

Professor Danuta Hübner

„Building an ever closer Union through different paths of integration - a political process of change with no finalite politique”

European University Institute and Trans European Policy Studies Association (TEPSA) high-level conference on “A differentiated future for the European Union?”

2 December 2021 (online)

European Union is a democratic construct built through integration of its members. It is internally differentiated based on the diversity of membership, concluding compliance with rules and policies. The integration is a political process, evolving over time in response to internal and external factors, challenges and expectations. The change occurs through small steps but there have also been big moments of overhaul based on a strategy and road map (e.g. single market, common currency, Schengen).

In principle, European integration has been developing through law. This process has always required accommodative approach to differentiation, a legacy of every enlargement. Treaties have provided legal framework for this accommodation taking into account diversified institutional and political capabilities of individual member states.

Subsequent enlargements have taken place in parallel to deepening integration, on many accounts reducing differentiation between national policies, options and discretions with less success when it comes to politically sensitive policy areas. Progress in the latter depends on political will to deepen the integration, which in turn depends heavily on outcome of national elections.

More politically sensitive policies, in areas associated with perception of sovereignty continue to be resistant to communitarization or a meaningful Europeanisation.

The fact that while policies have increasingly been embraced by decisions at the European level and the politics has largely remained a national level phenomenon has serious impact on the political propensity to deeper integration and persistent differentiation.

Today, differentiation remains a major feature of the integration process of various political entities because of multidimensional diversity of the entering states, of legal provisions of the treaties, allowing for differentiated integration and political will of national leaders.

So far, seven enlargements took place, each bringing in members with varying capacities to adjust. Integrating different states and societies implies permanent efforts to identify common European interests and goods. Every generation has the right to ask what Europe is for, what keeps us together and what is perceived as common European public goods.

Integration happens through institutional, political and policy frameworks. They form a kind of corset supposed to ensure certain level of homogeneity of the outcome of integration.

We have had decades of integration focusing on one size fits all policies to ensure that the most important integration framework and driver which is single market develops and works. The Union has developed its power to legislate globally relevant norms and standards, known as the Brussels effect.

Crises have often been important moments for identifying new common European goods and pandemic is a good example here.

However, we can also see in the pandemic time an exacerbation of an unprecedented trend of bending European democracy to nationalistic partisan

interests through rejection of established fundamental common European goods - values, rule of law, liberal democracy, and human rights. For some they are not cast in stone.

In the Union of 27 member states, there are frequent changes to political compositions of the Council due to elections. Recently we see unprecedented situations when populist anti-European politicians take over governments and want to have right to not respect the European law and reject the EU as community of law. They want to have the right to their own definitions and interpretations of European values. This is a differentiation of the European construct taken to extreme.

Current legal and institutional order - especially since Maastricht Treaty, the foundation treaty of the European Union, have been responding in a compromise based manner to political will of some member states seeking deeper integration and those in favor of retaining stronger national control - has a space for a multi speed Europe. I think here of existing variable geometry with opt ins and opt outs, euro area, Schengen, EU Charter of Fundamental Rights, examples of enhanced cooperation (the patent court- with 25 member states, unfinished FTT - with 10 states).

Differentiated integration is for some a controversial idea, others underline that already the Treaty of Rome envisaged different paces and intensity of integration when necessary. For decades, it was understood that differentiated integration should take place within the treaties, avoiding international agreements outside the EU legal order. The ruling of the ECJ has made it clear that if differentiated approach based on the Treaty proves impossible, then intergovernmental agreements can be an option.

So yes, the Treaties allow for different paths of integration through opt-out mechanism, enhanced cooperation, permanent structured cooperation and intergovernmental cooperation. Except for the permanent structured cooperation envisaged for the common foreign and security policy, all other forms have been used.

While the differentiated integration should be opened to all Member States, it must not take us toward the Union à la carte. It should be a way for those who want more to do more. And that the possibility for the non-participating states to join later should be ensured.

The main issue where I have serious doubts is how to avoid consequences of differentiated citizens' rights resulting from non-participation of a member state in certain policies or policy measures. Citizens might lose some of their rights.

Differentiated integration should not be an instrument of excluding some citizens from European rights; it is a way to advance European integration.

The EU has been practicing differentiated integration for decades, and common currency as well as Schengen system, both symbolic elements of European integration, can be examples here.

Of course differentiated integration should be organized in such a way that tailor made membership is not a choice. We must have clarity of what membership of the European Union means. In addition, we must admit that in reality the unanimity principle does not allow for progress in integration.

In the reflection on differentiated integration, the bottom line is to allow those who want a faster progress towards ever closer Union to have the possibility of doing so. This implies the freedom to recourse to the enhanced cooperation, the consolidation of multispeed principle and availability of the best possible mechanism making it possible.

It is worth looking at the differentiated integration in the context of crises. The history seems to confirm an observation that crises hit mostly in the areas where Europe has no competences or where they are limited. Also, crises allow to test European capacities to go on with integration. Usually, while during crises there is always a risk of the response being too little and too late, after the crises, like in the case of 2008 crisis, or still during the crisis, like in the case of pandemic induced crisis, we see a big wave of fundamental reforms. Unfortunately, the crisis effect is

not always deep enough to provide sufficiently strong and persistent political will and unfinished reforms stay with us.

The big question has been open for years, whether a differentiated integration means de facto a disintegration. An important element is also the accountability issue. In reality, Euro group does not have accountability framework. National parliaments do not play such a role for example. European Parliament has in principle an instrumentarium of accountability for Euro area. It is the only forum for accountability, representing EU citizens. In addition, the Euro is currency of the Union; it has impact on the single market, which makes the EP again the right accountability forum. However, the common currency mechanism has institutional elements, which cover only part of the EU.

The difficulties of the EU in responding to a dramatic health crisis, with its unprecedented social, political and economic ramifications, has made tackling the institutional and substantive weaknesses of the current EU constitutional architecture more necessary than ever.

Intergovernmental modes of decision-making dominate the EU governance system, but far too often institutions such as the European Council and the Eurogroup have struggled to take decisions in a timely, effective and democratic way.

An interesting example in this context is the European trade policy. It has been noticed how in the field of international trade the EU has been able to achieve its objectives successfully. Nevertheless, the ability of the EU to work in an area such as international trade conceals the fact that this is a special domain where the institutional structures of the EU actually support effective governance. In fact, the EU Treaties make the common commercial policy an exclusive competence of the EU, vesting the power to handle international negotiations in the Commission, subject to the mandate of the Council, which operates under qualified majority voting, and the oversight of Parliament. Unfortunately, lack of ratification of a growing number of trade and investment agreements, is a proof of competence battle.

That is why it is noteworthy to realize how intergovernmentalism has slowly but steadily stepped down also into the area of international trade. In fact, while the EU Treaties grant to the Commission exclusive authority to conduct the EU commercial policy, the European Council has acquired a crucial role in endorsing, and shaping EU trade agreements suggesting that even areas traditionally governed under the Community method are not immune from the spill over of the intergovernmental dynamics that have become dominant elsewhere.

The EU system of governance also lacks powers to act in areas such as health, or enforcement powers to make sure that member states abide by the common rules and is also not endowed with real own resources to support its spending programs without having to rely on financial transfers from the member states.

Iris es and policy makers involved in the Conference on the Future of Europe should consider channeling the outcome of their work into a new international treaty, a subject to less-than-unanimous entry-into force principle, allowing the EU to move forward beyond the obstacles embedded in the EU treaty revision procedure. Such a move would take the differentiated integration issue to a new territory.

Differentiated integration brings the need to distinguish between democratic legitimacy and accountability. For example formal legitimacy of the Euro group which plays a central role on euro issues comes from the Lisbon Treaty. The same is true for the President of the Euro group. But formal legitimacy of Euro summit is less clear, though it is true that nothing in principle prevent the European Council to dedicate its meeting to euro related issues.

Fiscal compact seems to be far more problematic. It formalized the Euro summit and its President, it provided for regular holding of meetings. The European Parliament may be invited. But its Art. 12 is constitutionally problematic. It creates a situation when a treaty signed outside the European Treaty can have impact on EU institutions. New binding rules on institutions are allowed to be created in a manner described in the Treaty and Member States can have power within the confines of the Lisbon Treaty and not the Fiscal Compact.

The current situation actually means that Euro group and Euro summit democratic legitimacy might be questionable. De facto Euro governance continues to be based on an intergovernmental mechanism with parliamentary component lacking in spite of the legislative changes, which increased the EP's role in the framework and a stronger involvement of National parliaments.

I am mentioning these issues to underline the importance of formal legitimacy and accountability in case of the differentiated integration.

I already mentioned that there are several forms of differentiated integration, including intergovernmental formations outsourcing the Treaty framework. However, there are as well many flexibilities within different legislative frameworks. The latter make it very difficult to identify all cases of differentiated integration.

There is a long history of reflection on and reality of differentiated integration. First discussions on the issue took place already in 70s, then in 1993 the EMU was established. Since then differentiated integration grew exponentially. Today we have a number of forms of opt outs by Ireland, Denmark and Czech Republic. We have enhanced cooperation on patent, on divorce law, on European prosecutor; FTT is still pending, as well as property regime rules. In the defense area, we have PESCO. Moreover, there is as well intergovernmental cooperation on the European Space Agency. It seems to me legitimate to say that choices made by member states mostly reflect political divisions in Europe on Europe.

They seriously impact the balance between unity and flexibility, between flexible legal arrangements under intergovernmental cooperation and homogeneity of European law. But behind this variety of reasons for and forms of the differentiated integration there is a constitutional issue whether the differentiated integration should lead to establishment of separate institutions or should the existing institutions provide the service for all scopes of integration. This is linked to the ways and means of ensuring democratic legitimacy and accountability. In addition, the ECJ ruling addresses this issue only partially. And last but not least, there have been public debates in the central and east European member states signaling that differentiated integration could bring political dilemmas related to the public perception of being first or second category member.

It might be also worth looking at the link between differentiation and fragmentation of Europe. I see a difference between differentiated Europe as an outcome of accommodative policies taking on board differentiated preferences and a fragmented Europe, which is largely an outcome of lack of commonly agreed policies and lack of implementation discipline. In short, fragmentation might imply a failure of common policies, when legislation is not agreed on, when it is delayed, postponed or blocked. There are, unfortunately too many examples of such situations. Banking Union is one of those and the outcome is a continued fragmentation of financial services market. Unfinished architecture due to the lack of political will adds to the unsolved issues in the areas of cross border services, home host issues, national options and discretions or the resolution deficiencies.

European integration has always been a political process of change, an open-ended one with no *finalite politique*. Small changes have been taking place systematically, but with smaller or bigger intervals, meaningful overhauls took place, embracing new areas of competences and policies. In addition, enlargements, introducing territorial and political diversity in deep sense contributed to diversity on all accounts. They implied different sensitivities, capacities to adjust, capacities to integrate, politically, institutionally, policy wise.

I have already mentioned that one size fits all policy approach was fundamental to build common solid foundations, in particular the single market and common currency. One best way of doing things was tested in symmetric crisis times but also in times of crises with asymmetric impacts and reactions to them.

The political dimension of differentiated integration played a different role in the era of one size fits all paradigm. Pandemic tells us that there is not anymore a one best way to do things, no more one size fits all approach, and that specificities of member states matter. NFEU and RRF have been based on this new approach, influencing European semester policy coordination.

Moving toward “no one best way” can be seen as constitutional tool to offer flexibility when needed without compromising the entire political system and the equality of

citizens. This opens a big question whether differentiation should be seen as temporary and pragmatic exception or a normal feature of EU integration.

Throughout its existence, the EU has strongly deepened and widened. A lot has happened in terms of consolidations of powers and policies. The integration framework is in place. Today the question is more about how to make differentiation work for European integration and be its driver, how to organize it, on what conditions, in which areas.

We have reached in terms of advancement of European integration a moment, when everything is unprecedentedly deeply interdependent with everything else. That means that interdependence is an important driver of integration. That could be seen as a new environment for the reality of differentiated integration. But when I look at differentiation today I see mostly politicization roots behind it and not political rationale.

To make the differentiated integration an integration driver the way forward is to remove unanimity or start using the passerelle clause. Opt outs should not be possible anymore as this is a negative differentiation, actually it means moving backwards. Differentiation should not be allowed when it undermines the accountability of European institutions. Its purpose is to accommodate the heterogeneity, or even to use it as integration driver, and not undermine the general interest.

EU is a democratic space, with shared values and objectives. That excludes differentiation when it comes to fundamental rights and values or where non-participating states generate negative externalities, including social and economic dumping. It should be open to all states and not lead to creating parallel institutional arrangements. It should be a role model for deeper integration and not a way to facilitate EU à la carte.

Euro zone has been for years under growing political pressure to deepen. Still, reforms have faced many delays; political sensitivities have been augmenting leading

to differentiation within the Euro zone in terms of approaches and capacities to embark on needed reforms.

Pandemic tested our unity and political appetite for diverging. There have been turbulences. Some governments usurped the right not to respect European law.

As a minimum, there is a need to better define and manage the differentiation policy approach and to ensure compliance of any differentiation paths with common principles and goals. Listening to citizens in this context is fundamental. They do not, in principle, look at the Union from the national interest perspective. They demonstrate capacity to embrace European integration as a common good.