West Africa Institute

Avenida da Liberdade e Democracia,
Nº 9 – 5º andar Praia
Achada Santo António

BP 396- A
Cape Verde

Phone: +238-(0)262-40-58
www.westafricainstitute.org

Rheinische
Friedrich-Wilhelms-
Universität Bonn

Center for European
Integration Studies

Walter Flex-Straße 3
53113 Bonn

Phone: +49-(0)228-73-1810
www.zei.uni-bonn.de

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Dirk Leuffen

European Union as a Blueprint?

Nine Hypotheses on Differentiated Integration in a Comparative Perspective

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Dirk Leuffen
Dirk Leuffen is a Senior Fellow at the West Africa Institute (WAI) and a Professor of Political Science at the University of Konstanz, Germany. He holds a PhD from the University of Mannheim and has been a Senior Researcher at the Swiss Federal Institute for Technology (ETH) in Zurich. His research is focusing on the Political System of the European Union and the connection between domestic and foreign policy in this context.

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Introduction[1]

The comparative study of regional organizations goes back to early neo-functionalist work in the 1960s and 1970s (cf. Haas, 1961; Haas and Schmitter, 1964; Nye, 1968; 1971). With the self-critical diagnosis of the "obsolescence of regional integration theory" (Haas, 1975) in the mid-1970s, comparative work on regional integration broadly came to a standstill, to be taken up more systematically only in recent years (cf. e.g. Mansfield and Milner, 1997; Mansfield and Milner, 1999; Choi and Caporaso, 2002; Fawcett, 2004; Acharya and Johnston, 2007; Kühnhardt, 2010; Lombaerde, et al. 2010; Börzel, 2011; Börzel, et al. 2012). This paper takes up this renewed research agenda and formulates some initial tentative hypotheses on comparative differentiated regional integration.

Differentiation has become an increasingly prominent topic in academic studies and political debates on European integration alike. At the same time, with very

1 A previous version of this paper was presented at WAI-ZEI Research Cooperation "Sustainable regional integration in West Africa and Europe" in Bonn on 11-13 March 2013. I thank the participants of this workshop and especially Samuel Priso-Essawe for helpful comments. Thanks also go to Kerstin Radtke and Frank Schimmelfennig who provided useful feedback. In addition, the paper in general heavily draws on joint work with Berthold Rittberger and Frank Schimmelfennig on differentiated integration (cf. Leuffen et al. 2013).

rare exceptions such as Su (2007), the literature has not addressed differentiated integration from a comparative perspective. Accordingly, the goal here is to draw on recent developments in the literature on differentiated integration in the European Union (EU) EU) in order to derive hypotheses and formulate some possible lessons from the European case, for other regional integration settings. While taking the cautionary notes of the new regionalism approach seriously (cf. e.g. Warleigh-Lack, 2006; Lombaerde, et al., 2010; Warleigh-Lack and Rosamond, 2010) – and without postulating that the EU necessarily constitutes a role model or template that other regional organizations should follow – it is still argued that the EU is a valid reference point for comparative research. The EU certainly represents one of the deepest integrated regional organizations today; at the same time, it displays a high degree of differentiation. In addition, the fact that the literature on differentiated integration in the EU has progressed in recent years makes it a natural starting point for studying differentiated regional integration in a comparative perspective.

Based on a review of the literature on EU differentiated integration, this paper will formulate a set of hypotheses on comparative differentiated regional integration. The hypotheses will center a) on different settings or regional organization, b) on different issue areas, and c) on different actors. I will argue that the causes of differentiation lie mostly in a combination of institutional settings and diverging member state preferences. I will show that differentiation is generally considered a measure to overcome gridlock amongst a heterogeneous group of member states of a regional organization, in the context of unanimous decision-making. At the same time, differentiation by all means is no panacea, since it constantly threatens to erode an organization's *acquis communautaire*.

The paper is structured as follows: I will start out by reviewing selected contributions to the recent political debate on differentiation in the EU. The aim of which is to show that differentiation remains a contested idea amongst political actors and that it is closely linked to debates on the *finalité* of the EU. Also, I will show that the discourse on differentiation has changed over time; in fact, it is less contested today than it was in the past. I will then turn to the academic concept of differentiation or differentiated integration. Most literature on this topic stems from the legal sciences, but political science is increasingly becoming interested in this topic. I will introduce different types of differentiation which are distinguished by the literature. In the next part, I will highlight empirical patterns and theoretical explanations for differentiated integration in EU primary law, before

then turning to the field of secondary law. In these empirical chapters the causes and consequences of differentiated integration will be discussed. The aim is to introduce readers without a strong background in EU differentiated integration to the topic. Based on the preceding elaborations, the concluding chapter formulates a set of hypotheses about differentiated integration in a comparative perspective. The paper ends with an outlook for differentiation in the EU and other regional organizations.

Differentiated Integration as a Political Program

Differentiated integration, flexibility or differentiation – I will use these terms broadly and interchangeably in the following – are political as well as academic concepts. We find references to differentiation in political debates on the future and design of the EU, as well as in academic works on this topic. I will first give a short overview of the political positions on differentiation, before turning to the academic context.

Today the concept of differentiated or flexible integration is at the center of numerous debates on the future of the European Union (EU). For instance, British Prime Minister David Cameron in his speech of January 23rd 2013 – a speech in which he promised to renegotiate Britain's EU membership terms with the option of holding an 'in/out' referendum – demanded more flexibility in EU politics: "We need a structure that can accommodate the diversity of its members – North, South, East, West, large, small, old and new. Some of whom are contemplating much closer economic and political integration. And many others, including Britain, who would never embrace that goal. […] We must not be weighed down by an insistence on a one-size-fits-all approach which implies that all countries want the same level of integration. The fact is that they don't and we shouldn't assert that they do." Furthermore, David Cameron finds that "[…] power should flow back to Member States, not just away from them."[2] This second request caused the strongest objections from Brussels, as the prospect of a renationalization of community competences is often considered to represent a major threat to the traditional, monotonous development towards an "ever closer Union". Defenders of the community spirit such as, the Christian Democrat Member of European Parliament, Elmar Brok, responded by accu-

2 Cf. http://www.number10.gov.uk/news/eu-speech-at-bloomberg/ [Accessed 05/03/2013].

sing Cameron of “cherry” or “raisin picking” (Frankfurter Allgemeine Zeitung, 09/02/2013). But David Cameron does not stand alone in the debate. The Italian EU scholar Giandomenico Majone envisages the EU’s future as a network in the form of a “club of clubs – organized around functional tasks“. He sides with Cameron, when he argues that “[t]he traditional one-size-fits-all approach to European integration is obsolete” (Majone, 2013). A similar position is taken by German legal scholar, Christian Joerges (2013), for whom a scenario of disentanglement, a turning away from the big unifying approach and, in the words of Jospeh Weiler, the “Political Messianism” of Europe seems attractive. In a similar vein, Dutch Prime Minister Mark Rutte echoes Cameron by also demanding a repatriation of competences. In a letter of Thursday 31st January 2013, responding to a question in the Dutch Parliament, Rutte and his finance minister Jeroen Dijsselbloem, said that the governing coalition had agreed that “it should be possible under mutual consideration to exit from the community arrangements (Schengen, eurozone, European Union). […] This requires in the case of the eurozone and Schengen a treaty change as the current EU treaty does not foresee this possibility”.[3] Currently, the Lisbon treaty‘s article 50, allows for the first time, a general withdrawal from the Union. However variable exit options, from individual policy areas, are not foreseen by the treaties. Already during the World Economic Forum on January 24th 2013, Rutte cited the Rock band “The Eagles”: “In terms of rules and legislation, it’s a bit like ‘Hotel California’, you can check out but you can never leave” (ibid.). German law professor, Christian Hillgruber, demands a re-transfer of antidiscrimination law to the national level and thus does not even spare the Single Market, the filet of the EU, from differentiation (cf. Verfassungsblog, 08/02/2013).

At the same time, the general idea of differentiation is no longer contested in EU circles. For instance, François Hollande embraced the idea of flexibility in his speech before the European Parliament on February 5th 2013: “En revanche, je considère légitime de travailler à une nouvelle architecture de l’Union. Je plaide pour une Europe différenciée, selon l‘expression de Jacques Delors, ça ne serait pas une Europe à deux vitesses, qui deviendrait d‘ailleurs vite une Europe inégale, ou une Europe divisée, ce n‘est pas davantage une Europe à la carte. Non, l‘Europe différenciée c‘est une Europe où des Etats, pas toujours les mêmes, décident d‘aller de l‘avant, d‘engager de nouveaux projets, de dégager des financements, d‘harmoniser leurs politiques, au-delà du socle substantiel, qui doit demeurer, des compétences communes. Mais je n‘invente rien en vous disant cela. C‘est cette démarche qui a permis de dépasser les frontières avec Schengen, de créer une monnaie unique avec l‘euro, d‘instituer la taxe sur les transactions financières. Cette démarche, c‘est la voie des coopérations renforcées, ouverte à tous, à tous ceux qui veulent les rejoindre, et un jour, pouvant nous rassembler tous autour de ces principes. Dans cette Europe, le Parlement européen aura un rôle majeur à jouer, parce que, par son contrôle, il assurera la cohérence d‘ensemble.”[4]

Frontrunners of the idea of a differentiated Europe were the German CDU politicians Wolfgang Schäuble and Karl Lamers. In their widely noted policy paper “Überlegungen zur europäischen Politik” of September 1994, these authors argued in favor of a “hard core Europe”. At about the same time, this idea was also reflected by then French Prime Minister Edouard Balladur’s concept of a Europe of concentric circles. Commission president Jacques Delors had coined the idea of an “avant-garde” of member states, who would move ahead towards a European federation, inviting the laggards to follow-up over time: “Such a federation should bring together the states of a European avant-garde. To speak of a pioneer group, or an avant-garde, is to recognise that one can only reconcile a deepening of European integration with enlargement of the EU by allowing some countries to go further. My vision of an enlarged Europe is that, at the start, it should consist of both a geopolitical entity bringing together the wider Europe - «the Union» - and an avant-garde that is overtly organised into a Federation of nation states. The point of the avant-garde is to maintain the momentum of building Europe. It should remain open to those countries which want to, and can join. I am not talking about two parallel tracks which do not touch each other. One day, the two entities will come together” (cf. CER Bulletin 14, 2000). Jacques Delors’ concept was taken up by Joschka Fischer in his Humboldt speech of May 12th 2000. At that time, the German Minister of Foreign Affairs, Fischer, sees differentiation as inevitable since a future federation needs to be driven by a center of gravity. But Fischer also understood that such a development would not be without harm: “Does the answer to the twin challenge of enlargement and deepening, then lie in such a differentiation,

3 As cited by euobserver.com (01/03/2013).

4 Cf. http://www.elysee.fr/declarations/article/intervention-du-president-de-la-republique-de vant-le-parlement-europeen/ [Accessed 05/03/2013].

an enhanced co-operation in some areas? Precisely in an enlarged and thus necessarily more heterogeneous Union, further differentiation will be inevitable. […] However, increasing differentiation will also entail new problems: a loss of European identity, of internal coherence, as well as the danger of an internal erosion of the EU, should ever larger areas of intergovernmental co-operation loosen the nexus of integration" (cf. Fischer, 2000).

This short overview of the political debates surrounding differentiated integration highlights that the idea of differentiation today is supported by EU sceptics and EU supporters alike. Interestingly, this was not always the case. While the idea of differentiation was already promoted in the Tindemann report of 1975, and even Jean Monnet seems to have envisaged forms of differentiation (cf. Stubb, 1996), its supporters were still treated as outcasts during the 1970s. As Ralf Dahrendorf's EU speech of 1979 documents: "I have often been struck by the prevailing view in Community circles that the worst that can happen is any movement towards what is called an Europe à la carte. This is not only somewhat odd for someone who likes to make his own choices, but also illustrates that strange puritanism, not to say masochism which underlies much of Community action: Europe has to hurt in order to be good. Any measure that does not hurt at least some members of the European Community is (in this view) probably wrong. In any case it is regarded as unthinkable that one should ever allow those members of the Community who want to go along with certain policies to do so, and those who are not interested to stay out. The European interest (it is said) is either general or it does not exist" (Dahrendorf, 1979).

After having reviewed differentiated integration as a political program, I will now briefly turn to different concepts and understandings related to this term in the academic literature.

Differentiated Integration as an Academic Concept

There is great variety on the understanding of differentiation or differentiated integration in the literature. According to Kölliker (2001, p.127) "differentiation constitutes the general term for the possibility of member states to have different rights and obligations with respect to certain common policy areas. The term is often used interchangeably with the concept of flexibility". For Dyson and Sepos (2010, p.4) "[d]ifferentiated integration is the process whereby European states, or sub-state units, opt to move at different speeds and/or towards different objectives with regard to common policies […] In this way relevant actors come to assume different rights and obligations and to share a distinct attitude towards the integration process – what it is appropriate to do together, and who belongs with whom." Tuytschaever (1999, p.2) stresses that the concept in legal scholarship, has been used to "refer, *stricto sensu*, to instances where EU primary or secondary law distinguishes between its addressees; that is, where some Member States (or regions within Member States) are excluded from the scope of application of primary and secondary law or where the rights and obligations imposed by primary or secondary law on some Member States (or regions within Member States) are different from those imposed on others." From this perspective, differentiated integration modulates "the classic Community method of imposing rights and obligations on all, so as to take account of the situation, interests or successful advocacy of individual Member States" (Tuytschaever, 1999, p.3). Differentiation thus, softens the principle of uniformity of community law, which formally can be traced back to the European Court of Justice's landmark ruling Costa vs. ENEL of 1963, which established the principle of supremacy or prevalence of EU law.[5] In this respect, differentiation can contribute to an erosion of the *acquis communautaire*. While there is general consensus about the meaning of differentiated integration, there are a number of different subtypes, distinguished by the literature. Holzinger and Schimmelfennig (2012, p.297) identify the following six dimensions which separate different types of differentiated integration:

(1) permanent v. temporary differentiation;
(2) territorial v. purely functional differentiation;
(3) differentiation across nation states v. multi-level differentiation;
(4) differentiation takes place within the EU treaties v. outside the EU treaties;
(5) decision-making at EU level v. at regime level;
(6) only for member states v. also for non-member states/areas outside the EU territory.

5 In Costa vs. ENEL the Court rules the following: "The executive force of Community law cannot vary from one State to another in deference to subsequent domestic laws, without jeopardizing the attainment of the objectives of the Treaty set out in Article 5 (2) and giving rise to the discrimination prohibited by Article 7. […] The precedence of Community law is confirmed by Article 189, whereby a regulation ‚shall be binding' and ‚directly applicable in all Member States'. This provision, which is subject to no reservation, would be quite meaning-less if a State could unilaterally nullify its effects by means of a legislative measure which could prevail over Community law." (JUDGMENT OF 15.7.1964 — CASE 6/64).

Based on these criteria Holzinger and Schimmelfennig (2012) classify ten different types of differentiation: 1. Multiple speed, 2. Multiple Standards, 3. Avantgarde Europe, 4. Core Europe/concentric circles, 5. Flexible integration, 6. Variable geometry, 7. Europe à la carte, 8. Optimal level of jurisdiction, 9. Flexible cooperation, 10. Functional, Overlapping and Competing Jurisdictions. The concepts are ordered by Holzinger and Schimmelfennig (2012, p.293) "along the criterion of how far each model deviates from the current legal conception of the EU." For reasons of space, I cannot describe in detail all these types of differentiated integration. However, three notions of differentiated integration, which were first systematically explored and distinguished by Alexander Stubb (1996; 2002) on the basis of temporal, territorial and sectoral criteria, may provide some initial ideas about the various logics, underlying different types of differentiation. Stubb (1996; 2002) compares a "multi-speed", a "variable geometry" and an "à la carte" differentiation. For Stubb (1996, p.285) multi-speed is a "[m]ode of differentiated integration according to which the pursuit of common objectives is driven by a core group of Member States which are both able and willing to go further, the underlying assumption being that the others will follow later." Differentiation which is transitory, is thus at the heart of the multi-speed concept (cf. Stubb, 2002, pp.32-33). Variable geometry for Stubb (1996) is a "[m]ode of differentiated integration which admits to unattainable differences within the integrative structure by allowing permanent or irreversible separation between hard core and lesser developed integrative units." À-la-carte, finally refers to a "[m]ode of differentiated integration whereby respective Member States are able to pick-and-choose, as from a menu, in which policy area they would like to participate whilst at the same time holding only to a minimum number of common objectives" (Stubb, 1996). In this reading "à la carte" is the most flexible and least community-oriented form of differentiated integration. There is no benchmark of integration for all, rather the member states are to pick and choose from the European menu.[6] This concept seems most in line with David Cameron's ideas.

An important analytical distinction on EU differentiation is whether it relates to

6 Other classifications of differentiation are introduced by Emmanouilidis (2007) or Tuytschaever (1999). In addition, there are numerous other terms and metaphors in the literature. For example, Wallace and Wallace (1995) speak of "flying geese", de Neve (2007) suggests a "European onion".

primary or secondary law (cf. Tuytschaever, 1999).[7] In primary law, exceptions often take the form of protocols attached to the treaties. But in the secondary law there are also numerous exceptions to the principle of uniformity of EU law. In addition, there are formal types of differentiation and informal ones relating to non-compliance (cf. Thym, 2006). This second category will not be investigated any further in this piece; rather I will examine formal differentiation in EU primary and secondary law in more detail.

Differentiated Integration in Primary Law

As established above, differentiation was for a long time a taboo in European integration. In fact, until the 1990s, there was none or only tempory occurrences of horizontal differentiation in the EU. Only with the Maastricht treaty did differentiation became a prominent factor shaping integration. Leuffen, et al. (2013, p.25) shows that today more than half, of a selection of eighteen policy areas, display some form of differentiation. Prominent cases of differentiation today are the European Economic and Monetary Union (the Eurozone today has 17 member states as opposed to 27 EU member states) and the Schengen-Area. Schengen, in fact, shows a particularly interesting pattern of integration, as it combines internal and external differentiation: some EU member states such as the United Kingdom, Ireland, Cyprus, Bulgaria and Romania are not part of the Schengen area, whilst non-EU member states such as Iceland, Norway, Switzerland and Liechtenstein do participate. Other, at least temporary exceptions or opt-outs, concern EU citizenship (Denmark) or the social chapter in the Maastricht treaty (United Kingdom). In addition, Denmark was allowed an opt-out from all common foreign policy initiatives with defense implications (cf. Leuffen, et al. 2013, p.192). In the Area of Freedom, Security and Justice, Denmark and the United Kingdom have a special status (Tekin, 2012). Ireland, Poland, the United Kingdom and the Czech Republic negotiated opt-outs from the Charter of Fundamental Rights at Lisbon. This illustrates that today differentiation is not uncommon in the EU. But how can we explain the growth of differentiation over time? Leuffen, et al. (2013) draw on three theories of European integration in order to explain differentiation in the EU: namely supra-

7 A study of comparative differentiated regional integration will, in addition, need to include a focus on more informal modes of governance; e.g. ASEAN generally builds on less legally-binding documents and also APEC relies on legally non-binding commitments.

nationalism (e.g. Stone Sweet and Sandholtz, 1998), (liberal) intergovernmentalism (Moravcsik, 1993; 1998) and constructivism (cf. e.g. Risse, 2009). These integration theories can be distinguished most clearly by a) the emphasis they put on different actors in the EU integration game, and b) by the assumptions that characterize theses actor's behavior and interactions. In contrast to constructivism, supranationalism and (liberal) intergovernmentalism share a rationalist understanding of EU integration. While identities, norms, and ideas are the core ingredients of the constructivist menu, supranationalism and (liberal) intergovernmentalism stress the importance of (mostly material) interests. The latter approaches, however, can be distinguished by the role they attribute to supranational actors and previous integration steps for explaining further integration. Supranationalists stress the importance of supranational and transnational actors that, in concert, successfully voice demands for integration and in a dynamic and endogenous process ultimately bring about integration. While intergovernmentalism stresses the role of member state governments in EU negotiations. While the liberal strand of intergovernmentalism conceptualizes state preferences as an aggregation of societal interests that are defended on the European level by governmental agents, realist strands of intergovernmentalism see national interests as predefined and rather perpetual in nature. In most general terms, according to this view, states strive for survival and the protection of sovereignty. In their case studies on different policy regimes and their development over time, Leuffen, et al. (2013) found that functionalist reasons can best explain demand for integration. In our analysis, interdependence was a core driver of integration. Reasons for differentiation, however, are either unwillingness or incapacity. Unwillingness relates to the demand side of integration – why or why not does a state want to join? Incapacity is indirectly related to the supply side – can a candidate meet the accession criteria or requirements established by the insiders?

The reluctance to participate in integration generally stems from either a high level of autonomy or identity costs.[8] Autonomy costs relate to a loss of a nation state's action capacity. Identity costs refer to a domestic population's fear of losing out on the nation state's identity by delegating competences to another, supranational level. Often both costs combined seem to explain decisions not to participate in a policy field. For example, the United Kingdom's reluctance vis-à-vis Schengen can be explained by autonomy as well as identity costs. While there is a loss of autonomy linked to the idea of giving up the power to control persons entering the British islands, Schengen also has repercussions for the United Kingdom's identity as an island nation (cf. Wiener, 1999).[9] The relevance of identity costs more generally, is also underlined by the fact that some countries opt-out more often than others, despite similar functional structures. In the more reluctant countries, for example the United Kingdom and Denmark, the public are comparatively eurosceptic. With growing euroscepticism and a growing salience of European issues – in short: the politicization of Europe – integration is more difficult to 'sell' to domestic publics. Hooghe and Marks (2008) accordingly speak of a "constraining dissensus" when Europe enters the realm of domestic politics.

In addition, we find that the more an issue relates to state sovereignty – Jachtenfuchs and Genschel (2013, forthcoming) speak of a core state power – the higher the probability that there will be differentiation between the member states of the European Union (cf. Rittberger, et al., 2013, forthcoming). Only if a core state power is weakly integrated and remains intergovernmental in nature, can uniformity be maintained. This is because governmental autonomy is less harmed in intergovernmental policies. An example from the EU is the Common Security and Defence Policy. Despite its close linkage to state sovereignty there is, with the exception of the Danish case, hardly any differentiation in primary law.[10] Thus we find an interaction effect between core state power quality of a policy area and the depth of its integration. Accordingly, one could hypothesize for the Common Security and Defence Policy that deeper integration of this policy area would be accompanied by more differentiation. On the other hand, supranationalism teaches us that once competences are pooled or delegated to supranational institutions, differentiation is harder to enact. If supranational

8 Abbott and Snidal (2000) and Moravcsik (2000, p.220) more generally speak of „sovereignty costs".

9 Incapacity rather than unwillingness is a better explanation for the non-participation of Romania and Bulgaria in the Schengen area. These countries are willing to join, however, from the point of view of member states, in particular Germany, France, the Netherlands and Finland, they do not yet fully fulfil the necessary membership criteria. In particular, the opponents argue that Romania and Bulgaria have not sufficiently progressed in the fight against corruption. Setting up Schengen external borders in Cyprus would entail extensive costs because of the division of the island. Thus a functional explanation can best account for this case.

10 Note however, that protocol 10 of the Lisbon Treaty foresees the instrument of permanent structured cooperation as a means of differentiation.

actors already enjoy a strong degree of autonomy (from the member states), those actors work hard to maintain uniformity amongst the organization's member states.

As to development over time, there is little evidence of strong socialization effects. For example, two of the initial three laggards, concerning the abolishment of border controls in the early 1980s, are still not part of the Schengen area: namely the United Kingdom and Ireland, and Denmark which negotiated a special intergovernmentalist status at Amsterdam for the Area of Freedom, Security and Justice. At the same time, we see that Schengen – at first a regime based on international law outside of the treaty framework - was integrated into the *acquis communautaire* with a protocol attached to the treaty of Amsterdam. Starting with an initial group of five member states, there are now 26 EU member states in Schengen. Thus Schengen depicts some evidence of centripetal integration-enhancing effects. At the time of writing, it is difficult to gauge whether such centripetal effects will also work in the case of the Eurozone. According to Kölliker's (2001) work on public good theory, the common currency should drive outsiders towards membership because the outsiders are likely to face external costs from their exclusion. At the moment, non-participating states seem to be in a more secure position during the euro crisis. But again, we find a mixed pattern of participation, some of the new EU member states still strive for membership in the Eurozone, for instance, Lithuania and Latvia plan to join in 2014. And the old laggards see fewer incentives than ever for joining; thus identity or identification seems an important factor for understanding a state's willingness to join or not to join an integration regime.

When summing up differentiated integration in primary law, an important condition needs to be mentioned. Integration in primary law, in the European Union always necessitates unanimity. Therefore differentiated integration is the answer to the problem of growing heterogeneity. Without differentiation the enormous progress of integration, that the EU has experienced since the early 1990s, would have been impossible to enact. Only because laggards were allowed to opt-out from integration steps, werde the others able to move ahead. Schengen had been impossible to set up in the Community of ten during the 1980s, similarly the Euro. The Social Chapter and the Defence part of Common Foreign and Security Policy were not established for all EU member states. Differentiated integration can thus be seen as a measure for overcoming gridlock. But at what price does it come?

Different effects or consequences of differentiated integration are debated in the literature. Naurin and Lindahl (2010) and Adler-Nissen (2008; 2009; 2011) investigate whether the administrative personal of states that have opted-out from various policy regimes are discriminated against by the administration of more willing member states. In general, they find very few negative effects for the outsiders. For example, in their analysis of network data, Naurin and Lindahl (2010) show that the Swedish, Danish and British Council working group members are rather welcome partners in the inter-administrative networks. A different type of argument is being formulated by Jensen and Slapin (2012). These authors present a formal model of growing differentiation between the core group of integration and the laggards. They argue that the opting-out of more eurosceptic countries leads to an acceleration of integration, because the brakemen step off the train. While this logic is theoretically compelling, the authors present only limited evidence to support their claim. However, one could argue that the current developments around the European Stability Mechanism (ESM) and the fiscal pact work towards a deepening of the differences between insiders and outsiders of the eurozone.

Secondary Law: Enhanced Cooperation in Practice

After having briefly reviewed differentiated integration in primary law, I will now turn to enhanced cooperation as an instrument of differentiated integration in secondary law. The instrument of enhanced cooperation was established by the treaty of Amsterdam.[11] Today, following the treaty of Lisbon, a minimum of nine EU member states is needed for establishing enhanced cooperation. States willing to establish enhanced cooperation, need support from the European Commission, the European Parliament and the instrument must be approved within the Council by a qualified majority. According to Article 20 of the Treaty on European Union (TEU) "[e]nhanced cooperation shall aim to further the objectives of the Union, protect its interests and reinforce its integration process. Such cooperation shall be open at any time to all Member States, in accordance with Article 328 of the Treaty on the Functioning of the European Union." Article 20 TEU, further stipulates that the "decision authorising enhanced cooperation shall be adopted by the Council as a last resort, when it has established that the

11 Cf. on differentiation in Amsterdam more generally Tuytschaever (1999), Stubb (2002) and Ehlermann (1998).

objectives of such cooperation cannot be attained within a reasonable period by the Union as a whole, and provided that at least nine Member States participate in it. […] All members of the Council may participate in its deliberations, but only members of the Council representing the Member States participating in enhanced cooperation shall take part in the vote. […] Acts adopted in the framework of enhanced cooperation shall bind only participating Member States. They shall not be regarded as part of the acquis which has to be accepted by candidate States for accession to the Union." The two main principles are thus; the respect for the objectives of the EU and the integration process, as well as the understanding of the instrument as a measure of last resort. Thus enhanced cooperation is not designed for common recourse, but rather for exceptional circumstances. While enhanced cooperation was already established by the Treaty of Amsterdam in 1999, enhanced cooperation was so far only used in two instances; first, concerning the law applicable to divorce and legal separation and second, the European patent.[12] More recently a proposal for enhanced cooperation in the financial transaction tax was issued.

The divorce legislation aims at solving the question of which national law should apply in international divorces. In order to prevent 'litigation shopping' the European Commission had first proposed EU wide rules on divorce in 2006 ('Rome III regulation'). After no consensus was reached among all 27 member states, ten member states decided to move ahead and asked the Commission to make use of the 'enhanced cooperation' procedure. Correspondingly, the European Commissioner for justice, fundamental rights and citizenship, Viviane Reding, issued a proposal for enhanced cooperation in divorce rules in March 2010 (COM (2010) 105). The main goal of the Commission's proposal was to enhance transparency by defining which country's law applies when couples cannot agree themselves (cf. Leuffen, et al., 2013, p.236).

The European patent has turned out to be a more contested example of enhanced cooperation. The European Commission had long argued that the national system of patents in the EU was very costly as compared, for instance, to US or Japanese patents. At the end of 2009 the Council reached a general agreement about the usefulness of such a system, however, the translation arrangements for the EU patent, were not covered in its conclusions. In 2010 it became evident that the member states were unable to reach unanimity on the translation arrangements. In particular, Spain and Italy objected to an EU patent restricted to the English, French and German languages. It therefore seemed impossible to establish a uniform patent system across the EU. In response, several member states expressed their desire to turn to enhanced cooperation in this area. On February 15th 2011, the European Parliament consented to proceeding under enhanced cooperation. The procedure was then formally authorized by the Council in March 2011 and in April 2011 the European Commission issued a proposal for a regulation implementing enhanced cooperation for the creation of an EU patent. Italy and Spain – the opponents of the EU patent's language regime – lodged a complaint before the European Court of Justice against using enhanced cooperation for the EU patent. Spain's EU affairs minister Diego Lopez Gariddo explained that the Spanish government 'insists that the reinforced cooperation mechanism was used to impose a solution which excludes Spain with a mechanism which, paradoxically, was thought up to facilitate the integration of the Member States.' In a statement the Italian Ministry of Foreign Affairs declared: 'The use of enhanced co-operation within the patent sector is contrary to the spirit of the single market, because it tends to create division and distortion within the market, and will thus prejudice Italian businesses.' Internal Market Commissioner Michel Barnier replied that he was 'confident, that the enhanced cooperation procedure presented by the Commission is not discriminatory. We are assured that Spanish and Italian business will suffer no discrimination. [...] I hope that in time Italy and Spain will join in the enhanced co-operation: that would be in the general European interest.'[13] In December 2012, Yves Bot, advocate general of the European Court of Justice, recommended to dismiss the objections of Spain and Italy (while opinions of the advocate generals are not binding, they are usually followed by the European Court of Justice). The entering into force, of the EU patent in January 2014, has thus become more likely, following the European Court of Justice ruling in spring 2013.

The two cases of enhanced cooperation thus differ in the degree of controversy that they have raised. While both issues were only possible with enhanced cooperation as unanimity was reached in neither one of the cases. Therefore enhanced cooperation facilitated cooperation between a subset of member sta-

12 For detailed case studies of these two cases compare Kroll (2012).

13 Cf. Leuffen, et al., 2013, p.130; citations from www.euractive.com. For further information see: http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/intm/119665.pdf.

tes and thereby partial integration. The recourse to the procedure in the case of the EU patent has raised strong objections from two member states, leading them to appeal to the European Court of Justice. A clear difference between the cases concerns the externalities that they entail.[14] While there are very few externalities linked to the case of the divorce rules, enhanced cooperation in the EU patent can indeed leave Spanish and Italian businesses 'behind'; provided these two states do not decide to join the EU patent regime over time. The issue thus has negative external costs for the non-participating member states. In addition, Italy and Spain contest that enhanced cooperation in the EU patent was really a measure of last resort, given that they generally supported a common patent but only disagreed with the restriction of the official languages English, French and German. The case illustrates that enhanced cooperation can be a solution to gridlock, but at the same time does not come without costs. In this case, Italy and Spain suffer from being left behind through the circumvention of the unanimity criterion. In that respect, differentiated integration in the form of enhanced cooperation differs from differentiation in primary law. Here differentiation is only allowed under unanimity, and the countries that decide to opt-out, still allow the others to move ahead. With only two to three cases where enhanced cooperation was used in practice, it is too early to generalize on the patterns and consequences of this instrument. From the two cases, the common divorce rules and the EU patent, one might still hypothesize that differentiation in the form of enhanced cooperation is more due to functional than to identity concerns. The reason being that issues of secondary law should generally impact less on national sovereignty.

Taking Differentiated Integration to a Comparative Agenda. Lessons and Hypotheses

So far I have reviewed the concept of differentiated integration and its practice in the EU. The goal was to make the non-EU-expert reader familiar with the causes and consequences of EU differentiated integration over time. As argued above, the EU can possibly serve as a useful starting point for a comparative analysis of differentiated integration; not least, because the literature on the EU arguably provides the most extensive coverage of the topic of differentiation. Again, this does not imply that the EU must serve as a role model for other international or regional organizations. Rather I want to contribute to "accumulate knowledge generated about specific regions" (Börzel, 2011) and, ultimately, it should empirically be evaluated whether findings on differentiated integration actually have a travel potential to other political settings. Due to the growing importance of regionalism (cf. e.g. Mansfield and Milner, 1999; Kühnhardt, 2010; Powers and Goertz, 2011) we will concentrate on hypotheses concerning differentiation in regional organizations.[15]

14 Cf. more generally on externalities and differentiated integration (Kölliker, 2001; 2006).

In fact, there are some well-known examples of differentiation, flexibility or fragmentation in other regional organizations. For example, the 'ASEAN Minus X' formula established by the ASEAN Charter of 2007/2008 allows for "flexible participation" in the implementation of economic commitments "where there is a consensus to do so" (Art. 21 ASEAN Charter). Flexibility has also been introduced into the ASEAN Banking Integration Framework (ABIF) endorsed by the ASEAN central bank governors in 2011, by establishing a double-track implementation plan for the ASEAN 5 (Singapore, Malaysia, Thailand, the Philippines and Indonesia), and BCLMV countries (Brunei Darussalam, Cambodia, Laos, Myanmar and Vietnam).[16] In the Asia Pacific Economic Cooperation (APEC), the pathfinder method resembles enhanced cooperation in the EU (cf. Su, 2007). However apart from Su's (2007) contribution, there is very little comparative work on differentiated regional integration. Therefore the following hypotheses are designed for thinking more systematically about differentiated integration in different regional organizations. The hypotheses draw on (liberal) intergovernmentalist, supranationalist and constructivist integration theories and relate a) to regional organizations, b) to issue areas and c) to different actor characteristics.

Organization-specific hypotheses: In which regional organizations should we expect differentiation to occur?

Two prominent criteria for distinguishing regional organizations (besides evident criteria such as geographical location and cultural background) are the

15 Introductions to regional organizations are offered by Börzel (2011), Best und Christiansen (2011), Heywood (2011), and Kühnhardt (2010).

16 Cf. http://www.eastasiaforum.org/2012/05/31/asean-banking-integration-positioning-indonesia/ [Accessed 15/03/2013].

range of policy areas that are covered by a regional organization[17] and the degree of 'centralization' of supranational authority. For instance, Choi und Caporaso (2002, p.484) argue that "three major regions of the world, that is (Europe, the Americas and East Asia) have shown a wide divergence in the degree of institutionalization as measured by the existence and the power of the regional authority presiding over the integration process. The strongest variation lies in the existence of a third party to make binding and enforceable decisions". For example, the EU has a high coverage of sectors and supranational actors such as the European Commission and the European Court of Justice are influential. The Association of Southeast Asian Nations (ASEAN) has a medium sectoral scope – the ASEAN Regional Forum is primarily concerned with security issues. The ASEAN Free Trade Area and the ASEAN Economic Community cover economic issues – but supranational authority is rather weak. South America's *Mercado Común del Sur* (MERCOSUR) is still basically limited to a customs union, although recent activities in the security sector are to be noted (cf. e.g.Oelsner, 2009). However the level of supranational authority in the commercial field, is relatively high, as it possesses a formal dispute settlement procedure.

Concerning scope, we can expect that the more issue areas or sectors which are integrated, the more likely divergence is to grow between the members of a regional organization. For example, in the first 30 years of its existence, differentiation in the EU was low. Only with the broadening of policy areas did differentiation increase. Accordingly, the hypothesis on scope reads as follows:

H1: The more diverse policies are covered by a regional organization, the higher the likelihood of differentiation.

The diversity of policy areas covered may be the result of regional organizations starting in areas of agreement and then expanding into areas of non-agreement. Thus there is also a temporal dimension linked to hypothesis 1.

As to centralization, I expect strong supranational authorities, all else being equal, to exert a unifying pressure on member states of an organization. For instance, the principle of supremacy of EU law was formulated by the European

17 In the context of the EU this is also called sectoral integration, scope or breath (cf. Lindberg,1970; Lindberg and Scheingold, 1970; Rittberger and Schimmelfennig, 2005).

Court of Justice and together with the European Commission, as the guardian of the treaties, should work towards a unifying approach. At the same time, the establishment of centralized structures might also cause reservations from specific states, as they fear higher sovereignty costs. This relates to the establishment of a regime; however, once supranational authorities are set into place, they should use their powers to actively promote uniform integration. The centralization hypothesis builds on supranationalism and expects the following:

H2: Ceteris paribus, the more centralized a regional organization, the smaller the degree of differentiation.

Since heterogeneity of integration preferences is a core driver of differentiation, I further expect differentiation to increase between more diverse member states. If a system is composed of very diverse member states, differentiation should increase. The heterogeneity hypothesis thus leads us to expect the following:

H3: The higher the heterogeneity between members of a regional organization, the higher the likelihood of differentiation.

Finally, vertical integration should matter. Policies which are barely integrated and firmly remain under the control of member states, create fewer autonomy and identity costs. For example, Abbott and Snidal (2000, p.437) argue that "[g]reater sovereignty costs emerge when states accept external authority over significant decisions. […] Delegation provides the greatest source of unanticipated sovereignty costs. As Charles Lindblom [1977] points out, a grant of 'authority always becomes to a degree uncontrollable'". There are thus fewer incentives for states to opt-out from policies that are only integrated at the level of intergovernmental cooperation.[18] Accordingly, the vertical integration hypothesis – competing, at least in part, with hypothesis 2 – claims the following:

H4: The more vertical integration in a regional organization, the higher the likelihood of differentiation.

18 Cf. for a scale of vertical integration Börzel (2005) and Leuffen, et al. (2013).

Issue-related hypotheses: Which issues are likely candidates for differentiation?

The first set of hypotheses invite a comparison between different regional organizations. But where, or more precisely in which, issues can we expect differentiation to occur in regional organizations?
A first criterion is already contained in hypothesis 4 above. The depth of integration should increase autonomy and identity costs, and accordingly should impact on the incentives for differentiation. Translated to the policy or issue level, the vertical integration hypothesis reads as follows:

H5: The deeper a policy is integrated, the higher the likelihood of differentiation.

Note that hypothesis 5 competes – at least in part – with hypothesis 2. But we also expect other policy-related factors to impact on differentiation. A purely regulatory policy should invite fewer concerns from domestic publics and political elites, than policies which are redistributive in nature. The reason being, that there are fewer costs associated with a regulatory policy which is assumed to be pareto efficient. Hypothesis 6 accordingly focuses on the policy-type:

H6: Regulatory policies are less likely to be differentiated as compared to redistributive policies.

Also the linkage of a policy to a "core state power" (Jachtenfuchs and Genschel, 2013, forthcoming) should impact on the degree of differentiated integration. Core state powers are closely related to state sovereignty. Pooling and delegation of such policies entails strong autonomy and identity costs. Accordingly, the core state power or sovereignty hypothesis predicts the following:

H7: The more an issue-area relates to state sovereignty, the higher the likelihood of differentiation.

At the same time, the degree of differentiation should depend on the depth of integration on the policy area. Only if a core state power is deeply integrated, should differentiation occur.

Actor-related hypotheses: Which actors are likely opt-out candidates?

After having formulated hypotheses on organizations and issue areas, we finally turn to the actors. Who is most likely to opt-out from regional integration endeavors?

In general terms, members of a regional organization which are likely to opt-out from integration steps, are those whose preferences do not align with the preferences of the drivers of integration. The preference hypothesis is accordingly rather general in nature:

H8: The further a member state of a regional organization deviates from the other member states' preferences for integration, the higher the likelihood that this state will opt-out from deeper integration.

Based on Hooghe and Marks' (2008) postfunctionalist theory of integration, I expect countries with strong exclusive national identities to be likely candidates for opting-out from regional integration regimes. For countries with exclusive national identities, integration comes with high identity costs. Accordingly, they should be more reluctant vis-à-vis integration. The identity hypothesis thus reads as follows:

H9: The more exclusive the national identity of a country, the more likely this country is to opt-out from integration steps.

This analytical framework is designed to trigger an interest in further scrutiny of differentiated integration in a comparative perspective. If we apply these hypotheses to different organizations, we should expect, for example, that there should be less differentiation in MERCOSUR as compared to ASEAN, as MERCOSUR covers fewer issue-areas and has deeper degree of centralization. Future work should aim at filling in the blanks around this framework with examples, so that we gain a better understanding of differentiated integration in a comparative perspective.

Conclusion

In this paper, I have reviewed the literature on differentiated integration in the EU in order to provide a background for generating a set of nine hypotheses toward a comparative study of differentiated regional integration. I began with an overview of common statements in political debates on the future of the EU, in order to underline the concept's political significance in today's EU. I then turned to different academic understandings of the concept, before giving an overview of theoretical and empirical findings on the history, the causes and consequences of differentiated integration in the EU. In this part, I distinguished differentiation in the context of primary and secondary law. In primary law we find an important increase in differentiation since the early 1990s. While differentiated integration in secondary law has always existed, for instance, in the context of EU enlargements. However the instrument of enhanced cooperation has so far only been used two times in the EU.

In relation to the causes of differentiation, I demonstrated, amongst other things, that differentiation is most often the result of preference heterogeneity and that opting-out is usually either autonomy- or identity-cost driven. While the long-term effects of differentiated integration are hard to predict, there is some evidence for both integration-enhancing and integration-hindering developments. Without differentiation many integration steps in the last two decades would not have been enacted in the EU; in addition, some policies such as Schengen have displayed centripetal effects. At the same time, differentiation always entails the risk of the erosion of the *acquis communautaire*. In policy areas such as the Economic and Monetary Union, there is growing evidence to suggest that the laggards of integration are becoming less likely to follow the 'avant-garde'.

Based on the general assessment of differentiation in the EU, the final chapter generates a set of nine hypotheses on differentiated integration in a comparative perspective. The first four hypotheses relate to the organizational-level, hypotheses 5 to 7 concern issue-areas and hypotheses 8 and 9 bring the actors of differentiated integration to the center. The set of hypotheses can be considered an initial analytical framework for inviting further studies of differentiated integration, beyond the EU context. Embracing the debate about differentiation comparative could entail some important conceptual, theoretical and empirical improvements to the literature. Conceptually, we might learn that the notion of differentiation needs to be adapted more strongly to varying regional contexts.

For instance, in Western Africa there is a "fragmentation" and "duplication" of regional organizations such as the Economic Community of West African States (ECOWAS) or the West African Economic and Monetary Union (UEMOA) (cf. Resende-Santos, 2013). Does this fall under the category of differentiation, or do we need to find more closely adapted concepts for such cases? Should UEMOA be considered a nucleus of further integration, a laboratory, or how can its links to ECOWAS be conceptualized from a perspective of differentiated integration (cf. also Sirpe, 2013; Touré, 2013)? Theoretically, various cases and developments of differentiation across regional organizations can inform about the mechanisms and conditions of differentiation. Finally, comparative differentiated integration can contribute to broadening our empirical knowledge of different forms and practices of differentiation. Different experiences might inform practitioners how and when best, to make use of differentiated integration.

To conclude, differentiation creates chances and risks for regional integration. The chances lie in enabling integration against the backdrop of unanimity-related gridlock. Also, differentiation has some democracy-enhancing characteristics. By not forcing states and their populations into integration regimes, their positions are more strongly respected. For example, it has been argued that differentiation fits well with the European Convention's slogan "unitas in pluritate" (unity in diversity) (cf. Thym, 2006a; b; Joerges, 2013). At the same time, differentiation might enhance a pick-and-choose attitude that can over time weaken the community spirit. In such a reading, differentiation can be considered a hindrance for future federalist developments. A renationalization of competences as demanded by David Cameron, bears some important risks for regional organizations. According to neofunctionalism, functional spill-over can explain integration dynamics across different sectors. Based on this logic, a re-transfer of policies to the national level might similarly trigger spill-back effects with negative repercussions on the coherence of regional integration.

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