EUI ROBERT SCHUMAN CENTRE

POLICY BRIEF

Integrating Diversity in the European Union (InDivEU)

National Constitutional Obstacles To Differentiated EU Integration[1]

Introduction

With a growing number of member states of all sorts and conditions, with sometimes fundamentally different views of the EU's development, it has become increasingly difficult to unite all member states behind policies that some of them consider desirable or necessary to further the integration process. Differentiated integration may be a way out of the impasse, but also comes at a price. In a way, the rocky history of the ratification of the Agreement on a Unified Patent Court tells the story in a nutshell.

The Agreement, a treaty under international law to which only EU member states can be party, has been signed by 25 of them. At the time of writing, almost all conditions for its entry into force have been fulfilled: the final hurdle to be overcome is ratification by the German president. However, that will take some time, because first the German constitutional court will have to deal with complaints lodged against it. It is the second time that the German court reviews the treaty. The first time this resulted in the invalidation of the act by which the German parliament had approved the treaty: it had not been adopted by the required two-thirds majorities. This time, that procedural condition has been met and substantive issues will take center stage. In other

1 Based on the report by Jan-Herman Reestman, National constitutional obstacles to differentiated integration (available as Working Paper, EUI RSC, 2021/06, at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3798391).

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member states, the approval of the Agreement has not gone unnoticed too. It also had to be approved by qualified parliamentary majorities in various other member states because it transfers sovereign powers to an international organization. For the same reason, a referendum was necessary in Denmark. In Hungary, the constitutional court ruled the Agreement contrary to the Hungarian Constitution. It can therefore only be approved by the Hungarian Parliament and ratified by the Hungarian president after the adoption of a constitutional amendment.

And should Ireland, also co-signer of the Agreement, ever want to ratify it, it has to amend its Constitution too, for which a referendum is required. In short, the road to the establishment of differentiated integration is paved with all kinds of national constitutional obstacles and complicates decision-making, the extent of which depends, among other things, on the variety chosen and the states participating.

Varieties; *additional* national constitutional obstacles

Differentiated integration among member states essentially comes in two varieties: inside the EU legal order, on the basis of the Treaties, by secondary EU law; and outside the EU legal order, by concluding 'ordinary' international agreements (hence 'substitute EU treaties'). The enactment of secondary EU law which requires the consent of the Council and the conclusion of treaties are to a certain extent always conditioned by national constitutional law. Therefore, in order to determine whether and to what extent the establishment of differentiated integration complicates decision-making, a comparison must be made with the 'ordinary' or at least the 'most obvious' decision-making procedure for the relevant subject matter.

Differentiated integration inside the EU legal order

For differentiated integration inside the EU legal order the ordinary decision-making procedure is decision-making by all member states. As is well known, member states have conditioned the voting behaviour of their government representatives in the Council via various scrutiny and mandating systems, which oblige these to take into 'due account' their national parliaments positions on draft-decisions. Additionally, in some member states, representatives' consent to specific draft decisions is bound to prior approval of these drafts by their parliaments. All these various national conditions remain applicable when these member states participate in a differentiated integration regime inside the EU legal order. Compared to these existing national constitutional obstacles, there are only very few additional national constitutional obstacles to establishing differentiated integration inside the EU legal order. In fact, the only additional obstacle is that Ireland's participation requires the consent of both houses of the Irish parliament.

Differentiated integration outside the EU legal order: the history

The additional national constitutional obstacles multiply if differentiated integration is established outside the EU legal order, on the basis of substitute EU treaties, as is done by the Schengen Treaties, the Prüm Convention, the Treaty on Stability, Coordination and Governance in the EMU, the Treaty establishing the European Stability Mechanism, and the Agreement on a Unified Patent Court. Treaties often have to be approved by parliaments; can, and sometimes have to be the subject of referendums; will have their constitutionality tested by political institutions, and sometimes by courts; can often only be accepted after prior constitutional amendment if they are considered incompatible with the constitution; and must often be ratified or approved by national executive action. It is, of course, similar for substitute EU Treaties.

In fact, the substitute EU treaties negotiated thus far have been – and had to be – subjected to parliamentary approval in the largest possible majority of member states. Also, in a number of member states several of these treaties have been subjected to higher parliamentary approval requirements, and to referendums in Denmark and Ireland. More specifically, it should be noted that in Germany, and to a lesser extent Hungary, substitute EU treaties are equated with EU (Amendment) Treaties and in principle have to be approved by qualified majorities, whereas a treaty transferring the same competence to an 'ordinary' international organisation could have been approved by ordinary majorities. However, in some other member states substitute EU treaties have benefitted from the fact that they were not equated with EU (Amendment) Treaties. For that reason they only required approval by simple parliamentary majorities.

Inevitable national constitutional obstacles

What are the highest national constitutional obstacles to future substitute EU treaties?

That is difficult to predict, because many variables are at play, not only constitutional rules and principles that differ per member state, but for instance also the political situation in the member states and the political and constitutional sensitivity of the subject-matter regulated in those treaties. Nevertheless, the following general remarks may be made.

Some of the national phases of treaty conclusion are inevitable. This applies to parliamentary approval and ratification. Although most member states observe a distinction between categories of treaties that require parliamentary approval, and those that can be made binding by executive action alone, we may assume that future substitute EU treaties will generally require approval. If any generalisations can be permitted in that regard, the odds are great that treaties co-authored by the government will be approved in member states with unicameral parliaments and a parliamentary system of government. However, if the treaty needs to be approved by qualified majorities because it is considered to transfer sovereign competences to an international organisation, or to the EU, support of a part of the opposition may be required, which may complicate decision-making. Also, in member states with bicameral or multi-cameral (Belgium) parliaments, approval may be less self-evident, especially if the opposition holds a majority in the upper house.

Something similar may apply to ratification, which is generally done by the heads of state. In most member states, the heads of state will simply ratify a treaty that government and parliament want to see ratified. However, in a few member states, such as France and Portugal, where the head of state is directly elected and has the constitutional capacity to make independent political decisions, this may be different in times in which the political affiliation of the president differs from that of the government and the parliamentary majority. In those times it is, at least theoretically, conceivable that the president refuses to ratify a treaty that government and parliament want to see ratified.

Contingent constitutional obstacles

Other constitutional obstacles are contingent, in the sense that they must be raised by acts of political or constitutional authorities (the president, the government, parliament, the parliamentary opposition, etc.) or (groups of) individuals. This concerns referendums and constitutional review of treaties by courts. It is noteworthy that, except for Denmark and Ireland, where they were necessary for constitutional reasons, none of the member states whose legislation allow for treaty referendums has so far organised a referendum on substitute EU treaties. Similarly, the number of those treaties submitted to courts seems rather modest given the overall potential of such review in the member states. The possibility cannot be excluded that some of the until now unused potential for referendums and judicial review will be tapped for future substitute EU treaties, especially in those member states where these obstacles may be raised by the parliamentary opposition and/or (groups of) individuals. More specifically, it is quite possible that the observed tendency of an increased involvement of courts in treaty review will endure and the frequency of findings of incompatibility with the constitution will rise.

In most member states declarations of incompatibility with the constitution can be overcome by constitutional amendment.[2] Constitutional amendments generally require qualified majorities in parliament, and therefore most often the support of a part of the opposition, and sometimes a referendum. Although the referendums held so far on substitute EU treaties have 100% success rate, referendums are probably the most unpredictable phase in the national process of treaty conclusion. This among other things because in a referendum, whether constitutionally required or triggered, a vote for or against an act submitted to referendum can be used as a vote for, or more likely against, an incumbent government. Arguably, referendums are potentially also the highest national constitutional obstacles, as their results cannot be easily set aside – that would require a new referendum, or a new treaty, as the history of EU integration shows.

2 In some member states, notably Germany, the enactment of a new constitution is required in case unamendable constitutional principles or provisions are affected – but treaty drafters will approximately know where those cliffs lie and try to steer clear of them.

No requirement of unanimous ratification

Even if certain constitutional obstacles would prove to be insurmountable and prevent one or more member states from ratifying, that would not necessarily be the end of the substitute EU treaty. So far, those treaties have had a huge advantage over EU (Amendment) Treaties: they did not require unanimous ratification. We may assume that this will be the same for future substitute EU treaties. That means that a hitch somewhere along the line during the national treaty-conclusion phase will not necessarily frustrate the entire project.

However, not all member states are equal in this respect. For some of the substitute EU treaties (the ESM Treaty, the Agreement on the Single Resolution Fund, and the Agreement on a Unified Patent Court) ratification by a core of large member states, among them France and Germany, was, or is, indispensable for their entry into force. It should be added that, although this was not necessary from a strictly legal perspective, it is questionable whether the Fiscal Compact would have entered into force if France and Germany, and perhaps Italy, had not accepted to be bound by it. That suggests in more general terms that the participation of these two or three member states is, from a political point of view, a *conditio sine qua non* of differentiated integration, at least if it takes place outside the EU legal order. But that of course is not a particularly surprising finding.

Integrating Diversity in the European Union (InDivEU) is a Horizon 2020 funded research project aimed at contributing concretely to the current debate on the 'Future of Europe' by assessing, developing and testing a range of models and scenarios for different levels of integration among EU member states.

InDivEU is coordinated by the Robert Schuman Centre at the European University Institute, where it is hosted by the European Governance and Politics Programme. The project comprises a consortium of 14 partner institutions and runs from January 2019 to December 2021. The scientific coordinators are Brigid Laffan (Robert Schuman Centre) and Frank Schimmelfennig (ETH Zürich).

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