

A Differentiated Europe – 12 Theses

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For a more detailed analysis see also Janis A. Emmanouilidis, Institutional Consequences of Differentiated Integration, C·A·P Discussion Paper, Munich, February 2007. This text was prepared in the framework of the project “Greater Europe” jointly run by the Bertelsmann Foundation and the Center for Applied Policy Research.

Executive List

Thesis 1: The increasing diversity of interests, the growing heterogeneity of national capabilities, and diverging expectations concerning the future of the EU call for a higher degree of differentiated integration. At the same time, there is a need to dedramatise the debate about differentiation.

Thesis 2: There is no one single model but rather a range of diverging forms of differentiation: (1) *Creation of a new supranational Union*, (2) *Differentiation via established instruments and procedures*, (3) *intergovernmental cooperation outside the EU*, (4) *differentiation through opt-outs*, (5) *differentiation through enlargement*, and (6) *differentiation through withdrawal*.

Thesis 3: The creation of a new supranational Union – with an independent institutional structure and an independent set of legal norms – entails the risk of creating new dividing lines in Europe.

Thesis 4: Differentiated integration creates numerous opportunities, however, it bears also a number of potential risks, especially if cooperation is organized outside the EU.

Thesis 5: Differentiated cooperation within the EU framework should be preferred to initiatives outside the Union.

Thesis 6: Differentiated cooperation within the EU framework should not follow a single master plan with a predefined idea of Europe's *finalité*.

Thesis 7: Differentiation within the EU should follow the concept of *functional-pragmatic differentiation*, which does not follow a predefined master plan but rather aims to overcome specific blockades of certain member states case-by-case.

Thesis 8: The widespread use of the opt-in by the UK and Ireland in the area of JHA is proof that even a radical instrument such as an opt-out can result in integrationist dynamics throughout the Union.

Thesis 9: In some cases it might be better to make a step forward outside the Union instead of waiting indefinitely for a small step inside the EU. Cooperation should however follow the concept of an *Intergovernmental Avantgarde*, which aims to integrate the legal norms into the EU as soon as possible.

Thesis 10: The temporary or indefinite exemption of new EU countries from certain policy fields as an effect of enlargement can alleviate and speed up the accession of new member states and open up the prospect of a “limited EU membership”.

Thesis 11: The voluntary withdrawal of one or more countries from the Union can enable a further deepening of integration. However, the EU and the withdrawing state(s) must redefine their relationship if they want to avoid a deep and enduring political rift.

Thesis 12: A highly differentiated EU will require (i) the elaboration of a narrative of differentiated integration portraying to European citizens the objectives and the overall logic of differentiation and (ii) the development of novel procedures, instruments and institutional settings for managing and supervising a Europe of different speeds.

Detailed List of Theses

Thesis 1: The increasing diversity of interests, the growing complexity of decision-making, the increasing heterogeneity of national capabilities, and diverging expectations concerning the future path of integration in an enlarged EU call for a higher degree of differentiation. However, the debates about *directorates*, *triumvirates*, *pioneer* and *avantgarde groups* or *centres of gravity* are characterized by threats and by semantic and conceptual misunderstandings, which overshadow the fact that differentiation provides a key strategic opportunity. There is thus a necessity to dedramatise the debate and to open it up for rational arguments.

Thesis 2: There is no one single model but rather a range of diverging forms of differentiation. One can distinguish between the following six forms (see also overview of the key characteristics and consequences on pp. 7-8):

- (1) *Creation of a new supranational Union:* A group of countries, which hold that a further deepening of integration seems impossible within the framework of the existing EU, creates a new Union. The new entity aims at a higher level of supranational cooperation and entails a transfer of competences beyond the level inside the “old EU”. The legal basis of the new Union is laid down in a separate treaty or constitution worked out, approved and ratified solely by the participating states. The new entity would require a strong executive, a parliamentary dimension securing democratic legitimacy, and a separate judiciary for settling legal disputes within the new Union.
- (2) *Differentiation via established instruments and procedures:* A number of member states raise their level of cooperation by applying general instruments of differentiation (enhanced cooperation) or predetermined procedures for specific policy areas (e.g., EMU, JHA, permanent structured cooperation), which are laid down in the Union’s primary law. One can distinguish between two different sub-forms, which mainly differ with respect to their final objective: (i) Creation of a federal Union guided by the idea that the employment of treaty-based instruments and procedures of differentiation should lead to the creation of a federal political Union – e.g., creation of a “United States of Europe” comprising the countries of the Eurozone (Verhofstadt). (ii) Functional-pragmatic differentiation, which follows a case-by-case approach without a pre-defined final outcome. In other words, differentiation is not guided by a master plan, but rather aims to overcome specific blockades of certain member states, which are either not willing or not able to engage in a higher level of cooperation.
- (3) *Intergovernmental cooperation outside the EU:* A group of member states intensifies cooperation on the basis of intergovernmental mechanisms and procedures outside the EU framework. Cooperation is limited to governments and includes no (immediate) transfer of sovereignty rights to any supranational authority. One can distinguish between three sub-forms: (i) Europe of Nations: The participating countries assume that further progress in the respective (sub-)policy area can only be achieved outside the EU and not on the basis of supranational instruments and procedures. Cooperation is not guided by the wish to transfer national competences to a higher supranational authority at any stage. (ii) Intergovernmental Avantgarde: The participating countries hold that further progress in a specific (sub-)policy field will only be possible if a group of states takes the lead by cooperating outside the EU framework. There is a clear goal to

integrate intergovernmental cooperation into the Union as soon as possible (Treaty of Prüm, Schengen-Model). The participating countries work out a treaty or agreement laying down the objectives and the organisational and legal details of cooperation. (iii) Loose coalitions: Intergovernmental cooperation is established to fulfil a single task or purpose (Contact Group, EU-3, G6 or Salzburg-Group). Loose coalitions are characterized by a very low level of institutionalization and by a very limited number of participating states.

- (4) *Differentiation through opt-outs*: The opposition of certain member states towards a further deepening of integration in a new (sub-)policy field is overcome by the allocation of an opt-out (Denmark/UK concerning the Euro; Denmark/Ireland/UK concerning Schengen; Denmark in the defence area of ESDP). The opt-out initiative comes from the country wishing to be excluded. The decision to grant an opt-out must be agreed unanimously and the legal and institutional rules and procedures regulating an opt-out must be laid down in the EU's primary law.
- (5) *Differentiation through enlargement*: Different levels of integration between EU countries can be the result of the enlargement process. New member states – at least temporarily – do not enjoy all the benefits of membership in certain policy areas (examples: late introduction of the Euro, no immediate abolition of border controls, limited access to labour markets etc.). New EU countries could also be excluded from one or more policy areas if both parties – the EU and the acceding country – agree to an exemption. In other words, new member states would not take part in certain (sub-)policy areas (e.g., EMU, Schengen or ESDP) or would not be obliged to apply certain legal norms, which have been adopted for example in the framework of enhanced cooperations.
- (6) *Differentiation through withdrawal*: The countries of the EU pursue a higher level of cooperation after the voluntary withdrawal of one or more countries from the Union. The member states remaining inside the Union are able to intensify their level of cooperation only after the countries opposing more integration have left the EU. The withdrawing state or states conclude an agreement with the EU setting out the legal, institutional and political arrangements guiding the withdrawal from the Union.

Thesis 3: The creation of a new supranational Union – with an independent institutional structure and an independent set of legal norms – entails the risk of creating new dividing lines in Europe. The members of the new Union would concentrate their political energies on the development of their newly founded entity. In return, the “old EU” would gradually become marginalized. In this case the “old EU” would not be able to function as a kind of bracket between the two entities. The idea that the “old EU” could ally the more integration-friendly European states and those less willing or able to further integrate in some sort of a “stability community” would not materialize. On the contrary, the rivalry between the Unions could even lead to a division of Europe into two opposing camps – on the one hand the members of the new Union, and on the other the excluded states which seek their political fate in other (geo-)political constellations.

Thesis 4: Differentiated integration creates numerous opportunities, however, it bears also a number of potential risks. Cooperation among a smaller number of member states can (i) lead to the creation of parallel institutional structures, which have the potential to weaken the EU's supranational institutional architecture, (ii) exacerbate the coordination between different policy areas and thus damage the overall coherence of the EU, (iii) lead to a fragmentation of legislation, (iv) decrease the level of transparency and democratic accountability, and (v) in the worst case even carry the

seed of creating new dividing lines in Europe. These potential risks are particularly high if cooperation is implemented without clear procedures and norms and without the involvement of supranational institutions. This is especially the case, if differentiated cooperation is organized outside the EU.

Thesis 5: Differentiated cooperation within the EU framework should be preferred to initiatives outside the Union. Differentiation inside the Union (i) respects the EU's single institutional framework, (ii) limits the anarchic use of flexibility, (iii) preserves the supranational powers of the European Commission, the European Parliament and the European Courts, (iv) guarantees a high level of calculability due to the existence of clear-cut rules concerning the inception, the functioning and the widening of differentiated cooperation, (v) is characterized by a high level of openness as participation must be open to every member state at every time, (vi) guarantees a high level of democratic legitimacy through the involvement of the European Parliament, (vii) enables the continuous development of the Union's *acquis* in line with the requirements of the EU Treaties and most importantly (viii) reduces the overall risk of a confrontational split between the "outs" and the "ins".

Thesis 6: Differentiated cooperation within the EU framework should not follow a single master plan with a predefined idea of Europe's *finalité*. The idea to use the instruments of differentiation to create a "United States of Europe" (Verhofstadt) is not (yet) realistic and counterproductive. The wider public and even parts of the elites also in the most integration friendly countries are not (yet) willing to surrender or to pool substantial national competences in order to develop some sort of a federally organized political union. Moreover, in many EU countries the idea to create a "United States of Europe" via instruments and procedures of differentiation is (mis)perceived as an attempt to create a closed core. Especially the Union's smaller and new countries fear that they could be excluded from such an exclusive club. These fears raise distrust between member states and in the end decrease the chances that the instruments of differentiation are constructively employed in practice. Calls for a European core impede differentiation and thus in the final analysis do a disservice to the future development of integration.

Thesis 7: Differentiation within the Treaty framework should follow the concept of *functional-pragmatic differentiation*, which does not adhere to a predefined master plan, but rather follows a case-by-case approach while aiming to overcome specific blockades of certain member states, which are either not willing or not able to engage in a higher level of cooperation (e.g., harmonisation of the corporate tax base; military cooperation; EU missions). In the years ahead greater use should be made of the various instruments of differentiated integration laid down in the EU Treaties in order to reduce the wide spread scepticism concerning differentiation and to limit the necessity for extra-EU cooperation. It will be particularly important that the EU institutions and the member states become familiar with the instrument of enhanced cooperation. Only then will it be possible to ascertain how well the current legal provisions concerning enhanced cooperation work in practice and where improvements are needed in order to increase the usefulness of this key instrument of differentiation.

Thesis 8: One should not demonize a Europe *à la carte*, as the limited granting of opt-outs allows a further deepening of integration despite the staunch opposition from one or from a limited number of member states. The widespread use of the opt-in by the United Kingdom and Ireland in the area of Justice and Home Affairs in recent years is

proof that even a radical instrument such as an opt-out can result in integrationist dynamics throughout the Union. Further advantages of opt-outs relate to the fact (i) that the EU's single institutional framework is not questioned, (ii) that the adopted *acquis* also applies to future member states (not the case with enhanced cooperation as laid down in the Constitutional Treaty!), and (iii) that the affiliation of the opt-out countries limits the danger of a divide between the opt-out countries and the other member states.

Thesis 9: Despite numerous risks associated with cooperation outside the EU, it might in some cases be better to make a step forward outside the Union instead of waiting indefinitely for a small step inside the EU. In this case cooperation outside the Treaties should follow the concept of an *Intergovernmental Avantgarde*, which aims to integrate the legal norms adopted outside the EU into the Union at the soonest possible moment. However, the experience with the Treaty of Prüm shows that the integration of a legal *acquis* into the EU can prove to be difficult. This is particularly the case if (i) the legal norms conflict with existing or planned law in policy areas which are (partially) covered by the EC/EU-Treaties, (ii) if cooperation outside the EU covers issues which are strongly disputed between the member states and the “outs” are not willing to accept a set of legal norms that was enacted without their participation, (iii) if EU institutions are not associated with or at least continuously informed about the activities outside the Union, (iv) if cooperation outside the Union has decreased trust between the “ins” and the “outs”, which will make it difficult or even impossible to find a qualified majority inside the Council in favour of integrating the legal norms for example via the instrument of enhanced cooperation. Dividing lines between the “ins” and the “outs” and between the “ins” and the EU's supranational institutions can not only hinder the overall progress in the respective policy field, but also lead to negative spill-overs in other policy fields. Cooperation outside the Union should not follow the model of a *Europe of Nations*, because long-lasting cooperation that escapes the EU and engages only the governments of a limited number of member states has the potential to fundamentally weaken the Union.

Thesis 10: Transitional periods or other forms of derogation or the temporary or indefinite exemption of new EU countries from certain policy fields as an effect of enlargement can alleviate and speed up the accession of new member states and open up the prospect of a “limited EU membership”, which legally entails a full-fledged membership but excludes the acceding countries from (key) policy areas. However, the introduction of a second or third class membership could lead to a rupture between the old and the new member states, if the latter feel discriminated by the former. A deep rift between the new and the old member states could negatively affect the EU's ability to act and structurally impede the Union's further development.

Thesis 11: The voluntary withdrawal of one or more countries from the Union can enable a further deepening of integration within the institutional and political framework of the EU. However, if the Union and the withdrawing state(s) fail to redefine their relationship one might witness a deep and enduring political rift between both sides. The departure of one or more countries from the Union can in particular weaken the EU if the number of countries exiting the Union is high and if the withdrawn states have played a significant role in a certain policy field (e.g., UK in ESDP). In order to avoid a deep and enduring political rift the withdrawing state(s) could decide to join the *European Economic Area* in order to benefit from a functioning inter-institutional structure (EEA Council, Joint Committee, Consultative Committee) and in order to

continue to benefit from the advantages of the Common Market. The participation of former EU states in the *European Free Trade Association* could lead to a renaissance of ETFA, which in return would become more attractive for countries aspiring but not yet able to join the EU.

Thesis 12: The need for more differentiation in an EU 27+ and the application of very diverse forms of differentiation inside and outside the EU framework will lead to a twofold challenge: (1) The complexity of a Europe of different speeds will require the elaboration of a narrative of differentiated integration portraying to European citizens the objectives and the overall logic of differentiation. (2) The effective management and supervision of a highly differentiated Europe will require novel procedures, instruments and institutional settings in order to avoid a split between the various groupings and in order to secure the coherence between different policy areas. A special responsibility will lie with the states participating in all major initiatives and with the European Commission as the central guardian of the Treaties.

Table 1: Key Characteristics of the Six Forms of Differentiated Integration

<i>Form</i>	New supranational Union	Cooperation via established procedures and instruments		Intergovernmental cooperation outside the EU				
		Creation of a Federal Union	Functional-pragmatic differentiation	Europe of Nations	Intergovernmental Avantgarde	Loose coalitions		
KEY CHARACTERISTICS	<ul style="list-style-type: none"> group of MS creates new Union objective: higher level of supranational cooperation leading to a federal political union separate treaty immediate transfer of competences high degree of openness 	<ul style="list-style-type: none"> inside EU use of general instruments of differentiation or predetermined procedures for specific policy areas participation must be open to every MS at every time (but: participation criteria or minimum number of states) 	<ul style="list-style-type: none"> differentiation should lead to a federal political union – a “United States of Europe” 	<ul style="list-style-type: none"> functional case-by-case approach to overcome specific blockades no pre-defined final outcome 	<ul style="list-style-type: none"> (originally) outside EU limited to intergovernmental relations no (immediate) transfer of sovereignty rights cooperation adheres to principle of loyalty: supremacy of EU acquis; not undermine functioning of EU cooperation not possible in areas in which EU has exclusive competences 	<ul style="list-style-type: none"> no wish to transfer competences to higher supranational authority no motivation to integrate cooperation into EU rather low degree of openness 	<ul style="list-style-type: none"> Avantgarde takes lead integration of cooperation into EU as soon as possible independent treaty participation in principle open to every MS 	<ul style="list-style-type: none"> single task or purpose oriented very low level of institutionalization closed circle

<i>Form</i>	Differentiation through opt-outs	Differentiation through enlargement	Differentiation through withdrawal
Key characteristics	<ul style="list-style-type: none"> allocation of opt-out(s) initiative comes from opt-out country principle decision to grant opt-out requires assent of all MS basic legal and institutional rules and procedures laid down in EU’s primary law 	<ul style="list-style-type: none"> new MS – at least temporarily – do not enjoy all benefits of membership in certain policy areas differentiation via derogations (transition periods), non-fulfilment of participation criteria, indefinite exclusion or non-application of a legal acquis 	<ul style="list-style-type: none"> EU countries pursue higher level of cooperation after voluntary withdrawal of state(s) withdrawing state concludes agreement with EU setting out legal, institutional and political arrangements guiding withdrawal EU Treaties/Constitutional Treaty cease to apply to withdrawn country

Table 2: Key Consequences of the Six Forms of Differentiated Integration

Form	New supranational Union	Cooperation via established procedures and instruments		Intergovernmental cooperation outside the EU		
		Creation of Federal Union	Functional-pragmatic differentiation	Europe of Nations	Intergovernmental Avantgarde	Loose coalitions
Key consequences	<ul style="list-style-type: none"> no direct role of existing EU institutions creation of new supranational institutions no fertile coexistence, but rather disruptive rivalry between “old EU” and new Union weakening of “old EU” and danger of a new dividing line 	<ul style="list-style-type: none"> preservation of EU’s single institutional framework <ul style="list-style-type: none"> clear cut rules guarantee calculability preservation of supranational character of European Commission, EP and Courts involvement of “outs” reduces risk of confrontational split <ul style="list-style-type: none"> (in-)ability to reform legislative procedures predefined idea of Europe’s <i>finalité</i> limits practical potentials of differentiation 	<ul style="list-style-type: none"> practical experience with instruments of differentiated integration 	<ul style="list-style-type: none"> “outs” confronted with legal <i>fait accompli</i> legal norms might conflict with existing or planned EU law potential decrease of trust between “ins” + “outs” new coordinative institutions long-lasting cooperation weakens EU 	<ul style="list-style-type: none"> exclusion of EU institutions lack of democratic legitimacy even on national level <ul style="list-style-type: none"> insufficient judicial control new institutions authorised to take decisions possible alignment of EU institutions and “outs” problematic integration of legal <i>acquis</i> into EU danger of permanent fragmentation 	<ul style="list-style-type: none"> no or very low level of institutionalization alignment of EU and “outs”

Form	Differentiation through opt-outs	Differentiation through enlargement	Differentiation through withdrawal
Key consequences	<ul style="list-style-type: none"> preservation of EU’s single institutional framework opt-outs do not prevent further development of EU’s <i>acquis</i> limited danger of a fundamental divide between “ins” and “outs” opt-outs promote <i>à la carte</i> Europe but also integrationist dynamics 	<ul style="list-style-type: none"> no weakening of the EU’s institutional structure alleviation of EU accession prospect of “limited EU membership” danger of rupture between new and old member states 	<ul style="list-style-type: none"> unaffected institutional operability and limited institutional adaptations redefinition of relationship in order to avoid rupture potential weakening of EU potential renaissance of EEA and EFTA