Introduction

Bruno De Witte, Andrea Ott and Ellen Vos

Some 15 years ago, we edited a book entitled *The Many Faces of Differentiation* together with Dominik Hanf, in which the various facets of flexibility in EU law, following the Treaty of Amsterdam, were examined.[1] The 2001 volume addressed the topic of flexible and differentiated integration that started to receive increased political and scholarly attention[2] around that time, after the introduction of closer cooperation into the Amsterdam Treaty in 1997. This Treaty-based recognition of differentiation took place against the backdrop of the preparation for the Union's enlargement and for a more heterogeneous institutional future.[3] We defined differentiation in 2001 as 'the facilitation and accommodation of a degree of difference between Member States or regions in relation to what would be otherwise common Union policies'.[4] Differentiation was a new concept denoting a long-established reality. Certain forms of differentiation had existed from the very beginning of the Communities as, for instance, safeguard clauses in the Treaties, Benelux *inter se* cooperation and flexible arrangements in EU legislation. Differentiation took many legal forms, ranging from primary Community law to secondary law and soft law instruments, and from external agreements with third states to 'internal' agreements between the Member States themselves.

Differentiation became a politically relevant topic as of the 1970s and more obviously from the 1990s onwards in the context of the Maastricht

[1] Bruno De Witte, Dominik Hanf and Ellen Vos, *The Many Faces of Differentiation in EU Law* (Intersentia 2001).

[2] See e.g., Filip Tuytschaever, *Differentiation in European Union Law* (Hart Publishing 1999); Gráinne de Búrca and Joan Scott (eds), *Constitutional Change in the EU. From Uniformity to Flexibility?* (Hart Publishing 2000).

[3] See on this: Andrea Ott, 'Fundamental and Basic Principles on the EC and the EU', in Andrea Ott and Kirstyn Inglis, *Handbook on European Enlargement* (TMC Asser Press 2002) 25–6.

[4] See (n 1) XII.

Treaty and its aftermath. At first it was not perceived as a threat to European integration, but rather as a tool to promote further integration, by allowing a group of Member States to forge ahead with closer cooperation while leaving the door open for the remaining Member States to join later. The Schengen and Prüm Conventions and social policy can be highlighted as successful examples of this multi-speed concept, while the Economic and Monetary Union (EMU) (and in particular the adoption of a common currency), although built on that same multi-speed logic, soon developed in a different direction towards a more permanent division of two sets of Member States.

Today, 15 years after the publication of that earlier volume on the *Many Faces of Differentiation*, differentiated integration has developed much further and now arguably is a defining feature of the European Union polity. More EU policies than ever are marked by concentric circles of integration, implying a lack of uniform application of those EU policies in the various states. The internal market provides a good example. It is a core policy for all EU Member States and is extended to the EEA countries Norway, Iceland and Liechtenstein, but it also includes significant temporary derogations for new accession states. The Area of Freedom, Security and Justice is a fragmented 'area' with special arrangements for Denmark, the UK and Ireland and temporary exceptions for Schengen candidates. Remedying the deficiencies of the EMU resulted in intergovernmental constructions such as the European Stability Mechanism and the Fiscal Compact. And finally, the general mechanism of flexibility introduced by the Treaty of Amsterdam and now renamed as 'enhanced cooperation' has emerged from the shadows since 2010 and has now been used in relation to divorce law, patents, and financial transaction tax, thereby resulting in important jurisprudence by the CJEU clarifying the legal regime.

This volume takes stock of the many faces of the 'EU law of differentiation' that exist today. It is divided into two parts dealing respectively with the general institutional and the policy-specific aspects of differentiation. Part I is devoted to the general institutional aspects, with chapters dealing with the nature and characteristics of the various institutional and extra-institutional forms of differentiation. Part II takes a policy-oriented perspective, zooming in on the most important areas of EU law and policy in which differentiated integration is prevalent or particularly intriguing, such as EMU, the internal market, justice and home affairs, and foreign policy. The overall question underlying this exploration was whether differentiated integration serves the EU integration process and the core values of the supranational entity by introducing a useful degree of flexibility in the complex EU machinery among so

many EU Member States or whether the multiplication of those forms of differentiation threatens to lead to the disintegration of the European Union.

The first, institutional, part of the book starts with a chapter in which *Bruno De Witte* sketches the general evolution of flexibility in EU law, from one Treaty revision to the next, and notes the paradox that, whereas the negotiations leading up to the Constitutional Treaty and the Lisbon Treaty paid relatively little attention to the legal regulation of flexibility, the post-Lisbon years have seen a remarkable upsurge of the practice of flexibility in its different guises of enhanced cooperation, opt-outs and *inter se* agreements between Member States. In the following chapter, *Daniel Thym* emphasizes the 'legality' of differentiated integration in the sense that the many, often quite adventurous, forms of flexibility that we have witnessed in the past years were basically compatible with the constitutional rules and principles of EU law. The main challenge, in his view, is therefore not the legality of differentiation, but its legitimacy, as widespread flexibility contributes to make Europe more distant and impenetrable for the citizen. *Steve Peers* then examines the differentiation mechanism *par excellence*, the enhanced cooperation procedure originally introduced by the Amsterdam Treaty, and compares it to Cinderella: after a promising early life, it was neglected for a long time and has only recently been revived, although still rather timidly. Peers argues that a more frequent use of the mechanism could increase the EU's input and output legitimacy. *Mark Dawson* and *Alieza Durana* discuss flexible legal instruments as modes of differentiation. They argue that the increasing 'hardening' of soft law instruments may not necessarily upset the ability of soft law to accommodate diversity but requires a re-evaluation of the legal framework in which these instruments operate. *Deirdre Curtin* and *Cristina Fasone* address a novel institutional question, namely whether there is a need for differentiated representation within the European Parliament to reflect the fact that an increasing part of EU legal norms do not apply across the whole EU territory. They argue that a move towards such a 'flexible' European Parliament would affect that institution's overall institutional credibility. *Andrea Ott* examines differentiation through accession treaties in relation to free movement, particularly their impact on European citizens' rights. She argues that differentiation by accession treaties was a necessary precondition to achieve enlargement, although it is doubtful whether it serves to deepen integration and it rather leads to two classes of EU citizens. *Maartje de Visser* and *Anne Pieter van der Mei* discuss the protection of fundamental rights in EU law and plead for more flexibility in this domain. They argue that the European Court of Justice should be more liberal in allowing the

Member States to offer a higher level of protection of fundamental rights within their domestic legal orders in situations falling within the scope of EU law.

The book subsequently turns to the discussion of differentiated integration in various policy sectors, starting with two conceptualizations of differentiation in economic and monetary policy. *Stefaan Van den Bogaert* and *Vestert Borger* discuss the many forms of differentiation in EMU law. While noting the dangers of this fragmentation, their analysis underlines the dynamism of differentiation and the EU's unique transformative capacity that allows it to adapt to new challenges. *Christoph Herrmann* delves into the use of (semi)extra-legal instruments in the euro-crisis and the limits of existing mechanisms of differentiated integration. He proposes to insert a new Treaty article allowing for amendments of Article 139(2) TFEU by euro-area Member States only, a so-called *inter se* Treaty amendment. This flexibility, he argues, would be the only way to repatriate the legal and constitutional framework of the euro area under the umbrella of the Treaties and of EU law. *Eilís Ferran* examines the specific forms of flexibility that characterize the European Banking Union, which straddles the borderline between (essentially uniform) internal market law and (essentially differentiated) EMU law, and she argues that the institutional arrangements that were adopted in this area may have both centripetal and centrifugal effects.

Turning to internal market law, *Pieter Van Cleynenbreugel* and *Wouter Devroe* analyse the EU's financial transaction tax proposal as an example of 'fast track' enhanced cooperation provided for by the Treaties. They conclude that this proposal may in fact constrain the regulatory freedom of non-participating Member States. *Ellen Vos* and *Maria Weimer* discuss institutional instruments allowing for derogations from internal market harmonization measures. They show that the opt-out procedures laid down in Article 114 TFEU (but originally created by the Single European Act) have not been resorted to often by the Member States and, when they were used, were frequently rejected by the European Commission or the Court. In view of the ongoing conflict on the acceptance of genetically modified organisms (GMOs), they plead for a rethinking of the ways in which the internal market paradigm of uniformity may be combined with a respect for regulatory diversity between the states. *Suzanne Kingston* discusses the flexibility that has been embedded in EU environmental law since the 1970s. She explains flexibility as a response to the natural complexity and indeterminacy of the topic. She nevertheless stresses the need for clarity in defining the outer limits of flexibility.

Nadine El-Enany analyses formal differentiated integration arrangements and informal flexibility which, on the one hand, have enabled the UK to adopt a cherry-picking approach to participation in the Common European Asylum System (CEAS) and, on the other hand, have led to vast differences in practice between Member States in their treatment of asylum seekers. She argues that differentiated integration, either in the form of official agreements or in the form of informal flexibility, is not appropriate in the field of asylum. *Ester Herlin-Karnell* explores flexibility in the field of EU criminal law, in particular the emergency brake and accelerator procedures laid down in Articles 82 and 83 TFEU. She considers that too much flexibility in criminal law is likely to challenge the legality principle and the possibility for citizens to claim their rights in cross-border situations. *Panos Koutrakos* addresses flexibility in what used to be known as the EU's 'second pillar', namely Common Foreign and Security Policy; this policy domain is marked by a wide range of cooperation arrangements which groups of Member States rely upon in practice, combined with a heavily proceduralized, but little used, formal framework for closer cooperation laid down in the TEU. He argues that, paradoxically, while this field would be most suitable for accommodating differentiation, it also seems to be the less amenable to a process-oriented management of differentiation.

In *The Many Faces of Differentiation* book, published in 2001, we observed that 'differentiation may be the opposite of uniformity, but that it may well – if handled with care – actually strengthen European unity'.[5] Today, when the European Union is faced with multiple challenges which often amount to true crises, and with discussions on a possible decrease of its number of Member States, the term disintegration is becoming ubiquitous in the public discourse. The question arises whether the proliferation of mechanisms of flexibility over the years has contributed to this newly fragile state of the integration project or whether, on the contrary, differentiation has been able to keep the impetus of European integration going despite the heterogeneity of national interests and priorities. There are good arguments to support that geographical widening and policy deepening can only be reconciled by allowing a sufficient degree of flexibility in EU law and policy. This is true for specific policy areas (as discussed in the single contributions to this book), but it may be equally true in more general terms, as a condition for the continued existence of the EU and of the whole integration process and for inhibiting a process of disintegration. Differentiation and flexibility seem

[5] See (n 1) xii–xiii.

essential components to address tensions and reconcile differences between Member States. In this manner, differentiation may indeed truly strengthen European unity. Finally, the question whether flexibility is a tool for disintegration or integration can only be answered by establishing what are the core institutional and policy elements, the core principles and values from which the Union of all EU Member States cannot deviate without putting the essence and functioning of the supranational entity at stake. Practical suggestions have been put forward, such as excluding the internal market from variable geometry and preserving the distinctive features of EU law like primacy, direct effect, centralized judicial enforcement and unity in the EU's external relations. The message that this book seeks to convey is that differentiation is a necessary tool to help prevent a breakdown of the European integration project. It is no longer an anomalous feature of the progress towards an ever-closer union, but rather a structural characteristic of the European Union project. Therefore, the question for the future is not so much whether differentiation and flexibility are good things per se, but rather which *forms* of flexibility are preferable from democratic and efficiency perspectives and which *limits* should be set to the range and depth of flexibility arrangements in order to protect the core principles and values of the European integration project.

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