (outcome) to policy implementation (output) and problem solving (impact). This cycle involves formal decision-making structures as well as secondary organizations involved in the preparatory or implementation phases, such as committees, policy networks, regulatory agencies and non-EU bodies.

The focus and the combination between the regulatory and the organizational dimensions of differentiation allow us to capture the various forms that differentiation takes in the EU context and their impact on governance. First, it allows us to account for the commonly held understanding of (horizontal) differentiation (Leuffen et al. 2013) which includes internal and external dimensions. Differentiation occurs when some EU members cooperate beyond the existing EU *acquis*, or partly opt out from it, or when non-EU members selectively join existing EU arrangements, which creates arrangements whose membership differs from formal EU membership.

Second, through this approach we can capture different actors involved in differentiation in the EU, which are not necessarily states but include various sub-state actors, such as regulators or local authorities, that are also involved in these processes. This could also include transnational networks of sub-national authorities (primarily cities and regions) that are part and parcel of Europe's system of multi-level governance, insofar as they participate in the EU's policy cycle at various stages and in various ways (Hooghe 1995, Perkmann 2007, Tortola 2013 and 2017, Tortola and Couperus 2020). Still, unlike what happens at the state level, where we usually find one main cooperation or integration arrangement per policy area, at the sub-national level several networks usually coexist within each policy area, creating multi-level differentiation.

Third, such an approach is open to a crucial, yet widely neglected, feature of differentiation, namely differentiated cooperation. Differentiated cooperation does not necessarily manifest in different levels of legal integration, but also takes place at an organizational level through non-homogeneous participation in the institutional venues where EU-related policies are designed and implemented, such as in the case of EU cooperation with third countries or informal cooperation of groups of member states in the foreign policy field.

Finally, the approach selected allows us to detect incongruence caused by differentiation, among those who take decisions and those affected by them (Fossum 2015, Herrmann and Leuffen 2020, Nguyen 2020), that leads to a mismatch between decision makers and decision takers. Decision makers in differentiated policy sectors can either represent more citizens than those affected by the policy in question (internal differentiation) or represent fewer citizens than those affected (external differentiation). Thus, we should assess governance arrangements and types of accountability to detect how they vary across differentiated policies and

institutions. The types of accountability can include democratic, legal, administrative, professional and social, based on accountability mechanisms that vary in terms of where (venues), when (stages of the policy cycle), by whom (actors) and how (rules) they are implemented.

1.2 The constitutional factor

Given that “united in diversity” is the overarching narrative of European constitutionalism, differentiation can be perceived either as a challenge to unity or as a tool for managing heterogeneity among member states, thus reconciling diversity, cohesion and unity.

Assessing whether differentiation can be a tool for integration – and for avoiding disintegration – requires an analysis of whether and how different forms of differentiation safeguard the core constitutional elements from which the EU and its member states cannot deviate without compromising the essence and functioning of the Union (De Witte et al. 2017).

Hence, we need to take into consideration two foundational elements of the EU’s constitutionalism, namely: (1) political unity, more specifically “the unity of its policies, laws and institutions; and to any prospect of it developing into a political community based on shared rights and obligations of membership” (Lord 2015: 784); and (2) legal uniformity, anchored to the *acquis communautaire*, which covers not only primary and secondary law, but also the “adherence to the aims of political, economic and monetary union and the administrative capacity to effectively apply and implement the *acquis*” (Council of the EU 2005: 7).

These essential elements regulate the relationship between the EU and its member states and among member states, which are engaged in the process of “creating an ever closer Union among the peoples of Europe” (Art. 1 TEU). As such, they constitute the building blocks of the EU’s common identity and citizenship.

Subsequent crises have posed a number of internal and external challenges to the political unity of the EU, which was intended to be a community based on shared rights and obligations. Most recently, winds of Euroscepticism and populism blowing through the 27 member states, concerns about the respect of rule of law in some member states, the health, economic and social consequences of the Covid-19 pandemic, the dramatic experience of Brexit as well as the secessionist tendencies of regions such as Catalonia have challenged the resilience of the EU project and undermined its relationship with candidate and partner countries.

The political option of differentiation has been implemented in the past to manage heterogeneity and accommodate diversity among member states, for example to make possible the Big Bang enlargement in 2004–2007 through (mainly temporary) exceptions or in reaction to the impact of the 2008 economic and financial crisis in the Euro area, most notably through additional differentiated integration arrangements in the EMU such as the Stability and Growth Pact and the Fiscal Compact. As analysed

by Tekin et al. (2019), if the narrative of political unity among elites has turned from a positive (yes, we can) to a negative legitimation discourse (yes, we must), political unity has remained the ultimate goal, thanks to the commitment of member states to an ever closer Union. In fact, reality has shown that shared rights and obligations for all members can only be partially achieved and often only through patterns of differentiated integration (Meissner and Tekin 2021).

As a result, differentiation has gradually become the ‘new normal’ in the EU’s process of integration. We cannot exclude that heterogeneity may increase in the EU as a consequence of current crises, thus reviving old proposals for further differentiation and giving rise to new ones. Based on previous experience and related literature, different forms of differentiation could help once more safeguard the constitutional diversity in the EU’s *sui generis* system (Tekin 2012), and thus preserve its political unity, or at least set boundaries to the amount of political disunity that the EU can tolerate.

Differentiation has also become a normal feature of EU law, while legal uniformity remains an ideal goal. Not only do primary and secondary law allow for derogations from the *acquis communautaire*, for example in the form of opt-outs or transitional arrangements for new member states; its uniform application is impeded both by the fact that national authorities and courts do not always apply it faithfully and correctly, and by the fact that the EU allows differential application, as in the case of directives¹ (De Witte 2017: 9-10). As a consequence, the principle of uniform application of EU law as defined by the Court of Justice in 1972 – rules of Community law being “fully applicable at the same time and with identical effects over the whole territory of the Community” (European Court of Justice 1972: para 8) – has clashed with the increasingly common practice of differentiation.

Several dilemmas persist relating to the nature and depth of differentiation that is compatible with the EU’s constitutional integrity. The Union’s integration system is based on the fundamental premise that member states share a set of core values on which the EU is founded, as defined in Art. 2 TEU, and envisages various mechanisms for the Union’s institutions to address potential breaches. A notable example is the rule of law, which is safeguarded through the provision of Art. 7 TEU,² but also through instruments such as the Rule of Law Mechanism³ and the new general regime of conditionality for the protection of the Union budget.⁴

1 On the basis of Art. 288 TFEU, directives can be transposed by the member states with the freedom to decide the “form and methods” of that transposition and further application.

2 In 2018, the European Commission and the European Parliament activated the rule of law mandate by triggering the procedure of Art. 7.1 TEU against Poland (European Commission 2018) and Hungary (European Parliament 2018), respectively.

3 The European Rule of Law Mechanism provides a process for an annual dialogue between the Commission, the Council and the European Parliament together with member states as well as national parliaments, civil society and other stakeholders on the rule of law. The Rule of Law Report is the foundation of this new process (see European Commission website: *Rule of Law Mechanism*, https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/rule-law-mechanism_en).

4 Entered into force on 1 January 2021, the conditionality mechanism is aimed at protecting the EU’s budget from breaches to the principles of the rule of law (see European Parliament and Council

We cannot exclude political demands for differentiation in the field of rule of law, since it is an area that relates to core state powers and policies (Genschel and Jachtenfuchs 2014). And in fact, we have witnessed a high level of heterogeneity in judicial governance, both internally among the member states and externally in relations to the candidate countries (Damjanovski et al. 2020: 20). But the EU's fundamental values cannot be compromised if we want to ensure the survival of the EU project. In the cases of Hungary and Poland, alternative conceptions and application of EU rules have put the rule of law under severe strain. Poland has gone so far as to question the primacy of EU law, when Poland's Constitutional Tribunal ruled in October 2021 that the country's constitution takes precedence over some EU laws (Wanat 2021).⁵

As argued by Damjanovski et al., this form of differentiation does not relate to the substantive (policy) aspects of member states' participation in EU integration such as in the cases of Schengen or EMU, but to its structural (systemic) aspects. If the divergence in the member states' conception of EU membership is not a new phenomenon, beyond a certain point its nature and depth might have a fundamental or even existential impact on the EU legal order and the functioning of the EU more generally (Damjanovski et al. 2020: 22).

1.3 The socio-political factor

Another paramount factor shaping EU governance is the level of support for, and opposition to, EU integration and differentiation among both national and local political elites, and the wider public. For a long time, differentiation was perceived rather negatively by European elites as an (unwanted) by-product of integration (Koenig 2015). Today, after the end of the years of permissive consensus (Hooghe and Marks 2009), differentiation and integration need to gain broad and explicit support from large socio-political segments of the European populace in order to be viable policy choices and, thus, a legitimate, effective and sustainable option for EU governance. In other terms, we should assess whether political actors and wider public regard differentiated integration as a suitable and effective alternative to homogeneous integration, which could foster integration in the EU (and wider Europe) over time.

Against this background, two recent datasets presented by Meissner and Tekin (2021) and Stahl (2021)⁶ have shown that today differentiated integration is considered

of the EU 2020).

⁵ In reaction to the escalating rule of law crisis in Poland, the European Parliament has repeatedly requested the European Commission to act on a potential suspension of EU funds for rule-of-law violators (see Vázquez Lázara and Lagodinsky 2021).

⁶ We can rely on the results of two recent datasets, presented by two papers, that aimed to look at national preferences among politicians and citizens. The first paper by Meissner and Tekin (2021) presents a new dataset based on interviews of national political elites in nine EU and non-EU countries (namely the Czech Republic, Finland, France, Germany, Italy, Norway, Turkey, the United Kingdom and Ukraine). The other paper by Stahl (2021) is based on a public opinion poll conducted between August



as an inevitable and pragmatic, if not desirable, way forward of integration among EU national politicians and citizens. Among interviewed political actors (Meissner and Tekin 2021: 6-7), the majority has pointed out that differentiated integration should not be exclusive and maintain an open character, allowing other countries to join later on. In addition, the degree of support for differentiation varies between policy areas, as political actors perceive differentiated integration as effective only in certain sectors, for instance in foreign, security and defence policy. Among EU 27 public opinions (Stahl 2021: 7), differentiated integration enjoys a support of a majority of citizens, although there is some deficit in understanding of the concept of differentiated integration across a wide range of countries and demographics (Stahl 2021: 7). Moreover, whereas we can already say that national attitudes seem to hold more positive perception of differentiation than in the past (Stahl 2021, Meissner and Tekin 2021), what remains crucial is to assess the nature (pro-European or Eurosceptic) and extent (across polices and countries) of such a positive attitude toward differentiation.

Indeed, the nature of this support for differentiated integration seems to vary a lot, as this (general) notion suggests different things to different people. If we look at the perception of differentiation among the public, supporters include both pro-European and Eurosceptic citizens, as differentiation seems to be perceived as a tool both for deepening integration and for opposing it (Stahl 2021: 7-8). This is often the case also among political elites, where a majority of both Europhile and Eurosceptic political actors support differentiation as a conscious choice in specific policy fields, even if for very different reasons (Meissner and Tekin 2021: 10). All this suggests that we should carefully check, case by case, how distinctive types of differentiation are understood by different people and generate different degrees of support or aversion to integration and differentiation.

Differentiation also produces an impact on European identity. Based on relevant literature, European identity is “heavily contingent on the ways in which national identities are discursively articulated” by political actors in EU member states and candidate countries (Aydın-Düzgit et al. 2020: 2-3). As claimed by Aydın-Düzgit et al., the impact of differentiated integration on European identity is perceived by member and candidate countries in terms of “preserving European identity (deepening), the dilution of European identity (disintegration)” and the territorial/geographic limits of European identity (widening)” (Aydın-Düzgit et al. 2020: 4), and this perception varies considerably depending on the policy area in question (Aydın-Düzgit et al. 2020: 28). Therefore, the assessment of the impact of differentiation on European identity should be based on both the national factor and the policy factor – by taking into consideration the articulation of the political discourse at national level and the perceived implications of differentiation in the different policy areas.

and September 2020 in the 27 EU member states and four non-EU states (Norway, Turkey, the United Kingdom and Ukraine).

2. Measuring the impact of differentiation on EU governance

The factors presented above are essential elements to be considered alongside the traditional regulatory dimension of differentiation in order to conduct a comparative analysis of the various forms of differentiation implemented in the different policy areas, with a view to measuring their overall impact on EU governance. Our comparative analysis aims to assess to what extent each form of differentiation is *effective* – it introduces a useful degree of flexibility that facilitates policy making, policy implementation and problem solving; *sustainable* – it preserves the homogeneity required to avoid disintegration; and *legitimate* – it is recognized by EU citizens, member states and affected third partners as appropriate.

2.1 Effectiveness

To define differentiation as effective we need to assess whether the degree of flexibility it introduces at both regulatory and organizational level facilitates policy making (output), policy implementation (outcome) and problem solving (impact). More explicitly, effectiveness entails generating policy outputs whose outcome is to solve policy problems (Lavenex and Križić 2019). We examine three policy areas that are particularly relevant for the functioning of the Union as a whole: economic governance; foreign, security and defence policy; and Justice and Home Affairs, including migration. This assessment is conducted against two main benchmarks: (1) relative policy change scenario – did differentiation produce an improvement compared to a hypothetical state of affairs without differentiation? and (2) ideal scenario – did differentiation constitute an appropriate or even ideal solution to the underlying policy issue? (Underdal 2002, Lavenex and Križić 2019). We also evaluate the effectiveness of differentiation both (1) within the various differentiated arrangements – does the differentiated arrangement provide an institutional design that fits its defined goals and objectives? and (2) in the Union as a whole – does differentiation provide an institutional arrangement that fits the EU's defined goals and objectives? (Emmanouilidis 2021: 20)

If we apply a combined regulatory-organizational approach to the study of differentiation in the EU as a whole, we find an incredibly varied array of forms of differentiation across policy sectors. In the EU economic policy field, it is possible to detect a number of differentiated arrangements with varying degrees of institutionalisation, including internal and external dimensions and involving the participation of national and sub-national actors (Eisl and Rubio 2021). In the foreign policy field, differentiation often occurs in the margins or outside EU institutional structures or legal frameworks, in the form of regional groupings, contact and lead groups, as well as various defence initiatives, while Treaty-based formal differentiated frameworks such as constructive abstention or enhanced cooperation have rarely been used due to the tight procedural requirements and the disconnect from policy practice (Grevi et al. 2020: 4). In the realm of defence policy, some forms of differentiation involving legally binding commitments have taken place in



accordance with Treaty provisions – notably the Permanent Structured Cooperation established in 2017 among 25 member states according to Art. 42.6 and Art. 46 TEU. In the field of border, asylum and police cooperation, differentiation started with strictly intergovernmental arrangements. The Lisbon Treaty incorporated all these cooperation arrangements into EU law, but Denmark was granted an opt-out for the entire area, Ireland and pre-Brexit UK were granted opt-outs with a opt-back-in clause on a case-by-case basis, while non-EU member states Norway, Iceland, Switzerland and Liechtenstein were accepted into the Schengen area. In addition, the EU developed an external dimension of border and migration policy through flexible cooperation with neighbouring countries of transit for migrants to the EU (Comte and Lavenex 2021).

The objectives of the different arrangements also vary from the implementation of common rules to the adoption and enforcement of joint decisions, from the exchange of information to the promotion of mutual learning on how to address a common problem (Eisl and Rubio 2021).

The hypothesis formulated by Lavenex and Križić (2019) is that more stringent institutional frameworks should lead to better policy performance, based on the assumption that they are more likely to ensure members' compliance with agreed rules. If we look at the effectiveness of various differentiation arrangements in terms of policy outputs and policy outcome, this hypothesis holds true for Treaty-based cooperation schemes among states in Community policy areas, both internal such as in the cases of the Banking Union, and internal/external such as the European Economic Area and the Energy Community (Mack 2020, Eisl 2020, Franza et al. 2020). However, the effectiveness of formal differentiated arrangements in intergovernmental EU policy areas such as diplomacy, defence and migration is negatively affected by the lack of sanctioning mechanisms and by a culture of non-compliance, for example in implementation of the obligations deriving from Permanent Structured Cooperation and EU asylum legislation (Biscop 2019: 7, Comte 2020). In the case of Justice and Home Affairs, differentiation was spurred by mainly intergovernmental arrangements, reflecting the preferences and sensibilities of the member states. Differentiation was however accompanied by a parallel process of de-differentiation thanks to the partial transfer of responsibility to EU institutions, which delivered new policy outputs in terms of harmonization and the creation of new agencies and instruments to manage the area. The result is a mix of differentiation and de-differentiation that has proved fragile in the light of mounting problem pressure, as documented by the crisis of the Common European Asylum System (Comte and Lavenex 2021).

In the foreign policy field, informal differentiation arrangements outside the EU Treaties, such as lead groups, have allowed restricted numbers of member states to circumvent the shortcomings of unanimity-based decision making in EU foreign policy by joining forces and enabling a European response to specific issues (Siddi et al. 2021). When we look at external differentiation in foreign policy, the degree of institutionalization of the relationship is not always as important as other factors, such as policy alignment. Turkey, for example, is formally a candidate country, but is far from EU positions on foreign policy matters, while the UK has no institutionalized

relationship with the EU in foreign and security policy matters, but remains very important and contributes to the effectiveness of Western policy in key international contexts (Aydın-Düzgüt et al. 2020: 14, Alcaro and Siddi 2020).

Also, forms of sub-national differentiated cooperation such as the Covenant of Mayors and similar networks, which are primarily focused on promoting best practices and policy learning, seem to be better served by more informal arrangements that favour an inclusive and open-ended approach to membership (Tortola and Couperus 2020).

While we can conclude that various forms of differentiation are likely to produce a relative improvement in terms of policy making and implementation, their effectiveness is more contested if we take a problem-solving approach and evaluate the overall impact of differentiation schemes in providing a solution for specific policy issues. In particular, we find that formal differentiation arrangements such as those introduced and/or reformed in the early 2010s, during or in the aftermath of the economic and financial crisis, ultimately strengthened the functioning of the EMU and/or reduced its vulnerabilities, thus making the Union more effective in its policy making and less vulnerable to future crises (Pilati and De Angelis 2020: 18). However, we are still far from an ideal situation, since the introduction of policy novelties led to political backlash in some countries, e.g., against unconventional monetary policy, fiscal constraints and conditions on financial assistance, while political cohesion and economic coordination are still threatened today by the aftershocks/long-term effects of the crisis (Pilati and De Angelis 2020: 19). As for differentiated cooperation arrangements in the field of foreign policy, such as the lead groups on Iran (E3 between German, France and the UK) and Ukraine (the Normandy format between France and Germany), the engagement of larger EU member states in major international crises has sometimes led to positive policy change but did not provide an adequate or ideal solution to the issues at stake (Siddi et al. 2021). As far as border, asylum and police cooperation is concerned, the differentiation arrangements have enabled the abolition of internal border controls and the creation of a borderless European Single Market. However, the unilateral reintroduction of border controls in the Schengen area – first in reaction to crises in Libya and Syria, and more recently in response to the Covid-19 pandemic – shows the limits of what has been agreed. In addition, the EU has also failed to find political agreement to reform the Dublin asylum system and increasingly relied on ambiguous external differentiation arrangements with third countries in the management of migration (Comte and Lavenex 2021).

Empirical research conducted in different EU policy fields suggests that there is no one-size-fits-all solution that would make differentiation effective and shows the importance of having an institutional set-up that is adequate for the identified objectives (Eisl and Rubio 2021). While more stringent institutional frameworks are suited for Treaty-based differentiation schemes among states in Community policy areas, looser forms of differentiated cooperation seem to better serve the objectives of intergovernmental EU policy areas, including in the external dimension, as well as mechanisms involving sub-national actors.

In the case of more informal differentiated cooperation, it was found that the positive impact was stronger when cooperation adhered to common European values and

identity (as expressed in EU policy discourse), thus revealing the importance of the constitutional factor, and when it was built on long-established EU positions. The establishment of an institutional link with relevant EU decision-making bodies would ensure congruence with EU positions. The Iran nuclear deal offers a good example: the link in this case was established through the association between the E3 and the office of the HR/VP. The HR/VP in turn ensured that informal differentiated cooperation fed into the agenda of the Foreign Affairs Council and European Council. Cooperation with (and the opposition of) major powers such as the US has also been an important driver for (or challenge to) effectiveness (Siddi et al. 2021).

Another finding is that the effectiveness of differentiation arrangements depends on their adaptability over time (Eisl and Rubio 2021). This is the case for third-country access to the Single Market, due to the constantly developing EU regulatory environment and the need to adapt objectives and instruments to evolving circumstances. Those agreements that do not facilitate dynamic adjustments, as is the case of the EU-Swiss agreement, tend to be ineffective (Eisl 2020). The Trade and Cooperation Agreement (TCA) between the EU and the UK “provides an in-built dynamism in form of several grace periods, transitional periods and reviews of (part of) the Agreement” (Eisl 2020: 8).⁷ However, whether these technical mechanisms are able to ensure effectiveness, or even avoid collapse of part of the current arrangement, in a highly politicized context such as the one characterising EU–UK relations remains to be tested (Wachowiak and Zuleeg 2021).

2.2 Sustainability

Sustainability is addressed as a benchmark to identify the scope and form of heterogeneity that is required to make differentiation a tool for integration (internal and external) rather than disintegration. Sustainability of differentiation should be measured with reference both to a single differentiated policy or institution, and to its compatibility with the resilience of overarching EU governance. How sustainable particular examples of differentiation might be is particularly linked to the *constitutional criteria*, namely the objectives of the commitment and their compatibility with the core constitutional elements of an ever closer Union. Possible variations of sustainability are connected to *regulatory criteria*, namely the scope of the commitments, their legal quality and the extent of legal commitment; and *organisational criteria*, namely the existence of relevant bodies at different levels of governance which are in charge of different stages of the policy cycle, from agenda setting to policy evaluation.

In sectors where member states’ practices are highly heterogeneous, such as migration and asylum, differentiation may represent the only available option to start cooperation (Comte 2020).

7 This includes a general review of the Agreement after five years, a review of the fisheries provisions four years after the end of the adjustment period and the possibility for either party to request a review of the deal’s trade provisions after four years (TCA, Art. 776, 510 and 411). See Wachowiak and Zuleeg (2021).

As argued by Eisl and Rubio (2021), empirical analysis has shown that most differentiated integration arrangements tend to persist over time once they are created, and the EU is more likely to react to crises through path-dependent and incremental reforms. In particular in those areas where differentiated integration is a reality, such as the EMU and Schengen, radical shifts towards further integration or complete disintegration are unlikely, while the reaction to crises has usually been more – or a different type of – differentiation. Many recent studies have also taken the stance that differentiated integration in EU foreign policy is likely to further increase in the near future (Bassiri Tabrizi 2018, Siddi et al. 2021).

However, there are also risks of disintegration attached to differentiation, both internal and external. In fact, an over-use of flexibility can result in fragmentation among members and between members and non-members, thus jeopardising political unity in the EU, as well as producing a negative impact on the integrity of the EU's internal system of law.

What happened with the Schengen system in connection with recent crises is a case in point. Schengen's flexibility allows members to temporarily reintroduce border controls in the event of a serious threat to public policy and internal security. This provision has been used in a continuously extended and uncoordinated way since the migration governance crisis of 2015–2016 and following the outbreak of Covid-19, thus overstressing Schengen's flexibility. Temporary border checks have been prolonged by member states by shifting from one legal basis to the other, often with insufficient justification, with disruptive consequences at the intra-Schengen level and for the entire EU. In fact, they both hampered the proper functioning of the Schengen system and led to instances of infringement of the principle of non-discrimination between EU citizens and regions, thus creating the risk of an erosion of the *acquis* in the long term (De Somer et al. 2020).

If we look at the field of external migration policy, since 2015–2016 we have assisted to the proliferation of differentiated cooperation frameworks with third countries aimed at reducing migratory pressure at the EU external borders. In particular, the EU and its member states have increasingly resorted to informal differentiation mechanisms – based on non-binding agreements and involving a multitude of actors in intergovernmental and trans-governmental venues – rather than legally binding cooperation sustained by supranational procedures and checks and balances (Okyay et al. 2020). This has resulted in the reduction of the EU's internal legal standards. For example, countries have watered down the criteria for determining a country as safe in the asylum procedures in order to justify cooperation with countries that have lower human rights safeguards such as Libya, Morocco, Turkey and the Western Balkans (Okyay et al. 2020). Moreover, the fact that differentiation arrangements such as the EU-Turkey deal or informal cooperation with Libya are concluded by an unidentified set of actors as explicitly non-binding instruments also make them non-traceable to an EU institution and therefore impossible to adjudicate before the Court of Justice, thus circumventing the EU's rule-of-law standards in external cooperation (Okyay et al. 2020).



As shown by the cases above, differentiation *per se* does not jeopardise EU political unity and normative consistency, and hence the internal dimension of European integration. However, the increasing resort to policies associated with intergovernmental venues, soft cooperation mechanisms and informal instruments of differentiation raises significant constitutional challenges, creating fragmentation, hampering judicial oversight and eroding human rights safeguards.

The connection of arrangements of differentiated cooperation with the EU institutional framework has been shown to mitigate the risks of fragmentation linked to flexibility, and to trigger in the long run a process of convergence and de-differentiation, as in the case of the European asylum system, where as early as the 1990s participating states started to transfer responsibility to European institutions, harmonize standards and build new auxiliary agencies (Comte 2020).

The involvement of EU institutions in differentiation arrangements is also instrumental in providing coherence of various differentiated formats with shared EU goals and decisions. In the case of Treaty-based differentiation arrangements, specific provisions identify the role and mandate of EU institutions. When intergovernmental differentiation initiatives are established outside the EU Treaties, EU institutional involvement can be ensured through reviewing and monitoring powers, as in the case of the European Commission for the Fiscal Compact, consultation and cooperation mechanisms, as in the case of the High Representative in EU foreign policy lead groups, or by ensuring oversight by the European courts as well as the European Parliament, as in the case of external migration policy.

Moreover, empirical research has shown that one condition for ensuring the sustainability of differentiated arrangements in terms of impact on overall EU governance is to include mechanisms that mitigate potential negative side-effects on non-participating and third countries (Eisl and Rubio 2021). These mechanisms can take the form of: provisions to refrain from discriminatory actions against any – participating or non-participating – member state; or voting procedures for important decisions that involve non-participating member states; or legal frameworks that facilitate the admission of non-participating member states. In the case of the Banking Union, mechanisms such as the unity-protection provisions of the Single Resolution Mechanism and the Single Supervisory Mechanism or the double majority voting of the European Banking Agency prevented disintegration risks in the Single Market and helped to generate centripetal forces at the EU level. In fact, they were instrumental in convincing Croatia and Bulgaria to join and in making Denmark and Sweden consider possible membership (Mack 2020).

Brexit deserves to be treated as a special case, representing a unique instance of differentiation by disintegration that raised questions about the core principles of EU membership as well as what it means to be in or out (Wachowiak and Zuleeg 2021). The red lines imposed by the EU to guarantee the indivisibility of the four freedoms in the Trade and Cooperation Agreement (TCA) and the Northern Ireland Protocol have preserved the integrity of the Single Market. However, it still remains to be seen if the complex institutional framework and the binding enforcement and dispute settlement mechanisms introduced to manage the relationship will be able to

mitigate political and economic disruption in the face of new crises.⁸ For sectors not included in the TCA such as foreign, security and defence policy, alignment between UK and EU policies might be favoured by the creation of institutional mechanisms allowing the participation of the UK in shaping – but not making – EU decisions, but there is no sign at this stage that the UK itself wants such a relationship (Bond 2020).

The impact of Brexit on internal and external differentiation, and EU governance overall, is a subject of ongoing debate and research. It is too simplistic to conclude that the opt-outs granted to the UK either paved the way to disintegration or were not enough to accommodate divergence (Wachowiak and Zuleeg 2021). At the same time, while Brexit seems to have triggered centripetal forces in the EU, for example in the field of economic governance through the adoption of the Next Generation EU and in the field of defence with the launch of Permanent Structured Cooperation, its enabling effect for further integration should not be overstated. In terms of external differentiation, Brexit 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). Overall, Brexit seems to have reinforced the assumption that differentiation can help accommodate divergence as long as it does not involve the core elements of EU membership such as the integrity of the EU's system of law and judicial oversight, as well as its founding principles as laid out in Art. 2 TEU.

2.3 Legitimacy and democratic accountability

Accountability can be defined as “a relationship between an actor and a forum, in which the actor has an obligation to explain and to justify his or her conduct, the forum can pose questions and pass judgement, and the actor may face consequences” (Bovens 2007: 450). Closely related to the notion of accountability, and partially depending on it, is the notion of legitimacy. Following Tallberg and Zürn (2019: 585), legitimacy is defined as the “beliefs within a given constituency or other relevant audience that a political institution's exercise of authority is appropriate”. Legitimacy belief depends on several factors, including the procedural standards in decision-making processes and the authority of an institution (Tallberg and Zürn 2019). For supranational institutions such as the EU, the recognition of the authority of an institution is strictly tied to both its capacity to deliver effective problem solving and citizens' general confidence in the supranational institution, thus its socio-political legitimacy (Dellmuth and Tallberg 2015).

If we take into consideration the organizational dimension, it is clear how differentiation challenges both accountability and legitimacy of EU governance, as it creates incongruences between those who take decisions and those who are affected by them (Fossum 2015, Herrmann and Leuffen 2020). Indeed, depending on the format of differentiation, citizens and governments might have only marginal or no control over policies that affect them. In the EU economic policy field, for

8 The TCA institutional framework includes a Partnership Council co-chaired at the ministerial level (EU Commissioner and UK Minister) and a plethora of committees and working groups (Wachowiak and Zuleeg 2021).



instance, we can note a high degree of variation with a number of differentiation formats. In the EMU, the European Parliament represents more citizens than those who are directly affected by eurozone measures, whereas the Eurogroup and Euro summits exclude the government representatives of those member states that may be indirectly affected by the decisions (Nguyen 2020).

This incongruence between the authors and subjects of a political decision is also present in external differentiation in the economic field, where different external agreements with third countries grant access to the Single Market, and thus impose regulatory alignment with EU rules on those countries. Nevertheless, these various external economic differentiation regimes include a set of accountability mechanisms and procedures, such as joint parliamentary committees that can monitor and require information. Among non-EU countries participating in the Single Market, only members of the European Economic Area can participate in the decision-shaping process through agenda setting and policy formulation, with the exception of decision-making (Eisl 2020, Lavenex and Križić 2019). Moreover, a number of additional accountability mechanisms have been established in this policy field to complement democratic accountability. For instance, the European Central Bank, in its role of managing the euro and implementing monetary policy, has only limited accountability to the European Parliament. However, this is supplemented by a narrow specification of the institution's mandate by Article 282 TFEU and thus by the scrutiny of judicial review (Dawson et al. 2019: 77).

During the last decade, we have seen a proliferation of new governance arrangements outside the EU Treaties, which have exacerbated problems of accountability. Indeed, the eurozone crisis led to a strengthening of European executive powers, meaning the European Council, the Euro summit and the Eurogroup, and the adoption of measures outside the EU legal framework, and thus without the scrutiny of the European Parliament and European Court of Justice. Examples of this are the European Stability Mechanism, where control is provided through the administrative accountability of the Board of Auditors (Nguyen 2020, Mack 2020), or the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (Papadopoulos 2021, Nguyen 2020).

Still, the legitimacy of these emergency measures, introduced in the aftermath of the financial and economic crisis, also depends on their effectiveness and the wider socio-political perception by EU citizens. Whereas these measures have reduced EU vulnerabilities, making the Union more effective in facing future crises (Pilati and De Angelis 2020: 18), perceptions of them vary considerably along North-South and eurozone membership divides. Citizens from Northern member states are less supportive of deeper economic integration than those from Southern countries, although the latter are nevertheless more sceptical of the benefits of the euro (Stahl 2021: 11-12).⁹ At the same time, citizens of countries outside the eurozone are more sceptical about the potential benefits of the euro, although there is a significant

9 Whereas a relative overall majority of 49 per cent of EU citizens supports more economic integration, populations in Southern European member states are far more likely to support further economic integration than those in Northern countries. This suggests an association between the notion of deeper economic integration and the idea of financial solidarity (Stahl 2021: 11).

variation among countries (Stahl 2021: 11). Sometimes policy makers from non-eurozone members even express fears that further institutionalization of the EMU could push non-eurozone countries to the periphery of European integration (Meissner and Tekin 2021: 8, 12). All these points create different constraints that should be carefully taken into consideration when evaluating the impact of differentiation on EU governance.

Turning to differentiated cooperation in the intergovernmental area of foreign, security and defence policy, differentiation has typically taken place informally through informal groups of member states leading EU foreign policy (Grevi et al. 2020, Koutrakos 2017, Delreux and Keukeleire 2017), thus challenging the accountability and legitimacy of these differentiated arrangements. Siddi et al. (2021) have argued that, while missing formal accountability mechanisms, informal groups of member states have usually had a (relatively) positive impact on the legitimacy of EU foreign policy making. This is because they spurred the Union into action on specific issues by generating consensus, especially when their initiatives have been in line with EU values and identity. Nevertheless, there are clear limits to the accountability of these differentiated groups steering EU foreign policy. Indeed, they risk creating exclusive formats, limiting access to information and participation in policy planning and policy making by the other EU member states. A key element in mitigating these risks is the establishment of connections to the formal EU foreign and security policy structures, for example through the participation of the office of the EU HR/VP in various differentiation formats, ensuring some level of alignment to the EU's common values and established common positions (Siddi et al. 2021). At the same time, the greatest risk for the EU's common foreign, security and defence policy seems to be inaction. Only 10 per cent of EU citizens see a national response to international crises as their favourite option. By contrast, 30 per cent would prefer an EU response to international crisis, 17 per cent would favour cooperation among selected countries or an international coalition, 16 per cent cooperation within NATO and 13 per cent would like their country to act within the UN framework. Citizens from smaller EU member states seem to be particularly supportive of a European response to international crises; citizens in Central-Eastern European and Baltic countries are more supportive of NATO response; and UN is favoured in Sweden (Stahl 2021: 18-19).

Another case where legitimacy has been mainly a function of effectiveness is EU differentiation in border, asylum and police cooperation, as argued by Comte and Lavenex (2021). Insofar as differentiation has proved effective and has succeeded in abolishing internal border controls and integrating the related cooperation in EU structures, it has been perceived as effective and legitimate. The free movement of people still enjoys great support from EU citizens (European Commission 2020). But growing external migration challenges and mounting politicization have undermined the existing arrangements, ushering in disintegration tendencies. In a recent survey among EU 27 citizens, a relative majority of 39 per cent declared that they strongly or somewhat supported their country's exit from the Schengen area (Stahl 2021: 14-15). Despite almost two decades of successful policies in this area, limits to border, asylum and police cooperation have emerged. In particular, the Treaty of Lisbon finally brought EU Justice and Home Affairs within the standard EU legal framework,



so that the ordinary rules on decision-making and jurisdiction of the Court of Justice now largely apply to this area (Peers 2011). However, lack of compliance by the member states, together with increasing difficulties in reforming the system, have spurred a sense of crisis over both the effectiveness and legitimacy of cooperation. Neither the European Parliament, nor the national parliaments and governments, have full control. That undermines both its effectiveness and legitimacy, and confuses citizens who have a limited understanding of these differentiated arrangements (Stahl 2021: 14). As a consequence, the EU has largely externalized its management of migratory challenges through a number of deals with third countries designed to help reduce pressure at EU external borders. This temporary solution came at a high price, however. As we noted in the previous section, these deals downgrade EU protection standards. They do not respect the criteria for recognition as a “safe third country” set out in the EU’s Asylum Procedures Directive (European Parliament and Council of the EU 2013); and they are not subject to the scrutiny of the European Parliament and European Court of Justice (Okyay et al. 2020).

Finally, in the coming years, we should expect to see a rise in demand for tailor-made approaches to external differentiation, which could pose both opportunities and risks for EU governance. Indeed, both citizens and political representatives in third countries diverge greatly in their preferences for the scope and content of cooperation with the EU (Stahl 2021, Meissner and Tekin 2021). Among the selected countries, only Ukrainian citizens were in favour of closer ties with the EU in general, while citizens of Norway, the UK and Turkey were more divided in their level of support for their countries’ cooperation with the EU. Trade is generally considered to be the most beneficial area of cooperation, followed by human rights and democracy and security and defence policy (Stahl 2021: 24-26).

Conclusion

The investigation above started from the assumption that the traditional regulatory approach – aimed at analysing who is bound by which policies and how – is not enough to evaluate fully the impact of differentiation on EU governance, and needs to be enriched with additional elements. The organizational element allows us to grasp the different forms, venues and actors of differentiation so as to determine who participates in the production and implementation of differentiated policies and how. The constitutional element connects the different forms of differentiation to the foundations of EU constitutionalism such as political unity (i.e., ever closer Union) and legal uniformity (i.e., rule of law). The socio-political element goes beyond the analysis of differentiation as a policy practice and qualifies it as a policy choice by investigating the preferences of policy makers and citizens directly or indirectly affected by it.

These elements have been used to conduct a comparative analysis of crucial sectors of EU integration, namely economic governance; foreign, security and defence policy; and justice and home affairs, including migration, to test different forms of differentiation. The case studies examined have confirmed that differentiation

is likely to produce a relative improvement in terms of policy making and policy implementation across policy sectors and for the EU overall, but its impact is more contested if we take a problem-solving approach and evaluate the results achieved against an ideal scenario. There is no one-size-fits-all solution in terms of institutional set-up, as more stringent or looser forms of differentiation can be best suited for different policy objectives. Clarity of objectives is therefore determinant in identifying the right form of governance. The degree of effectiveness can also be influenced by other factors, such as adherence to common European values and identity, and the adaptability of differentiation schemes to evolving circumstances and policy priorities.

Moreover, the assessment of various forms of differentiation against the criteria of sustainability has shown that excessive recourse to flexibility 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 particular Brexit has hardened the boundaries for external differentiated integration by making the EU more constitutionally sensitive to the risks of fragmentation. Formal differentiation arrangements based on binding agreements and institutional oversight are likely to produce a process of convergence within each policy sector and at the same time provide coherence among various differentiation formats and with EU goals and decisions. One criterion determining sustainability is the avoidance of negative effects on non-members, 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.

Finally, differentiation challenges both the accountability and the legitimacy of EU governance, as it creates incongruences between those who take decisions and those who are affected by them, and thus breaks the democratic identity between the author and subject of decision-making. This holds true for both internal and external differentiation. Against this background, the lack of direct democratic control can be mitigated inter alia 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 the governance cycle. In addition, the case studies clearly show a tendency toward the adoption of (differentiated) measures outside of the EU legal framework, or of completely informal differentiation, to deal with unforeseen circumstances and crises. These measures, while they may offer short-term solutions, can pose serious challenges to the accountability and legitimacy of such differentiated policies, undermining their socio-political acceptability and damaging intra-EU cohesion in the longer term. Maintaining their formal anchoring to the EU legal framework and ensuring scrutiny by EU institutions is fundamental if those differentiated arrangements are to remain legitimate and accountable. At the same time, formal accountability mechanisms need to be complemented by the willingness of European policy makers and citizens to accept certain differentiated EU policy arrangements as appropriate ways to solve problems.



Based on this assessment, it is possible to conclude that differentiation can be not only compatible with, but also conducive to a more effective, cohesive and democratic EU, if a number of conditions are met. In particular, we found that differentiation can foster EU integration when it is based on formal arrangements, preferably established within the framework of the Treaties, have clear objectives in line with EU's core values and shared interests, establish binding commitments for participating members, a direct link to the EU's institutional framework, information and participation procedures for non-members, and a mix of accountability mechanisms (democratic, judicial, administrative). On the contrary, looser form of differentiated cooperation established outside the EU Treaties should be avoided as they can lead to fragmentation and possibly disintegration dynamics, due to excessive flexibility when it comes to the identification of their ultimate goals, the establishment of the criteria for participation, and the adherence to the EU's system of values and norms, combined with the lack of EU institutional anchors, judicial oversight and democratic participation.

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EU Integration and Differentiation
for Effectiveness and Accountability

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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