



DIRECTORATE-GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT **C**
CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS

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

In-Depth Analysis for the AFCO Committee





DIRECTORATE GENERAL FOR INTERNAL POLICIES
POLICY DEPARTMENT C: CITIZENS' RIGHTS AND
CONSTITUTIONAL AFFAIRS

CONSTITUTIONAL AFFAIRS

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

IN-DEPTH ANALYSIS

Abstract

This analysis examines the development of differentiated integration connected to the EU legal order, and raises questions for the future.

This document was requested by the European Parliament's Committee Constitutional Affairs.

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CONTENTS

LIST OF ABBREVIATIONS	4
EXECUTIVE SUMMARY	5
1. OVERVIEW: DIFFERENTIATED INTEGRATION.....	6
2. LEGAL FRAMEWORK FOR DIFFERENTIATED INTEGRATION	8
3. DIFFERENTIATED INTEGRATION IN PRACTICE	12
4. ROLE OF THE EUROPEAN PARLIAMENT.....	15

LIST OF ABBREVIATIONS

CJEU Court of Justice of the European Union

EMU Economic and Monetary Union

EP European Parliament

EU European Union

JHA Justice and Home Affairs

MEP Member of the European Parliament

EXECUTIVE SUMMARY

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

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, which is defined in this study as a potentially permanent non-application of EU law by one or more Member States.

The first significant provision for such integration was the original Treaty on European Union (TEU), ie 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 (ie the Member States participating in EMU). That Treaty also provided for an opt-out for the UK as regards social policy, although this was later rescinded by the Treaty of Amsterdam.

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. LEGAL FRAMEWORK FOR DIFFERENTIATED INTEGRATION

KEY FINDINGS

- **EMU** was subject to differentiated integration from the outset, and this was modestly extended by the Treaty of Lisbon.
- **JHA opt-outs** were first provided for in the Treaty of Amsterdam, and were expanded by the Treaty of Lisbon
- **Enhanced cooperation** was also first provided for in the Treaty of Amsterdam, and its use was made easier by the Treaty of Nice and the Treaty of Lisbon.
- Differentiated integration **outside the EU framework** (but linked to it) has developed significantly since the Treaty of Lisbon, as have other forms of differentiation **within the EU framework**.

Differentiated integration at the level of EU primary law dates back to the original TEU (Maastricht Treaty), which provided for it as regards economic and monetary union and social policy. The EMU provisions combined the two different basic forms of differentiated integration: an **obligation** for all Member States to apply the rules in question, once they met the objective criteria to that end; and a complete **exemption** from any obligation to apply those rules, with an option to apply them if that Member State wished.

The complete exemptions were granted only to the UK and Denmark, by means of separate Protocols which differed slightly as regards the rules which those Member States did not have to participate in. But the core rule was that neither Member State ever had to participate in the key aspect of EMU, namely the single currency.

As for the other Member States (10 at the time when the original TEU was signed), the Treaty provided for the possibility that they might not meet the criteria to participate in EMU at the time it was started. They therefore had the status of 'Member State with a derogation' (Article 109k EC). According to Article 109k(3) EC, a number of Treaty provisions did not apply to such Member States: the rules on sanctions for breach of the excessive deficit rules; most of the rules on the European System of Central Banks; the issue of banknotes by, and control of the issue of coins by, the European Central Bank; the European Central Bank's power to adopt binding measures; the external relations of EMU; and the appointment of senior members of the European Central Bank. Also, the Member States with a derogation would not vote on the exchange rates of Member States joining EMU (Article 109l(4) EC).

Conversely, the rules on balance of payments would continue to apply to Member States with a derogation, even after they ceased to apply to Member States participating in EMU. So would the obligation to treat exchange rate policy as a matter of common interest (Article 109m).

This legal framework was amended by the Treaty of Lisbon, principally to add a new Article 136 TFEU. This provision gives the power to adopt further legislation on the multilateral surveillance procedure or the excessive deficit procedure that applies to Eurozone Member States alone. A new Article 137 TFEU and a connected Protocol reaffirmed the pre-existing practice of the Eurozone Member States of holding meetings within the framework of the

'Euro Group'. Article 140(2) TFEU now also provides that the Eurozone Member States shall assess whether a new applicant to join EMU meets the relevant conditions, before all Member States have a vote on this issue in the Council. Article 139 TFEU extends the list of provisions which do not apply to Member States with a derogation, to include economic policy guidelines for the Eurozone.

The **social policy** exception took the form of a Protocol to the Treaty, which specified that the UK would not have to apply the provisions of a new Agreement on social policy (which was attached to the Protocol) that enlarged the EU's express powers in this field beyond the area of health and safety (which had already been an express EU competence since the Single European Act). Subsequently, the Treaty of Amsterdam repealed this Protocol, and integrated the Agreement on social policy into the main text of the Treaties.

As regards **JHA**, there were initially no opt-outs from this policy field, when it was first referred to in the EU Treaties at the time of the initial TEU (Maastricht Treaty). Instead, differentiated integration outside the EU legal framework continued in the form of Schengen cooperation, on the basis of the Schengen Convention (signed in 1990, in force 1993, applied from 1995).

This changed when the Treaty of Amsterdam aimed to do two things: to integrate Schengen within the EU legal framework, and to transfer aspects of JHA cooperation (immigration, asylum and civil cooperation) from the intergovernmental third pillar into the first pillar of EU law, ie 'Community law'. The first change raised issues relating to differentiated integration, because some Member States did not want to participate in the core aspects of Schengen, ie the abolition of internal border checks (particularly the UK, and necessarily Ireland also, due to the Common Travel Area between the two countries). For its part, Denmark agreed with Schengen, but not with subjecting any aspect of the Schengen rules to Community law (besides those aspects of the law on visas which were already subject to that law). Also, not all of the remaining Member States participated in the Schengen rules fully yet, and it was not judged feasible for future Member States to join Schengen as from the date of joining the EU.

So a special Protocol on integrating the Schengen acquis into the EU legal system addressed these issues, by: allowing the UK and Ireland to apply to participate in the Schengen rules in part only; specifying that the Schengen rules would not have the force of EC law in Denmark; and setting up a procedure to admit further Member States to participate in the Schengen rules.

On the second point (transfers to the 'first pillar'), the UK, Denmark and Ireland had misgivings that were addressed by other Protocols. Denmark obtained a complete opt-out from the areas transferred to EC law (unless they were connected to the Schengen acquis), while the UK and Ireland obtained the right to opt in to such measures on a case-by-case basis.

These opt-outs had to be reconsidered in the **Treaty of Lisbon**, because that Treaty transferred police and criminal law measures to the normal EU law framework as well. So the protocols for the UK, Ireland and Denmark were extended to cover those aspects of EU law also. Furthermore, the Protocols relating to the UK and Ireland were amended to include rules on what would happen if those Member States opted out of a measure amending an EU law which they already participated in.

A further opt-out was added in this area for the UK. Before the Treaty of Lisbon, the ordinary rules relating to infringement procedures and CJEU jurisdiction did not apply to EU

policing and criminal law matters. The UK had misgivings about applying those ordinary rules to EU policing and criminal law measures adopted before the Treaty of Lisbon. So the transitional Protocol attached to the Treaties provides that these rules would not apply until the end of a five-year transitional period (which expired on 1 December 2014), at which point the UK could choose to disapply all such measures (unless they had been amended in the meantime). However, the UK could also request to participate in some of these measures again, if it wished.

Enhanced cooperation was provided for in the Treaty of Amsterdam for the first time (at this point, it was called 'closer cooperation'). It was subject to a number of constraints. For one thing, it was not applicable to foreign policy measures at all. In the area of EC law, it was only permissible (Article 11(1) EC) if it:

- (a) does not concern areas which fall within the exclusive competence of the Community;
- (b) does not affect Community policies, actions or programmes;
- (c) does not concern the citizenship of the Union or discriminate between nationals of Member States;
- (d) remains within the limits of the powers conferred upon the Community by this Treaty; and
- (e) does not constitute a discrimination or a restriction of trade between Member States and does not distort the conditions of competition between the latter.

If any Member State objected to the authorisation of enhanced cooperation, it could invoke an 'emergency brake', with the consequence that the measure might have to be adopted by unanimity.

There were also general criteria, applying to closer cooperation in either the first or third pillar. Closer cooperation was only allowed (Article 40 TEU) if it:

- (a) is aimed at furthering the objectives of the Union and at protecting and serving its interests;
- (b) respects the principles of the said Treaties and the single institutional framework of the Union;
- (c) is only used as a last resort, where the objectives of the said Treaties could not be attained by applying the relevant procedures laid down therein;
- (d) concerns at least a majority of Member States;
- (e) does not affect the *acquis communautaire* and the measures adopted under the other provisions of the said Treaties; [and]
- (f) does not affect the competences, rights, obligations and interests of those Member States which do not participate therein.

These rules were made less restrictive by the Treaty of Nice, which provided that enhanced cooperation: could apply to foreign policy issues; had to aim to reinforce the EU's process of integration; needed only to 'respect' (instead of 'not affect') the *acquis*; had to include at least eight Member States (rather than a majority of them); could not set up a 'barrier' to trade (rather than a 'restriction' upon trade); and could not 'undermine' the internal market or economic and social cohesion (replacing the requirement that it could not concern EU citizenship or discriminate between EU citizens). Also, the Treaty clarified that the 'last resort' requirement had to be determined by the Council, assessing whether the objectives of a proposal could be obtained 'within a reasonable period', and the 'emergency brake' requirement was dropped for the first and third pillars.

The Treaty of Lisbon made some further changes, for instance raising the minimum number of Member States to nine, and replacing the requirement to 'respect' the *acquis* with a requirement that enhanced cooperation must 'comply with the Treaties and Union law'.

Outside the EU legal order, there is no general legal framework set out in the EU Treaties themselves.¹ A minor Treaty amendment added an Article 136(3) to the TFEU, referring to the possible adoption of a treaty among eurozone Member States on financial assistance.² However, in its judgment in *Pringle*, the CJEU said that this amendment was not necessary, as it already reflected the *status quo*.³ Article 273 TFEU also permits Member States who sign treaties among themselves to have recourse to the CJEU to settle their disputes, if the dispute relates to the subject-matter of the Treaties.

Inside the EU legal order, there is again no general legal framework providing for EU legislation to be applicable to some Member States only, other than the rules on enhanced cooperation and the specific provisions on issues such as EMU and JHA.

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 lost all three of these cases, concerning social security for EEA countries, Switzerland and Turkey.⁴

The CJEU has also clarified that EU development powers apply to readmission clauses with third states;⁵ that EU transport powers apply to aspects of criminal law information exchange as regards road traffic offences;⁶ and that criminal law provisions in a treaty relating to intellectual property protection are ancillary.⁷ All of these ruling have the effect of limiting the scope of the JHA opt-out in various respects.

As regards EMU, CJEU ruled in *Pringle* that the European Stabilisation Mechanism treaty did not infringe either the substantive or the institutional law of the EU.⁸

Finally, in the area of enhanced cooperation, Spain and Italy challenged the authorisation of that process as regards the unitary patent legislation, but were unsuccessful.⁹ Similarly, the UK also unsuccessfully challenged the authorisation of enhanced cooperation as regards the financial transaction tax.¹⁰ Finally, Spain has challenged the legislation implementing enhanced cooperation as regards the unitary patent.¹¹

¹ On treaties between Member States, see: B. de Witte, 'Old-Fashioned Flexibility: International Agreements between Member States of the EU', in G. De Burca and J. Scott (eds.), *Constitutional Change in the EU: From Uniformity to Flexibility* (Hart 2000), p. 31; B. de Witte, 'Chameleonic Member States: Differentiation by Means of Partial and Parallel International Agreements', in B. de Witte et al., (eds.), *The Many Faces of Differentiation in EU Law* (Intersentia 2001), p. 231; A. Rosas, 'The Status in EU Law of International Agreements Concluded by Member States', 34 *Fordham International Law Journal* (2011) p. 1304 at p. 1317-1320; and R. Schutze, 'EC Law and International Agreements of the Member States: An Ambivalent Relationship?', 9 *Cambridge Yearbook of European Legal Studies* (2007) p. 386 at p. 408-425.

² European Council Decision in OJ [2011] L 91/1.

³ Case C-370/12 *Pringle*, judgment of 27 Nov. 2012.

⁴ Cases: C-431/11 *UK v Council*, judgment of 26 Sep. 2013; C-656/11 *UK v Council*, judgment of 27 Feb. 2014; and C-81/13 *UK v Council*, judgment of 18 Dec. 2014.

⁵ Case C-377/12 *Commission v Council*, judgment of 11 June. 2014.

⁶ Case C-43/12 *Commission v Council and EP*, judgment of 6 May 2014.

⁷ Case C-137/12 *Commission v Council*, judgment of 22 Oct. 2013.

⁸ Case C-370/12 *Pringle*, judgment of 27 Nov. 2012.

⁹ Joined Cases C-274/11 and 295/11 *Spain and Italy v. Council*, judgment of 16 April 2013.

¹⁰ Case C-209/13 *UK v Council*, judgment of 30 April 2014.

¹¹ Cases C-146/13 and C-147/13, *Spain v Council*, pending. An Advocate-General's opinion of Nov. 2014 advises the CJEU to reject these challenges.

3. 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.

As for **EMU**, the two Member States with a full opt-out (the UK and Denmark) have never opted in. The other 10 Member States which originally signed the TEU all joined, with nine of them participating from the outset of EMU in 1999, and Greece joining in 2001.

There has been less participation in EMU from Member States which joined the EU after the original TEU was signed. Two of the three Member States which joined the EU in 1995 participated in EMU from the outset (Austria and Finland), but the other 1995 entrant did not (Sweden). Seven of the ten Member States which joined the EU in 2004 have participated in EMU over the years, but the three exceptions (Poland, Hungary and the Czech Republic) are the largest economies out of those countries. None of the three Member States which joined the EU in 2007 or 2013 (Romania, Bulgaria and Croatia) have participated in EMU yet.

As noted already, the Treaty opt-out for **social policy**, originally introduced by the TEU, was little used in practice, and was then repealed by the Treaty of Amsterdam. This is the only example to date of a Treaty rule on differentiated integration that was later rescinded. All of the other such Treaty rules have been retained, and indeed even amended over the years to widen their scope.

In practice, the Protocol had only been used to exempt the UK from four measures: Directives on part-time work, parental leave, works councils and the burden of proof in sex discrimination cases. Following the election of a UK government in 1997 which favoured UK participation in EU employment law measures, these Directives were amended to extend them to the UK, pending the formal repeal of the social policy protocol.

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**, under the Amsterdam version of the opt-out rules, initially the UK and Ireland opted in to all civil law measures, all measures on irregular migration, and almost all asylum measures. They primarily opted out only from the EU's measures on legal migration.

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, as noted above, Denmark is no longer covered by measures in this field adopted since that Treaty entered into force. The UK has invoked the **block opt-out** (discussed above) in order to disapply all EU policing and criminal law measures adopted before the entry into force of the Treaty of Lisbon (if they were not subsequently amended). However, it opted back in to 35 of these measures.

The partial application of the **Schengen rules** by the UK and Ireland was 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. Various Member States began applying the Schengen system between 1999 and 2014 (Greece, the Nordic States, and then the 2004 entrants other than Cyprus). However, 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.

Next, despite its initial introduction in the Treaty of Amsterdam, and the amendment of the rules in the Treaty of Nice, **enhanced cooperation** was used for the first time only in 2010, after the further amendments made by the Treaty of Lisbon. On that first occasion, it was authorised as regards adoption of a Regulation on choice of law in **divorce**.¹² The process was used for a second time in 2012, to authorise enhanced cooperation as regards EU legislation on a **unitary patent**.¹³ A third use of enhanced cooperation has been authorised, as regards a **financial transaction tax**,¹⁴ although in this case the participating Member States have not yet adopted the proposed legislation in this field.¹⁵

Outside the EU legal order, there is a clear trend since the Treaty of Lisbon came into force for groups of Member States to agree treaties which are outside the EU legal framework, but closely linked to that framework. One such treaty established the **unified patent court**,¹⁶ which is integrally linked to the EU's unitary patent legislation (that legislation cannot take effect until the treaty enters into force, and will only apply to those Member States which have ratified that treaty). Like differentiated integration within the EU legal order, the treaty provides for flexibility as regards its application: it will enter into force when it is ratified by thirteen Member States, as long as the UK, France and Germany are among them.

Also, there have been a series of treaties between Member States closely linked to EMU: the treaties on the European Stabilisation Mechanism,¹⁷ the 'fiscal compact' treaty,¹⁸ and

¹² OJ [2010] L 189/12. See Reg. 1259/2010, OJ [2010] L 343/10.

¹³ Regs. 1257/2012, OJ [2012] L 361/1 (unitary patent Regulation) and 1260/2012, OJ [2012] L 361/89 (translation Regulation). See also the decision authorising enhanced cooperation in this case (OJ [2011] L 76/53). For more on the legal issues concerning unitary (EU) patents, see S. Peers, 'The Constitutional Implications of the EU Patent', 7 *European Constitutional Law Review* (2011) p. 229.

¹⁴ [2013] OJ L 22/11.

¹⁵ See the Commission proposal (COM (2013) 71, 14 Feb. 2013).

¹⁶ [2013] OJ C 175/1. The treaty is not yet in force.

¹⁷ On this treaty, see: J.V. Louis, 'The Unexpected Revision of the Lisbon Treaty and the Establishment of a European Stability Mechanism', in D. Ashiagbor et al. (eds.), *The European Union after the Treaty of Lisbon* (CUP 2012) p. 284 at p. 297-314; A. Gregorio Merino, 'Legal Developments in the Economic and Monetary Union During the Debt Crisis: The Mechanisms of Financial Assistance', 49 *Common Market Law Review* (2012) p. 1613 at p. 1621-1623; and C. Ohler, 'The European Stability Mechanism: The Long Road to Financial Stability in the Euro Area', 54 *German Yearbook of International Law* (2011) p. 47. For the text, see: <http://www.european-council.europa.eu/media/582311/05-tesm2.en12.pdf>

the treaty on a bank resolution fund.¹⁹ Each of them provides for their own form of differentiated integration, as it is not necessary for all of the Contracting Parties to ratify them before they enter into force. Furthermore, the first of these treaties is open to Eurozone Member States only, while the latter two, while open to all Member States, do not have to be signed or ratified by all of them to take effect.

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. This is not formally provided for in the Treaties as regards the legal bases in question (concerning banking supervision and the internal market). However, it has been assumed that it is possible to differentiate between Member States in practice, because of the underlying distinction between Eurozone States and non-Eurozone states as regards EMU.

¹⁸ On this treaty, see P. Craig, 'The Stability, Coordination and Governance Treaty: Principle, Politics and Pragmatism', 37 *European Law Review* (2012) p. 231; D. Adamski, 'National Power Games and Structural Failures in the European Macroeconomic Governance', 49 *Common Market Law Review* (2012) p. 1419 at p. 1356-1360; N. de Sadeleer, 'The New Architecture of the European Economic Governance: A Leviathan or a Flat-Footed Colossus?', 19 *Maastricht Journal of European and Comparative Law* (2012) p. 354 at 364-374; and S. Peers, 'The Stability Treaty: Permanent Austerity or Gesture Politics?', 8 *European Constitutional Law Review* (2012) p. 404. For the text, see: <http://www.eurozone.europa.eu/euro-area/topics/treaty-on-stability,-coordination-and-governance-%28tscg%29/>

¹⁹ For the text, see : <http://register.consilium.europa.eu/doc/srv?!=EN&f=ST%208457%202014%20INIT.>

4. 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.

Within the EU legal order, usually the **non-participating Member States** have observer status but no vote in the Council. As an exception, there is no observer status in the Eurogroup for Member States not participating in EMU; conversely, where differentiated integration is adopted within the ordinary EU legal framework, all Member States can vote. For its part, the EP has its ordinary powers (with **all MEPs voting**), ie either a special legislative procedure (in the case of the financial transaction tax), or an ordinary legislative procedure (where the UK, Ireland and Denmark opt out of EU criminal or immigration law). Equally, all the members of the other EU institutions have full participation rights, meaning that all Commissioners, CJEU judges, et al have a vote.

Outside the EU legal order, in practice, the involvement of Member States is decided on a case-by-case basis. All Member States were involved in discussions relating to the Unified Patent Court. However, only the Eurozone Member States were involved in discussions on the ESM treaty, and only those Member States which planned to participate in the treaties on the Fiscal Compact and the Resolution Fund participated in discussions. The EP was informally consulted during the negotiation of these treaties.

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, and that it might ensure that some

measures strongly supported by the EP, but blocked in the Council, are adopted (albeit they will apply only to a limited number of Member States).

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. Formally speaking, the EP cannot trigger the process, only a group of Member States can. But it is open to the EP to urge that a group of Member States do so. The EP could, in appropriate cases, even decide to use its leverage relating to other EU proposals in order to attempt to trigger enhanced cooperation informally. For instance, it could block certain legislation or funding unless enhanced cooperation is authorised.

To this end, new provisions in the EP's **rules of procedure** could address this issue. It would be inappropriate for the EP to request legislation that would, from the outset, be subject to the enhanced cooperation rules, since those rules can only be used as a 'last resort' when Member States cannot agree on a proposal. But the EP could set up a process committing it to examine whether to call for the enhanced cooperation to be used whenever a proposal has been discussed in the Council for a certain period (perhaps one or two years) with no apparent prospect of agreement.

This would take the form of the relevant committee (perhaps in conjunction with the constitutional affairs committee) examining in detail whether the criteria for enhanced cooperation are met, and considering whether to table a resolution calling upon Member States to take the step of calling for the start of the enhanced cooperation process. This should take the form of a public hearing, where all the stakeholders with a particular interest in the legislation proposed would be able to discuss the arguments for and against using the enhanced cooperation process.

The EP should also request the Commission to consider more systematically whether enhanced cooperation might be worth considering for blocked proposals, by carrying out a parallel review of its own when proposals have been blocked in the Council for a considerable period of time. It should also urge the Commission to change its practice of withdrawing proposals simply on the basis that they have been blocked in the Council for a considerable period of time.

No such withdrawal should take place unless the Commission has also assessed whether enhanced cooperation would be legal and desirable as regards the proposal concerned. If it is, then the Commission should call upon a group of Member States to request enhanced cooperation, and wait to see if such a request is forthcoming. Only if there is no such request should the Commission withdraw the proposal. Perhaps an arrangement to this effect could form part of a revised framework agreement on relations between the EP and the Commission, or there could be an inter-institutional agreement between the EP, Commission and Council aimed at encouraging the use of enhanced cooperation.

For instance, it is time to consider whether the blocked proposal on discrimination outside the workplace should be subject to enhanced cooperation. The Italian Presidency raised this issue but at the most recent EPSCO Council, it was decided to continue on the basis of all Member States' participation. The EP could keep this proposal under review and consider urging the start of the enhanced cooperation process if there is still no sign of unanimous agreement in the Council in practice.

The EP's review of the Commission's planned withdrawal of proposals, in its 2015 work programme, could also take account of these principles. It could identify those proposals

which are blocked but which could potentially be the subject of enhanced cooperation, and call upon the Commission to consider this possibility before any withdrawal. This could be relevant, for instance, to the proposals on a common VAT form and European corporate entities.

It would also be open to the EP to call upon Member States to negotiate treaties outside the EU legal framework, but there would not likely be enough support in the EP to do so whenever the measure in question could potentially take the form of an EU legal act instead. The focus in this area could be on treaties between Member States similar to those which have already been signed, such as an arrangement for Eurozone States to establish an unemployment insurance system, or the creation of a European asylum court to ensure more consistent application of the Common European Asylum System.

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). Either option is problematic in principle as regards the Eurozone, given that all Member States are in principle obliged to join EMU (besides the UK and Denmark). The suggestions are also problematic as regards other measures, since it is open to all Member States to opt in to enhanced cooperation measures and to all except Denmark to opt into JHA measures, and such later opt-ins frequently occur in practice. Any obligation to abstain would arguably be incompatible with the Treaties and the EP's rules of procedure.

A Eurozone Parliament would have a role that overlaps considerably with the EP's role. It would entail a significantly higher cost than the EP's current cost, unless the opportunity is taken to amend the Treaties to ensure that the EP meets permanently in Brussels, whereas the Eurozone Parliament uses the EP's facilities in Strasbourg. The tasks relating to the Eurozone treaties do not currently call for much parliamentary involvement; either those treaties would have to be amended to this effect, or there would have to be new treaties creating new Eurozone-only obligations with a role for a Eurozone parliament, addressing issues such as employment policy and fiscal harmonisation.

A Eurozone Parliament might potentially only form one of a number of Eurozone institutions, in the proposal of Jean-Claude Piris.²⁰ There would, however, be a legal problem with duplicating many EU institutions and providing for them to have many competences shared with the EU. Such a far-reaching overlap with the EU's powers and institutions would arguably violate the principle of sincere cooperation between the Member States and the EU.

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. JHA policy is fairly well established, although the UK might seek further power to opt out of measures which it had previously opted in to, or a renewed possibility to opt out of the Court's jurisdiction. Enhanced cooperation rules could be amended by dropping the first step in the process (authorisation by the Council, with EP consent), once a certain time period had passed without agreement in the Council, or by creating new special rules for certain areas of EU integration, like EMU-related issues. The EMU rules could be amended by providing for more areas of cooperation where the Eurozone states cooperate among themselves, in particular providing for new powers relating to fiscal or employment policy coordination and automatic transfers between Eurozone Member States.

²⁰ See: J.C. Piris, *The Future of Europe? Towards a Two-Speed EU* (CUP 2012).

It would also be possible to add rules relating to **treaties between Member States** within areas of EU competence, to protect the interests of the EU as a whole, the EP and non-participating Member States. First of all, the substantive rules relating to enhanced cooperation could mostly be extended to such Treaties; those rules already reflect the CJEU jurisprudence requiring treaties between Member States to comply with EU law (see *Pringle*, for example). As an exception, the substantive rule in Article 20(1) TEU would be adapted to read that such treaties '*shall not prejudice* the objectives of the Union, its interests or its integration process', and there seems no reason why nine Member States as a minimum would have to participate. Like enhanced cooperation, the treaties would be open to all Member States who met the criteria for participation, and wanted to sign up, although it should probably be left to the participating Member States (not the Commission) to decide on their admission.

Possibly it could be provided that treaties between Member States are a last resort when it is not possible to agree measures *either* between all Member States *or* by means of enhanced cooperation.

Secondly, such treaties could be subjected, as far as possible, to the same rules on authorising enhanced cooperation, ie a request by a group of Member States, consultation of the Commission (a requirement of a Commission proposal would undermine the nature of such treaties too much), and authorisation by the Council after consent by the EP. If a Member State was outvoted in the Council regarding the authorisation, it would therefore be able to defend its interests by challenging the Council Decision in the CJEU. But if the process of authorising ordinary enhanced cooperation was simplified, as suggested above, perhaps the process of authorising such treaties should be simplified to match it.

The treaty amendments could provide that the participating Member States 'may' have recourse to the EU institutions, and the European Parliament, the Commission and non-participating States would have observer status when the actual treaties were being negotiated. Otherwise, the normal process of negotiating and ratifying international treaties would apply.

The EP's veto on the authorisation of treaties between Member States would enable it to ensure that the draft treaty was acceptable from the point of view of the EP's interests, perhaps insisting on specific provisions relating to the EP's role. The EP would also be able to raise substantive concerns.

DIRECTORATE-GENERAL FOR INTERNAL POLICIES

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