

## Panel II - Constitutional evolution of the EU

### **Trends in differentiation of the EU Law and lessons for the future**

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The use of differentiated integration has grown, at the level of primary law and in practice, with the last four Treaty amendments.

In particular, it is relevant to the single currency and related measures on economic governance, including treaties outside the EU legal framework and special laws within it. It is also highly relevant to Justice and Home Affairs law.

There is a formal procedure for enhanced cooperation among groups of Member States, although it is rarely used.

Questions arise about the EP's position as regards these measures, in terms of voting by MEPs from non-participating Member States, as well as further future Treaty amendments.

- 1. OVERVIEW: DIFFERENTIATED INTEGRATION**
- 2. DIFFERENTIATED INTEGRATION IN PRACTICE**
- 3. ROLE OF THE EUROPEAN PARLIAMENT**

## 1. OVERVIEW: DIFFERENTIATED INTEGRATION

### KEY FINDINGS

- The **legal framework** for differentiated integration has **changed over time**, allowing **new forms** of differentiated integration and making it **easier to adopt**.
- Differentiated integration has also developed **outside** the EU legal framework, **closely connected** to differentiated integration measures within that legal framework.
- Differentiated integration has also developed **within** the EU legal framework where it is **not formally provided for**, again **closely connected** to differentiated integration measures which are formally provided for within that legal framework.
- The development of differentiated integration is frequently (but not always) legally and politically **controversial**, and some forms of differentiated integration are **less frequently used** than others.

Initially, the Community Treaties (as they then were) **did not formally provide** for differentiated integration. The first significant provision for such integration was the original Treaty on European Union (TEU), i.e. the Maastricht Treaty, which provided for **Economic and Monetary Union** (EMU) to start potentially among a limited number of Member States, and also provided for a potentially permanent opt-out from this policy for the UK and Denmark. Some of the economic governance measures in this area (such as sanctions for Member States which breach budget deficit rules) only apply to 'euro-zone' States (i.e. the Member States participating in EMU).

The Treaty of Amsterdam then provided for another area for differentiated integration: **Justice and Home Affairs** (JHA) law. In particular, the UK, Ireland and Denmark did not have to participate in the rules regarding civil cooperation, immigration and asylum. As for the **Schengen rules**, they were extended to further Member States only when the existing Schengen States considered those Member States ready for this. The UK and Ireland were permitted to apply to opt in to only part of the Schengen rules, while Denmark applied those rules only in the form of international law.

Furthermore, the Treaty of Amsterdam provided for the first time for **enhanced cooperation**, the general possibility of some Member States going ahead of others to adopt some EU law that does not apply to all Member States. However, the possible authorisation of enhanced cooperation was subject to fairly **strict conditions**. Next, the **Treaty of Nice amended the rules** on enhanced cooperation, to make it easier to authorise.

Most recently, the **Treaty of Lisbon amended** the rules on differentiated integration in several respects. As regards **EMU**, it inserted a new Article 136 into the Treaty on the Functioning of the European Union, providing for the adoption of measures concerning economic governance that would only apply to the euro-zone Member States. As regards **JHA**, it extended the opt-outs of the UK, Ireland and Denmark to include also police and criminal law cooperation, and gave the UK the power to opt-out of pre-existing police and criminal law measures as of 1 December 2014. As regards **enhanced cooperation**, it amended the rules again in order to facilitate the adoption of this form of cooperation.

## 2. DIFFERENTIATED INTEGRATION IN PRACTICE

### KEY FINDINGS

- The use of differentiated integration in the field of **EMU** has been stronger in practice since the enlargements of the EU in 2004-2013.
- The use of the **JHA opt-outs** has grown over time.
- **Enhanced cooperation** has been used since the Treaty of Lisbon entered into force, but in quantitative terms, its impact has been modest.
- The use of differentiated integration **outside the EU framework** (but linked to it), and **within the EU framework** (even where it is **not formally** provided for) has become a factor since the entry into force of the Treaty of Lisbon.

When EMU was established in 1999, only two Member States without an opt-out (Greece and Sweden) were a non-participants, and Greece joined EMU soon after (2001). Only two Member States were given formal opt-outs from **EMU** (Denmark and the UK), although these opt-outs have been applied in practice. A number of Member States joining the EU after the original TEU entered into force do not participate in EMU (Sweden, Poland, Hungary, the Czech Republic, Romania, Bulgaria and Croatia). After the entry into force of the Treaty of Lisbon, Article 136 TFEU has been used several times to adopt economic governance measures for euro-zone States only (some of the 'six-pack' measures, and both of the 'two-pack' measures).

As regards **JHA**, initially the UK and Ireland opted in to all civil law measures, all measures on irregular migration, and almost all asylum measures. This changed by the mid- to late-2000s, after which point the UK and Ireland opted out of most second-phase measures adopting the Common European Asylum System, as well as many measures relating to irregular migration and some civil cooperation measures.

Following the entry into force of the **Treaty of Lisbon**, the UK and Ireland have increasingly used the opportunity to opt out of police and criminal law measures. Also, Denmark is no longer covered by measures in this field adopted since that Treaty entered into force. The UK has invoked its **block opt-out** over measures adopted before the entry into force of the Treaty of Lisbon, although it has also sought to opt back into a number of these measures.

The partial application of the **Schengen rules** by the UK and Ireland has been approved by the Council, although Ireland's application has not been put into force yet, and the UK is not yet applying the Schengen Information System in practice. There has also been a lengthy delay extending the Schengen system to Romania and Bulgaria. Cyprus and Croatia do not yet participate in the Schengen rules either.

**Enhanced cooperation** was used for the first time in 2000, when it was authorised for the adoption of a Regulation on choice of law in **divorce**. It was used for a second time when adopting EU legislation on a **unitary patent**. A third use of enhanced cooperation has been authorised, as regards a **financial transaction tax**, although in this case the participating Member States have not yet adopted the proposed legislation in this field.

**Outside the EU legal order**, groups of Member States have adopted a treaty establishing the **unified patent court**, linked to the EU's unitary patent legislation, as well as treaties providing for financial assistance to Member States, the 'fiscal compact' and a bank resolution fund, all linked to **EMU**. **Inside the EU legal order**, legislation giving banking supervision powers to the European Central Bank and establishing an EU banking resolution fund applies to Eurozone States, and willing participants among non-eurozone States, only.

The use of differentiated integration has been **legally controversial**, particularly as regards the scope of the JHA opt-out, EMU, the unitary patent and the financial transaction tax. In a series of cases brought to the CJEU, the UK has challenged its inclusion within EU measures extending social security rules to third States, on the grounds that its JHA opt-out should apply. It has lost two of these cases (the third is pending). The CJEU has also clarified that EU development powers apply to readmission clauses with third states; that EU transport powers apply to aspects of criminal law information exchange as regards road traffic offences; and that criminal law provisions in a treaty relating to intellectual property protection are ancillary.

As regards EMU, the UK objected to aspects of the Fiscal Compact treaty, but did not challenge it. Various treaties related to EMU have been challenged in the national courts, as well as the CJEU (*Pringle* case). Spain and Italy challenged the EU's unitary patent legislation, and the UK challenged the authorisation of the financial transaction tax.

### 3. ROLE OF THE EUROPEAN PARLIAMENT

#### KEY FINDINGS

- The EP **rarely has a formal distinct role** as regards differentiated integration, except as regards authorisation of the approval of enhanced cooperation.
- The question arises whether the EP should have a **bigger role**, as regards suggesting the use of enhanced cooperation and limiting the role of MEPs from non-participating Member States.
- Further questions arise as to whether there should be Treaty amendments regarding the use of differentiated integration, and if so, what form they should take.

Differentiated integration in the field of **EMU and JHA** is triggered automatically. A proposal is made by the Commission, with the relevant legislative procedure then becoming applicable. The non-eurozone Member States automatically do not participate in Eurozone legislation not applicable to them, and Denmark automatically does not participate in non-Schengen JHA measures. The UK and Ireland have three months to opt in to JHA proposals (they can also opt in after such measures are adopted, and have occasionally done so).

With enhanced **cooperation**, there is a two-step process. It is authorised when a group of Member States request the Commission to make a proposal for enhanced cooperation. If the Commission does so, then it must be approved by the Council (by qualified majority) with the consent of the EP. There are special rules for foreign policy and aspects of criminal law, but they have not been used yet.

There is no special procedure for the use of differentiated integration **outside the EU legal framework** (and no formal role for the EP). Within the EU legal framework, the EP's normal role applies.

Usually the **non-participating Member States** have observer status but no vote, while the EP has its ordinary powers (with **all MEPs voting**), as do the other EU institutions (with all Commissioners, CJEU judges, et al having a vote). As an exception, where differentiated integration is adopted within the ordinary EU legal framework, all Member States can vote.

The question arises whether the **EP ought to play a greater role** in triggering enhanced cooperation, given that it is not used in practice much. For instance, the EP could suggest that a group of Member States may wish to trigger the procedure, as regards EU legislative proposals which are stuck in the Council.

Another question arises as to whether there ought to be a **Eurozone Parliament**, or whether the MEPs from non-participating Member States ought to abstain as regards proposed measures which do not affect their Member State (at least for the time being).

Finally, the EP could consider if it supports **further Treaty amendments** relating to the use of differentiated integration, and if so, what form they should take.

## Biography

**Steve Peers** is a Professor of EU Law and Human Rights Law at the University of Essex. His research interests include EU Justice and Home Affairs, Constitutional, External Relations, Human Rights, Internal Market and Social Law. He is the author of three editions of EU Justice and Home Affairs Law and the co-author of Commentary on the EU Citizens Directive, and the co-editor of EU Immigration and Asylum Law: Text and Commentary (2 editions); Commentary on the EU Charter of Fundamental Rights; and European Union Law. Also, he has written over eighty articles on many aspects of EU law in journals including the Common Market Law Review, European Law Review, International and Comparative Law Quarterly, European Law Journal Yearbook of European Law and the Cambridge Yearbook of European Legal Studies, as well as many chapters in books. He has worked as a consultant for the European Parliament, the European Commission, the Foreign and Commonwealth Office, the House of Lords Select Committee on the European Union and the Council of Europe, and contributed to the work of NGOs such as Amnesty International, Justice, Statewatch and the Immigration Law Practitioners' Association.