



## ARTICLES

# NEW OPTIONS FOR DIFFERENTIATED INTEGRATION IN THE EUROPEAN UNION

*Edited by Juan Santos Vara and Ramses A. Wessel*

### NEW OPTIONS FOR DIFFERENTIATED INTEGRATION IN THE EUROPEAN UNION: INTRODUCTION TO THE *SPECIAL SECTION*

Brexit particularly triggered new discussions on so-called differentiated integration (DI) in the European Union. Not only was Brexit perceived as a potential tool to take further integrative steps in certain policy areas, it also pointed to the idea that there is a risk in trying to force each and every Member State to follow the same pace. Hence, while part of the scholarship sees Brexit as a tragedy for the European integration process, others have pointed to possible advantages that would allow for further integration in certain areas. In any case, Brexit seems to have renewed the debate on the ways in which the EU Member States could proceed, together or in smaller groups. In that sense, the current debates reflect the earlier discussions on a *géometrie variable* or concentric circles that were vivid some decades ago.<sup>1</sup>

The aim of the present *Special Section* is to assess theoretical, conceptual implications of Brexit for integration scenarios, and – more broadly – to take stock of the DI possibilities in different concrete policy areas and highlight options and obstacles. First drafts of the *Articles* of this *Special Section* were discussed in Salamanca on 28-29 October 2021 at a workshop organised in the framework of the European Papers Jean Monnet Network under the direction of Prof. Juan Santos Vara (University of Salamanca) and Prof. Ramses A. Wessel (University of Groningen), with support of the Centre for the Law of EU External Relations (CLEER) in The Hague on the topic: *The EU after Brexit: New Options for Differentiated Integration?* The *Articles* were subsequently discussed, reviewed and revised in various rounds. The end-result is laid down in this *Special Section*.

A first set of *Articles* deals with various approaches to European integration and differentiation. In his *Article*,<sup>2</sup> Robert Böttner, one of the key experts in this area, sets the stage by exploring the potential of enhanced cooperation as introduced by art. 20 TEU.

<sup>1</sup> See for a comprehensive overview of past and current developments from a political science/IR perspective B Leruth, S Gänzle and J Trondal (eds), *The Routledge Handbook of Differentiation in the European Union* (Routledge 2022).

<sup>2</sup> R Böttner, 'The Instrument of Enhanced Cooperation: Pitfalls and Possibilities for Differentiated Integration' (2022) *European Papers* [www.europeanpapers.eu](http://www.europeanpapers.eu) 1145.



Böttner argues that shifting political attitudes of EU Member States and – plainly and simply – the legal framework for this tool of differentiated integration influence how and when enhanced cooperation can and will be used as an instrument to overcome deadlocks in negotiation. This *Article* is followed by a contribution that assesses the limits of this potential. Armin Cuyvers argues that the legal space for truly structural forms of differentiation in the EU is limited by several sources of rigidity, understood as legal rules and principles that limit the scope for structurally significant differentiation in the EU's legal and constitutional set-up.<sup>3</sup> Cuyvers demonstrates how Brexit brought these sources of rigidity to the surface, and how legal rigidity can and likely will collide with an increasing political desire for more structural differentiation in the future. That structural differentiation can also be reached less drastically, is argued by Hübner and Van den Brink.<sup>4</sup> In their *Article*, they point to the potential of, what they term “legislative differentiation” as an alternative to more classic forms of DI. With legislative differentiation, they refer to the situation in which Member States are allowed to make substantive policy choices in the implementation of EU legislation and use such flexibility to customize EU legislation to their own domestic contexts. Fabian Terpan and Sabine Saurugger,<sup>5</sup> in their *Article*, reveal that differentiation is not *per se* about legislation, but that there is also a “soft law” dimension. The purpose of their *Article* is to provide a framework that helps analysing the relationship between soft law, differentiation, and the prospects of integration/disintegration. More specifically they aim at developing a typology of scenarios in order to show how soft law contributes to our understanding of differentiation and to the overall discussion about integration/disintegration in the European Union, in a context of crises. Finally, in this first – more theoretical – part, Maria Kendrick focusses on lessons to be learnt on differentiated integration from applying Brexit as a framework.<sup>6</sup> The confusion surrounding differentiated integration as a concept, and the prominent role of the UK in availing itself of opportunities to utilise differentiated integration mechanisms, has led differentiated integration to be attributed to the UK as a form of British exceptionalism. In the new situation, the maintenance of differences between the remaining Member States means that there needs to be increased open acceptance of the likely need for greater differentiated integration in the future.

<sup>3</sup> A Cuyvers, ‘The Legal Space for Structural Differentiation in the EU: Reciprocity, Interconnectedness and Effectiveness as Sources of Constitutional Rigidity’ (2022) European Papers [www.europeanpapers.eu](http://www.europeanpapers.eu) 1165.

<sup>4</sup> T van den Brink and M Hübner, ‘Accommodating Diversity through Legislative Differentiation: An Untapped Potential and an Overlooked Reality?’ (2022) European Papers [www.europeanpapers.eu](http://www.europeanpapers.eu) 1191.

<sup>5</sup> F Terpan and S Saurugger, ‘Does Soft Law Trigger Differentiation and Disintegration?’ (2022) European Papers [www.europeanpapers.eu](http://www.europeanpapers.eu) 1229.

<sup>6</sup> M Kendrick, ‘Brexit the Ultimate Opt-Out: Learning the Lessons on Differentiated Integration’ (2022) European Papers [www.europeanpapers.eu](http://www.europeanpapers.eu) 1211.

A second set of *Articles* address DI in specific policy fields with the aim to assess options in more concrete terms. First of all, Juan Santos Vara studies DI in the context of the EU's asylum policy.<sup>7</sup> The aim of his *Article* is to analyse to what extent the development of flexible solidarity in the field of asylum will allow the EU to address the shortcomings that the Common European Asylum System (CEAS) is facing today. A key question is whether differentiation as regards solidarity serves to further develop the EU asylum policy by introducing a useful degree of flexibility to accommodate the different interests of the Member States. Similar national sensitivities can be found in the area of financial markets regulation. The question of how Brexit affects the manner in which the EU manages financial rules and regulations with the UK is central in the *Article* by Shawn Donnelly.<sup>8</sup> He raises the question of how Brexit changed the EU's need to rely on differentiated law internally to overcome intergovernmental conflict over the proposed legislation. A consequence of Brexit may be that the EU need not rely on differentiated law as much as in the past. Effects of Brexit can also be seen in EU foreign, security and defence cooperation. Benjamin Martill and Monika Sus show that while the strategic benefits of differentiation increased following the Brexit vote, the growing concern in Brussels for the precedent set by Brexit, the collapse of issue-specific dynamics into a singular concern for UK "cherry picking", and the rightward shift in UK politics occasioned by the Brexit negotiations all undermined the prospects for a differentiated outcome in security and defence.<sup>9</sup> Still, as Beatriz Cózar Murillo analyses,<sup>10</sup> the launch and implementation of the Permanent Structured Cooperation (PESCO) in the EU in 2017 has emerged as a real game-changer. The author focuses on the analysis of both horizontal and vertical differentiated integration from an eminently practical point of view to distinguish a real group of front runners in the implementation of PESCO and the window of opportunity that opens up by allowing third states to participate in individual projects. In the end, however, the question remains to what extent defence cooperation under the umbrella of PESCO can be cut up in pieces and yet still be considered a *common* defence adhering to the EU's general principles of consistency and sincere cooperation, that are fundamental to any common policy. The question raised by Anneke Houdé and Ramses A. Wessel in their *Article*,<sup>11</sup> therefore, is whether DI in PESCO is limited by these principles, and consequently, whether the Common Security and Defence

<sup>7</sup> J Santos Vara, 'Flexible Solidarity in the New Pact on Migration and Asylum: a New Form of Differentiated Integration?' (2022) European Papers [www.europeanpapers.eu](http://www.europeanpapers.eu) 1243.

<sup>8</sup> S Donnelly, 'Brexit, EU Financial Markets and Differentiated Integration' (2022) European Papers [www.europeanpapers.eu](http://www.europeanpapers.eu) 1265.

<sup>9</sup> B Martill and M Sus, 'With or Without EU: Differentiated Integration and the Politics of Post-Brexit EU-UK Security Collaboration' (2022) European Papers [www.europeanpapers.eu](http://www.europeanpapers.eu) 1287.

<sup>10</sup> B Cózar-Murillo, 'PESCO as a Game-changer for Differentiated Integration in CSDP after Brexit' (2022) European Papers [www.europeanpapers.eu](http://www.europeanpapers.eu) 1303.

<sup>11</sup> AS Houdé and RA Wessel, 'A *Common* Security and Defence Policy: Limits to Differentiated Integration in PESCO?' (2022) European Papers [www.europeanpapers.eu](http://www.europeanpapers.eu) 1325.

Policy (CSDP), despite the differentiation, still contributes to a common policy. In short, is there a tension between *commonness* and *differentiation*?

This final question can be seen as leading all contributions to this *Special Section*.

**Juan Santos Vara\* and Ramses A. Wessel\*\***

\* Professor of Public International Law and European Law, University of Salamanca, savajuan@usal.es.

\*\* Professor of European Law, University of Groningen, r.a.wessel@rug.nl. This *Special Section* has been conceived in the framework of the Jean Monnet Network 'European Papers: A Journal on Law and Integration' (2016) [www.europeanpapers.eu](http://www.europeanpapers.eu).