

DIFFERENTIATED INTEGRATION
DIFFERENT ROUTES TO EU COOPERATION

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Members Dr Femke van Esch
Koos Richelle
Dr Adriaan Schout
Professor Linda Senden
Carlo Trojan

Expert member Professor Jaap de Zwaan

Executive secretary Paula Sastrowijoto

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Introduction

The European Union is under pressure on all sides. Externally, it is threatened by the crises on Europe's periphery caused by the intimidating actions of Russia and the rise of Islamist extremism,¹ and by the mass movement of refugees in the Mediterranean region. Internally, there are constant tensions within the eurozone, mainly focused around the risk of Greece leaving the EU. In addition, politicians and the general public have become increasingly sceptical about the EU since the accession of ten new member states in 2004.² The popularity of movements and political parties critical of the EU, in both southern and northern member states, is forcing even moderate centre parties to take a more critical stance on the process of European integration.³

Background

The Greek debt crisis has severely strained the functioning of the eurozone and cohesion within the EU as a whole. For the first time, the EU and the monetary union seem not irreversible, but vulnerable.⁴ Recent developments raise many questions about the governance of the eurozone and financial and economic management in a fragmented European Union. In addition, the danger of the UK leaving the Union (Brexit) and the EU's inability to tackle the refugee and migration crisis effectively are undermining support for European integration in the member states. Never before have the goals of European integration been questioned so profoundly; old certainties seem to have disappeared. Questions like whether and how the European treaties should be changed to prevent Brexit and a difficult ratification process are being asked. The opinion pages are full of advice on legal constructions to extract the EU from this complex situation. These issues are also being discussed openly in the European Parliament and other fora and positions are being taken.⁵

1 See AIV advisory report no. 94, 'Instability around Europe: Confrontation with a new reality', The Hague, April 2015.

2 See AIV advisory report no. 88, 'Public Support for the European Union: Building Trust', The Hague, April 2014, and *The Guardian*, 'Europe cannot wait any longer. France and Germany must drive ahead', 4 June 2015.

3 Examples of such critical parties are Syriza (Greece), Podemos (Spain), AfD (Germany), FN (France), PVV (Netherlands) and UKIP (UK).

4 Luuk van Middelaar, 'Griek kiest voor roekeloosheid' (Greeks opt for recklessness), *NRC Handelsblad*, 6 July 2015, Marc Peepers, 'Vooraan bij een megadrama' (At the forefront of a megadrama), *De Volkskrant*, 4 July 2015.

5 See own-initiative reports by the European Parliament on the future of the European Union by EP rapporteurs Brok, Bressan and Verhofstadt.

In June 2015, the President of the European Commission published his report 'Completing Europe's Economic and Monetary Union',⁶ outlining the steps that need to be taken to improve the economic governance of the eurozone and ultimately achieve a financial and fiscal union. While the five presidents and heads of government like Angela Merkel and François Hollande speak of deeper integration of the eurozone, there is a growing awareness within the Council and the Juncker Commission that the people of Europe want a different kind of EU. The European Commission has initiated an explicit search for a new form of European cooperation centred on political priorities – so that in many other areas the EU has less need to regulate and hence encroach so far on national powers.

In its conclusions of June 2014, the European Council noted that the formula of an ever-closer Union among the peoples of Europe enshrined in article 1 of the Treaty on European Union (TEU) does not exclude different routes to integration. At this juncture and with the new European Commission in office, differentiated integration is one of the central themes in the discussion on European integration mechanisms and final objectives. The question that arises is whether differentiated integration can both contribute to progress in the process of cooperation and integration and prevent stagnation and even disintegration. Is a multi-speed Europe of concentric circles (variable geometry) or a Europe *à la carte* desirable or will the European project become ungovernable with a patchwork of different regimes?

It is against this background that the government submitted a request for advice on this issue to the AIV in April 2015 (see annexe I for the full text). In the request for advice, the government stated that it 'would welcome an analysis of trends in flexible integration, with a view to exploring the political, institutional and policy-related consequences for the Netherlands and the EU'. It requested that the following specific questions be addressed:

1. What is the AIV's view on the expectation that more frequent use will be made of flexible integration for the foreseeable future, and what policy areas warrant specific attention in this connection?
2. What consequences could an increase in flexible integration have for the EU's institutional architecture and governability?
3. What consequences could an increase in flexible integration have for relations between the member states of the EU? Economic and Monetary Union has created a distinction between the countries in the eurozone and other member states. To what extent does this have an impact on the positions they adopt and the coalitions they form in the Council in economic and other policy areas?

Before answering these questions, the AIV considers it important to note that, since the Treaty of Amsterdam – and in fact even since Maastricht – European integration has taken many forms and moved ahead at different speeds. In other words, flexible/differentiated integration has already been part of European reality for a considerable time.

6 The report was drawn up in close cooperation with the presidents of the Euro Summit, the Eurogroup, the European Central Bank and the European Parliament. It is therefore often referred to informally as the 'Five Presidents' Report'.

Chapter I examines developments relating to differentiated integration and outlines the legal framework. Chapter II looks at the possible applications of differentiated integration, and chapter III addresses the consequences for institutions and the governability of the Union. Chapter IV assesses the effects on relations between member states. In the final chapter, the AIV draws a number of conclusions and makes recommendations.

The AIV is aware that the refugee crisis is dominating all political discussions at national and EU level. The Dublin Regulation and the Schengen Agreement are under pressure and the majority decision of the Justice and Home Affairs Council of 22 September 2015 represents a clear break in thinking on asylum and migration in the Union. During the writing of this advisory report, long discussions therefore took place on whether differentiated integration is possible and desirable in the field of asylum and migration and, if so, what form it should take. Because of the questions posed by the government, the AIV cannot examine this particular issue in depth in this advisory report and is of the opinion that the scope for differentiated integration in the field of asylum and migration could more appropriately be addressed in a separate advisory report.

The report was prepared by a joint committee consisting of the following persons: Professor A. van Staden (chair), Dr F.A.W.J. van Esch, Professor L.A.J. Senden, Dr A. Schout, C.G. Trojan (all from the European Integration Committee), J.N.M. Richelle (Development Cooperation Committee) and Professor J.W. de Zwaan (expert member). The executive secretary was Ms P.H. Sastrowijoto, assisted by trainees Ms E.J.M. Smit and Ms T.J.E van Rens. The civil service liaison officers from the Ministry of Foreign Affairs were A.J.B. de Wilde and T. Nauta.

A special word of thanks goes to V. Borger of the Europa Institute at Leiden University, who read the advisory report with a critical eye in the final phase.

The AIV adopted this report on 2 October 2015.

I Differentiated integration: forms, experiences and legal framework

Introduction

What exactly is meant by ‘flexible integration’ and what does it aim to achieve? Flexible integration is a catch-all term that can comprise many different variants. As the Treaty on European Union (TEU) does not use the term flexibility, the AIV prefers the concept of ‘differentiated integration’ – which is also used in academic publications – to describe various forms of European cooperation in which not all member states participate. This refers to differentiation in rights and duties between the EU member states. To provide some insight into the various forms of differentiated integration, a short summary of the main variants is given below:⁷

- enhanced cooperation; this is a formal EU instrument introduced in the Treaty of Amsterdam enabling a lead group of at least nine member states to take the initiative to further integrate a specific area of policy, with the possibility of other member states joining at a later stage (article 20 of the TEU, articles 326-334 of the Treaty on the Functioning of the European Union (TFEU)). This requires a qualified majority decision by the Council;
- temporary opt-out and opt-in (exemption) clauses;
- temporary or permanent intergovernmental cooperation, on the basis of agreements under international law. Recent examples include the Fiscal Compact,⁸ and the Treaty Establishing the European Stability Mechanism (‘ESM Treaty’);
- transitional provisions for parts of the *acquis* in the event of enlargement of the Union.

The starting point until now has always been further integration for a group of member states, in some cases even with states outside the EU. An example is the Schengen Agreement, in which four non-EU states participate (Norway, Iceland, Liechtenstein and Switzerland).

1.1 From Maastricht to Lisbon

Flexibility has become a distinguishing characteristic of the European Union. The increase in the number of member states, competences and policy areas has made the Union what it is: a partnership that grows not by linear development, but through spasms of widening and deepening and crises, of which the current euro crisis is the most recent. All of these developments have found expression in the series of treaties which, when examined closely, clearly reflect the new realities that the member states find themselves facing time and time again.

Cooperation within the European Union is an integration model that has created its own legal order, a model that goes far beyond and is much more ambitious than ‘normal’

7 Nicolai von Ondarza, ‘Zwischen Integrationskern und Zerfaserung. Folgen und Chancen einer Strategie differenzierter Integration’, Berlin, Stiftung Wissenschaft und Politik, September 2012.

8 Formally, the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union.

intergovernmental cooperation between states. It stands or falls by the endorsement, by all member states, of shared objectives and implementing decisions. Unity is a principle inherent to application of this integration model but at first sight it might seem difficult to reconcile that unity with the accommodation of differences and with differentiated integration. The history of the treaties shows, however, that it is precisely the shared fundamental principle of 'unity in diversity' that has repeatedly made new steps possible. Principles like unity and diversity appear difficult to accommodate within the current differentiated character of the EU, but history shows that much is possible to ensure that unity is maintained.

Since the Maastricht Treaty, permanent opt-outs have become normal practice in certain policy areas. Maastricht can therefore be seen as the beginning of differentiated integration, albeit at that stage only in the form of permanent opt-outs. The opt-outs relating to Economic and Monetary Union (UK and Denmark), the Common Security and Defence Policy (Denmark), Justice and Home Affairs (UK, Denmark and Ireland) are examples of differentiated cooperation incorporated in the Maastricht Treaty. The Treaty of Lisbon expanded the system of exemptions with an opt-out for the UK and Poland in relation to the Charter of Fundamental Rights (Protocol 7). The opt-outs show that not all member states share the same goals and ambitions in all policy areas or the pace at which they wish to achieve them.

The opt-outs in the Maastricht Treaty set the member states thinking about policy areas in which cooperation is desirable, but in which not all member states wish to participate. The idea was to make it possible for further integration to be initiated by a core group of member states, with the option of others joining at a later stage (the multi-speed concept). This led to the instrument of *enhanced cooperation*, established in the Treaty of Amsterdam (article 20 of the TEU and articles 326-334 of the TFEU). One factor that contributed to this development was the imminent accession to the Union of a large group of new member states (mostly in Central and Eastern Europe), which were a long way behind the existing member states, primarily in terms of economic development, and were undergoing a process of structural transformation, partly with an eye to EU membership. Since then, the opportunities for enhanced cooperation have, in theory, increased considerably. It may not be applied in areas that fall within the EU's exclusive competence (e.g. common commercial policy or the monetary policy of the countries in the eurozone) or distort the single market or competition. But it can be applied in other areas, including freedom, security and justice, economic policy (also in the eurozone), environment policy, social and regional policy, and research policy. It can also be applied in the area of foreign policy and defence, though here – under the current rules – it does require a positive mandate issued by unanimous decision of the Council. Although the conditions for applying enhanced cooperation are strict, it is not inconceivable that they could be relaxed, though this would require a treaty change (see chapter II). Examples of enhanced cooperation to date are rather limited in number and include the regulations on divorce law, the unitary patent and the financial transaction tax (see chapter III).

The Schengen Agreement (1985) and the Prüm Convention (2005) are examples of intergovernmental cooperation that originated outside the treaties but was later incorporated in them (Schengen through the Treaty of Amsterdam, Prüm through the Treaty of Lisbon). Schengen was a form of intergovernmental cooperation between an initially limited number of member states, which was intentionally arranged outside the Treaty and not necessarily temporary. The UK, Ireland and Denmark were granted formal exemptions from the follow-up cooperation through the EU, which was made possible by the Treaty of Amsterdam (Britain and Ireland in the form of an opt-in and an opt-out). Another recent

example is the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (the Fiscal Compact), which is intergovernmental in structure but in which not all member states participate. There is, however, an explicit obligation to take the necessary steps to integrate the Fiscal Compact in the EU treaties before 2018.

The instrument of transitional provisions has been in use since the Maastricht Treaty, but it has been incorporated in the treaties more explicitly since the post-2004 enlargement. This can be seen as a temporary form of differentiation (for example, in relation to labour migration from Bulgaria and Romania). See annexe II for a detailed overview of the various forms of differentiated integration.

Marginal notes

The common factor in the above-mentioned forms and instruments is that the main question they raise is how far member states are willing and able to work together in certain policy areas and/or take steps towards further cooperation. This means that the concept of differentiated integration as such must be viewed separately from the question of how much discretionary scope member states are allowed in certain policy areas by secondary EU legislation (regulations and directives). In that sense, differentiated integration concerns the more fundamental question of whether all member states are willing and/or able to take part in the integration process to the same degree and at the same time in all the policy areas covered by EU law.

What heads of government are now discussing, however, is the issue of differing goals of integration and levels of cooperation (variable geometry) and permanent opt-outs. The aim of this discussion appears to be to reverse certain steps towards integration, for example, relating to some aspects of the single market, or to limit membership of the Union to the single market. Consequently, the political goal of differentiated integration seems to have become twofold: further integration for some member states, while reversing the achieved degree of integration for others. That raises fundamental questions relating to the core of EU cooperation and the desirability of member states withdrawing from areas that have already been integrated. In the public debate, too, the possibility of different types of membership is being discussed as a way of keeping the 28 member states together or preventing the integration of a core group of member states from stagnating.⁹

As an instrument to prevent disintegration or to safeguard further integration, differentiated integration displays two sides of the same coin. At the same time, it can be argued that differentiated integration is an innovative form of integration in itself, i.e. not linked to possible scenarios for disintegration.

1.2 Motives for differentiated integration

In the past, differentiated integration was used exclusively to promote further integration whenever a uniform route proved impossible. By differentiating rights and obligations, differentiated integration makes it possible to form sub-systems or lead groups of member states by accommodating differences with member states that are not willing or able to integrate or cooperate.

9 *NRC Handelsblad*, 'Geen aparte EU-deals meer voor de Britten' [No more separate EU deals for the British], G. Verhofstadt, 9 May 2015 and *Die Zeit*, 'Merkel strebt radikale Euroreform an', 2 June 2015.

In practice, therefore, the motives for various forms of differentiated integration are based on four different situations:

1. the social, economic and political starting situations of member states are so widely divergent that it is impossible for them to follow the same route (willing but not able);
2. a majority of member states wish to cooperate further, but a small number do not want to participate, for example the UK and the Czech Republic in the case of the Fiscal Compact;
3. a small lead group wish to go further than the majority, for example in the early stages of Schengen;
4. a crisis calls for far-reaching intervention for which there is no consensus among all the member states.

Situations 1 and 2 can lead to permanent (for example, the UK and the EMU) or temporary opt-outs (see also the Danish referendum in December 2015 on the opt-in on Justice and Home Affairs).¹⁰

In choosing a hybrid form of integration that combines EU law and intergovernmental action, practical, spurious and institutional arguments can play a role: examples could include avoiding the qualified majority rule, restricting the role of the European Parliament and forestalling full review by the European Court of Justice (ECJ) in Luxembourg. These are considerations that are not discussed openly, but which certainly play a role in the negotiations.¹¹

Aside from specific situations that directly lead to differentiated cooperation, economic motives can be seen as a more general explanation for certain forms of differentiated integration: in other words differentiated cooperation based on a rational weighing up of costs and benefits. The economic theory of 'club goods',¹² for example, predicts that, the larger and more heterogeneous a group of participating countries becomes, the greater is the likelihood that some members of the group will decide to set up a 'club' and produce their own goods (e.g. harmonised policy, technical standards or collective security). Although, the reasoning goes, the costs of producing the common goods will be lower for each member if all members of the group participate, at the same time it becomes increasingly probable that the characteristics of the goods diverge more and more from the preferences and needs of the individual members. This is an inevitable consequence of the diversity of the group. The ratio between on the one hand the advantages of reducing production costs by sharing them among as many members as possible and on the other the loss of benefits as the gap between average collective

10 'Danish prime minister announces date for EU referendum', see: <<http://www.euractiv.com/sections/elections/danish-premier-announces-date-eu-referendum-316988>>, 21 August 2015.

11 On the subject of review by the Court of Justice, it is worth pointing out that, in recent examples of intergovernmental cooperation (e.g. the Fiscal Compact, the ESM Treaty), the member states invoked the arbitration provision in article 273 TFEU to try and involve the Court in their initiatives. Although this does not mean that the Court enjoys the same powers as in the case of treaty-based procedures, this does suggest that there is no desire among the member states to curtail or avoid review by the Court.

12 'Club goods' are goods that benefit the group as a whole, but where the members of the group that do not contribute to the costs are excluded from the benefits the goods bring. See J. Buchanan, 'An economic theory of clubs', *Economica* vol. 32, no. 125, February 1965, pp. 1-14 and G. Majone, 'Rethinking European integration after the debt crisis', The European Institute, June 2012.

preferences and individual preferences widens thus becomes the deciding factor. If the loss of benefits is greater than the reduction in costs, it is rational to set up a 'club' or, in other words, a form of differentiated cooperation. Of the various models, variable geometry and Europe *à la carte* come closest to the assumptions of this theory as they make it possible to accommodate the individual preferences of the member states. From the viewpoint of welfare economics, it could be argued that the presence of a relatively large number of forms of differentiated cooperation in the EU is a positive development from the perspective of the member states aiming to maximise utility.

1.3 Legal framework

The EU is a community of law and values, founded on and framed by the European treaties. Differentiated integration can only take place within the framework of these treaties, but that does not mean that the member states do not have the political freedom to modify that framework by changing the treaties. In answering the government's first question, on the expectation that more frequent use will be made of differentiated integration in the foreseeable future and what policy areas warrant specific attention in this connection, it is therefore necessary to examine, from a legal perspective, what scope the current treaties allow for this. That scope is in any case determined by the following elements.

First of all, there are the objectives of the EU which, according to article 3 of the TEU, the Union shall pursue 'by appropriate means commensurate with the competences which are conferred upon it in the Treaties'. Taken together with the catalogue of competences introduced by the Treaty of Lisbon in articles 2-6 of the TFEU, this means that the Union has exclusive, shared or coordinating/supplementary competences, as specified in detail in individual provisions of the TFEU. The question about differentiated integration seems to focus mainly on the areas of shared competence, where the Union shares legislative powers with the member states. These include the single market, the area of freedom, security and justice, consumer protection, agriculture and fisheries, environment, energy, transport and certain aspects of social policy. Where there is no special provision for differentiation in these policy areas (in terms of an opt-out, for example in the event of a revision of the treaties), member states cannot be granted an opt-out in a particular policy area without an amendment to the treaties. It is possible, however, for member states to oppose actual use of the legal bases in these areas during the process of adopting new legislation. They can, for example, refuse to support proposed legislation or challenge it on the grounds that it violates subsidiarity or proportionality. In this sense, member states can preserve the status quo as regards integration in a certain area. Where this could lead to stagnation that other member states find undesirable, the enhanced cooperation procedure could offer an opportunity to move forward.

In the second place, it must be remembered that the Union is founded on a number of fundamental values, as specified in article 2 of the TEU: 'respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights'. According to this article, 'these values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail'. These are also the minimum conditions that have to be met for membership of the EU, as laid down in treaty law in combination with the Copenhagen criteria (1993). It is important to ensure that differentiated integration is not applied in a way that undermines these core values. The fact that some member states have now insisted on an opt-out from the Charter of Fundamental Rights does not change that since,

on the basis of the settled case law of the Court of Justice and article 6 of the TEU, the fundamental rights guaranteed in the European Convention on Human Rights and in the constitutional traditions common to the member states constitute general principles of EU law. An opt-out from these principles is not legally possible.

Thirdly, in specific relation to the single market, it should be noted that article 3, paragraph 3 of the TEU not only designates the establishment of the single market as one of the Union's core objectives, but also serves to guarantee that it is structured in such a way as to protect certain public interests (sustainability, the social market economy, social justice and solidarity). In that sense, the Treaty also gives some indication of what kind of single market is to be created. This is strengthened by articles 7 to 14 of the TFEU, which emphasise that, in all its policies, the Union will aim to achieve a high level of protection in the areas of environment, consumer protection, equal treatment, public health, etc. (see also article 114, paragraph 3). Of course, how this is elaborated in practice will ultimately depend on the process of political deliberation and decision-making, but member states cannot insist on an opt-out from the single market objective formulated in the treaties unless there is a legal basis allowing for exceptional treatment (see article 114, paragraphs 4 to 6 of the TFEU).

If member states start to tamper with these fundamental principles by changing the treaties to allow opt-outs, the core of what the EU stands for will come under threat and disintegration will become a real danger.

II The future of differentiated integration

II.1 Applying differentiated integration

The government's first question is as follows: what is the AIV's view on the expectation that more frequent use will be made of differentiated integration for the foreseeable future, and what policy areas warrant specific attention in this connection? In the AIV's opinion, it is legitimate to expect that differentiated integration will be used more frequently in the near future. With the various rounds of enlargement that the EU has undergone, the political leaders responsible consciously took the risk of a growing diversity in interests and viewpoints between the member states. The more member states the Union has, the less likely it is that they will all share the same ambitions and aspirations about the future of Europe. Differentiated integration can be seen as a way of resolving the long-standing dilemma between 'deepening' and 'widening'.

Besides growing diversity, there is another reason why differentiated cooperation will or should be used more widely: the changed mood among the people of Europe. As noted in the introduction, the goals of European integration have become the subject of controversy in a number of member states and further progress towards European unification can no longer be taken for granted. In some cases, national governments will have difficulty persuading their parliaments to introduce European legislation in more areas of policy or to hand over more competences to the Union through treaty changes.¹³

II.2 Conditions for the further application of differentiated integration

Differentiated integration

The AIV advocates a level-headed and pragmatic assessment of differentiated integration, but is also of the opinion that differentiation in existing and new obligations between member states must not be allowed to erode to an unacceptable extent the *acquis communautaire*, the existing system of legal EU rules and the common rights and obligations of European cooperation.

On penalty of a loss of cohesion within the EU, there should therefore be a minimum of objectives, rules and obligations that apply to all member states, including those that do not wish to participate in realising certain integration ambitions. In this context, the previous chapter referred to the core values that make the EU a community of values. These values must be inviolable. Similarly, the core objectives of the Union, as specified in article 3 of the TEU and as pursued within the framework of the competences conferred on the Union by the treaties, must remain intact. These objectives are in particular:

- realising the single market and protecting certain public interests in this context;
- guaranteeing citizens 'an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration

13 See also the private member's bill of 11 September 2015 to change the majority for revising EU treaties: <<https://www.eerstekamer.nl/behandeling/20150911/mededeling/document3/f=/vjx8hmof8hzs.pdf>>.

and the prevention and combating of crime'. It is important to note that member states may pursue their own policies on immigration, but not on asylum. The rules on the free movement of persons within the borders of the EU are also inviolable, as they are part of the minimum *acquis*;¹⁴

- establishing the EMU.

The AIV is of the opinion that great caution should be exercised in ensuring that differentiated measures do not lead to stagnation, hamper the achievement of core objectives or erode the *acquis communautaire*. This also applies to policies that are closely linked to the working of the single market, for example in the areas of social policy, competition, commercial policy, agriculture and fisheries, transport and the environment. Such measures, in the form of transitional provisions or opt-outs, should in the future only be permitted on a temporary basis, irrespective of whether it is a matter of member states not being willing or able to participate, or of a crisis situation (see I.2). This therefore also applies, for example, to differentiated and restrictive measures such as those now being taken to combat the current refugee crisis and the associated free movement of persons. After all, the creation of the single market, including the free movement of persons, is one of the most important achievements of European cooperation.

In the AIV's view, it is sometimes unavoidable in such crisis situations that measures are taken in the form of intergovernmental agreements or arrangements that are a mix of EU law and intergovernmental cooperation. Such measures must fulfil a number of basic conditions:

- *openness*: this means that individual member states must be free to participate on the basis of objective criteria without requiring the approval of existing participants;
 - *temporary character*: the ultimate aim should be integration into the EU legal order;
 - *legal certainty*: EU rules must not be subordinated to intergovernmental rules.¹⁵
- The primacy of EU law and the jurisdiction of the Court of Justice must be respected.

In the AIV's opinion, there is no reason to object to differentiated measures that are aimed at making quicker and better progress towards achieving the Union's core objectives. The AIV does, however, believe that differentiated integration should be based on EU law and therefore on the enhanced cooperation procedure, even though it sees opportunities for improving the working of this procedure (see below).

In areas that are not directly covered by the core objectives, the AIV also sees no objection to enhanced cooperation and even finds strong arguments in its favour in certain areas. One example is the formulation and implementation of the common foreign and security policy (see II.3 for more on this subject).¹⁶ One important question that then arises is the extent to which member states have scope to press for temporary

14 These objectives do not apply fully to the UK and Denmark, which have negotiated a number of opt-outs.

15 Needless to say, member states cannot make *de jure* EU rules subordinate to intergovernmental rules. The nature of the EU legal order is such that EU law has primacy, including over intergovernmental cooperative initiatives. Nevertheless, it is advisable to make this explicit in such initiatives (as was done, for example, in relation to the Fiscal Compact).

16 For a similar discussion, see Professor J.W. de Zwaan, 'De voortgang van de Europese Unie-samenwerking' [The progress of European Union cooperation], valedictory lecture, Erasmus University Rotterdam, 2014, p. 32.

or permanent opt-outs in areas not covered by the Union's core objectives, either for socioeconomic reasons or because they lack the political will to continue along the road to European integration (situations 1 and 2, I.2). The AIV is of the opinion that neither possibility can be ruled out in advance. The AIV can also envisage a situation in which it becomes possible for a member state to stop participating in integration that has already been achieved in certain policy areas. Formally, this is only possible by means of a treaty change, but it is conceivable that political agreements could be made with a member state wishing to withdraw from a form of cooperation which in fact amount to lifting the obligations arising from participation in a certain area of policy. Member states should not only be given the opportunity to get more out of the European cooperation process if they have the political will to do so, they must also retain the opportunity to take time out in specific areas. One strict precondition for this, however, is that it should not impact on the functioning of the single market or the irreversibility of the EMU.

In addition, the AIV takes a pragmatic view on the design of single market policy. There is still a relatively large degree of latitude here for member states, given that it is a shared competence (articles 2 and 4 of the TFEU) that is probably not currently being used optimally. After all, member states themselves decide, largely through the European decision-making process, the extent to which the Union should act (subsidiarity) and, if so, the form and substance of the necessary European legislation (proportionality). In that sense, there is for example also scope for a political choice between minimum European requirements and uniform European legislation. The same applies to many other, related policy areas like environment and transport. In addition, it should not be forgotten that, in many areas – such as labour market policy – the Union only has coordinating competence, so that policy latitude and hence scope for policy competition continues to exist.

Interests/wishes of EU citizens

For the AIV, it is crucial that a system of differentiated integration produces results that are in accordance with the wishes of the EU's citizens and therefore contribute to greater democratic legitimacy. Building up public support strengthens Europe and can mean that the EU can take further steps towards differentiated cooperation in the future. As the AIV observed earlier, that calls for absolute commitment and accountability/ownership on the part of government and parliament.¹⁷ In addition, it is unlikely that citizens will make a strict distinction between regular and differentiated forms of integration. As in the case of Schengen and the EMU, in their eyes every form of integration will simply represent the EU.

Modifying the conditions for enhanced cooperation

The AIV is of the opinion that enhanced cooperation is the most straightforward instrument under EU law for differentiated integration with a view to moving forward. The way to achieve that cooperation is clear: the European Commission submits a proposal at the request of at least nine member states, there is a quantitative quorum to block the cooperation (the 'blocking minority' referred to in article 16, paragraph 4 of the TEU) and the non-participating members remain involved and can join at any time. In addition, the European Parliament is involved and monitoring and accountability are in place, even though there may be questions about whether MEPs from opt-out countries should have any say in the associated legislation. Enhanced cooperation is governed by EU law and

17 AIV, advisory report no. 88, 'Public Support for the European Union: Building Trust', The Hague, April 2014.

is therefore under the jurisdiction of the Court of Justice. In other words, there is a clear division of tasks and competences.

However, as emphasised previously, the conditions for applying enhanced cooperation are strict. It may only require a small number of member states (nine), but before enhanced cooperation can be initiated, a proposal from the Commission must have the support of a qualified majority in the Council.¹⁸ If it is not possible to achieve a qualified majority in favour of a Commission proposal in the regular negotiations, there is unlikely to be one to enable a minority to act as a vanguard. This is confirmed by the small number of exceptional cases in which this has occurred.

Assuming that enhanced cooperation is only applied when member states cannot agree, consideration should also be given to a fundamentally different approach in which, to allow enhanced cooperation to go ahead, a group larger than nine member states would have to wish to work more closely together but less than a qualified majority would be required in the Council. A larger group of member states is necessary to ensure sufficient support within the Union for the intended cooperation. A lower threshold in the Council is desirable as it is ultimately about furthering the Union's objectives, protecting its interests and reinforcing the integration process (article 20, paragraph 1 of the TEU).¹⁹ Clearly, such a relaxation of the conditions would require a treaty change.

II.3 Relevant policy areas

Which policy areas merit special attention in the application of further differentiated integration? The first example is differentiated cooperation in the context of the Economic and Monetary Union. Just as the financial crisis led to increased regulation of the supervision and functioning of the banking system, in the long run more joint action will be required to promote further convergence of economic development in the member states. The continued existence of the EMU is at risk if the socioeconomic policies of the member states diverge too widely. Not only are monetary and economic policy clearly interrelated,²⁰ but social and labour market policies are also closely linked to the economic component of the EMU. The Five Presidents' Report referred to briefly in the introduction is also explicit about the link between the two components: 'For EMU to succeed, labour markets and welfare systems need to function well and in a fair manner in all euro area Member States'.²¹ The AIV would add that the Commission's argument also applies to tax and pension policies.

18 For the common foreign and security policy, unanimity is required.

19 For a detailed discussion of this subject, see Professor J.W. de Zwaan, 'De voortgang van de Europese Unie-samenwerking' [The progress of European Union cooperation], valedictory lecture, Erasmus University Rotterdam, 2014, pp. 28-30.

20 It is useful to recall what the Delors Commission wrote in its report of April 1989 about the future Economic and Monetary Union: 'Economic and monetary union form two integral parts of a single whole and would therefore have to be implemented in parallel'.

21 European Commission, 'Completing Europe's Economic and Monetary Union', report by Jean Claude Juncker, July 2015. See: <http://ec.europa.eu/priorities/economic-monetary-union/docs/5-presidents-report_en.pdf>.

In the AIV's opinion, when the Fiscal Compact is integrated into EU law (this has been agreed for 2018), the ESM Treaty should be incorporated in the Community treaty framework at the same time.²² A widening of the ESM's mandate can then also be agreed, provided it can be used in problem countries other than the so-called programme countries. Furthermore, experience has shown that a purely intergovernmental approach is a never-ending story and arouses a great deal of uncertainty in the financial markets, to which should be added the uncertainty of gaining parliamentary approval in a number of member states. Lastly, the length of the current procedure exerts undesirable pressure on the European Central Bank (ECB). Communitisation of the ESM does not mean by definition that the European Commission will automatically acquire greater powers. A possible construction would be to create an executive board, as with the ECB. It would then be essential to build in a form of democratic scrutiny to ensure that legitimacy is not jeopardised.

Besides areas directly related to the good functioning of the EMU, other policy areas are eligible for certain forms of differentiated integration. For example, social policy – which touches on the economic component of the EMU – including legislation on employment and working conditions (which is also relevant to competition and the single market), public health (cross-border epidemics and epizootic diseases), environment and climate. One policy area where efficiency can be improved through differentiated cooperation is energy. Although the European Commission proposed plans for an Energy Union in 2014, the speed and scope of the plans could lead to many years of deliberation. The AIV considers it conceivable (and desirable) that some countries could now go ahead more swiftly with some components of the cooperation plans. In addition, a European immigration policy exists on paper,²³ with common procedures for controlling the Union's external borders, but in practice implementation of visa, asylum and immigration policies varies widely, as the current difficulties in dealing with the influx of refugees illustrates almost daily.

In the AIV's opinion, the basic principles of asylum and immigration policy are part of the *acquis*, but there are differences in implementation, making enhanced cooperation possible. It is quite possible that common registration points will be set up along the EU's external borders to complement Frontex and that verification of asylum applications will become a shared responsibility. Not all member states will want to participate in this form of integration (Schengen 'outs', eastern member states).

It is very likely that certain member states will press for enhanced cooperation in the areas of criminal law and the police. Possibilities include proposals for further cooperation on the prosecution of individuals suspected of serious crimes (acts of terrorism) and more operational cooperation between the police services of the member states.

22 Unlike the Fiscal Compact, the ESM Treaty does not contain any provision making its incorporation in the Union treaties compulsory. The TFEU was amended in 2012 to enable the ESM to be created. Article 136, paragraph 3 of the TFEU now states that member states in the eurozone may establish a stability mechanism.

23 Differentiated cooperation already applies in this area, as the United Kingdom, Ireland and Denmark do not participate.

Efficiency can also be improved through more European cooperation on defence. In an earlier advisory report,²⁴ the AIV drew attention to the extensive waste of resources caused by member states generally being averse to military integration, preferring to organise their armed forces strictly along national lines. Fear of loss of sovereignty, differences in political and strategic culture, and national economic interests are significant obstacles to achieving greater efficiency in military efforts. The AIV repeats its viewpoint that there is a need for more military cooperation not only because of severely reduced national defence budgets, but also because Europe is no longer the main strategic priority in the security policy of the US. This means that European countries now have to rely more on themselves to safeguard the security of their continent. The permanent structured cooperation referred to in article 42, paragraph 6 and article 46 of the TEU offers pointers for a group of EU member states that are willing and able to take on greater responsibility for European security.

24 AIV, advisory report no. 78, 'European Defence Cooperation: Sovereignty and the capacity to act', The Hague, January 2012.

III Consequences for the institutional architecture and governability of the European Union

The government's second question was as follows: what consequences could an increase in differentiated integration have for the EU's institutional architecture and governability?

The AIV would like to make clear first that, with its diffuse governance structure, different legislative procedures and widely varying rules for decision-making, the EU is already a complicated political and administrative system that is difficult for its citizens to understand. The way in which the European institutions (the Council in particular) have responded to the financial and economic crisis of recent years shows that the system's capacity to solve problems is a cause for concern. Over-complexity is not good for the EU's effectiveness or its legitimacy. It can also be argued, however, that differentiated integration can actually make decision-making more efficient and effective. After all, there is a high level of consensus between the participants about the goals of further cooperation and the instruments that should be used to achieve it. Differentiated integration also offers the opportunity to devise a mix of integration for each member state that more closely reflects its preferences and those of its people (tailor-made solutions). This can increase the effectiveness and legitimacy of European cooperation in the specific domain where differentiated integration is applied.

On balance, moving towards more circles of cooperation that are limited to particular groups of member states would almost certainly lead to even less transparency. It would also cause more problems of coordination between participating and non-participating member states, especially if treaties were agreed outside the framework of the EU. The AIV is therefore of the opinion, in answer to the government's question, that differentiated integration entails the risk of increasing the burden on the institutional architecture and governability of the EU.

This may be one reason why member states have only used enhanced cooperation to a limited extent. The threat of enhanced cooperation has, however, sometimes led to progress in negotiations involving the Union as a whole.²⁵ That often seemed to be the only *raison d'être* for enhanced cooperation as an instrument: to move negotiations forward when they had run aground. But times change, the group is larger, and wishes and ambitions vary. The AIV is also of the opinion that, in weighing up the advantages and disadvantages of differentiation, considerations relating to the effectiveness of governance should not take precedence over the democratic legitimacy of the forms of cooperation on offer, in the sense of their acceptability to a majority of the population.

Intergovernmental cooperation versus communitisation

The degree of support within Europe and the supervisory function of European institutions can form an obstacle to intergovernmental cooperation. Intergovernmental cooperation outside the EU treaties may derive democratic legitimacy from national parliaments, but the European Parliament and the Commission are not formally

²⁵ See Nicolai von Onderza, 'Zwischen Integrationskern und Zerfaserung', Stiftung Wissenschaft und Politik, 2012, p. 12.

involved.²⁶ Practice has already shown that there is tension between the Community and the intergovernmental methods.

At the same time, the AIV advocates pragmatism in finding politically feasible solutions in crisis situations that call for urgent action. Nevertheless, extensive use of intergovernmental cooperation outside the EU treaties would result in parallel legal regimes and limit the scope for legal protection through the European courts, to which the AIV attaches great value. In addition, a network structure that would bring the member states into the forefront and would allow different islands of cooperation to emerge would erode the power of the EU in negotiations with third parties. This could weaken the EU's position in the world.

Scrutiny more difficult

A closer examination of the institutional and administrative risks leads to the unavoidable conclusion that differentiated cooperation can result in a patchwork of arrangements and agreements that make it difficult for parliamentarians to exercise effective scrutiny. The area of Justice and Home Affairs would certainly become very obscure if enhanced cooperation were added to the existing opt-ins and opt-outs. Countries to which the enhanced cooperation construction does not apply still take part in discussion on related issues, and can therefore also hamper their progress. The end result is a complex administrative and legal foundation. Despite not being involved, the UK and Denmark can influence negotiations in Brussels, which can lead to tension with the member states that have opted in.

To prevent all these arrangements and agreements from resulting in an unmanageable network of EU ministerial councils, the AIV urges caution in creating new councils. Given the exceptional importance of monetary cooperation, there were good reasons to establish and maintain the Eurogroup of finance ministers, but the AIV believes that this should remain an exception. The existing practice – in which non-participating countries are permitted to join in discussions on issues on which they have not committed themselves to cooperation but may not vote – seems workable.

Eurozone pre-ins and outs

Even though the AIV considers the ministerial Eurogroup a given, it cannot ignore the fact that friction can arise between pre-eurozone, non-eurozone and eurozone member states. The 'pre-ins' are kept informed but are not involved in decision-making. The 'outs' have no influence on the whole, but legislation adopted for the eurozone can certainly impact on the functioning of the single market and therefore affect the competitiveness of non-eurozone member states. This can create a division between euro and non-euro countries. The AIV is of the opinion that there must be maximum transparency and believes that a formal procedure for consultations prior to the Eurogroup's deliberations could offer a solution. The eurozone should be open to this, even though it only affects areas like the excessive deficit procedure, discussions relating to the provision of emergency support, deposit guarantee schemes and prudential supervision. The remaining legislation is also discussed at meetings of the Economic and Financial Affairs Council (Ecofin) and the Internal Market Council (financial services).

²⁶ This does not affect the fact that, in both the Fiscal Compact and the ESM Treaty, the member states allocated extensive tasks to the Commission. The Court of Justice reviewed and approved the Commission's involvement with regard to the ESM (in the *Pringle* case).

European Parliament

The members of the European Parliament (EP) are elected by the citizens of the European Union. The Parliament is deemed to give a voice to the people of the 28 countries that make up the EU, taking account of the interests of the Union as a whole (article 10, paragraph 2 in conjunction with article 13, paragraph 1 of the TEU). This means that all MEPs, including those from opt-out member states, vote on matters concerning the eurozone. There have been criticisms of this situation, suggesting a separate parliament for the eurozone, as proposed by the Council of State in 2013,²⁷ or a separate European Parliament committee comprising MEPs from the eurozone, as the AIV recommended in 2014.²⁸ It is likely that the Parliament will wish to adhere resolutely to the text of the treaty and will not permit any form of division within its walls. If political circumstances allow, establishing a separate EP committee would be relatively easy to arrange by reaching agreement among the political groups within the Bureau and amending the Rules of Procedure. A separate parliament for the eurozone would also require a treaty change.

European Commission

The European Commission has a threefold task: initiating legislation, implementing policy and supervising compliance with EU law. The third of these roles has been expanded as a result of the arrangements made to tighten up European supervision of national fiscal policies. Whether more extended use of differentiated integration will lead to a noticeable change in how the Commission performs its tasks will depend heavily on the form differentiated cooperation takes in practice. If it remains within the limits of EU law and is designed to help and encourage non-participating member states to join the enhanced cooperation at a later stage, most probably little will change in the position of the Commission. If, however, member states frequently seek to cooperate through intergovernmental agreements and some of them continue to keep their distance from forms of differentiated integration within EU law, there will be a risk that the initiating, implementing and supervisory tasks of the European Commission will be further eroded. The AIV believes that this would not be in the Netherlands' interests. This does not mean that, over and above its existing tasks, the European Commission cannot play a role in coordinating and managing the various policy networks now emerging. In addition, it can play a role in building administrative capacity in the member states.

Court of Justice

A similar conclusion can be drawn in relation to the position of the Court of Justice of the European Union. In the first scenario – differentiated cooperation within the limits of EU law – the Court's jurisdiction will extend to the new areas of limited cooperation, though its judgments will not be binding on non-participating states. In the second scenario – cooperation partly or wholly on the basis of agreements under international law – there is the danger that it will not be possible to submit disputes about the substance of these intergovernmental agreements to the Court.²⁹ The AIV repeats

27 Council of State advisory opinion W01.12.0457/I, Parliamentary Papers, Senate 2012-2013, 33454 AB.

28 AIV, advisory report no. 88, 'Public Support for the European Union: Building Trust', The Hague, April 2014.

29 The Court of Justice can in principle be involved on the basis of article 273 of the TFEU, which states that the Court 'shall have jurisdiction in any dispute between Member States which relates to the subject matter of the Treaties if the dispute is submitted to it under a special agreement between the parties'. As mentioned above, this applies in the case of the Fiscal Compact and the ESM Treaty. The involvement of the Court in the ESM was also reviewed and approved by the Court itself in the *Pringle* case, referred to earlier in this advisory report.

its opinion that such a development would be bad for the quality of the EU as a legal community and hence for the legal certainty afforded its citizens.

IV Relations between the member states

This chapter looks at how further use of differentiated integration will affect relations between the EU member states. It is clear that this especially applies to the relationship between participating and non-participating countries. The extent of the effect on relations will depend heavily on the chosen form of differentiation. Does it build on existing policy and do non-participating member states have the option of joining at a later stage? Or are differentiated constructions developed outside the EU treaties, precluding the possibility that non-participants can join later in the process? In the first case, the consequences will be limited, while in the second there is a risk of permanent dividing lines emerging that may jeopardise the cohesion of the EU as a whole. Three points are considered below: the balance of power between the member states, how standpoints are determined, and cohesion and mutual trust.

IV.1 Balance of power

Within the EU (and previously in the European Communities) continual efforts have been made to maintain a degree of equilibrium between the influence of the larger and smaller member states. This is expressed, for example, in the current double majority rule, which applies to the qualified majority decision-making system in the Council. The requirement that decisions must be approved by 55% of the member states is clearly to the benefit of the smaller countries, while the parallel requirement that the states in favour must also represent 65% of the EU's population takes account of the larger countries. There is also the possibility of a blocking minority (comprising at least four member states (article 16, paragraph 4 of the TEU)), which was likewise included to protect the interests of the smaller member states. This equilibrium could be disturbed if larger or smaller states were over-represented in certain forms of differentiated cooperation. That applies to both the relationship between northern and southern member states and that between old and new member states.

In addition, an increase in differentiated integration could strengthen the power, in a more general sense, of strongly pro-integration member states as they would probably wish to participate in all forms of integration. This would not only give them an advantage in terms of information and the strength of their networks, but also improve their negotiating position, since negotiating beyond the limits of a specific policy area is more difficult for states that do not participate in all the relevant areas. Differentiated integration could thus conceivably increase the dominance of a powerful, pro-integration European state like Germany. That could potentially distort not only Franco-German relations, but also the entire internal balance of power in the Union. Alternatively, greater differentiated cooperation could strengthen the position of the six original member states of the European Community in relation to the others.

Changes in voting patterns and the balance of power have undoubtedly had an impact on the standpoints taken by individual member states and the scope for forming coalitions in the Council. If a lead group of pro-integration member states emerges, the average level of preference within the differentiated cooperation structure will be more in favour of integration than in the full constellation of 28 member states. Consequently, their policy preferences will deviate more frequently and more widely from those of the majority, reducing their chances of success in negotiations. When it comes to coalition-building, the position of the UK in particular is of great importance to the Netherlands.

Because of its more sceptical attitude to Europe, the UK can only be expected to join a lead group seeking greater and faster integration in exceptional cases. In areas where this form of differentiated integration is the objective, the Netherlands would therefore lose an important ally. There may of course also be instances in which the Netherlands desires less integration, in which case the UK would be a good ally.

Lastly, differentiated integration can weaken cohesion and mutual trust between states. Especially if it is accompanied by a narrative of insiders and outsiders, 'us' and 'them' or pioneers and latecomers, irritation between member states can run high. This danger can be exacerbated when, as in the case of Justice and Home Affairs and the Fiscal Compact, it is a very small minority that opts for less integration. In other cases, such as the Eurogroup and the EMU opt-ins and opt-outs, these problems have hardly arisen. In general terms, mutual trust between member states will depend on the external effects and the degree of inclusion (transparency and participation) provided for in the design of the differentiated integration.

IV.2 Relations in the single market

The AIV is of the opinion that the competitiveness of member states that do not participate in a certain form of cooperation should in principle not be negatively affected by measures taken by participating states. However, rejecting discriminatory measures and acknowledging the advantages of the single market also presupposes recognising that certain forms of policy competition are essential for the economic strength of the member states and indirectly of the EU as a whole.

What measures should be considered an unacceptable infringement of fair competition and which can be considered more or less normal policy rivalry has been a recurring question for many decades. Are member states that decide jointly to set the rate of corporation tax at a low level being 'unfair' to others that do not wish to do so? The Court of Justice has already ruled on this question: it depends on whether it was the intention to disadvantage trade flows from other member states or whether the lower rate had that effect in practice.

If differentiated cooperation should not distort competition to the disadvantage of non-participating member states, conversely it should not, in the AIV's opinion, constitute an open invitation to free-rider behaviour. In other words, non-participating countries should not benefit from the efforts of a group of other member states without contributing to the costs. Obvious examples are the refusal of certain member states to participate in measures to further restrict emissions of greenhouse gases or to reduce dependence on Russian energy. Denmark is a striking example in the context of the EMU. As mentioned previously, Denmark has linked its currency to the euro. It therefore shares in the benefits brought by the stability of the European currency without having to contribute to operations in support of weak euro countries. Although it is not obliged to provide support, it is of course permitted to do so. In November 2010, for example, Denmark contributed to the support given to Ireland.

IV.3 The United Kingdom and the EU

The UK's relationship with the EU merits special attention in this chapter. The UK's greatest source of dissatisfaction with the Union is the immigration of EU citizens. At the end of November 2014, British Prime Minister David Cameron issued a blunt call for the reform of the EU's migration policy, specifically an end to the 'benefit tourism'

affecting the UK. He wants to curb entitlements to unemployment benefits, housing benefit, child benefit and family reunification. He also wants restrictions on migration from member states where economic development lags far behind that of the rest of the EU.³⁰ Although Mr Cameron says that he has no intention of infringing the principle of free movement of persons, his demands clearly do just that. In this connection, it is interesting to note that the Court of Justice recently ruled in favour of a German law that excludes citizens of other EU countries from claiming social benefits if they arrive in Germany for economic reasons. The ECJ's judgment gives national authorities the right to impose restrictions on benefits to citizens of other member states.³¹

There is also concern in the UK that the euro countries could join forces in the Council to adopt measures harmful to British interests. This is possible in principle, as the 19 euro countries will have a qualified majority in the Council.³² In British financial circles, there is widespread anxiety that Brussels will impose financial legislation, for example the proposed tax on financial transactions, that will damage the competitiveness of the City. These fears have resonated with the British government to such an extent that, in the context of its ambitions to review the UK's relations with the EU, it is insisting on guarantees that measures initiated by the Eurogroup will not erode the integrity of the single market. In his Mansion House speech on 10 June 2015, British Chancellor of the Exchequer George Osborne specified this as one of the two principles on which his government will focus during the negotiations, calling for 'fairness between the euro-ins and the euro-outs, and the integrity of the single market preserved'.³³ In the public debate in Britain, it has been suggested that the euro countries make a pledge to the UK to include an article in the treaty preventing them from promoting measures that might damage the single market.³⁴ As noted above, there already is a treaty provision (article 326 of the TFEU) to the effect that enhanced cooperation may not undermine the single market.³⁵ The AIV believes that extending this provision to all forms of differentiated cooperation merits serious consideration, because this could help to resolve the problem of the UK's continued membership of the EU. This would also be in line with article 4, paragraph 3 of the TEU, under which, in accordance with the principle of sincere cooperation, the member states (and the Union), in full mutual respect, will assist each other in carrying out the tasks which flow from the treaties.

30 See: <<http://press.conservatives.com/post/103802921280/david-cameron-speech-on-immigration>>.

31 See: <<http://curia.europa.eu/jcms/upload/docs/application/pdf/2015-09/cp150101en.pdf>>.

32 After the transitional provisions for what constitutes a qualified majority expire on 31 March 2017.

33 For the full text of Osborne's speech, see <<https://www.gov.uk/government/speeches/mansion-house-2015-speech-by-the-chancellor-of-the-exchequer>>, 10 June 2015.

34 See for example *The Financial Times*, 'David Cameron should stand up to the eurozone', 30 July 2015. The author of this article, Charles Grant, is director of the Centre for European Reform. He also calls for the non-euro countries to be given the right to observe meetings of eurozone ministers and for the introduction of an 'emergency brake', whereby if one non-euro member state thinks a particular measure would damage the single market, its implementation would be postponed for a year while it was reviewed.

35 The article also states that enhanced cooperation 'shall not constitute a barrier to or discrimination in trade between member states, nor shall it distort competition between them'.

In addition, the AIV is of the opinion that agreements on the extent to which and the way in which the EU makes use of its shared competences can be significant in the deliberations leading up to the British referendum on EU membership. Further to what was noted above, it is possible in all respects to reduce the regulatory burden in many areas by invoking the principles of subsidiarity and proportionality embedded in the treaties. It is also possible to stretch the discretion of the member states when it comes to applying and implementing secondary legislation. This is also the core of the message propagated by Frans Timmermans, First Vice-President of the European Commission. Reducing the regulatory burden is not, however, the sole prerogative of the Commission. The great majority of legislation is imposed or enforced by the Council and the European Parliament. An Interinstitutional Agreement between the three institutions would, in the AIV's opinion, be the appropriate instrument to curtail unbridled legislation and regulatory burden. It would also remove a major stumbling block in the Brexit debate, without the need for opt-outs and suchlike.

V Conclusions and recommendations

‘Differentiated integration’ appears to be the latest buzzword: a solution to the stagnation afflicting European policy development, a remedy to cure all the prevailing ills. But those who take this position are forgetting that differentiated integration has long been part of the European Union’s history. The Treaties provide for exceptions and opt-outs in the event of treaty change negotiations or enlargement, and an instrument was created almost 20 years ago to make it possible for a small vanguard of member states to engage in enhanced cooperation. The basic principle has always been that member states that did not participate at the time could join at a later stage.

Intergovernmental forms of cooperation have likewise found their way into EU law, or have been formalised in temporary agreements under international law such as the Fiscal Compact, taking EU law into account.

The government’s first question is:

What is the AIV’s view on the expectation that more frequent use will be made of flexible integration for the foreseeable future, and what policy areas warrant specific attention in this connection?

The AIV endorses the expectation that the instrument of differentiated integration will be used more often in the future. This has to do with the size of the European Union, frequent disparities in the state of economic development in member states, and differing views among member states as to both the pace and objectives of integration. The concept of integration held by the six original member states of the European Communities, which envisaged a certain convergence, is being eroded. National feelings and identities are becoming more and more dominant, judging by national debates in several member states. Meanwhile, the crises not only on the EU’s periphery but also within its borders call more than ever before for common policies.

For these reasons, the AIV believes that differentiated integration will acquire more weight. Member states will be quicker to invoke it than in the past, because in a Union of 28 it is sometimes simply impossible to reach agreement. The AIV does not view this as a negative trend, but accepts it as a result of a new political reality that calls for a pragmatic approach. It must be borne in mind that past experience shows that differentiated integration in the form of a lead group (including countries outside the European treaties, such as the Schengen Agreement) may lead to deeper integration in the longer term. In other words, the instrument can also serve to clear the path ahead. But the AIV wishes to stress that a number of conditions must be fulfilled: there must be no tampering with the EU’s core values, and the same applies to the objectives and structure of the single market, which means that there must be no erosion of the freedom of movement of persons. At the same time, decision-making on subjects relating to differentiated integration must rely as much as possible on the existing institutions. Such an approach can only benefit the solidity and consistency of the EU’s institutional framework.

Differentiated integration may develop into deeper integration, but it could also move in the direction of partial disintegration and the shrinking of the *acquis*. This necessitates a pragmatic assessment of the possibility of a member state withdrawing from existing integration in certain policy areas. The AIV takes the view that any such withdrawal should only be possible by following the formal channels – that is, by treaty changes. Nonetheless,

it is conceivable that political agreements might be made with member states that claim an exceptional position: agreements that effectively render inoperative the obligations arising from participation in a particular policy area.

The *acquis communautaire* is a system of legal rules that must remain intact in terms of objectives. However, the AIV wishes to emphasise that member states do have a certain policymaking freedom as far as the architecture and implementation of European legislation are concerned, and that this freedom should be seen as something positive. The use of intergovernmental agreements, too, may be acceptable in special circumstances such as the economic crisis, although the content of such agreements should be brought under the Community's umbrella as soon as possible.

The AIV certainly sees policy areas in which differentiated integration is a possible way of achieving progress. These include deepening cooperation within the framework of the EMU, enhanced cooperation on pension and tax policies, employment and working conditions, public health, environment, climate, energy, the implementation of immigration and asylum policy, police and criminal law matters, and permanent structured cooperation in the realm of defence. In this connection, the AIV would note that differentiated integration can be effective provided national and European administrative institutions function effectively. This also applies, by the way, to the regular integration process.

The government's second question is:

What consequences could an increase in flexible integration have for the EU's institutional architecture and governability?

The AIV reaches the conclusion that more far-reaching differentiated integration would inevitably impact on the EU's institutional architecture and governability. Transparency, democratic legitimacy and support among member states – which can be classified as opt-outs and pre-ins – should take precedence in the quest for solutions. The EU is already a patchwork, and this situation should not be exacerbated by the addition of unclear, unverifiable agreements concluded by a small vanguard. For instance, the AIV would advise against setting up any more ministerial councils. At the same time, it is important to guard against mixed forms of EU law and intergovernmental action leading to a reduction in the role of the European Parliament and the undermining of the jurisdiction of the Court of Justice in Luxembourg. Equally, it is important to guard against a situation in which greater intergovernmental cooperation erodes the position of the European Commission (although this did not occur with the Fiscal Compact or the ESM Treaty). The AIV foresees that as a result of differentiated integration, the Commission will not only retain its traditional roles of initiator, implementer and supervisor, but acquire the additional role of network manager. Regarding the consequences for the European Parliament, the AIV notes that the fact that representatives of non-euro countries can vote on matters relating to the European currency causes a certain resentment. This will probably increase the pressure to set up a separate parliament for the euro countries. Leaving aside the fact that this would require a treaty change, the AIV is unenthusiastic about this idea. After all, the European Parliament represents citizens, not member states. To split up the representative assembly of all EU citizens would be an unfortunate development. Furthermore, it would exacerbate the existing division between euro and non-euro countries. The AIV therefore repeats its earlier suggestion to set up a separate EP committee for the euro countries.

The government's third question is:

What consequences could an increase in flexible integration have for the relations between the member states of the EU? Economic and Monetary Union has created a distinction

between the countries in the eurozone and other member states. To what extent does this have an impact on the positions they adopt and the coalitions they form in the Council in economic and other policy areas?

The AIV acknowledges that differentiated integration may affect relations between member states. A one-sided composition of groups of member states that strive for closer cooperation in certain areas could disrupt the equilibrium between larger and smaller member states, between old and new member states, and between northern and southern countries. Pro-integration member states will probably find their positions strengthened, because they are likely to take part in all forms of differentiated cooperation. The cohesion of the EU as a whole could be damaged if member states that attach great value to their national sovereignty feel excluded as a result, even in policy areas in which they do participate. The AIV believes that such damaging effects may be prevented, or at least limited, by concluding good agreements about openness, exchanges of information, and regular consultations between participating and non-participating countries. Agreements of this kind are particularly important to the relationship between euro and non-euro countries. As far as the UK's relationship with the EU is concerned, the AIV believes that more specific agreements on reducing the regulatory burden and preserving the integrity of the single market could remove the UK's objections to the way the EU currently functions.

Recommendations

1. The AIV advises the government to accept differentiated integration as a necessary instrument that enables progress to be made in European cooperation in certain policy areas, and in this connection to take account of the legitimate objections or limitations of certain member states to engage in closer cooperation. However, differentiated integration should be contingent on certain conditions. The most important condition is that differentiated integration must not undermine the EU's core values or the foundations or architecture of the single market, and that closer cooperation must take place through the EU institutions and respect the applicable EU procedures.
2. The AIV advises the government to place the subject of differentiated integration on the Council's agenda. The informal contacts during the Netherlands' Presidency provide ample scope for this. The object of such consultations must be to launch an open dialogue on best practices in the member states and to identify the possible pitfalls of differentiated integration.
3. The Netherlands should endeavour to ensure that preference is given to enhanced cooperation when choosing which form of differentiated integration to adopt. In the short term, the government could sound out the views of other member states on modifying the conditions for enhanced cooperation. The AIV would favour such modification. On the one hand, for enhanced cooperation to go ahead, a group larger than nine member states would have to wish to work more closely together, to ensure substantial support, but less than a qualified majority would be required in the Council. In this connection, it should be borne in mind that enhanced cooperation serves the fulfilment of the EU's objectives, as is stated in the Treaties themselves.
4. Differentiated integration places severe demands on national authorities. They must be able to take part in different vanguards in different policy areas, and to participate in debates and negotiations. This calls for countries – including the Netherlands – to make clear choices at national level. The AIV therefore advises the government to chart the areas in which it considers differentiated integration to be desirable and/or

necessary, taking into account the Netherlands' policy priorities for the next five years. The AIV believes that the following areas or subjects, in any case, should be considered: the deepening of cooperation in the framework of the EMU, enhanced cooperation on pension and tax policies, employment and working conditions, public health, energy, immigration and asylum policy, police and criminal law matters, and permanent structured cooperation in the realm of defence.

5. The AIV considers it desirable for the government to seek to ensure that the intergovernmental Fiscal Compact is incorporated into the legal framework of the European Union. The agreement concerned states that this must be achieved before 2018. This matter needs to be considered and discussed in the Council in a timely fashion, with a view to possible treaty changes.
6. With a view to achieving the cohesion and stability desired, the AIV is opposed to the creation of permanent dividing lines within the EU and urges the government to act accordingly. Member states that initially decline to join in forms of differentiated cooperation should always have the opportunity to do so later, efforts should be made to maximise openness, and there should be regular consultations between participating and non-participating member states. In addition, as recommended earlier, the involvement of the EU institutions in such forms of cooperation is essential.
7. The AIV endorses the government's desire for the Netherlands to play an active role in the search for a solution to the problem of the UK's continued membership of the EU in the light of the referendum it is to hold. In this context, the government should try to find as many supporters as possible to reach an inter-institutional agreement between the three European institutions involved to restrict the regulatory burden and to increase the discretion of member states in the implementation and application of secondary legislation.

Request for advice

Professor J.G. de Hoop Scheffer
Chairman of the Advisory Council
on International Affairs
P.O. Box 20061
2500 EB The Hague

Date 15 April 2015

Re Request for advice on flexible integration in the European Union

Dear Professor De Hoop Scheffer,

In June 2014 the European Council concluded that there should be scope for 'different paths' towards EU integration for different countries (EUCO 79/14). This can be seen as an affirmation of the present reality. In the realm of Justice and Home Affairs, the Schengen system is seen as a success story, and the EU has gained broad experience with opt-outs, as exercised by the United Kingdom, Ireland and Denmark. In recent years integration measures taken as a result of the financial crisis have highlighted the divisions between euro and non-euro countries, and German Chancellor Angela Merkel has called in the past for a 'two-speed Europe' to facilitate a fiscal union.¹ Even the concept of second-tier 'membership' for non-member states that wish to deepen their ties with the EU has a place in the debate on flexible integration.

The European Council's embrace of flexible integration can be read as a concession to member states that cannot support the notion of 'ever-closer union'. What is more, flexibility – whether via treaty provisions on enhanced cooperation or otherwise – offers a necessary alternative to fully fledged integration of all 28 countries. The member states' divergent views on the general purpose and ultimate goal of the EU, and the criticism of the trend towards a political union, make it increasingly difficult to achieve consensus on the course EU integration should take. More and more, these dynamics are leading to varying speeds and multiple layers of integration within the EU.

It is not only the gap between the leading and 'peripheral' members that raises questions about the desirability of flexible integration, its institutional implications, and about relations between the member states. There is also the matter of the permanent divide that exists between member states based on their participation in the EU's integration frameworks. The government would therefore welcome an analysis of trends in flexible integration, with a view to exploring the political, institutional and policy-related consequences for the Netherlands and the EU. It would appreciate receiving an advisory report on this matter from the Advisory Council on International Affairs (AIV) by September, addressing the following questions:

1. What is the AIV's view on the expectation that more frequent use will be made of flexible integration for the foreseeable future, and what policy areas warrant specific attention in this connection?
2. What consequences could an increase in flexible integration have for the EU's institutional architecture and governability?

1 Interview with Chancellor Merkel in *ARD-Morgenmagazin*, 7 June 2012.

3. What consequences could an increase in flexible integration have for relations between the member states of the EU? Economic and Monetary Union has created a distinction between the countries in the eurozone and other member states. To what extent does this have an impact on the positions they adopt and the coalitions they form in the Council in economic and other policy areas?

I look forward to receiving your report.

Yours sincerely,

Bert Koenders
Minister of Foreign Affairs

Overview of multi-speed Europe 2013 (source: Ministry of Foreign Affairs)

Flexible cooperation in the EU, August 2015

Form of cooperation	Participating member states	No participation / special position	Outside the EU	Subject matter	Legal basis and other legal information
European Union	28 EU member states	-	Candidate countries: MAC, MONT, SER, TUR, ALB Potential members: BOS, KOS	Peace, security, well-being, single market, EMU.	EU treaties
Benelux	NL, BEL, LUX	25 EU member states	-	Cooperation in areas that do not fall under the EU.	Article 350 TFEU Benelux Treaty
Nordic cooperation	DK, FIN, SWE	25 EU member states	NOR, ICE	Regional, economic and political cooperation.	Acts of Accession See page 392 of the Acts of Accession of Sweden and Finland Nordic agreements
Outermost regions (ORs)	FRA (Martinique, Guadeloupe, French Guiana, Réunion, Mayotte and Saint-Martin) POR (Azores and Madeira) SPA (Canary Islands)	25 EU member states	-	Territories remote from the European continent.	EU law is applicable (article 355, paragraph 1 TFEU), but on the basis of article 349, paragraphs 1 and 2 TFEU certain, temporary exemptions are possible.
Overseas countries and territories (OCTs)	NL, FRA, DK and UK (see Annex II to the TFEU).	24 EU member states		Territories remote from the European continent.	EU law is not applicable to OCTs, unless explicitly stated otherwise (article 355, paragraph 2 TFEU). Paragraphs 4 and 5 of article 355 also contain specific exceptions. These are not detailed in this overview.

Form of cooperation	Participating member states	No participation / special position	Outside the EU	Subject matter	Legal basis and other legal information
Euro	19 EU member states	9 EU member states: UK, DK, SWE, ROM, BUL, CZE, POL, HUN, CRO. UK and DK are not obliged to introduce the euro. The other 7 have a temporary derogation from this obligation.	Officially: San Marino, Vatican City, Monaco, Andorra and some OCTs Unofficially: MONT, KOS	Single currency, monetary cooperation. The euro is the 'third phase' of the EMU.	EU treaties (article 3, paragraph 4 EU, article 119, paragraph 2 TFEU, art. 127 to 138 TFEU) ECB protocol , Protocol 14 (Eurogroup) See for UK Protocol 15 See for DK Protocol 16
Europlus pact	23 EU member states (eurozone plus BUL, DK, POL and ROM)	UK, HUN, SWE, CZE, CRO	-	Coordination of economic policy: competitiveness, employment, sustainable public finances and financial stability.	No legal consequences, politically binding. European Council conclusions 24-25 March 2011
European Stability Mechanism (ESM)	19 EU member states (eurozone)	9 other EU member states		Emergency fund, stability of euro. Permanent facility.	International agreement (using EU institutions: Commission, ECB and ECJ). Article 136, paragraph 3 TFEU.
European Financial Stability Facility	17 EU member states (eurozone)	11 other EU member states (including Estonia and Lithuania, which joined the euro later)		Emergency fund, stability of euro. Temporary facility.	International agreement (using EU institutions: CIE, ECB and ECJ).
Fiscal Compact	25 EU member states	UK, CZE, CRO		Strengthening budgetary discipline and economic governance.	International agreement

Form of cooperation	Participating member states	No participation / special position	Outside the EU	Subject matter	Legal basis and other legal information
Schengen	22 EU member states DK participating, but with an opt-out CYP is a member but the <i>acquis</i> does not yet apply fully.	UK, IRE not participating, but with an opt-in Candidates: ROM, BUL, CRO	ICE, NOR, LIECHT, SWI	Lifting internal border controls, common external borders.	Schengen Agreement, integrated in the EU <i>acquis</i> by the Treaty of Amsterdam. See Protocol 19 . DK/UK/IRE: Protocol 19 Candidates: Acts of Accession.
Controls on persons, single market	27 EU member states	UK	-	Link between single market and controls on persons. Retention of British controls on persons.	Protocol 20
Area of freedom, security and justice	25 EU member states	DK, UK, IRE (opt-out/in)	-	Police, criminal law and civil law cooperation.	EU treaties (old 'third pillar', 'Communitised' by the Treaty of Lisbon). See Chaps 3-5 of title V of Part Three of TFEU. UK and IRE: Protocol 21 DK: Protocol 22
Common Security and Defence Policy	27 EU member states	DK	-	Defence cooperation	DK: article 5 of Protocol 22 Article 31 TEU provides for flexible decision-making (opt-out). Article 45, paragraph 2 TEU provides for selective participation in European Defence Agency (EDA).
Permanent structured cooperation on defence	Not yet utilised	-	-	Further defence cooperation	Article 42, paragraph 6 and article 46 TEU. Protocol 10

Form of cooperation	Participating member states	No participation / special position	Outside the EU	Subject matter	Legal basis and other legal information
Charter of Fundamental Rights	26 EU member states	UK and POL	-	Fundamental rights	UK and POL: protocol 30 It can be argued that this protocol will not have the effect of an opt-out.
Enhanced cooperation: Rome-III	15 EU member states: BEL, BUL, GER, SPA, FRA, ITA, LAT, LUX, HUN, MAL, AUS, POR, ROM, SLOVE, LIT	13 EU member states: NL, UK, IRE, DK, SWE, FIN, EST, POL, CZE, SLOVA, GRE, CYP, CRO	-	Applicable law on divorce and legal separation.	Council decision on basis of article 329 TFEU Regulation Participation of Lithuania
Enhanced cooperation: unitary patent	25 EU member states	ITA, SPA, CRO	-	Unitary patent protection.	Council decision on basis of article 329 TFEU Regulation Translation regulation
Enhanced cooperation: tax on financial transactions	11 EU member states (FRA, GER, EST, AUS, BEL, GRE, ITA, POR, SLOVA, SLOVE, SPA)	17 EU member states		Making financial sector contribute to costs of recent financial crisis.	Council decision on basis of article 329 TFEU
Economies showing differences in development (article 27, lid 2 TFEU)	All member states	Less developed (parts of) member states	-	Taking account in legislation of (parts of) member states that are less developed (e.g. eastern Germany, Spain, Greece).	Examples: Directive 2002/83 , recital 63 Directive 98/30 , recital 2
Supplementary research programmes under article 184 TFEU	Not yet utilised	-	-	Multi-year research programmes in which not all member states wish to take part.	Article 184 TFEU. Inspired by article 7 of the Euratom Treaty. Supplementary programme initiated to develop a high flux reactor (NL participating).

Form of cooperation	Participating member states	No participation / special position	Outside the EU	Subject matter	Legal basis and other legal information
Specific authorisations in Treaty	All member states	-	-	On the basis of these provisions, member states can maintain their national measures in certain areas or go further than the EU.	Article 72, article 114, paragraphs 4 and 5 article 153, paragraph 4 article 168, paragraph 7 article 169, paragraph 4 article 193 TFEU.
Procedure for participation in secondary legislation	Participating member states	Non-participating member states		Specifying the instruments at the level of secondary law determining whether member states participate or not.	Examples: Bank supervision proposal Bank resolution proposal.
Snus	27 EU member states	SWE		Powdered tobacco for oral use, mostly consumed in Norway and Sweden.	Act of Accession Sweden. <u>Annexe XV to the Act of Accession</u>

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