



DIALOGUES

CONFERENCE ON THE FUTURE OF EUROPE

THE CONFERENCE ON THE FUTURE OF EUROPE  
AND EU REFORM:  
LIMITS OF DIFFERENTIATED INTEGRATION

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ABSTRACT: There is considerable uncertainty about the outcome of the planned Conference on the Future of Europe, especially regarding possible treaty change. This contribution to the *Dialogue* comments on the possibility of an intergovernmental agreement outside the EU treaty framework on the basis of theoretical and empirical knowledge about differentiated integration. It argues that such an agreement would deviate from the traditional logic of differentiated integration venues, and that differentiated integration is generally of limited value for overcoming decision-making blockades on constitutional and redistributive issues.

KEYWORDS: Conference on the Future of Europe – differentiated integration – European Union – institutional reform – ratification – treaty revision.

## I. INTRODUCTION

In his letter to the “Citizens of Europe” ahead of the 2019 European elections, French President Emmanuel Macron proposed a Conference for Europe involving representatives of the Member States, the EU institutions, citizens and stakeholders to promote and turn into action his agenda for a “European renewal”. This conference was to “propose all the changes our political project needs, with an open mind, even to amending the treaties”.<sup>1</sup> In their November 2019 “non-paper”, the French and German governments reiterated that the Conference “should address all issues at stake” with a focus on policies, but also including institutional issues, and “produce tangible and concrete results”.<sup>2</sup> In the meantime, the European Commission, the European Parliament and

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<sup>1</sup> E. MACRON, *For European Renewal*, 4 March 2019, [www.elysee.fr](http://www.elysee.fr).

<sup>2</sup> Franco-German non-paper on key questions and guidelines: Conference on the Future of Europe, 25 November 2019, [images.politico.eu](http://images.politico.eu).



the Council have signed up to the Conference, which was supposed to start in 2020 but has been postponed indefinitely.

The Covid-19 pandemic is not the only obstacle to blame. The preparatory stage has also revealed diverging positions of the institutions and the Member States on the scope and ambition of the Conference. At the time of writing, there still is no interinstitutional agreement on the Conference. Instead, discussions have focused on who will be chairing the Conference.<sup>3</sup> These developments create considerable uncertainty about the “tangible” and “concrete” results of the Conference and cast doubt on whether the proposed changes will ever make it into “amending the treaties”. In this regard, the most important statement in the Council position on the Conference is a brief sentence at the end of the document: “The Conference does not fall within the scope of Article 48 TEU”.<sup>4</sup> It implies that whatever comes out of the Conference on the Future of Europe will not directly feed into a process of treaty revision. Rather, the Conference is expected to present a report to the European Council. In other words, the Member State governments have made it clear that they will not cede the European Council’s gatekeeper position on treaty change or give up their individual veto positions on treaty revisions. This also means that reforms – e.g. on the consolidation of the Eurozone, the European asylum regime or the rule-of-law mechanism – that governments have not been able to agree on are unlikely to be unblocked by the Conference. In this context, the Conference on the Future of Europe risks turning into a Great European Palaver, reviving the European public sphere and deliberating political ideas, but falling short of producing political results. It is questionable whether such an exercise would “underpin the democratic legitimacy and functioning of the European project” and “uphold the EU citizens support for our common goals and values”, as envisaged by the Council.<sup>5</sup>

In this context, any thoughts and suggestions on how to work around intergovernmental gatekeeping and national vetoes are highly relevant. In this *Dialogue*, Federico Fabbrini made the original proposal for the Conference to prepare a treaty – a “Political Compact” – that would take the legal form of an “inter-se agreement” outside the EU – and thus independent of its formal requirement for unanimous intergovernmental agreement and national ratification. In addition, the Political Compact could introduce less demanding entry-into-force thresholds, with which the EU has recently experimented in other intergovernmental agreements.<sup>6</sup> Because such a treaty would only be binding on those

<sup>3</sup> E. SÁNCHEZ NICOLÁS, *Future of Europe: EU Council Urged to Propose a Chair*, in *EUobserver*, 14 October 2020, euobserver.com.

<sup>4</sup> Council, Note from the Presidency of 24 June 2020, Conference on the Future of Europe: Council Position, Council Document 9102/20, www.consilium.europa.eu.

<sup>5</sup> *Ibid.*

<sup>6</sup> See F. FABBRINI, *Reforming the EU Outside the EU? The Conference on the Future of Europe and its Options*, in *European Papers*, Vol. 5, 2020, No 2, www.europeanpapers.eu, p. 963 *et seq.*

Member States that agree to and ratify it, it would produce differentiated integration – a situation, in which integrated policies are not legally valid in all Member States.

This contribution to the *Dialogue* discusses ideas to conclude new agreements between existing EU Member States from a political (science) perspective, drawing on current theoretical and empirical scholarship on differentiated integration in the EU, in order to assess its novelty and feasibility.<sup>7</sup> First, I look at how the proposal fits with traditional venues of differentiated integration. Then I examine whether it would serve to promote EU reform. In my assessment, such a Political Compact would be problematic both institutionally and materially. Outside intergovernmental agreements are hardly compatible with the integrationist ambition of the Political Compact. Moreover, differentiated integration is unlikely to overcome the conflict on constitutional and redistributive issues on the EU reform agenda.

## II. VENUES OF DIFFERENTIATED INTEGRATION: DIFFERENTIATED TREATY REVISIONS V. EXCLUSIVE OUTSIDE AGREEMENTS

At its core, differentiated integration is an instrument to increase the chances of reaching agreement under the dual constraints of heterogeneous state preferences and capacities, on the one hand, and the unanimity rule, on the other. It is clear that the prospects of EU reform currently suffer from both constraints. In the face of a series of deep crises, EU policymakers and academic observers have identified a number of policy areas that require major reforms to overcome dysfunctional policies and consolidate the Union. Prominent examples include the completion of the banking union (above all the European deposit insurance scheme, EDIS), the overhaul of European asylum policy after the migration crisis, an effective rule-of-law mechanism to protect the independence of national judiciaries, a shift to qualified majority decision-making in foreign policy, and a solution to the conflict between Parliament and European Council on the election of the Commission President. In all of these areas, divergent preferences of the Member States and fundamental intergovernmental conflict have led to protracted reform impasses. And whereas these issues could be settled formally in principle without a new round of revisions of the EU Treaties, both *de iure* and *de facto* decision-making rules have prevented the EU from overcoming these impasses. Even in those cases, in which qualified majority decisions are foreseen, such majorities are either not available or regarded as unworkable. For instance, after the refusal of Central and Eastern European Member States to implement

<sup>7</sup> See F. SCHIMMELFENNIG, T. WINZEN, *Ever Looser Union? Differentiated European Integration*, Oxford: Oxford University Press, 2020. The contribution further draws on F. SCHIMMELFENNIG, *EU Crisis and Reform: Is Differentiated Integration the Answer?*, in *Le Grand Continent*, Working Paper 4, June 2020, legrandcontinent.eu. For a legal comment, see B. DE WITTE, *Overcoming the Single Country Veto in EU Reform?*, in *European Papers*, Vol. 5, 2020, No 2, www.europeanpapers.eu, p. 983 *et seq.*

the Council decision on the relocation of refugees,<sup>8</sup> taken by qualified majority, it is now generally understood that reforms of the Common European Asylum System need to be based on intergovernmental consensus. It is equally taken for granted that a regulation on EDIS could not be taken by a qualified majority against Germany.

Differentiated integration offers a way out of these impasses without abolishing the *de iure* or *de facto* decision-making rules: it exempts or excludes those Member States from a common policy who lack either the willingness or the capacity to participate. It thereby reduces the number of participating Member States up to the point at which their preferences and capacities become sufficiently homogenous to accept a reform unanimously.

At the treaty level, the EU can essentially use two venues to differentiated integration: differentiated treaty revision and exclusive outside agreements.<sup>9</sup> On the one hand, it can use a revision of the EU Treaties that grants opt-outs to countries that disagree with a new EU policy or are unwilling to meet the requirements for participation. Such treaty revisions can also specify conditions that Member States have to fulfil before being allowed to participate in an EU policy. Under these conditions, all Member States accept and ratify a new treaty, which is then also binding for all of them. Economic and Monetary Union (EMU) is the prototypical example. The Treaty of Maastricht not only granted opt-outs to Denmark and the UK (to secure the consent and ratification of Member States that were unwilling to participate) but also specified convergence criteria that States would have to meet to join the Eurozone (to facilitate the consent and ratification of hard-currency and fiscally rigid Member States that were sceptical about the participation of Member States with a looser macroeconomic policy). Treaty differentiation on EMU has also trickled down into secondary legislation, such as on the banking union. Differentiated treaty revisions often combine differentiations in a variety of policy domains, commensurate with the scope of the treaty. The four Danish opt-outs from the Maastricht Treaty, covering EMU, Justice and Home Affairs, defence and union citizenship are a telling example.

On the other hand, States can use exclusive outside agreements to achieve differentiated reform. In this case, the integrationist members exclude or exempt unwilling or incapable States from the entire agreement rather than from specific treaty rules. Correspondingly, outside agreements do not depend on the consent of, and do not bind, non-participating Member States. The Schengen Agreement and Convention are the prototypical examples. The Prüm Convention, the ESM Treaty, the Treaty on Stability, Coordination and Governance including the Fiscal Compact and the Intergovernmental Agreement on the Single Resolution Fund (SRF) are additional cases. In contrast

<sup>8</sup> Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece.

<sup>9</sup> I leave aside the special case of differentiated legislation, either in regular legislation or according to the enhanced cooperation procedure. The logic is similar to differentiated treaty revisions.

to differentiated treaty revisions, these agreements typically have a narrow policy scope, remain within a single policy domain and often address specific issues within this domain – such as national transfers to the SRF or the exchange of data and personnel in law enforcement in the Prüm Convention. The earlier cases used the same requirements of unanimous agreement and national ratification as the EU Treaties. It is only in the context of the Eurozone crisis that the related intergovernmental agreements started to deviate from this rule and envisaged entry into force after ratification by a subset of the contracting parties.<sup>10</sup>

States choose exclusive outside agreements rather than differentiated treaty revisions for several functional and political reasons alone or in combination. First, they may prefer an intergovernmental governance structure without the constraints imposed by supranational institutions, which would be difficult to achieve in a treaty revision if the relevant policy domain operates according to the “Community method”. Second, the agreement may be so limited in scope that a regular treaty revision procedure seems disproportionate. Both reasons are unrelated to Member State heterogeneity. Third, there are issue-specific reasons to limit the participation to a sub-group of the Member States. For instance, it was clear from the beginning that the ESM would be an exclusive arrangement for Eurozone countries. Fourth, the integrationist group of States may be forced to move outside the treaty framework because non-participating Member States are intent on preventing them from deeper integration, or demand conditions for their consent that are unacceptable to the integrationists. For instance, the Fiscal Compact was transformed into an intergovernmental treaty when the British Cameron government threatened to veto it unless it obtained concessions and additional exemptions on several financial market issues.

This brief review shows that the Political Compact is a novel proposal, indeed, but runs against the established logic of venue choice. The Political Compact aims at an ambitious reform of the EU potentially covering a variety of policy domains and deepening supranational integration. This is a feature of differentiated treaty revisions, however, that contrasts with the narrow policy scope and intergovernmental governance of exclusive outside agreements. It is problematic for two reasons.

First, unless the intergovernmental constellation of preferences and capacities is the same for all issues it covers, an agreement with a large issue scope would produce different patterns of membership across policies. For each issue covered in the Political Compact, there may be a different set of members unwilling or unable to participate. Whereas this hurdle can be overcome in principle, it produces complex negotiations. If Member States decide to go the outside-agreement route in the first place, it makes more sense for them to conclude a separate agreement for every policy issue, each of which would command the unanimous agreement of all participating States. This would

<sup>10</sup> F. FABBRINI, *Reforming the EU Outside the EU?*, cit.

also be the functional solution in the case of reforms limited to already differentiated policy areas such as the Eurozone.

Second, outside agreements are difficult to reconcile with supranational governance. It is not coincidental that the treaty integration of the Schengen agreements went hand in hand with the shift of migration policies from intergovernmental to supranational (“first-pillar”) institutionalization. If the Political Compact aims at supranational governance, it needs either to find a way to enlist the support of the EU’s supranational institutions or to create its own supranational institutions. The first route might be resisted by EU members not participating in the outside agreement; otherwise it might require complicated rules safeguarding the respective autonomy of insiders and outsiders. The introduction of the banking union is instructive in this respect. It triggered strong British concerns and a change in the decision-making rules of the European Banking Authority to a double-majority requirement in order to make sure that the banking-union bloc would not structurally outvote Member States not participating in the banking union. The second route would resemble ideas for a Eurozone Parliament and would lead to institutional fragmentation and duplication. Differentiated integration in the EU has therefore generally avoided creating differentiated supranational institutions.

For these reasons, it would be more productive for the Conference on the Future of Europe to propose a differentiated treaty revision – to the extent that its proposals could not be implemented without treaty change. It is true, however, that its differentiations would need to address the opt-out requests of all Member States to find unanimous support. Moreover, the treaty revision might still need to be transformed into outside agreements if a single Member State is intent on denying the integrationist group deeper integration or wielding its bargaining power to demand far-reaching concessions. Even in an EU without the UK, such a scenario cannot be excluded.

It should be noted, in addition, that the above-mentioned proposal by Fabbrini for outside agreements with majoritarian entry-into-force thresholds combines two safeguards against Member State vetoes that are partly substitutable and serve different purposes. In principle, outside inter-se agreements pave the way to consensus quasi-automatically because they bring together only those Member States that support integration. Veto threats disappear if opposed governments are either free to abstain or excluded from participation. The only reason to furnish outside agreements with non-consensual entry into force is uncertainty about national ratification, in particular in cases of ratification by referendum. This is why the Eurozone countries introduced novel entry-into-force rules in the outside agreements concluded during the euro crisis: given the time constraints and massive stakes of reform in the crisis, they could ill afford to make the rescue of the Eurozone dependent on the uncertain approval of individual Member State electorates (concretely, Irish voters). Put differently, majoritarian entry-into-force rules in outside agreements are not necessary to overcome veto

threats of governmental negotiators but constitute a technocratic device to circumvent domestic non-ratification threats.

### III. ISSUE TYPES AND DIFFERENTIATED INTEGRATION

The previous section focused on procedural and institutional issues. Yet material reasons may prove an even higher hurdle for effective EU reform pursued through differentiated integration. Two types of issues are particularly intractable for a differentiated approach to reform: constitutional and redistributive issues.

Constitutional issues concern the fundamental values and norms as well as the basic organizational set-up and institutional rules of a polity. The EU considers itself a community of liberal-democratic states sharing constitutional principles such as human rights, democracy and the rule-of-law and common values such as freedom, equality and non-discrimination.<sup>11</sup> To the extent that such values and norms pertain to the domestic institutions and behaviour of Member States, the differentiated integration of such issues is functionally feasible. Technically, the EU could grant its Member States opt-outs from non-discrimination, such as LGBT-free zones in Poland, or from fair elections in Hungary. In a narrow sense, such differentiations do not create externalities for other Member States. LGBT-free zones in Poland do not affect non-discrimination policies elsewhere, and unfair elections in Hungary do not make it any easier or more difficult for other Member States to hold fair elections.<sup>12</sup> Yet because Member State democracy is a foundational value of the EU, and human rights are considered “indivisible”, differentiated integration would be inappropriate even if it were feasible.

When the EU's own institutional order and rules are at stake, issues of externalities and feasibility loom large in addition. If individual Member States were granted the right to rig European Parliament elections or ignore CJEU decisions, differentiated integration would create inequality among States (and citizens) and undermine the proper functioning of the institutional system. For these reasons, divergent preferences and capacities of the Member States regarding constitutional issues do not lend themselves to differentiated integration.

They also explain why differentiations in these domains are rare and limited. Differentiations are absent from the general and institutional provisions of the EU Treaties. Accession treaties, which are otherwise a major source of differentiation in the European integration, do not exempt new Member States from political and institutional obligations. And the only differentiations in the domain of constitutional issues, the UK and

<sup>11</sup> Art. 2 TEU.

<sup>12</sup> In a wider sense, however, discriminatory policies in one Member State may affect the freedom of movement of persons in the internal market and thus create externalities that are problematic for differentiated integration.

Polish “opt-outs” from the Charter of Fundamental Rights, are generally seen as declaratory and having little practical effect.<sup>13</sup>

Redistributive issues concern burden-sharing and material transfers between the Member States. In general, the EU is a predominantly “regulatory” polity, which codifies and enforces rules that regulate which Member State behaviours are permitted or prohibited.<sup>14</sup> By contrast, redistribution is limited to a small share of public finances: inter-personal transfers in a narrow sector – agriculture – and inter-regional cohesion.

Just as in the case of common values and institutions, differentiated integration would be technically feasible in redistributive policies. It would be possible to exempt Member States with tiny agricultural sectors from participation in the Common Agricultural Policy (CAP) or the richest countries from contributing to the cohesion funds. It is also possible to exclude the poorest and most agricultural regions from receiving transfers. To a limited extent, the EU budget rebates and the phasing in of agricultural subsidies for new Member States work exactly in this way.

Yet, differentiated integration in redistributive policies tends to be self-defeating. For instance, risk-sharing arrangements are most efficient if they consist of a large number of participants with a high diversity of risk profiles. If they bundle very low risks only, they are unnecessary. If they bundle only a few participants with extremely high risks, they are unsustainable. Likewise, burden-sharing arrangements need to join low-capacity and high-burden members with those that have high capacity or a lower burden so that redistribution produces manageable burdens for all participants. Voluntary arrangements that allow Member States to opt out inevitably lead to the exit of the countries with the lowest risks, lightest burdens and highest capacity, or to a significant reduction of their contributions. As a consequence, differentiation undermines the purpose of integration aimed at the social sharing of risks, burdens and wealth. In such areas, integration is typically either (almost) uniform or does not happen at all.

The problem with differentiated integration to reform the EU is that many of the most pressing issues currently are either constitutional or redistributive. Take three of the institutional issues on the agenda: transnational lists in European Parliament elections, the lead candidate system for the appointment of the Commission president, and qualified majority decisions in foreign policy. None of these could be solved through differentiated integration. This is obvious in the case of interinstitutional relations and EU-level decision-making rules. Yet transnational lists also require uniform rules across the EU (whereas national rules can vary to some extent in the current system based on national party lists).

Nor would differentiated integration help in the rule-of-law crisis of the EU, in which the threat of national vetoes by the perpetrators has so far paralysed the Art. 7 proce-

<sup>13</sup> See P. CRAIG, G. DE BURCA, *EU Law. Text, Cases and Materials*, Oxford: Oxford University Press, 2015, p. 395.

<sup>14</sup> See. G. MAJONE, *The Rise of the Regulatory State in Europe*, in *West European Politics*, 1994, p. 77 *et seq.*



dures and prevented consensus on effective procedures of rule-of-law conditionality for EU financial transfers. Because the line between opt-in and opt-out countries would run between good-governance and bad-governance Member States, differentiated integration would neither improve the rule of law where it is under pressure most nor find the support of Member States and institutions aiming to defend this fundamental EU norm.

Reforms of the other two crisis-ridden policies of the EU – monetary and migration policies – are stuck on redistributive issues. Risk-sharing arrangements in EMU such as the EDIS, Eurobonds or common unemployment insurance, which would increase the overall stability and resilience of the monetary union, are resisted by the fiscally and financially strongest Member States concerned about higher interest rates and incalculable transfers to high-risk Eurozone countries. If such risk-sharing arrangements were differentiated, the “frugals” would either opt out or only join on the condition that participation was conditional on the fulfilment of certain stability criteria. Either way, differentiated integration would likely divide fiscally healthy northern and fiscally vulnerable southern Eurozone countries and thus defeat the purpose of risk sharing. It is therefore small wonder that proposals for differentiated fiscal integration have remained absent from the policy debate.

In migration policy reform, the big divisive issue is the relocation of asylum-seekers that would alleviate the burden of the Mediterranean frontline States and of the final destination countries such as Germany and Sweden. Yet a reform of the Dublin rules or *ad hoc* relocation arrangements have been opposed so far – most vocally and uncompromisingly by a group of mainly Central and Eastern European Member States, not only because they are either unaffected by migration or mere transit countries, but also because they are ideologically and culturally opposed to extra-European migration. As in the EMU case, differentiated integration would undermine redistribution. A reformed asylum system would most likely bring together only those heavily burdened frontline and destination countries that would benefit from reallocation. Whereas it might provide for a fairer and more orderly distribution of migrants across the most affected countries, it would not lower their collective burden, however, if transit and bystander countries remain outside. What is more, differentiated reform would likely generate positive externalities. An improved asylum regime might make it even more attractive for migrants to seek asylum in one of the integrationist countries. A differentiated arrangement would thus not only institutionalize the free-riding behaviour of the current non-affected countries, it would also create incentives for the insiders to defect.

In sum, in the EU policy domains most affected by the crisis, most in need of reform and most paralyzed by national vetoes and veto threats, differentiated integration – in the format of either differentiated treaty revisions or exclusive outside agreements – would not be productive.

#### IV. CONCLUSIONS

At this point, there is much uncertainty about the institutional arrangements and the starting point of the Conference on the Future of Europe, let alone its likely results and their potential effects. Based on theoretical considerations and past experience with differentiated integration in the EU, I have argued that new agreements between EU Member States to overcome problems of unanimity or to exclude certain Member States are not the most suitable format for reforming treaties covering a broad policy agenda and deepening supranational governance – or at least have not been used for this purpose in the past. Moreover, lower entry-into-force thresholds in such inter-se agreements serve the purpose of protecting the agreements against national referendums rather than governmental vetoes.

In addition, we cannot abstract from substantive policy characteristics when assessing the chances of achieving meaningful reform through differentiated integration. Regardless of the institutional setting and procedural rules, differentiated agreements are generally of limited use when the policy issue in question is either constitutional or redistributive. Unfortunately, however, many of the most pressing issues on the EU reform agenda fall in these categories.

Under certain conditions, inter-se agreements could still play a useful role in EU reform and as an outcome of the Conference on the Future of Europe: as issue-specific agreements in areas of low integration (intergovernmental governance) that are unlikely to be supported by all Member States. Defence policy is such an area. The integration of health policy in response to the Covid-19 pandemic could also be facilitated by such an agreement. In important areas of reform, however, there is no meaningful way around the arduous search for consensus and compromise within the decision-making and ratification rules of the current Treaties.