Towards an Ever More Differentiated Union? – Exit Strategies from Differentiated Integration

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Abstract

In the past 25 years, differentiated policies and mechanisms of differentiated decision-making have rapidly gained prominence and relevance on EU level. It is not only well-known EU policies such as the euro currency or the Schengen area of borderless travel which fall within the scope of EU activity in which not all Member States participate in. Rather, also lesser known instruments exist, such as constructive abstention in Common Foreign and Security Policy, the enhanced cooperation procedure, or Permanent Structured Cooperation (PESCO). A rapidly less homogenous circle of EU members and either the unwillingness or the unpreparedness on part of some of them to fully participate – if at all – in certain EU activity has resulted in an ever more differentiated EU. Is the Union destined to become one of 'bits and pieces'? Or is there a solution to the conundrum of the incompatibility of simultaneously enlarging and deepening the EU, an incompatibility which has been one of the driving factors behind differentiations? In other words: Do strategies exist to eventually truly create the ever closer Union of fully integrated Member States?

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A. 25 years of ZEuS – 25 years of accelerated differentiated integration

The first issue of ZEuS was published in 1998. When scholars at Saarland University's Europa Institut sat together the year before to discuss ideas for a new journal on European Law, some 380 kilometres as the crow flies away, the EU's Amsterdam Treaty was adopted. That Treaty, dealing with the so-called 'Maastricht-leftovers' – subjects a final agreement on which could not yet be achieved in the process of the negotiations on the Maastricht Treaty in the early 1990s –, brought considerable change to the European Union which itself had only been created by Maastricht in 1993. In particular and with relevance to this contribution, Amsterdam brought changes to the Union which had already been initiated with Maastricht but strongly accelerated with its successor in that additional differentiated policies were added to the EU and EC competencies and a new mechanism of differentiated (or flexible) decision-making was introduced: enhanced cooperation.

Forms of differentiation had always existed in the European Communities since their very inception despite the limited scope of intra-Community integration and the small number of relatively homogenous Member States in the 1950s. The political discourse on differentiated integration in the Communities only commenced in the 1970s with relevant ideas by former German Chancellor *Willy Brandt*[1] and then Dutch Prime Minister *Leo Tindemans*[2] and academic discussion only followed suit since *Eberhard Grabitz*' ground-breaking study in 1984.[3] Differentiation was only subsequently enshrined to a large extent in primary law. However, despite all this, original forms – even if formally hardly comparable with today's forms of differentiation and usually with a very limited scope – were already found in the ECSC and the Rome Treaties.[4] Some of them, such as the legal act of the directive which provides for differing implementation in the Member States in order to achieve a common result[5] or the Benelux system of deeper integration,[6] still exist today. Others of "rather esoteric"[7] character, such as rules on the import of bananas into Germany and of unroasted coffee into Italy and the Benelux countries, have rightfully been conscripted to the bin of European integration history. *Helen Wallace* even went as far as to attest the original Treaties to be "littered with special arrangements to cater

1 *Brandt*, Europa-Archiv 1975/2, pp. D 33 f.
2 *Tindemans*, Europa-Archiv 1976/3, pp. D 67 f.
3 The study actually comprised various authors with *Grabitz* serving as its editor.
4 See on this in particular *Hanf*, in: De Witte/Hanf/Vos (eds.), pp. 5 ff. On differentiated integration in the ECSC see *Riedeberger*, pp. 109 ff.; on differentiated integration in the EEC see ibid., pp. 140 ff.
5 On the directive as a means of differentiated integration see in detail *Wallace*, pp. 21 ff.
6 On Benelux see in detail *Wouters/Vidal*, in: Giegerich/Schmitt/Zeitzmann (eds.), pp. 285 ff.
7 *Wallace*, p. 20.

for the special interests of, and differences among, members".[8] In any case, the early European Communities were characterised by a correspondingly high degree of differentiation due to the low density of regulations and limited competences and thus the low degree of integration.[9]

The higher the number of and the bigger the heterogeneity between Member States, further adding new and more policies to the EC/EU competences, the need arose to add 'proper' means of differentiated integration even though this only happened with the Treaty of Maastricht. Noteworthy is the today largely forgotten and rather complicated case of the Social Protocol and Social Agreement that emerged from the Maastricht negotiations.[10] The combination of an intergovernmental inter se agreement and a Protocol belonging to primary law in accordance with today's Art. 51 TEU had become necessary because of the fundamental rejection by the United Kingdom to the introduction of limited social policy competences into the EC Treaty. The British did not even want to accept a 'genuine' opt-out for themselves, demanding that corresponding regulations should be laid down exclusively in international law and not in the EC Treaty. The other eleven Member States, however, rejected such an arrangement as had been made for Schengen in 1985 and 1990 and insisted on enshrinement in the TEC. In a compromise typical of the EC and today's EU, the twelve finally agreed on a middle way between the two, and the British stayed away from social policy for the time being.

Much better known and more important are however the other means of differentiation introduced with Maastricht: the Treaty made cooperation possible in policy areas in which the EC had not previously been given competences due to their sensitivity. Worth mentioning in particular are justice and home affairs, the CFSP as well as the intended introduction of a common currency. It soon became apparent that not all of the twelve Member States at the time were enthusiastic about such great leaps in integration and demanded exceptions for themselves – for example as a result of negative referendums in which the people (also) expressed their rejection of further integration steps.[11] During the Maastricht negotiations, the EC States opened a Pandora's box by granting Denmark and the United Kingdom permanent opt outs from the introduction of the common currency. After Denmark rejected the Maastricht Treaty in a first attempt in a referendum in June 1992, the Edinburgh European Council agreed to three further opt-outs with regard to citizenship, CSDP and asylum and immigration policy for the kingdom. In addition, Denmark was granted a rather atypical special regulation regarding the acquisition of real estate, which ultimately constitutes a derogation from the fundamental freedoms.

Amsterdam further accelerated and rendered more complex the practice of EU differentiation. Firstly, the Schengen agreements were incorporated into the Union acquis. Despite a change of the British government since Maastricht, there was no desire there to participate in the now partially communitarised justice and home af-

8 *Wallace*, p. 20.
9 *Avbelj*, GLJ 2013/1, p. 196.
10 See on this in detail *Van Raepenbusch/Hanf*, in: De Witte/Hanf/Vos (eds.), pp. 65 ff.
11 See *Müller-Graff*, integration 2016, pp. 272 f.

fairs policy and its Schengen acquis, which is why the British were granted a Schengen opt-out within the framework of a stay-away from justice and home affairs – as was also the case for Ireland, which until this day maintains a kind of mini-Schengen of its own with the United Kingdom in the form of the Common Travel Area which has existed since the 1920s. Unlike the Irish, however, who only initiated partial participation in Schengen in the wake of Brexit, the British decided in 1999 to join some parts of Schengen after all, with effect from 2005. In general, the Irish and British justice and home affairs opt-outs are (were) handled extremely flexibly, as they allow – like all opt-outs – the ultimate cherry-picking with the possibility of a (partial) opt-in. Furthermore, Denmark also participates in a unique way in justice and home affairs policy and Schengen: Since the Danes had already been partially successful in negotiating a stay-away from justice and home affairs policy with Maastricht and again with Amsterdam, but had acceded to the Schengen agreements, their participation in the area of borderless travel is not based on Union law but on international law. In addition, Denmark was granted an extended opt-out from the CSDP with Amsterdam.

The fact that, in addition to all these various types of permanent opt outs, the Treaty of Amsterdam also introduced the enhanced cooperation procedure is almost overlooked – all the more so as enhanced cooperation subsequently had not been applied for more than a decade, even after it was modified by the Treaty of Nice and its ambit was also extended to the CFSP.

The latest Treaty reform with Lisbon brought technical changes with regard to the already existing differentiation mechanisms and established new relevant instruments and forms enshrined in primary law, such as PESCO (Permanent Structured Cooperation). In the more than ten years of Lisbon's legal force, the idea of differentiated integration has not only been able to maintain its momentum in practice, but has also gained relevance in particular with the repeated application of the enhanced cooperation procedure of which there are now five cases and the recourse to PESCO with at current 60 running projects. It is striking that under Lisbon, with the EFSF and ESM as well as the European Fiscal Compact, there was a return to the model of differentiation under international law outside the Union framework, which could have been considered outdated due to the multiple manifestations of differentiations within the EU.[12] These differentiations under public international law contribute to the increasingly confusing practice of differentiation, as does the Euro Plus Pact, which is a hybrid between Union and international law and to which not only the euro States but also other EU Member States have signed up, or the practice of opt-outs with partial back-opt-ins, which continues to be completely inconsistently regulated. At least here, as a result of the Brexit, with the complete departure of the United Kingdom from the EU, some cases of application have disappeared, which makes the practice somewhat more uniform to a manageable extent, although the British exit from the EU – paradoxically, since the British were the driving force behind and protagonists of a differentiated Union – was in turn

12 On inter se agreements see *De Witte*, in: de Búrca/Scott (eds.), pp. 31 ff.

accompanied by a newly awakened political interest in forms of differentiated integration.[13] At the same time, however, Brexit brought with it the anomaly of differentiated disintegration, a Member State bit by bit departing from the political and legal structures of the EU.

In sum, differentiated integration, an idea as old as the European Communities, has gained prominence with the creation of the European Union and the process of differentiation has accelerated ever since. This also shows in a number of pieces on the subject matter published in ZEuS since its year one.[14] Whereas the original motivation on the part of the Community was to cater for particular circumstances in its Member States, this has evolved to tackling political and economic crises such as the Eurosclerosis in the 1970s. From the 1990s, means of differentiation have become ever more relevant in order to bridge the gap between deepening of integration and enlargement of the Union, providing for an accession of the central and eastern European States as swiftly and straightforwardly as possible. This shows in particular in time-limited differentiation employed in order to integrate new Member States into the Union.[15]

B. The motivation and reason on part of EU members to not fully participate in Union policies and acquis

Not only do reasons for differentiation on part of the EU exist, there is also motivation on part of the EU Member States not to participate in certain EU policies or measures and, what is equally relevant, there are well-founded objective reasons why some of them are excluded from certain EU activity. In other words, there are both subjective and objective motives on part of Member States for being an "out". In integration theory, some of the original concepts of differentiated integration only allowed for a State to remain behind for objective reasons, other differentiation concepts allowed subjective reasons to suffice. A few explicitly recognised both, in line with current integration practice.[16]

Objective reasons may, inter alia, be of an economic or financial nature, in that a Member State does not prove to be able to meet certain criteria established in order to participate in a certain policy or measure. Arguably, the best known example for this are the Maastricht convergence criteria of Art. 140 (1) TFEU in conjunction with Protocol (No 13) in order to participate in the third stage of the Monetary Union, i.e. the introduction of the euro currency. There are also lesser-known instances such as criteria to be fulfilled in order to fully participate in the Schengen

13 On this, see *De Witte*, CMLR 2018/special issue, pp. 229 ff. with further references; *Miglio*, EuConst 2018/3, p. 475.

14 In particular *Martenczuk*, ZEuS 1998, pp. 447 ff.; *von Buttlar*, ZEuS 2001/4, pp. 649 ff.; *Zeitzmann*, ZEuS 2011/1, pp. 87 ff.; *Böttner*, ZEuS 2017/4, pp. 501 ff. The subject matter has further prominently been touched upon by *Papayannis*, ZEuS 2008/2, pp. 219 ff. and *Strauch*, ZEuS 2021/4, pp. 683 ff.

15 On this, see *Mohn*, pp. 58 ff.; *Ott*, in: Ott/Vos (eds.), pp. 117 f.

16 On this, see in detail the author's forthcoming PhD thesis, part 2 – A.

area of borderless travel which are largely of political nature, to retroactively join an existing enhanced cooperation or to participate in PESCO which requires certain 'higher' military capabilities on part of the Member States (Art. 42 (6) TEU) but also serves as an example that in practice, objective requirements can be handled rather flexibly or even laxly. There may or may not be an obligation to participation if the objective criteria are met. Participation in the third stage of Monetary Union is mandatory for those States fulfilling the convergence criteria whereas in any other differentiated policy or mechanism the States are free to decide whether they would prefer to participate or rather stay outside. This proves that even where objective criteria exist, subjective reasoning plays a role not to be underestimated.

Generally speaking, an outsider position arising from a lack of willingness to contribute to deeper integration is of equal relevance as defined participation criteria, as in particular the former EU member the United Kingdom but also the current Member State Denmark prove. It is conceivable that a State would objectively easily be able to participate in deepening measures, but would refrain from doing so for political reasons, be it because the step in question would not be acceptable to the majority of the population or could not reasonably be conveyed to the citizens. Consequently, there is also the constellation that a State would not be able to participate, but would also not be willing to do so.

The unwillingness to participate in a given policy area despite objectively having the capacities to do so most clearly shows in the permanent opt outs mentioned above. Only three Member States including the former EU member United Kingdom ever mentioned to secure an opt put – in particular from the third stage of Monetary Union (Denmark, United Kingdom), from justice and home affairs (Ireland, United Kingdom), and from the defence component of CSDP (Denmark) – even though some scholars also consider as opt outs certain rules on the EU's Fundamental Rights Charter in Protocol (No 30) (Poland, United Kingdom)[17] and the Swedish conduct with regard to the third stage of Monetary Union.[18] Also, the constructive abstention in CFSP may be regarded as a aselective case-by-case opt-out by an EU Member State in relation to an individual act of Union law.[19]

C. Which way out? Exit strategies from differentiation

Both the various means and mechanisms of differentiation and the motivation and reason on part of the EU as well of the Member States need to be taken into account when trying to define exit strategies from differentiation i.e. to either incorporate an

17 E.g. *Chopin/Lequesne*, Int Aff. 2016/3, p. 540; *Sielmann*, p. 358. Cf. *Schulte-Herbrüggen*, ZEuS 2009/3, p. 368. See in detail this author's forthcoming PhD thesis, part 2 – B.I.2.a)dd).

18 'Informal' opt out, e.g. *Jensen/Slapin*, JoEPP 2012/6, pp. 779 ff.; also *Leruth/Gänzle/Trondal*, JCMS 2019/6, p. 1390; *Sion-Tzidkiyahu*, in: Giegerich/Schmitt/Zeitzmann (eds.), p. 112. See on this *Stegmann McCallionn*, in: Stegmann McCallionn/Brianson (eds.), pp. 59 ff.

19 E.g. *Sielmann*, p. 361; *Von Kielmansegg*, in: Giegerich7Schmitt/Zeitzmann (eds.), p. 142.

outsider Member State into closer integration as established by the other members or to terminate a differentiated policy or act. There are several ways imaginable, few of which have materialised in practice.

I. The implied way out – Temporary differentiation

One of the basic designs of differentiated integration provides for 'multi-speed' integration, implying a mere temporary differentiation: those Member States capable of deeper integration go ahead, the other States follow once they are themselves capable of doing so.[20] A respective obligation to follow suit exists, as mentioned above, however only in the framework of Monetary Union. Joint economic support of the outsiders on part of the EU and its Member States already participating in the third stage of Monetary Union may serve to speed up the process of the former catching up.

Due to the lack of such an obligation in any other area of differentiation, only their automatic termination by way of setting a deadline seems to be a suitable possibility. Such deadlines, however, hardly exist in EU law and that makes well sense: a State shall contribute to deeper integration once it is truly ready to do so and not when for political reasons it is deemed opportune to do so. Consequently, we only find deadlines as regards implementation of directives, establishing a state of all EU members eventually adhering to their respective obligation to implementation, and as regards accession of new States to the EU, the 2+3+2 rule being the most relevant practical case as to that respect. It provides for a transitional period of a maximum of seven years for unilateral restrictions on the free movement of workers vis-à-vis a new Member State, imposed by the 'old' Member States and laid down in the respective accession treaty.[21] Once the deadline has passed, the new State will be fully integrated into the system of free workers' movement. It is noteworthy to say that the existence of deadlines in that policy field is not motivated by the need of new members to catch up but by the wish to protect the labour market of the old Member States – which is not truly in line with the idea of multispeed integration as outlined above.

II. The easy way out – Member States' change in government

The arguably easiest way to incorporate individual States into a system, policy or act of deeper integration which they had originally refused to participate in is to keep passive and wait for a change of government in the respective Member State, well knowing, assuming or at least hoping that the current opposition to the government, once holding power, will accede to the policy or act in question.

20 See in detail *Herwig*; also see *Biegoń*, APuZ 2017/37, pp. 18 ff.; *Janning*, Europa-Archiv 1994/18, pp. 527 ff.

21 See on this fundamentally in *Ott*, in: De Witte/Ott/Vos (eds.), pp. 146 ff., 154 ff.

There is one more or less prominent example of exactly such conduct on part of a former opposition party with the Social Protocol and Social Agreement which initially had resulted in only the United Kingdom staying outside the first moderate social policy regulations: the Conservative government under *John Major*, which had vehemently opposed the integration of the United Kingdom into the EC social policy introduced with Maastricht against the background of the deregulated, employer-friendly British system, lost government responsibility six weeks before the Amsterdam European Council in 1997; the new social democratic (New) Labour government under *Tony Blair* dropped the resistance and ended the United Kingdom's special path in social policy, therefore allowing for the integration of the subject matter into the TEC. The Social Protocol is thus the only case of differentiation enshrined in primary law that has been repealed and led to full integration. It is futile to discuss whether the British agreement to fully embed social policy with Amsterdam and to participate in it was due solely to the change of government or whether the short differentiation phase, during which the three new 1995 members Austria, Sweden and Finland also joined the Social Union, was able to exert a pull effect on the United Kingdom in line with the idea of multiple speeds. In any case, the British special path only led to non-participation in four EC directives and thus had rather limited practical impact.[22] In fact, both under Amsterdam and Lisbon, certain differentiations in social policy were and are still possible, which could also have contributed to the British change of mind.

Another, albeit unsuccessful example can be seen in the Hungarian stance vis-à-vis the European Public Prosecutor's Office (EPPO) which was introduced by resorting to the enhanced cooperation procedure[23] and which the State for reasons beyond the scope of this contribution – together with five other EU members – refused to participate in. Prior to the general election held in the country in 2022, the united opposition claimed they were to join EPPO should they succeed in the election[24] which eventually they failed to.

A change of government might not only be an opportunity to join an existing enhanced cooperation which the previous administration had refused to participate in. A new government may also decide to no longer exercise an opt out from EU policies or to partially opt into certain measures within a respective policy area: all Protocols providing for opt outs open up the possibility of a corresponding partial and/or full integration (cf. No 2 Protocol (No 16), No 9 Protocol (No 15) on Monetary Union; Arts. 3, 4, 8, 9 and previously for the United Kingdom 10 Protocol (No 21) on justice and home affairs; Arts. 7, 8 Protocol (No 22) on justice and home affairs and CSDP). However, opt outs from sensitive policy areas are typically

22 Cf. *Peers*, p. 12.

23 Council Regulation (EU) 2017/1939, OJ L 283 of 12 October 2017, p. 1 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO'). See e.g. *Csonka/Juszczak/Sason*, eucrim 2017/3, pp. 125 ff.; *Strauch*, ZEuS 2021/4, pp. 699 ff.

24 See https://www.bloomberg.com/news/articles/2022-02-09/hungary-opposition-pledges-to-join-eu-prosecutor-to-unlock-aid (19/10/2022).

deeply rooted in a Member State's public. Therefore, a mere change of government seems unlikely to also change the respective EU member's position vis-à-vis the policy/policies in question.

III. The medium- to long term way out – Member States' change of mind

Possible is also the change of mind within a long-running Member State government or, going beyond that, in a Member State's overall political circles or even public as a whole on subject matters that fall within the just-mentioned areas of differentiation, i.e. opt outs or enhanced cooperations.

As regards the latter, the gravitational pull of a successful cooperation may play a significant role and shall not be underestimated. Each enhanced cooperation regularly serves as an experimentation field for an often ground-breaking subject matter, be it an EU unitary patent,[25] the EPPO, or an EU fiscal transaction tax,[26] which at the same time prove to be of sensitive and controversial nature. If, however, an enhanced cooperation functions successfully and its benefits outweigh the disadvantages for or concessions of the participants, it may become attractive to participate even for those States who initially refused to do so. A good example for this is the very first case of an enhanced cooperation, the so-called Rome III Regulation on the law applicable to divorce and legal separation.[27] Having started with 14 participants originally in 2010, the participating States now count 17 with three EU members retroactively joining between 2012 and 2016. Similarly, the EU unitary patent has gained one additional member since its legal creation, leaving just two States outside.

Compared to retroactively joining an enhanced cooperation, giving up an opt out partially or fully may require more severe outside events. It is rather push- than pull-factors that might change an outsider's general position on its opt outs. There are two examples for this in integration history, one of which is of huge prominence: Denmark's recent shift towards giving up its opt out in defence policy after Russia's illegal war in Ukraine, perfectly summed up by Danish Prime Minister

25 Regulation (EU) No 1257/2012 of the European Parliament and of the Council, OJ L 361 of 17 December 2012, p. 1 implementing enhanced cooperation in the area of the creation of unitary patent protection; Council Regulation (EU) No 1260/2012, OJ L 361 of 17 December 2012, p. 89 implementing enhanced cooperation in the area of the creation of unitary patent protection with regard to the applicable translation arrangements. See e.g. *Bonadio*, EJRR 2011/3, pp. 417 ff.; *Luginbühl*, GRUR Int 2013/4, pp. 305 ff.; *Müller-Stoy/Paschold*, JIPLP 2014/10, pp. 848 ff.

26 COM/2013/071 final. Not yet realised due to a lack of political agreement amongst participating Member States. See e.g. *Cleynenbreugel/Devroe*, in: De Witte/Ott/Vos (eds.), pp. 288 ff.; *Cloer/Trencsik*, Eur Tax 2014/7, pp. 307 ff.; *Englisch/Vella/Yevgenyeva*, BTR 2013/2, pp. 224 ff.

27 Council Regulation (EU) No 1259/2010 OJ L 343 of 20 December 2010, p. 10 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation. On this, see e.g. *Kuipers*, ELJ 2012/2, pp. 217 ff.; *Lemoine*, in: Giegerich/Schmitt/Zeitzmann (eds.), pp. 259 ff.

Mette Frederiksen: "Historic times call for historic decisions"[28]. It took roughly three months to organise a respective referendum in which the majority of participating citizens voted in favour of full CSDP involvement.[29] The lesser known example concerns Ireland which, following Brexit, for the first time decided to make use of its general possibility to partially opt into the Schengen policy legal framework which at that time had existed for over twenty years, now partially participating, amongst other acts, in the Schengen Information System II.[30]

IV. The painful way out – The outsider leaving the EU

If there is one good aspect of a Member State leaving the European Union, it may be the decrease of differentiation if the State in question had frequently made use of opt outs or any other opportunity not to participate in deeper integration. This has strikingly shown when the United Kingdom left the European Union in an approach itself generating temporary differentiation through differentiated disintegration by first leaving the political and in a second step also the legal and economic structures of the EU.[31] The United Kingdom – though almost on par with Denmark – had been the EU's opt out and differentiation 'champion' with full non-participation in the third stage of Monetary Union and initially social policy, partial non-participation in justice and home affairs and Schengen, non-participation in four out of the total five enhanced cooperations, non-participation in PESCO, a special position vis-à-vis the EU Fundamental Rights Charter, and even a special role as regards budget contributions: the British approach could easiest be described as cherry-picking wherever possible. All this has disappeared with Brexit and the relevant provisions in the respective Protocols to the EU Treaties have become irrelevant, adding to the unified EU approach. What is more is that with the strongest proponent for in particular opt outs gone, the political role of the remaining opt out States Denmark and Ireland has significantly been weakened.

As regards this way out of differentiation, its risks and side effects must not be concealed: the cure may be more sickening than the disease.

28 See Zeit Online, Dänen stimmen für Teilnahme an EU-Verteidigungspolitik, 1/6/2022, https://www.zeit.de/politik/ausland/2022-06/eu-verteidigungspolitik-daenemark-volksabstimmung-sonderregeln (22.9.2022).

29 See Politico Online, The End of Neutrality,, 24/3/2022, https://www.politico.eu/article/ukraine-russia-war-end-of-neutrality-europe-ireland-austria-finland-sweden-cyprus-malta-denmark-switzerland/ (24/10/2022).

30 See Council Implementing Decision (EU) 2020/1745 OJ L 393 of 18 November 2020, p. 3 on the putting into effect of the provisions of the Schengen acquis on data protection and on the provisional putting into effect of certain provisions of the Schengen acquis in Ireland; https://www.gov.ie/en/press-release/5dc00-minister-mcentee-and-commissioner-harris-welcome-irelands-connection-to-schengen-information-system-sis-ii/ (19/10/2022).

31 On this see *Zeitzmann*, in: Scheuermann et al., forthcoming.

V. The various ways to terminate an enhanced cooperation

Elsewhere, I provide an in-depth overview of how to terminate individual enhanced cooperations.[32] Given that each enhanced cooperation constitutes an act of differentiated integration, it makes sense to briefly mention the various options of bringing them to an end. These are the termination due to a drop in the number of participants below the legally required minimum number of nine (I call this an 'objectively justified termination'); the termination by annulment through CJEU judgment; the termination by actus contrarius ('subjectively justified termination') where participating States are no longer willing to pursue the enhanced cooperation in question; the termination through adoption of relevant secondary legislation by the EU as a whole, replacing the secondary law of the respective enhanced cooperation; and the termination by participation of all EU Member States in the enhanced cooperation and incorporation of the legal acts adopted within its framework into the acquis communautaire. Additional legislative steps may be needed to exercise the mentioned means of termination.

VI. The (almost) impossible way – treaty change

It is a mere theoretical option which therefore shall be treated here with the necessary and appropriate brevity to change the EU treaties, abolishing instruments and mechanisms of differentiation. Arguably, there won't be a second round of enlargement as grave as the 2004/2007 enlargements. However, the Union is as heterogeneous today as it was back then and this is unlikely to change, so there is a continuing need for differentiation where these are objectively motivated. Removing cases of subjectively motivated differentiation, in particular the opt outs, requires every single Member State's consent. Since it is unlikely that the turkeys will be voting for Christmas, the option of treaty change is actually a non-option.

VII. No way out – permanent differentiation

Lastly, in exceptional cases, differentiation in the EU is designed as permanent i.e. the only option to change the design is a respective change of primary law. The prime example for such permanent differentiated integration is one which already in its name signalises its enduring nature: Permanent Structured Cooperation, or PESCO.[33] Provided for in Arts. 42 (6), 46 TEU, it has been established by Council Decision (CFSP) 2017/2315[34] and now comprises 60 projects in which all EU States

32 See this author's forthcoming PhD thesis, part 5 – C.
33 On PESCO, see in particular *Fiott/Missiroli/Tardy* and *Mauro/Santopinto*.
34 Council Decision (CFSP) 2017/2315 of 11 December 2017 establishing permanent structured cooperation (PESCO) and determining the list of participating Member States.

bar Denmark and Malta participate in extremely differing degrees.[35] Not only is PESCO designed to exist 'forever' – it is also shaped as a 'hop-on-hop-off' form of differentiated integration in that withdrawal from it is explicitly foreseen in Art. 46 (5) TEU. A similar differentiated project structure can be found in the framework of the European Defence Agency (EDA) with a project and programme level of various ad hoc measures, as provided for in Art. 45 (2) sentence 4 TEU and Arts. 19, 20 of Decision (CFSP) 2015/1835,[36] for which the EDA represents the overarching umbrella.[37]

Both PESCO and EDA are dominated by the principle of voluntary participation. They are modes of differentiation that are 'here to stay' – only a change of the relevant primary law could provide for unified approaches in these respects and such a treaty change is, again, highly unlikely.

D. Conclusion: Differentiation is here to stay – but there will be limits to it

Over the decades, the European Union has grown into an ever more differentiated one. This has helped to create sensitive policy areas such as a common currency, it has made accession of a large number of new Member States easier or even possible, it has helped to adopt controversial legal acts, and for many years it has contributed to upholding integration-sceptical Member States' willingness to further participate in the Union and to not block relevant new stages of integration. Generally speaking, differentiation has been a useful tool to build the European Union the size and depth we know today.

At the very same time, ever increasing differentiation has moved the Union further away from its ideal of an ever closer one. It has added to complexity, thereby adding to the potential of confusion when trying to understand the Brussels system and machinery. It has also resulted in fears of some Member States to be '2nd class EU members' and outside an exclusive avantgarde club[38] – even though most means of differentiation try to address these concerns through safeguard mechanisms such as keeping open formal communication channels (such as Council meetings) and otherwise supporting those States that cannot participate in certain policies or acts from the start.

It is these risks and assumed threats to integration, Union and Member States alike that are reason enough to resort to a cautious use of differentiation in the EU. This is also why the granting of opt outs for new Member States is no longer an option – as *Barbara Lippert* has characterised: "EU accession means acquis total"[39]

35 For a full list of projects incl. each project's participating Member States see https://www.consilium.europa.eu/media/53013/20211115-pesco-projects-with-description.pdf (19/10/2022).
36 Council Decision (CFSP) 2015/1835 of 12 October 2015 defining the statute, seat and operational rules of the European Defence Agency.
37 See *Von Kielmansegg*, in: Giegerich/Schmitt/Zeitzmann (eds.), p. 156.
38 See *Brummer*, APuZ 2017/37, pp. 23 ff.
39 *Lippert*, integration 2017, pp. 104 f. („EU-Beitritt heißt Acquis total").

and neither do new opt outs for current EU members seem possible. Yet, Pandora's box remains open. Differentiation is an integral and everyday component of the European Union. Some cases of application automatically cease to exist after a defined timeframe or can more or less easily be pushed back. Others, such as every single enhanced cooperation, will require huge efforts in order to guarantee all Member States catching up, being able and at the very same time willing to join the others' efforts. Some means of differentiation are even designed to be of permanent nature. The ever closer Union will likely always be a differentiated one, however, without differentiation supplanting the unity principle, the foundation and backbone of the EU, without the Union becoming one of bits and pieces, without 1st and 2nd class members. ZEuS should continue to accompany relevant future developments and I am confident it will do so.

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