

# STUDY GROUP ON THE EUROPEAN CONSTITUTIONAL PROCESS

## Working Group 12 CONSTITUTIONAL ASPECTS OF A CONCENTRIC CIRCLES EUROPE

**Coordinator:** Peter SCHIFFAUER

**Contributions:** Peter SCHIFFAUER, Kinga BRUDZINSKA, Maria Isabel NIETO

### I BACKGROUND

- 1 Europe (geographically, culturally, politically) is an open concept. At present, there are a variety of “European” political organisations, ranging from the Council of Europe, the European Union, the Organisation for Security and Co-operation in Europe, the Organisation for Economic Co-operation and Development,<sup>1</sup> to the recently launched European Political Community.
- 2 The geographical scope of the European Constitutional process is uncertain and cannot be defined a priori. Constituting the most advance project of European integration, the European Union is both open to further enlargement and allows voluntary withdrawals. Only at a time when a sovereign State in form of a European Federation will emerge its extension will need to be definitively delimited. This state of affairs implies various options for differentiated integration steps within and beyond the European Union.
- 3 The current shape of the European Union (EU) is not similar to or an embryonic phase of a Federal State. Under the EU constitutional setup each Member State is remaining a sovereign state, however bound by the Law commonly put in place in the founding Treaties which provide for part of the sovereign rights to be exercised jointly in common institutions.
- 4 Incompatible political choices, political distrust and conflicting interests amongst Member States’ governing classes are currently hampering any attempts to integrate the whole EU more closely which would require Member States to relinquish some sovereign powers. Those who want to further

---

<sup>1</sup> Emerged from the Organization for European Economic Cooperation, including two non-European member states.

- develop European integration are therefore exploring ways of doing this through steps of differentiated integration.
- 5 Since the EU is the most important and valuable building block of European integration, any attempt to deepen integration between only a part of the Member States should respect and in no case jeopardise the achievements of the EU. Previous steps of differentiated integration have explicitly acknowledged this principle.
- 6 There are, however, no clear answers as regards the effects of differentiated integration on the EU as a whole: whether it creates a fresh impetus for further deepening or it pushes the union toward a permanent core-periphery structure.
- 7 For some EU Member States, it is a vehicle for overcoming deadlock, with integration among some countries preferred over the alternative standstill for all. They argue that differentiated cooperation isn't breaking the EU but rather enabling it to survive.
- 8 There is a group of Member States, on the other hand, that claim that differentiated cooperation threatens to deepen already apparent divides (East/West or euro/non-eurozone Member States) and eventually may lead to the disintegration of the EU (Brexit).
- 9 According to the GLOBSEC expert poll from 2020,<sup>2</sup> national policymakers across the EU are no longer debating whether their respective countries are proponents of flexible modes of cooperation but rather how they can play an influential and constructive role in an EU of different speeds.
- 10 The decisions of Member States to participate in different initiatives indeed tend to be based on two conditions: can it be justified in the national interest and is freedom provided to make decisions on a case-by-case basis.
- 11 While the majority of Member States agree that EU reform is needed to ensure a more efficient and effective decision-making process at EU-27, it cannot

---

2 For additional information see: Making Flexible Europe Work? European Governance and the Potential of Differentiated Cooperation, May 2020, <https://www.globsec.org/publications/making-flexible-europe-work-european-governance-and-the-potential-of-differentiated-cooperation/>; Multi-speed Concept is in the European Union's DNA, September 2018, <https://www.globsec.org/publications/multi-speed-concept-is-in-the-european-unions-dna/>.

- come at the expense of less populous countries, and must avoid creation of “closed clubs”.
- 12 EU Member States are adamant that all differentiated integration initiatives maintain “open door” policies that are inclusive to countries that elect to join at a later date. In other words, the model must avoid undermining the cohesion of EU integration and prevent the creation of a core-periphery EU landscape.
- 13 There is also some uncertainty in certain Member States related to concentric circles linked to the fear of being left out of “the core” of Europe and a concomitant seat “at the table” with key countries such as Germany and France.
- 14 Several EU Member States have proved receptive to the different flexible forms of integration, including Austria, Belgium, France, Germany, Italy, Spain, Portugal, Slovenia and Estonia. The outcome of the 2022 referendum allowed NATO Member State Denmark to remove its exemption from the EU defence policy and, going hand in hand with the imminent entry into NATO of Sweden and Finland, to reinforce the European pillar of defence. Other Member States including Ireland or Poland were less interested in participating in measures of differentiated integration.
- 15 Differentiated integration was accepted in various policy areas (e.g. the common currency, abolition of border controls, foreign and security policy, defence, social policy, taxation, patents) and in many cases led to tangible progress. However, there are policy spheres where a multi-speed Europe risks to cause serious problems and its admissibility is therefore controversial. Some take the view that differentiated integration should be excluded in the field of migration and regarding the core commitments to the EU values such as the democratic principles and the rule of law. Others believe that in these fields, too, a sufficiently large number of Member States could move forward jointly, e.g. by agreeing amongst themselves on a scheme for the relocation of refugees or that a modification of Article 7 TEU could be envisaged with the aim to exclude from the vote all Member States that are concomitantly facing a procedure pursuant to this Article.

## II. FIELDS OF POSSIBLE ACTION

- 16 In specific policy fields such as, foreign and security policy, defence, the fiscal policy linked to the common currency or intellectual property rights the objectives of the EU could be more exhaustively and efficiently achieved, if the cooperation of states were replaced by a (federal type) comprehensive competence and democratic majoritarian decision-making at Union level. As long as such a shift of sovereign powers to the Union has not taken place, measures of differentiated integration may be desirable as an instrument of last resort to overcome standstill when the EU decision-making processes is blocked by a veto of one or a few Member States.
- 17 Enhanced cooperation under the provisions of the EU Treaty is not a panacea when some Member States resist a desired European approach. Action under the enhanced cooperation rules can only be based on one of the limited powers that are currently conferred to the Union. Moreover, in the field of the common foreign and security policy, it cannot be launched unless Member States unanimously allow for it or, in the field of defence, have unanimously defined the defence tasks to be carried out by a permanent structured cooperation. The unanimity requirement in Article 329(2) TFEU could be removed by making use of the “bridging clause” in Article 48 (7) TEU, except for matters with military implications or in the area of defence. It should also be noted that a permanent structured cooperation of Member States in defence matters within the EU-framework was established by the Council acting by a qualified majority (Articles 42(6) and 46(2) TEU).
- 18 Experience has shown the usefulness of developing new fields of common action under agreements concluded amongst a limited number of Member States outside the EU framework such as the “Schengen”-agreement which subsequently was successfully incorporated into the EU framework. Similarly, the so-called Fiscal Compact and the Treaty on the European Stability Mechanism constitute complementary instruments for governing the common currency by the Members of the Eurozone.
- 19 Further to an initiative launched by the French President Emmanuel Macron, on 6 October 2022 the Heads of Government or State of 44 European countries gathered in Prague for the first meeting of a “European Political Community”. This new format is conceived as a platform of political dialogue

amongst European political leaders. The fact that the Russian Federation and Belarus are the only two European countries not invited suggests that the main purpose of this exercise, at least in the short term, is to coordinate and possibly unify the positions on Russia's warfare in Ukraine. The 44 participants indeed underlined their unity in condemning this war. With regard to possible further action in the area of energy supply, there was agreement on the desire to obtain cheaper gas with as little collateral damage as possible for relationships with suppliers. But opinions differed widely on how to achieve this. Discussions are expected to continue at future informal meetings of the same type in Moldova, Spain and the UK. It is currently unclear whether – and if so to what extent – European integration will benefit from the creation of an additional structure such as the European Political Community. Its added value compared to the Council of Europe with an almost identical number of states would need to be demonstrated. It could possibly be found in the different working methods, with that of the Council of Europe being typical of the heaviness of an international organisation while the new format would organise dialogue and consultations through immediate contact at the highest political level, without cumbersome bureaucratic underpinnings. While agreement on condemning an unjustifiable war of aggression can be reached without difficulty in such a political format, it remains questionable whether voluntaristic political understandings alone are sufficient to counteract a military aggression with effective joint measures and to ultimately create a common defence. The real purpose of an informal platform like the European Political Community would therefore rather lie in preparing and paving the way for future institutional steps. It could also become an alternative to too hasty EU enlargements for merely political reasons.

- 20 Economic interest and political leeway for using the EU provisions on enhanced cooperation are relatively small. The efforts to create a unified European patent system are finally in phase of implementation. The example of the so far unsuccessful attempt by 9 EU Member States to introduce a financial transaction tax through enhanced cooperation is not encouraging. Conceived as a last resort, enhanced cooperation is unlikely to lead to breakthroughs in the integration process.

- 21 The financial crisis following the bankruptcy of Lehmann Brothers, the economic downturn during the COVID pandemic, the pursuit of ambitious climate protection goals or the exorbitant inflation caused by a price explosion on fossil energy markets made or are still making anticyclical fiscal policy interventions necessary. In order not to distort the EU internal market, such interventions must be coordinated and jointly agreed, be it at EU level, between the Member States of the Eurozone or possibly with the participation of other European States. Where amending the Treaties is not a realistic option - be it for political reasons as during the Euro-crisis, lack of time or the intention to limit the intervention to a single ad-hoc measure – the conclusion of specific agreements outside the EU framework may be an appropriate way forward as long as such agreements are not in breach of the EU law. A significant fiscal policy of the Euro-Group could be shaped by the further development of the European Stability Mechanism towards a lender of last resort and as backstop in the event of a bank resolution. International agreements outside the EU framework could achieve significant integration progress between (part of) EU Member States or other European States if they are designed with the perspective of eventually being included in the EU framework.
- 22 The evolution of geopolitics may bring a majority of the citizenry and political class of several EU-Member States to conclude that they will not be able to effectively defend their security and global interests unless they transfer a part of their sovereign powers in order to merge them into a federal-type entity, particularly in relation to foreign policy and a joint defence, a common currency, fiscal and economic policy, respect for basic values and rights. From its inception, the European Economic Community has accepted closer forms of cooperation and integration between some of its Member States, from the Benelux-agreement to the Franco-German Elysée-Treaty until the more recent Baltic States cooperation, the Visegrad-Group or Med5. As long as the Union law is respected, nothing prevents some Member States from becoming more integrated amongst themselves when they are willing to do so. Union law would certainly require that all Member States be given the opportunity to join the federated core if they so wish. The creation of a more closely federated

core of Member States within the European Union is legally possible if carefully designed.

23 However, the question arises what would be the factual repercussions of a more closely federated core on other Member States. There is no single answer to this question. In the extremely unlikely event that the federated core alone would dispose of a qualified majority in the EU institutions, the remaining Member States that would not wish to join the federate core or to be overruled by it, might probably see no alternative to withdrawing from the EU. With that, the EU would disappear and only the federate core would continue to exist. If the wish not to join the federate core resulted from a free democratic process, such an outcome could possibly be acceptable. While under international law every citizenry has the right to maintain its full sovereignty, no citizenry of a single State is entitled to prevent the citizenry of other States from federating more closely with others. A problem arises where the citizenry of a State would have wished to join the federate core but for objective reasons was unable to do so (as was the case with the EU monetary union). In such a case the citizenry willing to join the federate entity deserves protection. The degree of integration achieved within the EU would justify a solidarity obligation amongst all Members wishing to form a federate core. Any attempt to create a federate core within the European Union would therefore need to include all States wishing to participate and disposed to definitely transfer part of their sovereign powers. All obstacles that objectively stand in the way of inclusion would have to be overcome through joint solidarity measures. In contrast, similar solidarity is neither justified nor mandatory under the EU Treaty, where a citizenry prefers to retain its full sovereignty.

24 Following these rather theoretical remarks, the relevant political question is to which extent the creation of a federate core within the European Union is likely to happen in a foreseeable future. A few solemn speeches by egregious political leaders or programmatic agreements between governing political parties may perhaps inspire hope for a closer federation of powers in the future. But the day-to-day institutional practice is rather deceiving that hope. In general, in today's EU the interests of Member States seem to aggregate rather issue by issue or sector by sector than depending on vicinity. The demand for majority voting in the EU Council is frequently raised, when

existing veto powers are abused to blackmail European partners. But the scrutiny undertaken by the Czech Council presidency of the possibilities to make use of the Treaty's "bridging"-clauses shows that practically no EU government is disposed to abandon full control over the future development of the sensitive areas of EU policy that are still subject to unanimity. Embryonic forms of federate structures exist in particular in the field of defence, both within the EU-framework ("structured cooperation"-PESCO) and outside (Eurocorps formed by France, Germany, Belgium, Luxembourg, Spain and recently Poland). For the time being the functioning of these structures is not hampered by the unanimity rule due to the small number of decision makers. While they may be a nucleus to which further federate structures could attach, it appears to be still a long way for this to happen.

\*\*\*

---