

The acceleration of differentiated integration and enhanced cooperation

Speech by Jean-Claude Piris, former Director General Legal Services at the Council of the EU, Palais d'Egmont, 30 september 2014

The last issue of *Studia Diplomatica* shows the transformation in the way the European Union has considered the subject of differentiated integration since the 1950's.

Until the mid-80's, European integration was characterized by a "unity dogma ». All Member States were supposed to apply the same policies, at the same speed. The concepts of "Europe à la carte ", "variable geometry "and "different speeds" were put in the same basket. No derogation was possible, unless justified, limited and temporary. During the following 30 years however, since the mid 80's, heterogeneity between members has grown formidably. Differentiation thus became unavoidable to allow those able and willing, to go further. I will go briefly over these two 30 year periods, and then turn to the future, and try to imagine where the EU could be heading.

Respect for the unity dogma during the period from the mid 50's to the mid 80's was justified by the necessity to build the common market. A common playing field had to be established:

- the same rules had to apply to all,
- they had to be interpreted in the same way by all,
- an independent arbitrator had to check their implementation,
- their infringement had to be subject to sanctions by a judge.

For years, the trend was also that the rule should be as complete as possible, targeting total harmonization of national laws. Detailed directives left little margin to Member States. This was pushed both by a lack of trust between the States, and by a lack of trust of the Commission for all Member States! It is true that, as shown by *Studia Diplomatica*, there were some exceptions. However, none of these exceptions were fundamental. Acceding States were given some temporary, if significant derogations.

During that period, the number of members doubled. The accession of the UK had a strong impact. Given its opposition to the freedom of movement of persons, some Member States decided in 1985 to achieve this through an international agreement outside the EU Treaty: the Schengen zone was born. In 1986, the Single European Act, while making the big step to allow qualified majority decisions to build the single market, permitted member States to keep or adopt more protective measures for the environment or for consumers. This was regarded by most as a step in the right direction, but seen by some, like Pierre Pescatore, as a catastrophe which might kill the single market!

It was during the second period, from the mid 80's to the mid 2010's, that a significant part of the legislation necessary to establish the single market was adopted. The EU also turned to other fields of action, which did not necessarily require a single rule and a single speed for all. In spite of that, it was difficult to abandon the unity dogma, given the dominant administrative culture deeply rooted in the institutions.

A permanent and substantial differentiated integration came with the Maastricht Treaty. Its negotiation opposed the UK to the other 11 Members. The British refused to accept, either provisions on social policy, or a commitment to adopt the future currency. In order to be able to progress, the others were obliged to give the UK a permanent opt-out on both issues, as well as on some aspects of judicial and police cooperation.

During that period, the number of Members more than doubled, from 12 to 28. Heterogeneity between them increased. In 2013, the average GNP per head was, for an EU average of 100, between 45 and 129 in the different Member States. The same year, 10 members had a minimal monthly wage lower than 500 €, while it was above 1000 € in 6 others. Heterogeneity among EU Member States is now wider than among the States of the USA.

Total harmonisation of national laws was progressively abandoned. Besides, the Amsterdam Treaty integrated the Schengen arrangements in the Treaties, and introduced provisions on enhanced cooperation on a case-by-case basis. The resistance to these provisions was still strong, not only from the Commission, but also from a number of Member States, worried about the creation of a first-class, to which they might not be able to belong. An example of that resistance is that the first proposal on that issue was a non-paper which I wrote and put on the table by the Secretariat of the Amsterdam IGC, because no Member State was willing to author such a paper! However, the first Treaty provisions imposed so many conditions that they could not be used, even after being slightly relaxed by the Nice Treaty. The Lisbon Treaty allowed more flexibility. Since its entry into force, the provisions on enhanced cooperation have been used twice, in the area of the law on trans-border divorce and for the creation of a European patent. It might be used a third time in the future, for the creation of a tax on international financial transactions.

What about the future?

The development of differentiation within the EU, over the next 10 to 15 years, will be influenced by two issues:

- the consequences of the eurozone crisis;
- the relations to be established between the EU and the UK.

First, the future of the eurozone.

The imbalances between the two parts of the EMU (economic and monetary) were known from the beginning. It was not possible to correct them, because Member States refused to share powers over their budgetary and economic policies. Rightly or wrongly, our political leaders decided to go ahead anyway. In spite of significant progress these last years (the 2012 treaty known as the "Fiscal Compact", the six pack, the two pack, the European semester, etc.), the truth remains that actual powers over national budgetary, economic and social policies are still held by the Member States. The resulting imbalances cannot be solved easily. There is a direct link between these powers and effective political legitimacy: the link between the voters and those who decide. Solving this asymmetry, while retaining the EU's political features, seems impossible. However, a monetary union based on loose rules on budget/tax/economic governance will remain incomplete, fragile, and probably unsustainable in the long term. Therefore, "muddling through" might not be sufficient in the long term.

This was acknowledged by the European Council with the December 2012 "Van Rompuy Report", which aimed at a more integrated eurozone, regarding financial, budgetary and economic policies, but

including also more democratic legitimacy and accountability. Even if our leaders agree that this should be the way for the future, most of them know that their populations are far from convinced, especially in the current economic situation. I think that even a return to economic growth would not be enough to enable a big step forward. Going ahead could be, for example, to confer on the Commission real powers over national budgets, as it has in competition policy. If achieved, this would one day imply acceptance of some sort of mutual responsibility between richer and poorer economies of the eurozone. Obviously, that would be a huge step, which could not be done without the acquiescence of the populations concerned.

In conclusion, this first issue leads to dilemma. I must confess that I do not see this dilemma being solved, without unexpected dramatic events, whether of a financial, economic, legal or political nature, which would precipitate decisions.

If, however, the integration of the eurozone continues, it will probably be through the conclusion of so-called "intergovernmental agreements", concluded mostly between eurozone members, like the European Financial Stability Fund EFSF, the European Stability Mechanism ESM, the Fiscal Compact, and the Single Resolution Fund SRF. These instruments are closely linked to the EU and make use of the EU institutions, as allowed under some conditions by the EU Court in the Pringle case. But, if integration deepens, the EU will have to organise relations between the EU and the euro-zone. In my opinion, decisions to be implemented by eurozone countries only, should be adopted by their representatives only, both in the Council (as provided for in the Treaty), and in the European Parliament, which seems now more open to imagining an appropriate solution, as far as powers involved are those conferred on the EU and on the EP in the Treaties. If powers involved "remain with the member States" (Article 5(2) TEU), national Parliaments must continue to exercise them, for example in an organ whose members would be their representatives. This is the only legally correct solution (see Articles 5 (1 and 2) and 13 (2) TEU), and it is also the only option delivering the necessary political legitimacy. As for the Commission and the Court of Justice, they would continue to exercise their functions with their full composition in all cases. Regarding the rights and interests of the non-euro Member States, in order not to endanger the EU's cohesion, they should be effectively protected by some rules, under the control of the Court of Justice, for example: to respect the EU Treaties' primacy over any intergovernmental agreement, to respect the priority of the proposals of the Commission to legislate in the EU, to guarantee the integrity of the single market, the open-ness of activities of the eurozone and, for those non eurozone members which are able and willing to join the euro soon, the right to participate in meetings (and maybe even in some decisions?).

Second, the British question.

After more than 40 years of membership, based on misunderstandings and lack of enthusiasm, qualified progressively by more and more opt outs, the British people might have a choice to stay or not in the EU. The paradox is that this is happening now, at a time when the UK has actually achieved most of the aims of its European policy:

- enlarging the EU, without deepening it and without changing its institutions,
- keeping the full benefits of the internal market, despite a number of opt-outs on other policies,
- keeping a strict control on foreign and defence policies, but liberalising external trade,
- getting rid of any federalist symbol, etc.

The British authorities will have to choose among three scenarios before trying to orientate the British people towards one or another.

The first scenario would be for the UK to stay in the EU.

According to the current British Government, this solution would only be acceptable if a special status was created by revising the EU Treaties. Some, in the UK, think that it would allow the UK to participate in the internal market and to participate in the corresponding EU decision-making, while the UK would not be obliged to participate in other EU policies: agriculture, fisheries, economic and social cohesion, social policy, justice and security, immigration, foreign policy.

Before giving my opinion on the substance of this scenario, I will make a comment on the timing of the procedure. The aim would be to propose to the British people to accept, in a referendum, a new status established by a revision of the Treaties. Therefore, that Treaty revision would have to be ratified by all EU States before the British referendum took place, because the British people would need to be sure of what they were heading towards. However, one may wonder how it would be possible to convince the EU States to organise such a politically hyper-sensitive procedure before knowing whether the British people would accept it in the referendum. There is no answer to this: the British call that “a catch 22 question”! On top of that, it would be impossible to negotiate the revision of the EU Treaties and get their ratification in the period between the 2015 British elections and the end of 2017.

In substance, the issue is serious and deserves to be discussed. According to some, it would be unconceivable that the UK would be treated by the EU like Norway or Switzerland. They think that the EU's interest in keeping close links with the UK, a big country, are such, that the EU would accept a special status allowing the UK to be a EU special member, participating only in the internal market.

According to me, this view is overly optimistic. The other Member States and the institutions would have three imperative reasons for refusing such a “Europe à la carte”:

-First, it would affect the autonomy of the EU decision-making.

-Second, such a status, if accepted for the UK, would be extremely attractive for others: it could open the door to requests, not only from third countries such as Norway or Switzerland, but maybe also from member States, for example Denmark or Sweden. That could well be an existential issue for the EU.

-Third, the UK's leverage is weaker than some think: the UK sells half its exports to the EU, while the rest of the EU sells only 10% of its exports to the UK. Moreover, half of the EU's trade surplus with the UK is accounted for by only two States (Germany and the Netherlands), while a Treaty-revision would require the positive vote of the other 25 as well, some of which are running deficits with the UK.

The second scenario would be the “Brexit”.

If the UK decides to leave the EU, there are seven different ways possible:

- 1) to negotiate with the EU ad hoc arrangements, in a withdrawal treaty as foreseen by Article 50 TEU,
- 2) to join the EEA with Iceland, Liechtenstein and Norway, and obey the same rules,
- 3) to follow Switzerland, by concluding sectorial agreements with the EU,

- 4) to join the EFTA only, but this is no longer a substantial organisation,
- 5) to conclude with the EU, like many third countries, a Free Trade or an Association agreement,
- 6) to conclude with the EU, like Turkey, a customs union,
- 1) to simply become a third State vis-à-vis the EU, like China, the USA, or others.

The UK would obviously aim for an option which would allow it to participate as much as possible to the single market. If it accepted that request, it is probable that the EU would impose strict conditions. If the UK decided not to join the EEA, the conditions imposed by the EU would probably not be so different from those of the EEA. This is shown by the negotiating mandate of an agreement with Switzerland adopted last May by the EU: non participation in decision-making in the European Parliament and in the Council, acceptance of the role of the Commission and the Court of Justice without one of its nationals being a member, as well as a significant financial contribution.

Such a scheme would appear politically difficult for the UK to accept. However, no option could be imagined that would reconcile, from a British point of view, the economic viability of a deal and its political acceptability. Any option would take the UK in one of two ways. The first would be to become a kind of a “satellite” of the EU, accepting the obligation to transpose into its domestic law all regulations and directives for the single market. The second would be to start trade negotiations from scratch, both with the EU and with all countries in the world, without having much bargaining power.

The third and last scenario would be for the UK, with a little help from its friends, to stay a Member State of the EU, without any change to the EU Treaties.

While recognising that nobody can predict the results of a referendum on Europe in the UK, this seems to be a reasonable scenario. True, it would imply the adoption of reforms suggested by the British authorities. But many of these reforms, except a “repatriation of powers”, which will not happen on important issues, look acceptable for most European leaders.

Actually, reforming the EU is more a question of the Member States' political will and of culture in the institutions, than a question of legal texts. Many things could be done without changing the Treaties. This might include policy measures, such as the adoption of a timetable to complete the internal market, especially in services, or to launch optional cooperation policies, for example on energy, or on industrial cooperation in defence equipment programmes. This might also include measures to improve the functioning of the institutions, by organising the Commission in teams pre-sided by Vice-Presidents (as already decided by Jean-Claude Juncker), and by containing the European Parliament within the limits of its legal powers. This last point is not as natural as it sounds: a recent paper by a Brussels think-tank pleads to confer on the EP some new powers not foreseen in the Treaties, without changing them, while the UK would seek to be guaranteed that, in the future, the limits of the EU Treaties would be strictly respected by all institutions.

The European Council has already shown its good will, by stating last June that the concept of an “ever closer union” is a political concept, which allows for different paths (not speeds) of integration. Concessions have been announced or might be made, on practical ways to cut red tape, to better respect subsidiarity, to better protect the rights of the non-Eurozone members, and to involve national parliaments more and in better ways in the functioning of the EU. However, it will remain to be seen if all this would be sufficient and politically acceptable for the British government and for the British people.

Finally, the EU must also address the nature of the relations it is to establish in the medium and long term with European countries which are not members of the EU, but who wish to participate to the single market: Switzerland, the three EEA EFTA members and the three "micro-States" (Andorra, Monaco and San Marino). Others might be added to this list in the future, for economic, or for political reasons. In a similar way as for the UK, this demands an answer to the question regarding the limits of differentiated integration. Can we imagine that a non-EU country would nevertheless be able to participate in the single market with the right to participate in the EU decision-making process? I personally think that the negative answer I gave to this question in the British case cannot be different in these other cases, while admitting that this raises difficult democratic and constitutional problems for non-EU members.

Asymmetric integration is unavoidable. I would say more: it is a welcome development. An EU of heterogeneous Member States must be able to accommodate the diversity of their needs, interests and wishes, while avoiding stagnation for all.

Of course, there is a tension between differentiation, unity and coherence. This is why there must be limits to differentiation, in order, as explained by Marc Lepoivre and Stijn Verhelst:

- to dilute the risk of excessive complexity, and therefore a lack of visibility for citizens,
- as well as to avoid the risk of undermining the unity of the European project.

In order to reach this goal, a few principles might help, such as:

- excluding the single market from variable geometry, and keeping the autonomy of the EU decision-making process in this domain;
- keeping the distinctive features of EU law: primacy, direct effect, uniform interpretation, and absence of reciprocity;
- keeping the Court of Justice and Commission's involvement in all cases of differentiation or enhanced cooperation;
- preserving the unity of the EU as one single actor in the world: trade policy, foreign policy, defence policy;
- last, but not least, keeping a reasonable visibility for people, by avoiding the creation of new groups of States, beyond the eurozone, the EU, and the non-EU States participating in the single market.

If such principles are respected, asymmetric integration would not be an obstacle for the European ethos and for further European integration for those willing and able to go further on this road.

However, for the time being, the priority is obviously to try and solve the economic problems. Nothing will be possible otherwise.