Differentiation or federalisation: Which democracy for the future of Europe?

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Differentiation or federalisation: Which democracy for the future of Europe?

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Abstract

Differentiation has become a central topic of debate in the EU. Generally, it is considered a positive device for advancing integration in crucial policies, letting the unwilling states opt out from the new regimes. However, the debate has not sufficiently acknowledged that policy differentiation has been made possible by governance differentiation. It was the 1992 Maastricht Treaty's decision to inaugurate an intergovernmental regime for core state power policies, distinct from the supranational regime regulating single market policies, that allowed differentiation to flourish. Differentiation and intergovernmentalism are thus inter-connected. During multiple crises of the last decade, intergovernmental governance has shown its undemocratic effects, thus soliciting a critical reappraisal of the differentiation logic. The federalisation of the EU appears a more promising alternative strategy for advancing integration and, at the same time, meeting the democratic expectations of the EU. This analytical exercise speaks to the Conference on the Future of Europe.

1 | INTRODUCTION

Differentiation (understood as differentiated integration) has become a central topic of scientific debate in the European Union (EU).[1] It is prized as a virtue of the process of integration which could proceed only by accommodating different national preferences and views around different policy regimes operating within the same Treaty's framework. According to Schimmelfennig and Winzen, "We speak of differentiated integration—as opposed to uniform integration—when the legally valid rules of the EU, codified in European treaties and EU legislation, exempt or exclude individual member states explicitly from specific rights or obligations of membership in the EU".[2] The EU has accommodated different forms of differentiation. The differentiation considered here concerns the formal opt-out of

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[1] B. De Witte, A. Ott and E. Vos (eds.), *Between Flexibility and Disintegration: The Trajectory of Differentiation in EU Law* (Elgar, 2017); D. Leuffen, B. Rittberger and F. Schimmelfennig, *Differentiated Integration: Explaining Variation in the European Union* (Palgrave Macmillan, 2013).

[2] F. Schimmelfennig and T. Winzen, *Ever Looser Union? Differentiated European Integration* (Oxford University Press, 2020), 3–4.

a Member State from participating in a policy regime which calls (or might call) into question its sovereignty's prerogatives. In fact, the EU has accommodated forms of differentiation based on a lack of capacity, by a Member State (for instance, recently entered the EU), in adapting to the acquis communautaire.[3] While the former differentiation is structural (concerning the opting-out from policy regimes), the latter is contingent (concerning the delay in adopting specific requirements), the former is sovereignty-induced and the latter is capacity-induced. Yet, the debate has underestimated that sovereignty-induced differentiation has been made possible by the differentiation in governance regimes. It has been the institutionalisation of differentiated decision-making regimes with the 1992 Maastricht Treaty that has allowed the differentiation of policy regimes. By institutionalising an intergovernmental regime, the EU could advance in integrating policies (defined by the political science literature as core state powers or CSP policies[4]) that were previously under the control of the national sovereignty of the Member States. This intergovernmental regime, however, in dealing with the multiple crises in the 2010s, has manifested a conspicuous lack of democratic quality, epitomised by the obfuscated accountability of the decision-makers.

How did differentiation become a structural feature of the process of European integration? Why has differentiation obstructed democracy in the EU? Could there be an alternative strategy for promoting integration in sovereignty-sensitive policies but also democracy at the same time? The article will answer these questions as follows. First, it will discuss the several approaches to differentiation to show their exclusive focus on policy differentiation rather than on governance differentiation. Second, it will analyse the differentiation of governance regimes, distinguishing between supranational and intergovernmental regimes. Third, it will assess the negative implications, for democracy, of the intergovernmental management of multiple crises in the 2010s. Fourth, it will investigate whether federalisation could better achieve what differentiation has tried to do. Finally, it will identify an agenda to bring federalism back to the EU.

2 | DIFFERENT VIEWS ON DIFFERENTIATION

Sovereignty-induced differentiation became a permanent feature of the European integration process with the 1992 Maastricht Treaty. Differentiation is considered to consist of different combinations of EU Member States participating in different policy regimes, although these regimes are open to changing composition. Economic and Monetary Union (EMU) and the Schengen Agreement are generally presented as the most significant examples of differentiated policy regimes, since 19 out of the 27 EU Member States participate in the former and 23 out of the 27 EU Member States (plus four non-Member States: Liechtenstein, Norway, Switzerland, and Iceland) participate in the latter regime. The interpretation of sovereignty-induced differentiation has become the object of theoretical and political debate.[5]

At a theoretical level, the debate has been influenced by the two main meta-narratives of European integration: functional and intergovernmental. Consider the functional meta-narrative. For neo-functional scholars,[6] differentiation is due to the different timing of participation of Member States in the integration process, although none of them contests the finality of the latter. For post-functionalist scholars,[7] differentiation is the result of different Member State preferences regarding participation in different policy regimes. Thus, for the former, differentiation might become a strategy through which the various Member States could participate "at different speeds" in the

[3]See T. Winzen 'From Capacity to Sovereignty: Legislative Politics and Differentiated Integration in the European Union' (2016) 55 *European Journal of Political Research*, 100.

[4]Conceptualised in P. Genschel and M. Jachtenfuchs (eds.), *Beyond the Regulatory Polity? The European Integration of Core State Powers* (Oxford University Press, 2014).

[5]See S. Fabbrini and V. Schmidt (eds.), 'Imagining the Future of Europe: Between Multi-Speed Differentiation and Institutional Decoupling' (2019) 17(2) *Comparative European Politics*.

[6]J.-C. Piris, *The Future of Europe: Towards a Two-Speed EU?* (Cambridge University Press, 2012).

[7]See V.A. Schmidt 'The Future of Differentiated Integration: A "Soft-Core" Multi-Clustered Europe of Overlapping Policy Communities' (2019) 17 *Comparative European Politics*, 294.

process of integration. For the latter, instead, differentiation might become a strategy through which distinct clusters of Member States can engage in the practice of reinforced cooperation in different policy regimes, according to a logic of activating "multiple (although partially overlapping) cores". Consider the intergovernmental meta-narrative. For liberal intergovernmental scholars, differentiation constitutes the inevitable outcome of inter-state negotiation, where rational actors accept agreements that only respect their sovereignty's prerogatives or preferences.[8] For political economy scholars, differentiation is rather the outcome of structural differences between Member States' economic and institutional capabilities, differences that inevitably constrain their policy agreement.[9] For the former, differentiation might become a strategy for formalising a "Europe à la carte", where each Member State could choose only the desired item from the menu. For the latter, differentiation should be the strategy for assessing the degree of "convergence between Member States' differently structured economies". The assumption of all these theories is that the EU is a sui generis organisation subject to an endless process of institutional redefinition. An indefiniteness that allows functionalists to entertain the idea of a post-nationalist development of the EU and intergovernmentalists the idea of its regression to the status of an inter-state organisation.

Practitioners also have tended to consider differentiation as an effective strategy to deal with the EU increasing heterogeneity due to its successful enlargement.[10] Widening has multiplied the national views on the rationale and finality of the process of integration, i.e. on the relation between national sovereignty and supranational integration, a condition that has triggered tensions between Member States or between some of the latter and EU institutions. Only once has the tension become unmanageable, with the UK's decision to withdraw from the EU. Not only has the UK's experience not been followed by other countries, but it has generated the opposite effect, reinforcing the differentiation status quo.

Notwithstanding its virtues, the scholars engaged in analysing differentiation or the practitioners celebrating it have rarely developed a critical interpretation of its vices. Focused on policy outputs, they have neglected the input price paid by the EU for making differentiation possible, namely the differentiation of its decision-making structures—which is what I will do here, relying on an institutionalist approach[11] and looking at the EU as a system of governance.

3 | DIFFERENTIATION OF GOVERNANCE REGIMES

The EU decision-making structure has formed relatively stable and predictable inter-institutional relations in dealing with its main policy responsibilities. Heuristically, one can argue that the process of institutionalisation of the EU has led to a basic differentiation between two decision-making or governance regimes, one dealing with issues concerning single market regulatory policies and the other dealing with policies close to national sovereignty's prerogatives that entered the EU agenda after the end of the Cold War. The 1992 Maastricht Treaty was the turning-point for this differentiation in governance structures. The Treaty introduced three distinct pillars, or decision-making regimes: the supranational pillar for the single market (organised around the triangle of the Commission, endowed with the monopoly of legislative initiative, and the Council of Ministers or Council and the European Parliament or EP, with the power to approve the Commission's proposals) and the two intergovernmental pillars of Common Foreign and Security Policy (CFSP) and Justice and Home Affairs Policy (JHA), where the main decision-making institutions are the Council and the (then informal) European Council of the heads of state and government. Through that Treaty it was formally recognised that the EU could proceed in the integration process into crucial policies

[8]G. Majone, *Rethinking the Union of Europe Post-Crisis: Has Integration Gone Too Far?* (Cambridge University Press, 2014). See, also, R. Bellamy and S. Kroger, 'A Demoi-cratic Justification of Differentiated Integration in a Heterogeneous EU' (2017) 39 *Journal of European Integration*, 625.

[9]D. Rodrik, *Straight Talk on Trade: Ideas for a Sane World Economy* (Princeton University Press, 2018).

[10]See European Commission, *White Paper on the Future of Europe: Reflections and Scenarios for the EU 27 by 2025*, Brussels, 1 March 2017.

[11]Basic references are: D. Kelemen, 'Federalism and European Integration', in A. Wiener, T.A. Börzel and T. Risse (eds.), *European Integration Theory* (Oxford University Press, 2019); S. Fabbrini, *Which European Union? Europe After the Euro Crisis* (Cambridge University Press, 2015).

(the CSP policies, i.e. policies touching national sovereignty's prerogatives) provided that the Member State governments were guaranteed an exclusive or predominant decision-making role (through the Council and European Council). The differentiation of the decision-making regimes was further consolidated with the start of the Economic and Monetary Union (EMU) in 1994, the economic policy side of which was put under the control of the intergovernmental institutions, whereas the monetary policy side was assigned to the full control of a supranational institution, i.e. the European Central Bank or ECB.[12]

The 2009 Lisbon Treaty abolished the division into pillars, but it preserved the distinction between different decision-making regimes in relation to various policies. It strengthened the supranational decision-making regime for single market policies,[13] which became the ordinary legislative procedure—with the Council voting by qualified majority, 55 per cent of the Council's members representing at least 65 per cent of the total population of the EU, and the EP voting by simple majority—and it institutionalised an intergovernmental decision-making regime for CSP policies[14]—with the European Council deciding by consent. Moreover, with the Lisbon Treaty, not only was the European Council fully recognised as an EU institution,[15] but it was also separated from the Council, becoming a proper executive institution. The two governance regimes have made possible alternative forms of integration, through law (in the supranational regime) and through voluntary policy coordination (in the intergovernmental regime). Without the formation of the intergovernmental regime, it would have been impossible to pursue integration on CSP policies. Of course, the distinction between policy realms has been periodically challenged by social and political processes. However, the basic governance distinction has continued to affect differently the EU policy-making process. EMU's economic policy side, Schengen asylum policy, permanent structured cooperation in security and defence policy (PESCO), the Prüm Convention on cross-border cooperation for contrasting terrorism, are all organised by one form or another of intergovernmental governance, i.e. by a logic of voluntary policy coordination.[16]

Thus, sovereignty-induced differentiation has emerged in CSP policies, not in single market regulatory policies, because in the latter policies integration is based on compulsory legal instruments (directives or regulations) and not on voluntary participation in policy coordination, as in the former policies. Although single market operation has allowed for contingent differentiation, due to the lack of capacity by a new Member State in transferring the EU rules into national legislation (Directives, contrary to Regulations, already guarantee flexibility in implementing EU decisions), normatively all Member States should abide by the constitutive rules of the single market (the four freedoms, i.e. free movement of goods, capital, services and persons),[17] whereas this is not required in CSP policies because of their voluntary management. Differentiation comes in when the majority of Member States agree to implement Brussels CSP policies, letting those unwilling to acquiesce sit aside from the process without halting it. Only a decision-making method based on voluntary coordination could make this possible, without disrupting the integration canvas. However, the intertwining of differentiation and intergovernmental governance has not met the EU's democratic expectations, as shown by the experience of the multiple crises in the 2010s and the 2020 pandemic emergency.

[12]K. Tuori and K. Tuori, *The Eurozone Crisis: A Constitutional Analysis* (Cambridge University Press, 2014).

[13]R. Dehousse (ed.), *The 'Community Method': Obstinate or Obsolete?* (Palgrave Macmillan, 2011).

[14]U. Puetter, *The European Council and the Council: New Intergovernmentalism and Institutional Change* (Oxford University Press, 2014).

[15]W. Wessels, *The European Council* (Palgrave Macmillan, 2015).

[16]Or at least they started as differentiated policy regimes thanks to their intergovernmental logic, although they might evolve in a supranational direction, as in the cases of reinforced cooperation on divorce and European patents.

[17]Certainly, over 30 years after the 1987 Single European Act, the single market still remains a work in progress. However, as the political scientist Michelle Egan writes, the single market "advanced significantly with the '1992 program' (which introduced, *n.d.r.*) changes in decision-making style, with institutional reforms to promote QMV in legislative decision-making related to the functioning of the single market to avoid gridlock, coupled with judicial activism that fostered the concept of mutual recognition to advance a new approach to market liberalisation" (M. Egan, 'The Internal Market: Increasingly Differentiated? In R. Coman, A. Crespy and V.A. Schmidt (eds.), *Governance and Politics in the Post-Crisis European Union* (Cambridge University Press, 2020), 161. That flexibility, yet, had to be implemented within statutorily protected principles.

4 | THE INTERGOVERNMENTAL MANAGEMENT OF THE CRISES

Let us start from the euro crisis of the first half of the 2010s.[18] Monetary and fiscal policies are crucial resources of state's sovereignty, resources that not all the Member States want to share. Indeed, not only did a few Member States opt out of EMU, but those opting in decided to transfer control of its monetary side to a supranational institution (the ECB), keeping for themselves, however, control of its economic side (inclusive of fiscal and budgetary policies) through the intergovernmental coordination of the Economic and Finance ministers of the Member States adopting the Euro (the Eurogroup). It is the intergovernmental governance of economic policy which politically characterises the EMU. The intergovernmental governance of the EMU's economic policy generated not only conflict of interests between the euro currency regime and the other national currency regimes, but it led above all to deep divisions within EMU Member States. The debtor Member States of Southern Europe came to collide with Northern Europe's Member States. This division was due to the policy mistakes of the former, but also to their structural difficulties in adjusting to the logic of the Stability and Growth Pact or SGP and its subsequent rationalisations (Six Pack, European Stability Mechanism or ESM, Fiscal Compact, Two Pack), a logic more consistent instead with the political economy of the countries of Northern Europe.[19] Those divisions led to regular decision-making stalemates within the top intergovernmental institution, the European Council, given the unanimity requirement it should respect for taking decisions. At the end of the day, decisions were taken but it was unclear who should have been considered responsible for their divisive national and social effects. Thus, through the direct control by national governments of EMU economic policy, it was possible to advance integration in a field very sensitive to national sovereignty prerogatives. However, intergovernmental integration ended up generating divisions between EMU Member States, obfuscating both responsibility and accountability for the decisions generating those divisions.

A similar pattern emerged also during the refugee crisis.[20] Migration and asylum are part of a bundle of policies related to the Schengen Agreement, born outside the EU Treaties in 1985 and then incorporated in the 1997 Amsterdam Treaty. This bundle of policies concerns crucial resources for national sovereignty, namely the control of the territory and the power to accept non-citizens within it. This bundle of policies was aggregated in the intergovernmental Third Pillar (JHA) of the 1992 Maastricht Treaty. The post-Maastricht evolution of the latter accommodated supranational views in its first two decades of operation, as happened with the 1999 approval of the Common European Asylum System that brought asylum policy within a supranational framework. However, with the record number of 1.3 million refugees (besides economic migrants) reaching Europe in 2015, national governments reclaimed control of migration policy. Indeed, the request by overburdened frontline Member States to reform the Dublin System and to introduce a new Asylum Procedure Regulation was opposed by the governments of Central and Eastern European Member States. During the crisis, a few national governments decided also to temporarily close national borders, suspending the freedom of movement principle which underlies the Schengen Area.

Although national governments were unable to agree on a course of action, at the same time they opposed the Commission intervening. The latter submitted several proposals to relocate refugees in all the EU Member States on the basis of objective criteria (population, GDP, territory), but its proposals were all bluntly rejected by the governments of Central and Eastern Europe. The recourse to ad hoc decision-making mechanisms[21] was the device used for unlocking the stalemate. In March 2016, a deal between the EU and Turkey was signed, which aimed to control the crossing of refugees from Turkey to the Greek islands and thus to continental European states (Germany in particular). The deal was first negotiated between a few national governmental leaders and Turkish authorities outside the EU framework, and then accepted by the European Council, raising unanswered issues of legality and

[18]F. Fabbrini, *Economic Governance in Europe: Comparative Paradoxes, Constitutional Challenges* (Oxford University Press, 2016); F. Schimmelfennig 'Liberal Intergovernmentalism and the Euro Area Crisis' (2015) 22 *Journal of European Public Policy*, 177.

[19]M. Matthijs and M. Blyth (eds.), *The Future of the Euro* (Oxford University Press, 2015).

[20]P. Genschel and M. Jachtenfuchs, 'From Market Integration to Core State Powers: The Eurozone Crisis, the Refugee Crisis and Integration Theory' (2017) 56 *Journal of Common Market Studies*, 178.

[21]Which has further segmented the EU; see J. Batora and J.E. Fossum (eds.), *Towards a Segmented European Political Order: The European Union's Post-Crises Conundrum* (Routledge, 2020).

accountability. In September 2019, the Interior ministers of Italy, France, Malta, Germany, together with the Finnish president of the Council, signed a pact in Malta creating a "coalition of the willing" (a form of informal differentiation) to deal with the migratory pressure (represented, in that case, by refugees coming from the coast of Libya). The proposal of a "Migration Pact" advanced by the Commission in September 2020 acknowledged the impossibility of adopting any form of compulsory relocation of refugees. If the intergovernmental governance of migration policy made possible the formation of the coalition of the willing, it did, however, raise unanswered issues of legality and accountability.

The 2020 pandemic crisis showed, as well, the downside of the intergovernmental governance in dealing with another resource at the core of national sovereignty, the rule of law. Of course, in the EU, differentiation in rule of law is impossible.[22] However, the intergovernmental logic has lowered significantly the common legal standard, contributing to a flexible interpretation of the "rules" of the rule of law. In the 2020, the pandemic was handled mainly by the European Council, since health policy is a prerogative of Member States and no emergency powers have ever been devised at the EU level. The national governments of Hungary and Poland—countries already subject to the procedure in Article 7 of the Treaty on European Union (TEU) for breaching the rule of law's principles celebrated by Article 2 of the same Treaty—used the pandemic to further advance the illiberal backsliding of their domestic institutions and practices, protected by the unanimity rule of the European Council. Once the anti-pandemic program (Next Generation-EU, NG-EU) was finally agreed by the European Council (on 17–21 July 2020), and since it was decided to relate NG-EU to the Multiannual Financial Framework (MFF) 2021–2027, the intergovernmental agreement passed to the supranational method to be legalised. In September–October 2020, the Commission drafted a regulation to translate the European Council's agreement into a legislative proposal, a draft then approved by majorities in the Council and the EP. Since the draft introduced a conditionality principle to receive the new program's funds, namely respect of the rule of law by the beneficiary Member State, the Hungarian and Polish national leaders threatened to veto the budgetary process.[23] With the sympathy of other national governments of Eastern Europe, those two national leaders claimed the right of a Member State to protect its own interpretation of rule of law, even if it contradicts the EU's principles enshrined in Article 2 TEU. The stalemate generated by the veto threat was overcome within the European Council, which, at the Conclusion of its meeting of 10–11 December 2020, instructed on how to interpret "the draft Regulation on a general regime of conditionality for the protection of the Union budget", asserting that it has "to respect the national identities of Member States inherent in their fundamental political and constitutional structures".[24] The intergovernmental governance of the European Council was able to break the stalemate and to make progress in the approval of the regulation, but at the same time it allowed for (de facto) differentiated interpretation of the rule of law's clause of the Treaty.

In short, intergovernmental governance has made it possible to advance the integration of sovereignty-sensitive policies through differentiation, but it has also generated undemocratic consequences. Intergovernmental governance has prevented the accountability of decision-makers at the level where decisions are taken. According to Robert Dahl (one of the most influential post-Second World War political scientists to investigate democracy),[25] the constitutive property of a democratic regime is represented by the political accountability of the decision-makers, that is by the obligation that executive power holders have towards either legislative institutions (institutional accountability) or voters (electoral accountability). In this decision-making regime, not only do voters have no voice on the decisions taken collegially by the European Council, but also the EP has no power to sanction its choices. In fact, the European Council's or Council's accountability is assumed to be indirect (each national leader or minister accounts to their respective national legislature). It is unlikely, however, that national parliaments, networking with the EP, could collectively exercise a checking role on the intergovernmental institutions, as envisioned by the

[22]R.D. Kelemen, 'Is Differentiation Possible in Rule of Law?' (2019) 17 *Comparative European Politics*, 246.

[23]The MFF 2021–2027 requires the unanimous vote of the Council, after receiving the EP's consent, while the NG-EU is co-decided by the Council and EP, but it requires the unanimous approval of the Own Resource Decision, allowing the EU to increase the resources for NG-EU, by the Council and all Member State parliaments.

[24]European Council (2020) 'Conclusions', 10–11 December, https://www.consilium.europa.eu/media/47296/1011-12-20-euco-conclusions-en.pdf

[25]R.A. Dahl, *Dilemmas of Pluralist Democracy* (Yale University Press, 1982), 11–13.

Treaties. It is even more unlikely that national parliaments could control Brussels' intergovernmental decisions, since those decisions are taken by bodies consisting of prime ministers or ministers expressing national parliamentary majorities. Rather, the opposite process has happened, with national leaders using intergovernmental decisions to limit the debate in their respective national parliaments. More integration has been paid for with less democracy. Since the leaders of national governments would be unlikely to accept the transfer of the management of CSP policies to the supranational regime, then what should be done?

5 | LEARNING FROM FEDERALISM'S EXPERIENCES

If the debate on the future of Europe wishes to take a critical approach to differentiation, then it might look to the experience of democratic federations.[26] Since the pioneering works of Sbragia[27] and Stepan,[28] federations' experience has been distinguished according to the historical path of their formation and thus consolidation. Stepan conceptualised the basic distinction between coming-together federations and holding-together federations, with the former expressing the aggregation of previously independent territorial states and the latter the territorial disaggregation of a previously unitary state. Coming-together federations are less centralised than holding-together federations, because the states, transferring sovereignty-sensitive policies to the centre, decided to constrain the latter from within, separating its decision-making institutions. Conversely, holding-together federations could keep the territorial disaggregation under the preeminence of a federal centre organised according to the logic of the fusion of powers because they did not display a conflict on sovereignty-sensitive issues (we might call the former federal unions and the latter federal states). Along the entire (democratic) federal spectrum, the United States and Switzerland are closer to the federal union pole, while post-war Germany,[29] Austria and Belgium are closer to the federal state pole, with Australia and Canada in between the two poles.[30]

All federations are based on the twin principles of self-rule and shared rule.[31] In federal unions, self-rule and shared rule are institutionally separated (each level has its own competences and executive, legislative, administrative and judicial institutions for carrying them out). In federal states, instead, the distinction between self-rule and shared rule is less compelling because competences are mainly shared between levels of government and their management implies the latter's close cooperation. The different organisation of federalism in the two types of federation is thus due to their different relations with sovereignty.[32] In coming-together federations, such as the US, sovereignty was originally in the states that decided to aggregate. The founding states agreed to transfer to the new centre only those parts of sovereignty necessary to protect the federation (to guarantee the federation's security from external and internal threats[33]) or to enable its economic development, keeping for themselves domestic-oriented policy responsibilities. To use the concept of Genschel and Jachtenfuchs, they agreed to share mainly CSP policies (foreign policy, defence policy, military security, monetary policy), and market-making policies (justified by

[26]See J. Kincaid (ed.), *A Research Agenda for Federalism Studies* (Elgar, 2019).

[27]A.M. Sbragia, 'Thinking about the European Future: The Uses of Comparison', in A.M. Sbragia (ed.), *Euro-Politics: Institutions and Policymaking in the "New" European Community* (Brookings Institution Press, 1992).

[28]A. Stepan, 'Federalism and Democracy: Beyond the US Model' (1999) 10 *Journal of Democracy*, 19.

[29]The German case requires several caveats. Here, I refer to post-Second World War Germany, not to the experience of German confederation in the nineteenth century, nor to the federal experience of the Weimar Republic. The post-war German federation was the outcome of the Allied Authorities' decision to decentralise the powers of the Third Reich's highly centralised state rather than the autonomous decision of independent *Länder* to aggregate to form a federation. Certainly, the territorial borders of previous *Länder* were recognised in a few cases, but many new *Länder* were formed either aggregating or separating previous *Länder* (to guarantee a reasonable balance between them, and in any case to prevent that a *Land* could have more than 30 per cent of the federation's total population). Hardly a case of coming-together federation.

[30]S. Fabbrini 'Which Democracy for a Union of States? A Comparative Perspective of the European Union' (2017) 8 *Global Policy*, 14; J.E. Fossum and M. Jachtenfuchs, 'Federal Challenges and Challenges to Federalism. Insights from the EU and Federal States' (2017) 24 *Journal of European Public Policy*, 467; A. Benz and J. Broschek (eds.), *Federal Dynamics: Continuity, Change, and the Varieties of Federalism* (Oxford University Press, 2013).

[31]D.J. Elazar, *Exploring Federalism* (University of Alabama Press, 1987).

[32]D. Grimm, *Sovereignty: The Origin and Future of a Political and Legal Concept* (Columbia University Press, 2015).

[33]It is the "external sovereignty" as it was much later conceptualised by S.D. Krasner, *Sovereignty: Organized Hypocrisy* (Princeton University Press, 1999). See, also, W. Riker, *Federalism: Origin, Operation, Significance* (Little Brown, 1964).

the Commerce Clause of the 1787 Constitution),[34] keeping under their control the many regulatory policies of the market (still today the US single market is much less integrated than the EU single market[35]) and social organisation. Sovereignty was thus divided, segmented, not simply transferred from one level to another. There is not a single (state or federal) level of government that might claim to represent national sovereignty, since the latter is represented by the states and the centre together.

Not only have the states kept many competences, but they have organised an internally divided centre for dealing with shared rule policies. The centre (constituted by the Senate elected every six years, the House of Representatives elected every two years, and the President elected every four years, renewable once) consists of "separated institutions sharing power".[36] This means that the House of Representative, the Senate, and the President (not to mention the Supreme Court which also plays a policy role through its power of judicial review) participat equally in the decision-making process. Those decision-making institutions are unconnected by a vote of reciprocal political confidence, are formed though different electoral systems, represent different constituencies, and operate through different time limits. Moreover, the legislature (Congress) is divided into two chambers (the House, representing within-state district voters, and the Senate, representing state voters since the 1913 17th constitutional amendment), with the Senate consisting of two senators per state regardless of the state's population (as a confederal institution), each of them voting individually in the Senate's deliberation. The two chambers of Congress have the same legislative powers, although the Senate has special prerogatives in matters of interest to the states (i.e., approval of international treaties or of the candidates for the President's cabinet and administration). Political accountability is mainly inter-institutional, thanks to the mechanism of checks and balances which incentivises each branch to take into consideration the preferences of the other branches (although, with the growth of the modern presidency and the development of the modern party system, the indirect election of the President has acquired the features of a popular mandate). As the centre was assigned limited and enumerated policies by the 1787 Constitution, no state is authorised to opt out from the centre's shared rule. Differentiation has developed between the various states' self-rule, since each state has the power to pursue one or another policy according to the preferences of its own voters or governors, in compliance with the requirements of the state's constitution (a claim that has continued to lead to a clash between different interpretations of rule of law, the hard core of states' sovereignty). If a policy is not part of the shared rule package, then a state can manage it as it sees fit. It can even behave as an independent actor at the international level, contradicting the decision of the same federal authorities (as was the case with environmental policy, when California decided to support the 2015 Paris Agreement while the Trump administration decided to withdraw from it in 2017). Certainly, although the US Constitution clearly separates competences and institutions between the centre and the states, the dramatic development of public responsibilities (since the 1930s and particularly after the Second World War) has called into question that neat separation, developing what has been called the "policy state".[37] However, that development could not change the internalised logic of competition between the separated levels of government regarding "who should do what".[38]

Quite different is the experience of a federal state like Germany.[39] Here, national sovereignty is represented by the *Bund*, i.e. by the institutions of the parliamentary government (*Bundestag* and *Bundeskanzler* or Federal Chancellor), integrated by the institution representing the *Länder*'s executives (*Bundesrat*). None of the *Länder*, as a single unit, can constitutionally claim to be sovereign, nor can it expect to have the same international status as the (parliamentary) federal government (although they have the "constitutional right to conclude treaties" based "on their quality of state … in

[34]Indeed, the formation of a federal budget supported by federal taxes ("fiscal sovereignty") was for long highly contrasted. Only with the 1913 XVI Amendment was Congress authorised to tax "incomes, from whatever source derived, without apportionment of the several States"; see J.A. Rodden, *Hamilton's Paradox: The Promise and Perils of Fiscal Federalism* (Cambridge University Press, 2006).

[35]See M. Matthijs, C. Parsons and C. Toenshoff, 'Ever Tighter Union? Brexit, Grexit, and Frustrated Differentiation in the Single Market and Eurozone' (2019) 17 *Comparative European Politics*, 209.

[36]R.E. Neustadt, *Presidential Power and the Modern Presidents: The Politics of Leadership from Roosevelt to Reagan*, (The Free Press, 3rd edn, 1990), 45.

[37]K. Orren and S. Skowronek, *The Policy State: An American Predicament* (Harvard University Press, 2017).

[38]D.F. Kettl, *The Divided States of America: Why Federalism Doesn't Work* (Princeton University Press, 2020).

[39]F.W. Scharpf, 'The Joint-Decision Trap: Lessons from German Federalism and European Integration' (1988) 66 *Public Administration*, 239.

fields of exclusive *Land* competence"[40]). However, the federal centre, considering both exclusive and shared competences, may affect a large number of policies, although the *Länder* contribute to the policy-making process in matters relevant for them through the *Bundesrat*, their representatives in the committees connecting the two levels of government, and their power to implement the policies that are decided centrally. In Germany, the growing policy responsibilities of the centre have been met through a cooperative logic,[41] although the parliamentary government has retained the power of the last word. Centralising power in the federal parliamentary government makes it possible to guarantee political accountability, while the dense network of cooperation between the *Bund* and the *Länder* aims to reduce tensions among the latter (which nevertheless emerged, particularly after the 1990 reunification of the country, between Western and Eastern *Länder*). The Federal Chancellor, as long as she is supported by the majority in the *Bundestag*, is responsible for governmental decisions and accounts (with her political party) for their effects to voters in the periodic parliamentary elections (to use Dahl's concepts, political accountability is electoral in Germany, institutional in the US).

Federal unions have constitutionally contained the policy responsibilities of the centre, further weakening the latter through horizontal separation of powers and a highly unrepresentative states' chamber, whereas federal states have constitutionally empowered the centre by enlarging the shared power of its parliamentary government, although mitigated by federal representation of the territorial units in the second or upper chamber.[42] Such representation, however, is prevented from playing a role in the formation or dissolution of federal parliamentary government. In both types of federalism, there is only one constitutionalised governance system for dealing with federal competences, although different pragmatic equilibria between decision-making institutions have developed in domestic and foreign policies. Thus, the two types of federalism meet differently the democratic requirements of the federation. The single decision-making framework is demos-constraining in federal unions and demos-enabling in federal states. The demos-constraining framework makes it difficult to affirm a clear popular majority at the federal centre. Although presidential elections have become the functional equivalent of a national competition, the legislative chambers might express different partisan majorities than the presidential majority (the so-called divided government). The demos-empowering framework allows instead the formation of a parliamentary majority at the centre, through the election for the *Bundestag*, expressing partisan and not inter-state divides.

From the perspective of comparative federalism, the EU, being the expression of the aggregation of previously independent sovereign states, is closer (in the federal spectrum) to the federal union pole than the federal state pole. The evolution of the EU towards the demos-enabling model of the (German) federal state appears unlikely, notwithstanding the EP parties attempt to introduce the *spitzenkandidaten* logic in EP elections. After the 2019 EP elections, the latter's demos-enabling logic came to clash openly with the demos-constraining logic pursued by the national leaders of the European Council. Any attempt to federalise a union of demographically asymmetrical states, with deep-rooted different national/sovereignty identities, through a parliamentary model would meet powerful structural hindrances. At the same time, while the strategy of multiple separation of powers appears more appropriate to compound asymmetrical states with distinct national identities, it does that, however, at the cost of preventing the formation of supranational popular majorities.

6 | FEDERALISATION AND THE FUTURE OF EUROPE

If the federal union model appears more coherent with the EU's experience than the federal state model, then that model would require an original adaptation to the EU's context. Moving from description to prescription, here is an agenda for the federalisation of the EU.

[40]R. Lhotta and J. von Blumenthal, 'Intergovernmental Relations in the Federal Republic of Germany: Complex Co-operation and Party Politics', in J. Poirier, C. Saunders and J. Kincaid (eds.), *Intergovernmental Relations in Federal Systems: Comparative Structures and Dynamics* (Oxford University Press, 2015), 226.

[41]A. Benz and J. Sonnicksen, 'Patterns of Federal Democracy: Tensions, Friction, or Balance between Two Government Dimensions' (2017) 9 *European Political Science Review*, 3.

First, the federalisation of the EU would require a preliminary constitutional pact (a *Political Compact*) among state and EU leaders, and the citizens they represent, agreed ex novo outside of the current Treaties.[43] The Political Compact should declare the reasons for the existence of the union, the values (rule of law, particularly) to uphold and the basic institutional framework for organising its operation. The principle of equality, between states and their citizens, should be paramount. The Political Compact should be relatively short and easily understandable by citizens. Experience shows that federations do not emerge from organic evolution, but they are the outcome of a deliberate political choice by political elites, with the consent of the citizens they represent.[44] Through the Political Compact, the union will acquire a legitimacy of its own, independent from the legitimacy of the signatory states (who will no longer be "the masters of the treaty"). Although Member States will have their own constitution, for regulating their own sovereignty, the latter's values and procedures should be coherent with those upheld by the Political Compact. National constitutional pluralism should be kept within the confines of the liberal democratic framework of the Political Compact. The Court of Justice of the EU (CJEU) should be the ultimate judicial decision-making body for any federal or inter-state controversy.

Second, the Political Compact should celebrate the plural nature of the European federal union, epitomised by its motto "*in varietate concordia*". The latter does not come into being to replace national democracies with a supranational democracy, nation states with a supranational state, national peoples with a supranational people. On the contrary, the European federal union should be a compound polity, aiming to reconcile national democracies with supranational democracy. The European federal union should not imply the existence of a single people, as in the case of nation states (even federal states). Those (like the German constitutional court, or *Bundesverfassungsgericht*) arguing that democracy can exist only at the national level, because it requires the pre-existence of a single and homogeneous people or *demos* for legitimising political authority,[45] express a parochial view of democracy, because they transform a specific (German) national experience of national democracy-building (or its romantic evocation) into a general theory applicable to all kinds of democratic federation building.[46] A European federal union would not aim to create a European identity to replace national ones, but it would aim to compound national and European identities.[47] What unites the national citizens of the European federal union is the adherence to *democratic* values and respect for the procedures and institutions substantiated by the Political Compact. Any attempt to identify the pivot for a univocal European cultural identity (in the Greek-Roman heritage, in the Catholic or Christian tradition, in the values of secularism, etc.) has divided, and not united, Europeans (one has only to remember the divisive discussion on the "cultural" Preamble of the 2002–2003 Constitutional Treaty).[48] European pluralism can never be enclosed in a single cultural identity. The European identity must be political, while national and sub-national identities will continue to be cultural.[49]

[43]For a legal interpretation of the Political Compact, see F. Fabbrini, *Brexit and the Future of the European Union: The Case for Constitutional Reform* (Oxford University Press, 2020, ch. 6).

[44]R.L. Watts, *Comparing Federal Systems* (McGill-Queen's University Press, 2008). But also, S. Fabbrini, 'The Constitutional Conundrum of the European Union' (2016) 23 *Journal of European Public Policy*, 84.

[45]"If the peoples of the individual States (as is true at present) convey democratic legitimation via the national parliaments, then limits are imposed, by the principle of democracy, on an extension of the functions and powers of the European Communities. State power in each of the States emanates from the people of that State", Decision of the German Federal Constitutional Court of 12 October 1993, In Re Maastricht Treaty, https://iow.eui.eu/wp-content/uploads/sites/18/2013/04/06-Von-Bogdandy-German-Federal-Constitutional-Court.pdf. Since then, this is the political ideology of the German constitutional court.

[46]I developed this criticism in S. Fabbrini, *Compound Democracies: Why the United States and Europe Are Becoming Similar* (Oxford University Press, 2nd edn, 2010).

[47]K. Nicolaidis, 'European Demoicracy and Its Crises' (2013) 51 *Journal of Common Market Studies*, 351.

[48]A detailed description on the debate concerning the cultural premises of the Preamble is in P. Norman, *The Accidental Constitution: The Making of Europe's Constitutional Treaty* (Euro Comment, 2005).

[49]This concept of political identity has been elaborated by the pragmatist school to explain the US experience, from H.M. Kallen, *Democracy versus the Melting Pot* (originally 1915, now Cosimo Classics, 2020) to M. Walzer, 'What Does It Mean to Be an "American"?' (2004) 71 *Social Research: An International Quarterly*, 633. This concept recalls the Swiss *Willensnation* ("nation of will", "nation by choice"), but it does not coincide with it. Political identity has a democratic underpinning that is not necessary, instead, to characterise the *Willensnation*. Certainly, the sharing of democratic/political values is not a sufficient recipe for promoting social trust. Indeed, in the US, federal welfare has been historically (and continues yet to be) more limited than in the single (culturally homogeneous) European nation states.

Third, the Political Compact should establish the constitutional principle of divided sovereignty between Member States and the federal centre (vertical separation of powers). The Political Compact is necessary not only to legitimise the latter, but to set limits on its powers. Divided sovereignty distinguishes the policies which are subject to the control of national democracies and those subject to the governance of supranational democracy. Shared rule should concern the policies that would guarantee the security and development of the union (such as the CSP policies) or the policies addressing common challenges (such as a pandemic or an environmental crisis), while self-rule should concern the policies that would be better managed at the national level (according to subsidiarity's criteria). The individuation of the policies better manageable at the state or federal level should constitute the outcome of a political exercise characterised by negotiation and contingency, taking place, however, within a pre-established constitutional framework. In the current EU context, this would imply bringing the competence for CSP policies to the centre (more integration), transferring to the states those regulatory competences now unnecessarily controlled supranationally[50] (less integration). If anchored to a Political Compact, the EU does not need to protect itself through the "over-constitutionalisation"[51] of the economic principles (the four freedoms) of the single market. Federal union's jurisdiction, in its shared rule domains, should have a general scope. The differentiation of governance regimes is incompatible with the need to guarantee the political accountability of decision-makers. At the same time, the Member States should be free to experiment with as much differentiation as possible at the level of their self-rule. Certainly, empirical reality will call into question this constitutional distinction, incentivising forms of cooperation between levels of government. Nevertheless, a clear constitutional setting would help deal with the implications of policy-making complexity.

Fourth, the Political Compact should institutionalise a single governance regime at the federal level, organised according to horizontal separation of powers, to manage the policies under the latter's responsibility. A *constitutional truce* is necessary between the European Council and the EP to set up a unitary executive power independent from both. The single governance regime cannot be organised according to the logic of the fusion of powers (or parliamentary government) of the federal state because it would centralise decision-making power over sovereignty-sensitive policies—a centralisation likely controlled by the EP representatives of the larger states (consider that, in the EP, the smallest state, Malta, has six representatives and the largest state, Germany, 96 representatives).[52] The direct election of the chief executive is also not recommended as the more populous Member States would have an inevitable advantage vis-à-vis the less populous Member States. The independent executive, although unitary, should reflect the double source of legitimacy of the EU: citizens and states. According to a path-dependent logic, it can be expected that the European executive or better presidency (based on the structures and personnel of the European Commission) might be co-directed by two heads, one connected to the EP's elections and the other emerging from an electoral college, organised in each state, indirectly voting between candidates shortlisted by the European Council.[53] Once constituted, the dual executive should be independent from those selecting its two heads. The relations between the two heads might be defined formally or through experience. However, only one of them should have the power to represent the federal union externally. At the same time, the bicameral legislature (the EP representing European voters and the Council/European Council representing European governments) should enjoy full and co-equal legislative power, supported by capabilities generated at the EU and not national level. The

[50]The federal union model would solicit a balancing act between the competences decided at the national and supranational levels. The logic of the spillover effect, uncritically considered the 'natural order of things', has led to the accumulation of functions in Brussels and to the downsizing of the democratic stakes of national elections. This has justified the growing claim by national parliaments to intervene in EU affairs, which has increased confusion over powers and accountability. F.W. Scharpf, 'De-constitutionalisation and Majority Rule: A Democratic Vision of Europe' (2017) 23 *European Law Journal*, 315, argued that this balancing act "will be unwelcome from the federalist perspective" (p. 333). On the contrary, according to the federal union (not federal state) model.

[51]See D. Grimm, *The Constitution of European Democracy* (Oxford University Press, 2017).

[52]Indeed, in preparation for the Conference on the Future of Europe, 12 small to medium-sized Member States published a non-paper claiming the necessity to safeguard "the inter-institutional balance, including the division of competences", Downloads/vergaderstuk-over-de-toekomst-van-europa.pdf

[53]I advanced a hypothetical model for democratising the formation of the European federal union executive, without resorting to either direct or parliamentary elections, in my *Europe's Future: Decoupling and Reforming* (Cambridge University Press, 2019), at 104–110. Comparatively, the dual executive is proper of semi-presidential governments (like Fifth Republic France), although the latter are not based on separation of powers.

reciprocal independence of executive and legislative institutions would guarantee the institutional accountability of the executive to the bicameral legislature.

Fifth, the Political Compact, through the distinction of policies, which would be governed nationally and supranationally, should allow voters to have their say (directly or indirectly) at the level where those policies are decided. Those levels should be separated, not fused, in order to make clear "who should be considered responsible for what". The levels of government will necessarily interact, but national parliaments should deal with national issues and the European legislature with supranational issues. If important issues will return back to the Member States, there would be less need for the national parliaments to invade the EU legislature policy-making. There is no reason to assume that two levels of government (national and supranational) should be organised through the same governance model. The union and the Member States reflect different historical trajectories and different systemic rationales, but accommodable within the plural framework of the federal union. Both vertical and horizontal separation of powers should be conceptualised as a political strategy, not a normative institutional framework, aiming to prevent the activation of dominating or hegemonic relations between the Member States (horizontally) and between levels of government (vertically).

Finally, the Political Compact should be approved indirectly, i.e., through special conventions, by the voters of the signatory states, because popular referenda have become captive of populist upheaval. Although the federal union model can accommodate sovereignty-based claims, its disapproval, from one or more Member States, is likely. In that case, the vote of disapproval would imply the exclusion from the European federal union's project. Because the Political Compact reflects an ex novo pact, external to the EU treaties, no Member State could claim to apply the unanimity criteria for boycotting it. It would yet follow that a compromise should be reached between the Member States and EP political actors willing to reset (through the Political Compact) the project of "an ever closer union" and those willing instead to go back to the pre-euro common market.[54] The common market and the federal union should have different legal settings, although the Member States of the latter should commit themselves to participate in the functioning of the former according to rules that would prevent them from imposing their interests.[55]

7 | CONCLUSION

The article has argued that, in the EU, policy differentiation has emerged with the Europeanisation of CSP policies, which started with the 1992 Maastricht Treaty. Integration of policies close to national sovereignty has been made possible by governance differentiation, specifically by the institutionalisation of intergovernmental governance based on voluntary coordination.[56] However, intergovernmental governance has not met EU democratic expectations. The multiple crises in the 2010s and the 2020 pandemic emergency, propelling the intergovernmental logic to the centre of the EU political system, have shown the latter's inability to promote the political accountability of decision-makers (if not the legitimacy of the decision-making process).

The article thus investigated federalisation as an alternative to differentiation, to test whether it would be capable of advancing integration in sovereignty-sensitive policies while satisfying democratic expectations. Through a critical analysis of federal models, stretching from coming-together (federal unions) to holding-together (federal states) federations, the article identified the pros and cons of the two federal models, highlighting the systemic constraints that led to their different path-dependent development. Since the EU is the outcome of the aggregation of previously independent states, the article argued that it has systemic similarities with federal unions rather than with federal states. All federations should combine shared rule with self-rule. In federal unions, shared rule policies (generally sovereignty-sensitive policies) are compulsory for the Member States, while self-rule policies are highly

[54]I investigated the nature of this cleavage in my book, *Europe's Future: Decoupling and Reforming* (Cambridge University Press, 2019).

[55]S. Fabbrini, 'Alternative Governance Models: "Hard Core" in a Differentiated Europe' (2019) 17 *Comparative European Politics*, 278.

[56]S. Fabbrini and U. Puetter, 'Integration without Supranationalization: Studying the Lead Roles of the European Council and the Council in Post-Lisbon EU Politics' (2016) 38(5) *Journal of European Integration*, 481.

differentiated. Moreover, in federal unions, the competences of the centre are managed by representatives operating within a single decision-making framework, although organised according to a demos-constraining separation of powers logic. Federal unions have institutionalised a tension between the centre and the states, as all of them contribute to the sovereignty of the union. Indeed, a federal union can be defined as a sovereign union of sovereign states,[57] inasmuch as the Member States are sovereign on specific policies (self-rule) and the centre is sovereign on other policies (shared rule). The boundary between self-rule and shared rule will continuously shift, thus requiring a constant renegotiation between the two levels of government. Federal unions are fragile political projects requiring a predisposition to compromise, by the leaders and voters of the distinct Member States, based on common values and objectives. Indeed, the federal union model is dynamic and not static.

Federalisation through a federal union perspective might help to promote a kaleidoscopic integration of interests and at the same time to meet the EU's democratic expectations. Nevertheless, it leaves unanswered several questions: how to prevent the system of checks and balances from generating decision-making stalemate? Is the institutional accountability promoted by the mechanism of checks and balances sufficient for legitimising political decisions? If not, how to balance the need to guarantee the pluralism of the many *demoi* with the need to form democratic majorities across them? The Conference on the Future of Europe might be the arena for finding an original answer to these questions.

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[57]P.S. Onuf, *The Origins of the Federal Republic: Jurisdictional Controversies in the United States, 1775–1787* (University of Pennsylvania Press, 1983).