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## Differentiated Integration as a Fair Scheme of Cooperation

Richard Bellamy and Sandra Kröger



European University Institute

**Robert Schuman Centre for Advanced Studies**

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## **Abstract**

In the past few years, there have been few discussions about the future of the European Union (EU) that did not involve the topic of differentiated integration (DI), the process whereby some member states integrate further, while others temporarily or permanently opt out of specific policies. Pragmatically, DI has allowed European integration to proceed by both widening and deepening. Normatively, it has allowed for diverging national capacities and preferences to be accommodated. However, the growing acceptance that the EU's future may lie in more institutional diversity leaves unanswered the question of the conditions under which DI could be accepted as a fair scheme of cooperation. This is the question addressed by this paper.

Why is this an important question? First, if DI is perceived as unfair, it will not generate the support it needs to work and, to the contrary, might further nourish hard forms of Euroscepticism. Second, if the institutional design of DI is perceived to be unfair, it will fail in its purpose of reconciling member states who want to integrate to different degrees, and at different speeds. Third, it has often been suggested that DI allows member states to leave their fundamental disagreements about the nature and the finalité of the EU unresolved by recognising that they may proceed separately, with some moving forward whilst others hold back. However, DI can in fact contribute to creating new divisions and is itself an expression of divisions. Therefore, it is important to develop a more explicit understanding of the different notions of fairness that are involved in different designs of DI. Overall, fair design in DI matters because it ensures that DI contributes to greater acceptance of the EU rather than creating additional divisions. The paper explores two main approaches of international cooperation – statism and cosmopolitanism – and relates them to fairness in institutional design in DI.

## **Keywords**

European Union, differentiated integration, integration theory, heterogeneity.





## 1. Introduction\*

In the past few years, there have been few discussions about the future of the European Union (EU) that did not involve the topic of differentiated integration (DI), the process whereby some member states integrate further, while others temporarily or permanently opt out of specific policies. As a result, member states have different rights and obligations in regard to specific EU policies. DI has at least two appeals. Pragmatically, DI has allowed European integration to proceed by both widening and deepening. Normatively, it has allowed for diverging national capacities and preferences to be accommodated. In a context of lasting crisis and increasing socio-economic and cultural heterogeneity among member states (Bellamy and Kröger 2017), there is an increasing awareness that the ‘one-size-fits-all model simply cannot work’ (Tsoukalis 2016: 199). However, the growing acceptance that the EU’s future may lie in more institutional diversity leaves unanswered the question of the conditions under which DI *could* be accepted as a fair scheme of cooperation. This is the question addressed by this contribution. Important differences arise according to whether we see such a scheme as operating among individual EU citizens or member states, with these differences producing contrasting accounts of the substantive and procedural fairness of different schemes of DI.

We shall explore two sets of questions posed by DI from the perspectives of social justice, or substantive fairness, and political justice, or procedural fairness respectively. If substantive fairness concerns the fair distribution of social and economic goods, such as income and opportunities, procedural fairness concerns the fair exercise of power by and participation within the political institutions of the EU. With regard to substantive fairness, we shall ask whether a particular scheme of DI can be regarded as fair if it fails to treat either individuals or states outside the scheme equally to those within it (or vice versa) from the perspective of socioeconomic justice. With regard to procedural fairness, we shall ask if a particular scheme of DI can be regarded as fair if it is either established by a process in which either individuals or states within the scheme do not have an equal say to those outside it, or results in such an inequality in decision making.

Unsurprisingly, the literature on DI is immense and growing, and we cannot do justice to it all here (for an overview see Holzinger and Schimmelfennig 2012). Mostly, scholars have focused on conceptualizing DI in the abstract and categorizing its main empirical manifestations. Strikingly, the discussion of DI remains – exceptions apart – rather disconnected from both established theories of European integration as well as more normative theories of legitimacy and fairness. EU integration theories have had problems coming to grips with DI (Hooghe and Marks 2009: 3; Jensen and Slapin 2012: 780; Kölliker 2016: 117), perhaps because by and large they seek to explain DI by the same factors which were previously used to explain integration, as if DI were just an inverted process of integration (but see Vollard 2014), rather than paying more attention to the main driver of DI, namely heterogeneity. Meanwhile, normative theory has also not been very engaged so far with the topic (but see Bellamy and Kröger 2017; Lord 2015; Erikssen 2018), despite the relevance of DI for the overall legitimacy of the EU.

Why is the question of under which conditions, if any, can proposals for DI be considered as substantively and procedurally fair important? First, if DI is perceived as unfair, it will not generate the support it needs to work and, to the contrary, might further nourish hard forms of Euroscepticism. Examples are the institutional power imbalances between ‘ins’ and ‘outs’ in the Eurozone, or the demands creditor states have imposed on debtor states in the context of the Euro crisis. Second, if the institutional design of DI is perceived to be unfair, it will fail in its purpose of reconciling member states who want to integrate to different degrees, and at different speeds. Third, it has often been suggested

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that DI allows member states to leave their fundamental disagreements about the nature and the finalité of the EU unresolved by recognising that they may proceed separately, with some moving forward whilst others hold back. Whilst this is true to some degree, it is not true all the way. DI can in fact contribute to creating new divisions, as has been amply documented in the context of the Euro crisis and its crisis management measures. Indeed, one could say that DI itself is an expression of new divisions in the EU (Michailidou and Trenz 2018). The fact that DI also entails a given conception of the EU becomes clear in its institutional design. In other words, where DI is thought acceptable, and on which grounds, as well as who owes what to whom, are all questions that involve a notion of the ‘nature of the beast’. There are different ways of designing DI, and different institutional designs involve different notions of fairness. Though DI may at first appear as a means of de-politicizing highly political questions, this is not what it achieves. Instead, DI is ‘a deeply political process and a way of relating to conflicts. There are winners and losers, and outcomes often reflect prevailing power constellations rather than efficient solutions to policy problems’ (Fossum 2015: 799). Therefore, it is important to develop a more explicit understanding of the different notions of fairness that are involved in different designs of DI. Overall, fair design in DI matters because it ensures that DI contributes to greater acceptance of the EU rather than creating additional divisions.

There are so many aspects to DI it is impossible to do justice to all of them in such a short paper. For instance, this contribution will not engage with external DI (non-EU members participating in EU policies), or with differentiated implementation. Instead, what is of interest here is how different notions of fairness in schemes of cooperation beyond the state play out in institutional design, in DI. The paper proceeds as follows. First, we will explore those normative principles relating to the fairness in international cooperation that underpin the two main normative approaches that have been adopted in regard to the EU – statism and cosmopolitanism – insofar as they are relevant to DI. Second, we will develop a categorization of DI that will allow us to apply these abstract principles to DI in the EU. Third, we will discuss how the normative principles developed in section 2 translate into propositions of fairness in the institutional design of DI, addressing questions such as when it is deemed fair to differentiate in the first place, who owes what to whom solidarity in which circumstances, and also, who should have a say in setting up a given scheme of DI and its subsequent organisation. The analysis will leave us with institutional designs that are likely to be perceived as unfair, by different sides. Which is why concluding, we will address whether a third approach, democracy, can address some of the shortcomings of the two approaches previously scrutinised.

## **2. Two views of a fair scheme of cooperation**

Normative accounts of substantive and procedural fairness often involve certain empirical assumptions that determine their applicability in given circumstances. Therefore, in applying these normative theories to DI we will relate them in turn to different empirical theories of European integration. Below we outline two approaches to fairness: statism (which can be related to liberal intergovernmentalism) and cosmopolitanism (which can be related to neo-functionalism). Both approaches have fundamentally different views of what constitutes a fair scheme of social and political cooperation in the international realm. For our purposes, we will concentrate on those aspects of these theories that seem relevant to explore the institutional fairness of DI, which implies addressing the following questions: Who constitutes the political community in the international realm, is it states or individuals? What is the purpose of international cooperation? And, as a result, how do the two approaches conceive of the EU, and of the ways it members should relate to each other – their mutual rights and obligations?

### **2.1 Statism**

Statists insist on the moral relevance of the nation-state and the right to collective self-determination of its citizens. Although there are variations among statist positions, all concur in regarding membership of an association with the characteristics of a state as providing a necessary context for considerations

of social and political justice of an egalitarian nature to apply. A state can be defined as possessing jurisdiction and control, backed by coercion, over resources, people and goods within the borders of a given territory, and the right to control and defend those borders. Its key characteristic lies in providing a system of common rules, policies and goods for those individuals living within its borders that make possible and facilitate their mutual interaction and flourishing. Belonging to some sort of association having these characteristics is more or less unavoidable for most individuals and, when well ordered, of huge benefit to them. Moreover, these common rules, policies and goods can be seen as in large part the product of cooperation among the members of the state, and would not exist without their efforts. Given nobody could be said to have an entitlement to them prior to the forms of cooperation that brought them into being, and all have a shared interest and roughly equal stake in them, then fairness suggests a presumption in favour of their equitable distribution and control (Sangiovanni 2007).

Analogous reasoning to that sketched above can be said to lie behind Rawls account of a political community as a 'a cooperative venture for mutual advantage' (Rawls 1971: 4), whereby the interactions and dependence of citizens on one another in a polity gains an intensity sufficient to generate the collective goods each requires to conceive and pursue an autonomous conception of the good. Rawls argues that in these circumstances the principles structuring the political and social institutions of the political community should be capable of gaining the reasoned endorsement of those subject to them as a fair basis for preserving their freedom and equality. He proposed two principles as capable of achieving such endorsement. The first principle concerns the securing of certain basic civil and political liberties essential for political justice. The second principle addresses social justice, and seeks a) to guarantee fair equality of opportunity and b) to allow only those inequalities that maximize the position of the worst-off group (the so-called 'difference' principle which governs the distribution of income and wealth, positions of responsibility and power, and the social bases of self-respect). He viewed these principles as lexically ordered, with 1 having priority over 2, and 2a over 2b, so that for various reasons that become relevant below political justice has priority over social justice.

Although others have argued that global interdependence had resulted in conditions similar to the basic structure for domestic justice, so that Rawls's principles could be applied at the global level (e.g. Beitz 1999: 151), this was not his view. In developing his argument he made two elaborations that are pertinent to our discussion. First, he came to see principles of justice as addressing not simply the forms of intense institutionalised cooperation to produce collective goods typical of a state, but also involving the shared culture and practices through which members of a state come to identify as a people and that have evolved through a history of multiple iterations of collective self-determination. One reason for according political primacy over social justice is that the former allows the latter to be legitimised as co-authored policies that those subject to them can agree on (Rawls 1993).

Second, Rawls contended that international justice differed from domestic justice and applied to the relations between the free and equal peoples of states rather than free and equal individuals (Rawls 1999). On his account, the extent and degree of interaction among individuals at the global level was insufficient to generate the conditions that might justify a demand for egalitarian principles of justice among them. Moreover, international society was even more heterogeneous and plural than most domestic societies. As a result, there was an absence of the shared values as well as the shared interests that might render agreement on such principles possible. Nevertheless, that did not mean that no principles of justice apply at the global level. After all, states do interact, leading to a need for an appropriately fair system of international cooperation. The relevant question, therefore, was 'What fair terms of cooperation would free and equal peoples (liberal and decent) agree to?' Rawls contended these terms for the most part would be fairly minimal, involving ensuring Treaties were contracted on the basis of free and equal agreements, the duties of which the states were obliged to honour, upholding certain basic human rights, and, most controversially, a 'duty of assistance' to aid 'burdened' societies that were unable to realise principles of justice for their peoples.

In referring to Rawls, we do not wish to imply that any statist argument must end up endorsing his specific principles for domestic and international justice respectively. Rather, his account merely

provides an example of how statism involves distinguishing between the scope and content of domestic and international justice on the basis of the differences in the types and intensity of the socio-economic, political and cultural interactions involved, and the nature of the collective goods and common meanings they establish among individuals and peoples respectively. As a result, substantive and procedural fairness have different implications in the two contexts, with the duties of justice to compatriots being more substantial and privileged compared to those to non-compatriots. However, nothing in the statist argument rules out the possibility that states might either voluntarily seek to cooperate in more intensive ways, or involuntarily find themselves and their citizens in relations of mutual interdependence of a kind that rendered it possible and appropriate to adopt principles of fair social and political cooperation analogous to those currently found within democratic welfare states (Sangiovanni 2007).

With regard to the former, statist call into question the extent to which the processes of socio-economic globalization have rendered the citizens of states interdependent in relevant ways in all respects, or produced sufficient convergence in values and identities. Nevertheless, most do accept that the alleviation of dire global poverty and the prevention of catastrophic climate change form morally mandatory duties that require cooperative action at the global level, along with the traditional global goods of securing peace and preventing abuses of basic human rights, such as genocide. Whilst there is a duty to act in these areas, however, that need not involve the creation of an international association. These goods could be achieved by voluntary cooperation, including allowing states to act independently in a way that credibly contributes to producing the good but that accords best with their resources and political culture. It suffices that all agree to do something.

With regard to the latter (political cooperation), statist do accept that peoples may democratically choose to cooperate in mutually beneficial ways but regard the legitimate goal of such inter-state cooperation to be the preservation of the capacity for national self-determination for each of the participating states. Such an association would have the form of a ‘club’ to produce certain ‘club goods’. 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, thereby preventing free-riding (Kölliker 2001, 2016). Once the association is established, there is a duty to assist those members of the association that lack the capacity to achieve their contractual obligations to protect the club good. Should the agreement setting up the association so determine, these duties may extend beyond the ‘duty of assistance’.

Some theorists suggest that statism might gradually transform into cosmopolitanism as global interdependence and cooperation develop. However, social and economic heterogeneity on the one side and political and cultural heterogeneity, on the other would mean that no uniform scheme of cooperation would be likely to be perceived as fair – the parties involved in producing collective goods at the global level would lack the requisite shared interests in them and shared values with regard to their meaning and distribution. That said, statism *per se* does not entail closed borders. The duty of assistance extends to humanitarian assistance for refugees fleeing oppression, war and natural and man made disasters. While citizens have a duty towards ensuring the continued maintenance of associational goods of their home state, they can be free to move when doing so would not impair this provision and they are willing and able to contribute to the production of the associational goods of their host state.

Consequently, statist perceive of the EU as a voluntary association of states, which join forces, when and insofar as this seems advantageous for the participating states, to generate certain club goods in what seems pragmatically the best manner, and possibly to achieve certain morally obligatory goods that require international cooperation. As such, their argument aligns with a liberal or republican intergovernmental account of the EU (Bellamy 2019), whereby governments as the democratic representatives of their respective peoples agree on forms of mutually beneficial international cooperation, including the possibility of free movement between states by their respective citizens. It is not regarded as a challenge to the nation-state but as a means for preserving it, where the EU achieves policy goals that no member state could achieve alone. Importantly, the member states remain ‘masters of the Treaties’ in that no new competences can be bestowed upon the EU without the consent of all

member state governments. An implication is that statist reasoning along Rawlsian lines allows for considerable DI.

## **2.2 Cosmopolitanism**

Cosmopolitans regard individual human beings as having ultimate value, so that states and other collective entities only have value indirectly; that all individual human beings have equal moral value; and that these two conditions apply universally and so should be acknowledged by everyone (Barry 1999: 35-6). Consequently, they seek to constrain the ways political institutions operate so as to ensure they treat 'every human being' as having 'equal stature as an ultimate unit of moral concern' (Pogge 2008: 175). They view the nation-state and the exclusive national identity it fosters as an obstacle to treating all human persons with equal concern and respect. Birth into one state rather than another is morally arbitrary, making discrimination on the basis of nationality as morally repugnant as discrimination on grounds of race or skin colour (Caney 2001: 115 n 3). Therefore, social and political justice should be global in scope, and focused on securing individuals not states peoples an equal right to flourish as autonomous agents.

Two different types of argument undergird the cosmopolitan case. The first argument appeals directly to the equal moral personality of individuals (e.g. Caney 2011). Advocates of this approach note how even statist invoke this status when they presume that a fair scheme of cooperation within a state should treat all citizens equally. On this account, involvement in a given political and social scheme has no role in determining the justification or applicability of principles of justice. The global scope of justice follows from the universality of moral equality alone. If a humanoid society were discovered on Mars, that happened to offer conditions for flourishing to its members that were less developed than those on earth, then on this account we would have reasons of cosmic-politan justice to equalise conditions.

By contrast, the second argument accepts that universal moral equality only entails egalitarian principles of justice when individuals belong to an institutionalised scheme of cooperation of a relevant kind – that is, one that is constitutive of the social circumstances conditioning the lives of individuals in ways that are largely unavoidable and to some extent necessary for them, and that is capable of being under their collective control (e.g. Moellendorf 2009). On this account, the global scope of justice results from the world economy having created such an institutionalised scheme, reflected in the development of international trade law and bodies such as the WTO. Meanwhile, related processes of globalisation in areas such as security and communications have had a parallel impact, gradually altering the situational geography of social and political life. As a result, cosmopolitans see no reason not to apply similar principles to those Rawls advocates for the domestic level also to the international level.

For different reasons, both these arguments for cosmopolitanism maintain that the design and competences of democratic institutions, and the size and location of the political communities in which they operate, should be determined by whatever scheme proves most appropriate to deliver equitable policies for *individuals* in the most efficient and effective manner (Van Parijs 2013). So long as the nation-state can contribute to this goal, it can still play an important role, although neither prioritising compatriots nor controlling borders would be permissible. However, for the second argument for cosmopolitanism it is crucial that global socio-economic trends have weakened the capacity of nation-states to provide for the security and welfare of their citizens. They modify the freedom of action of states and undercut their capacity to operate as sovereign units. Consequently, their capacity to achieve equality for individuals and help them realise their right to self-determination has likewise been eroded. Therefore, such cosmopolitans in particular look to the supranational or global level to preserve and expand freedom and equality among individuals. In an interconnected world, with multiple interdependencies and externalities, forming a supranational/global association is an obligation rather than an option. These cosmopolitans do not think, as statist do, of inter-state cooperation as establishing a voluntary association to protect a series of club goods. Rather, a scheme of fair cooperation at the

global level is morally obligatory to secure global collective goods in ways that are socially and politically just through treating all individuals as equals.

From this perspective, the teleology of the EU is to become a fair association of individuals of a kind capable of realising equality between them, as can be seen not least in its codification of human rights and EU citizenship, with the latter establishing transnational rights for individuals, including political rights to participate in EU and local elections wherever they reside. Rather than the member states remaining the masters of the Treaties, cosmopolitans prefer to see the development of a full-blown supranational government.

### 3. Categorizing different forms of DI

We mentioned above how there is a flourishing conceptual literature on DI that offers a broad range of conceptualisations and ways of looking at the topic, though generally not in a normative way. Of most relevance for the present purpose are Frank Schimmelfennig's and Thomas Winzen's (2014) distinction between *instrumental* and *constitutional* differentiation as well as the use Richard Bellamy and Sandra Kröger (2017) make of the same terms. For Schimmelfennig and Winzen, *instrumental* differentiation in relation to EU enlargements, 'is motivated by efficiency and distributional concerns' (Schimmelfennig and Winzen 2014: 355), and is by definition transitional. It occurs either when existing member states temporarily *exclude* new member states from certain policy areas because they 'fear economic and financial losses as a result of market integration with the new member states, the redistribution of EU funds or weak implementation capacity' (ibid.: 361); or when new member states seek to be *exempted* temporarily from integration and be granted more time to adapt to EU rules and market pressures. In such constellations, temporary differentiation ideally aids both sides. Bellamy and Kröger use the term in a similar way, but enlarge it to include '*structural* economic and social heterogeneity, which implies less space for uniform integration overall and might lead to some more durable forms of DI than the transitional ones linked to enlargement rounds' (Bellamy and Kröger 2017: 629).

According to Schimmelfennig and Winzen, *constitutional* differentiation occurs when competences particularly in core state powers are transferred to the EU in the context of treaty revisions and when a government chooses to opt out of a policy transfer due to sovereignty and identity concerns (Schimmelfennig and Winzen 2014: 355). In other words, governments of largely Eurosceptic countries, who are either ideologically opposed to further integration themselves or fear domestic opposition to further integration, will seek to achieve an opt-out of a specific policy, which is often, but does not have to be, permanent. Bellamy and Kröger in turn associate constitutional differentiation to heterogeneity in the values of different member states or in political preferences. This can involve policies involving cultural differences, such as those related to marriage and divorce, abortion, the use of stem cell research or euthanasia. Likewise, state support for certain religions or languages may be important in some communities and regarded as illegitimate in others. In such areas, some governments may be reluctant to integrate a policy or seek to opt out if it is integrated, so as to protect the predominant cultural values of their demoi. Or it involves issues of sovereignty and diverging views about how much political integration is desirable. Indeed, the electoral successes of right-extreme as well as populist parties of all sorts that typically defend anti-EU positions indicate how, for some citizens, the boundaries of European integration have been pushed too far. Heterogeneity of this kind proves particularly salient when core state competences are transferred to the EU in the context of treaty revisions, but may also touch other policies. In sum, increased heterogeneity is the common thread that links both forms of DI (Bellamy and Kröger 2017; Lord 2015).

Recently, Winzen has slightly relabelled these forms of DI and linked them to either 'capacity' or 'sovereignty' concerns (Winzen 2016), which is the vocabulary that will be adopted here. With regard to capacity, economic and social heterogeneity means that not all the member states may have the same stake in given collective goods – be these goods public goods, such as clean air, that are non-excludable,

or club goods, such as a custom union, that are excludable. ‘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. In both cases, costs may be distributed asymmetrically and not all those involved may value the benefits to an equal degree. Without compulsion, there can also be incentives for free-riding. The deciding factor is the ratio between the advantages of reducing production costs by sharing them among as many members as possible, and the loss of benefits as the gap between the distance of the individual preferences of a member state from the collective preferences under which the good is provided widens (see Kölliker 2001). The more heterogeneous the group of participating states becomes, the greater the likelihood that either the EU will refrain from producing a given collective good, leaving it to member states, or that some member states will decide to set up a ‘club’ that excludes others. The resulting capacity DI may also be further argued for on sovereignty grounds associated with political and cultural heterogeneity. As the EU has moved into more core state powers, particularly as a result of the adoption of the euro and the subsequent measures to tackle the euro crisis, so member state governments have increasingly encountered a growing constraining dissensus among their domestic electorates that has limited further integration and produced demands for greater DI on sovereignty grounds.

Capacity DI can be regarded as either multispeed – a temporary exclusion from certain policies, such as the Euro, until criteria for inclusion have been met or a choice by those with the capacity to forge ahead with enhanced cooperation until such time as others have the capacity to join them, or part of a multi menu EU whereby those with the capacity can either opt in to forms of enhanced cooperation or opt out of certain otherwise common policies. Opt outs of this latter kind are generally motivated by sovereignty concerns and more likely to produce a EU with variable geometry. Both multi speed and a constrained multi menu EU, where only opt outs in certain areas are allowable, will result in a multi tier EU – in which all are involved in certain core common policies and a smaller group are involved in more enhanced forms of socio-economic and/or political integration. With these conceptual clarifications in place, we can now move on to explore how the two different approaches would design DI.

#### **4. Fairness in institutional design of DI**

The EU seeks to be a fair scheme of co-operation with claims to equality and solidarity (Art. 2 and 3 TEU). It aspires to establish fair terms of co-operation expressed by equal rights and obligations. However, the EU is ambivalent as to whether it provides for solidarity and equality among state peoples (e.g. Art 3 TEU), with solidarity limited to a duty of assistance to deal terrorism and natural and man-made disasters (the ‘solidarity clause’ Art 222 TFEU); or among individuals (Art 2 TEU), with an explicitly cosmopolitan nod in the direction of encompassing duties towards human beings world-wide (Art 21 TEU). On the one hand, the EU commits to respecting the equality of the member states, their territorial integrity, distinct national identities and political and constitutional traditions (Art 4 TEU), with the competences of the EU governed by the principle of conferral and explicitly under the control of the member states (Art 5). On the other hand, the EU bestows a distinct set of rights and a common citizenship on the individual citizens of the member states through the status of citizenship of the Union and the Charter of Fundamental Rights of the European Union, including voting rights in a common political institution, the European Parliament. It is also committed to a principle of non-discrimination on grounds of nationality so far as the application of the Treaties is concerned (Art 18 TFEU), a provision many consider requires the uniform application of European law – not least the Court of Justice.

This dual character of the EU as a union of both states and individuals has been standardly considered as resolvable by regarding the EU as a multilevel system, in which member states create a supranational union with competences in specific areas that operate transnationally across all of them – most notably the single market and customs union. However, DI potentially complicates the picture by producing asymmetries among the member states with regard to the various EU policy areas they belong to. A number of potential problems may result. Certain forms of differentiation that might be appropriate from

a statist point of view to accommodate capacity and sovereignty concerns might produce forms of unfairness that would be unacceptable from a cosmopolitan point of view. Such forms of DI may also unsettle the equality of member states in decision-making. Alternatively, relevant differences might require differential treatment of individuals as matters of fairness from a cosmopolitan perspective, yet conflict with domestic fairness within states. In this section, therefore, we will address some of the main questions that arise in regard to fairness in DI, and outline how the two approaches would assess them. In doing so, we will distinguish between capacity and sovereignty types of DI.

In a first step, we will address the question of whether DI as such is deemed acceptable in the EU or not, whether for reasons of capacity and/or sovereignty and whether it should be multi-menu, allowing for an a la carte EU with considerable variable geometry, or merely multi-tier, with a core set of policy areas that should be exempt from DI. We will then move on to issues of institutional design, tackling questions such as whether DI could be only transitory or permanent, whether it should be organised within the Treaties or whether the creation of additional structures outside the Treaties would be legitimate? In a next step, we will address questions such: how much substantive fairness is required between ins and outs, rich states and citizens and poorer states and citizens? Finally, we will also look at procedural fairness which implies addressing the representation regime of DI, by asking questions such as: Who should be represented? Should ‘outs’ be able to take part in the discussions and/or decisions of ‘ins’? Should a coalition of member states be able to exclude another MS from participating against their will?

#### **4.1 Statists**

Statists emphasise the voluntary character of forming an international association and as a result the freedom of the member states to decide upon their degree of participation in the EU. On this account, procedural fairness requires that membership of the association, or some elements of it, should be approved by the citizens of the state according to domestic constitutional norms and be consistent with those norms unless these are explicitly changed via a legitimate domestic process. Therefore, sovereignty DI seems in principle to be possible on this account. Meanwhile, one would expect that states would only enter an association from which they expected to gain, or at least not be rendered worse off. That implies that the other association members would probably insist on some sort of capacity threshold as a requirement for any state to join an association, while a state lacking adequate capacity to be an equal partner might in any case feel disadvantaged by joining such an arrangement. So capacity DI would likewise be probable from this perspective, as both a temporary and a permanent measure (Bellamy 2019 Ch 6).

On the statist model of the EU, it corresponds to a club that states establish to provide its members with certain goods. Given membership of the association is not imposed or compulsory, but can be tailored to the needs of each contracting state – a Europe a la carte, with variable geometry appears allowable, theoretically at least. That said, in clubs that have the qualities of a symmetric N-person Prisoners’ Dilemma, statists would have an interest in preventing free-riding or backsliding. As a result, they would want to lock in membership and have an independent authority to sanction violations. Some core policies of the association might be exempt from the possibility of DI, either because they were constitutive of the association as such or involved producing collective goods that generated positive externalities or had the objective of guarding against negative externalities.

Thus, a case exists for statists to uphold the four freedoms of the single market, given these define the nature of the EU club and generate more than a club good that only benefits those fully involved. Meanwhile, the statist account clearly allows for DI outside the Treaties, should the formation of a club in a given area within the Treaties not be possible, as was the case with the Treaty on Stability, Cooperation and Governance in the Economic Monetary Union, the Euro Plus Pact or the European Stability Mechanism, or if the club involves non-EU members, as with the Schengen Treaty. Finally, the individual citizens of associated state peoples will have an interest in free movement between states,



both for themselves to take advantage of opportunities in other states on equal terms to nationals, and for non nationals to come and enhance the promotion of collective goods of their own state. So long as the capacity and sovereignty of both the sending and the receiving state are able to maintain the same level of social and political autonomy for citizens as before, therefore, statist will agree with cosmopolitans in this regard (Sangiovanni 2013).

What then does a statist account of substantive fairness require with regard to DI? The key is that there is no need to equalise the positions of states within a club or to distribute any of the surplus to non-members of the club. Pareto optimality among participating states provides a minimum condition for them to establish a club, with states being entitled to keep what they enter the club with and to insure against the possibility that club membership might make them worse off. Once that condition is met, the institutional argument underlying domestic social justice suggests that the costs and benefits of the collective goods generated by club membership ought to be distributed among states according to an egalitarian formula. That might be a defeasible assumption if the club has the character of a joint investment decision. In that case, it might be fairer to apportion power and benefits according to the amount invested. It may be that while each state gains overall from membership of the club, some groups within each state lose out so that certain domestic inequalities increase. Resolving that issue, though, is a matter of domestic justice.

However, once a state has signed up to a club, it has a duty to fulfil the ensuing obligations, such as making an appropriate financial contribution as defined in the club rules. Club members also have a duty to assist any members that suffer unexpected losses through membership of the club, and to support those members that, through no fault of their own, prove temporarily unable to fulfil their contractual obligations, especially if the club itself might be put at risk as a result. In the case of a form of DI that occurs within an already established overarching club, as in the EU, DI should also not make non-members worse off than they are or would otherwise be if the club did not exist, although it would be allowable for the relative inequality between members and non-members of the club to increase. However, they have no obligation to include all those who might benefit if in so doing the club might operate in a sub-optimal way.

So far as those outside the club are concerned, they only have a humanitarian duty of assistance to support burdened or failing states. Indeed, fairness towards the members of the club suggests DI should be designed in such a way that those countries that ‘do not participate in the integration of a policy also have to be excluded from benefiting from this policy’ (Schimmelfennig 2016: 14). Meanwhile, states are under no obligation to join a club designed to promote morally obligatory goods, such as tackling climate change, if the terms of the club would be excessively burdensome on them and they have a credible and equally effective alternative policy that would impose fewer costs on their domestic social system.

With regard to procedural fairness, we noted above that statism supports the possibility of sovereignty as well as capacity DI. However, just as we noted with regard to the latter that a side constraint exists not to make excluded states worse off, so it can be argued in the case of the former that excluded states should not find their self-determination diminished. One way both possibilities might be guarded against within the EU would be to make opt-outs of common measures or enhanced co-operation through the formation of exclusive clubs to be subject to a qualified majority vote in the council and/or challengeable by a majority of national parliaments. Sovereignty DI would also have to be compatible with the opt-out remaining compatible with the recognition of basic human rights that form the basis of membership of the society of sovereign peoples, such as those outlined in Art 2 and 6 TEU, and so allow for the measures of curtailing membership found in Art 7. Nonetheless, it might be feared that unless procedural mechanisms exist to ensure against decisions of a club, especially in a core area such as the Eurozone, worsening the sovereignty and capacity of other states, then DI might prove incompatible with statist procedural and substantive fairness. DI that was initially justified as temporary might become permanent as a result. This last possibility would appear to justify allowing the involvement of aspirant members of any club to have at the very least the status of a non-voting

participant in the decision-making of any club. It might also suggest grounds for allowing some central oversight of even differentiated policies by a body involving membership of all states of the broader union. After all, it could be argued that the club is only made possible through the passive cooperation of non-members respecting its existence, and the broader framework they provide. Yet that would only apply so long as it was accepted that the club formed part of a multi-tiered union of a federal character, rather than a number of overlapping unions where the thinner obligations of the international law of peoples applied.

#### **4.2 *Cosmopolitans***

The core concern of cosmopolitans is the equality of individuals. As we saw, some appeal directly to the moral equality of all human beings, others to globalisation having created institutionalised ties among individuals world-wide of a kind that justify treating them with a high degree of substantive and procedural fairness of an egalitarian character. Even if this latter argument could be disputed with regard to the global economy, a strong case exists so far as the EU is concerned. After all, states can join the EU only with the support of their citizens, and as a result of joining do confer on them a number of EU level rights, including the political rights of electing the EP and the socio-economic rights of non-discrimination on grounds of nationality in participating in the single market. Therefore, we shall argue from the second cosmopolitan position as offering the least controversial perspective so far as the EU is concerned for assessing DI.

The presumption from this perspective would be for equality among individual EU citizens with regard to substance and process, with uniform laws and policies at the EU level operating in much the same way as at the state level as a broadly effective mechanism for treating all individuals with equal concern and respect. However, reasons consistent with equality might justify both capacity and sovereignty DI. For example, we noted that Rawls advocated the difference principle with regard to the least well off, so long as that remains consistent with a system of equal liberties and opportunities – a principle many cosmopolitans, such as Beitz 1999, also adopt. Likewise, we do not regard treating those with a disability differently to the able bodied as arbitrary but as reflecting a distinction between treating all individuals the same and treating individuals as equals, including through dissimilar treatment so as to equalise their capacities when these are relevantly different. In an analogous fashion, a cosmopolitan might allow capacity DI, involving enhanced cooperation among a given group of states that excluded those states lacking equal or sufficient capacity to contribute effectively and efficiently to generating a given good, so long as it accorded with the difference principle. In other words, so long as those included in the group transferred some of the additional surplus to improve the position of the excluded and offered them an equal opportunity of ultimately joining the privileged group. To some degree, structural funds can be regarded in this fashion – both compensating areas that have lost out through the integration process and given them additional support so they might eventually participate on equal terms. Of course, such policies are only targeted at individuals indirectly, via their likely location. Yet, much domestic policy making operates in a similar fashion. Meanwhile, such capacity DI would need to be consistent with the common policy areas of the EU still operating in the equal interests of those involved. As the rule for use of Enhanced Cooperation insists, it ‘shall not undermine the internal market or economic, social and territorial cohesion. It shall not constitute a barrier to or discrimination in trade between member states, nor shall it distort competition between them’ (Art. 326 subpara. 2 TFEU).

The least controversial area of capacity DI for cosmopolitans relates to transitional opt-outs to allow an enlargement of the EU to new member states, an endeavour that can itself be regarded as a product of cosmopolitan concern. The aim here is to level up the new member to full membership. As such, DI of this kind should be guided by the principle of openness and implemented within the existing legal framework<sup>1</sup>, so as to a) protect the EU’s legal and institutional unity; b) enable the continuous

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<sup>1</sup> As fleshed out in the motion of the European Parliament on DI (2018).

development of the *acquis communautaire*; c) preserve the prerogatives and powers of the European Commission, the EP and the CJEU so as to ensure established mechanisms of scrutiny; and d) avoid a split between ‘ins’ and ‘outs’. All of these principles are fleshed out in the main mechanism of DI that the EU currently has, namely ‘Enhanced Cooperation’. The latter can only be established when ‘the objectives of such cooperation cannot be attained within a reasonable period by the Union as a whole’ (Art. 20 (2) TEU); it must be in line with the objectives and the values of the Union and preserve the *acquis communautaire*; there have to be at least nine participants so as to prevent fragmentation within the EU; whilst the obligation to ‘promote participation by as many member states as possible’ (Art. 328 (1), subpara. 2 TFEU) confirms the objective of unitary integration.

By contrast, sovereignty DI might be regarded as uncongenial to cosmopolitans. Yet once again relevant differences among the individual citizens of different states may render it justified. The EU accepts that subsidiarity and proportionality dictate that EU competences should only extend to areas that are best dealt with at the European level, with most policies being most appropriately tackled as close to the citizens with an equal stake in a given policy as possible. Yet, that may not necessarily involve a uniform application of subsidiarity across the EU. After all, divergences exist *within* many states, with certain regions potentially having greater competences than others. Likewise, multiculturalism and minority nationalism within states has led to a degree of sovereignty differentiation within states to accommodate cultural and linguistic diversity of the kinds to which we saw the EU is committed. Indeed, a liberal egalitarian basis can be given for such differentiation as necessary to allow individuals an equal opportunity to develop and pursue a plan of life consistent with a plurality of reasonable cultural norms.

As a result, even on cosmopolitan grounds a degree of DI may be consistent with, and even required to achieve, substantive and procedural fairness. From a substantive point of view, there will be an egalitarian case for a fair distribution among EU citizens of the surplus generated through involvement in the single market. For example, some have suggested that this might fund an EU basic income (Viehoff 2017). Even so, it would be appropriate for the amount awarded individuals to vary according to the cost of living across the EU, so this common policy would be differentiated to a degree to take into account a relevant difference. Likewise, forms of enhanced cooperation should be allowable only on condition that they do not diminish the equity, effectiveness and efficiency of core common policies, whereas additional surpluses need to benefit the least well off.

Turning to procedural fairness, we have noted that both capacity and sovereignty DI would require the endorsement of a majority of other EU members, though in this case it would be appropriate for the decision to be made by the EP, either alone or in conjunction with the Council. Similarly, suggestions that particular forms of DI, notably the Euro, lead to a separate parliamentary body for its members, or differential voting rights for MEPs on related issues within the EP, are also problematic from this perspective (Curtin and Fasone 2017). They provide insufficient scope for non-members to control what may be adverse knock-on effects or to ensure that a credible path remains open for them to become members. At the same time, we have seen that some scope exists for sovereignty DI that allows for opt-outs on the basis of self-government rights for cultural minorities. Parallel arguments can also be employed for special representation rights in the EP that ensure they have a voice.

## **5. Conclusion**

DI is the product of social and economic heterogeneity leading to differences in capacity, on the one side, and political and cultural heterogeneity leading to different sovereignty concerns, on the other. Both forms of DI may be motivated by considerations of substantive and procedural fairness respectively, while at the same time potentially raising other problems with regard to both. We have compared statist and cosmopolitan approaches and found that while both can accommodate certain aspects of DI, each could have reason to judge certain current arrangements as lacking in fairness. Be it for states or individuals, DI would not be substantively fair if it fails to be Pareto optimal for non-

members, and procedurally unfair if it involves domination that diminishes self-determination. As a result, some collective control by members and non-members of the process of DI seems required. Indeed, given that the benefits of enhanced cooperation, capacity DI could be regarded as deriving in part from the passive participation of non-members. On the institutional and relational grounds for fairness of the versions of both statism and cosmopolitanism employed here, a case exists from some distribution to non-members that renders them too better off than they would have been and enhances their capacity eventually to become members. Meanwhile, even on statist grounds, sovereignty DI should be compatible with the Charter of Fundamental Rights of the EU and the free movement rights of EU citizens. Moreover, cosmopolitans also have reasons to regard special representation rights in particular as warranted to ensure minority voices get equal consideration in collective decisions.

A further upshot of the comparison of statism and cosmopolitanism has been to note degree of overlap between the positions, that is to some degree mirrored in the EU's structures more generally. On the one hand, cooperation and interdependence among states creates aspects of cosmopolitan regard between them and their respective peoples. On the other hand, cosmopolitans can acknowledge that while the single market and supranational institutions within the EU have created a transnational association among citizens that meets the threshold for principles of social and political justice to be applicable in many areas at the individual level, the national socio-economic and political-cultural systems of the member states remain diverse and not fully and uniformly integrated in all respects, and continue to provide important and diverse collective goods for their distinct peoples. In this respect DI can be regarded as an acknowledgement of the EU's character as what has been called a *demosi-cracy*, involving a union of both individual citizens and state peoples (Bellamy 2013; Cheneval and Schimmelfennig 2013).

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