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A Social Compact for a Social Union: A Political and Legal Window of Opportunity?

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Abstract

The social crisis within the euro zone has not only showed the need for more integration in social areas, if not per se than to consolidate the EMU and the way our welfare states within the EU have been developed and proceed to be relatively successful. It has also triggered new thinking about how such a Social Union might look like. In this article we explore from both a political and a legal point of view how to overcome the problem that in the social area not all member states are willing to take further steps to strengthen the integration process of the European Union. We particularly examine whether the Fiscal Compact can serve as model for the challenge of differentiated integration. The central question is therefore whether such a model – developed outside the existing political and legal framework – is applicable to the social area, or, in other words, whether a Social Compact is possible, feasible and desirable and under what circumstances.

Keywords: European Union, differentiated integration, Fiscal Compact, member states, social union

Introduction

This article aims to explore the design of a Social Union, both from a political and a legal point of view.¹ By Social Union we mean a Union that "would support national welfare states on a systemic level in some of their key functions and guide the substantive development of national welfare states - via general social standards and objectives, leaving ways and means of social policy to member states".² We try to examine how such a Social Union might look like, thinking 'out of the box'. This means that **we develop a model** outside the existing political and legal framework of the European Union (EU), i.e. the Lisbon Treaty.

Developing a design of such a Social Union does not only have to take into account the substance of this particular policy area, but will also have to take into account the institutional setup. In fact, the policy-specific aspects of a social union will be left aside. By contrast, most attention will be paid to a political and legal problem that is typical for European integration in general and social policy in particular: the fact that not all member states (MS) are willing to take further steps to strengthen the social dimension of the EU. **How to overcome this problem of asymmetric and differentiated integration is central to our article.** First we will briefly review the political science literature on asymmetric integration as well as have a look of what it means in reality. Then, from a political as

¹ A first version has been presented in Leuven on 16 September 2014 at the Euroforum conference 'Which Social Dimension for the European Union? Normative, Political, Legal and Economic Perspectives' and published as J. Lievens, S. Van Hecke, S. Sottiaux & W. Wolfs, A Social Compact for a Social Union?, KU Leuven: Euroforum Paper, September 2014, 16p.

² F. Vandenbroucke, The Case for a European Social Union: From Muddling Through to a Sense of Common Purpose, KU Leuven: Euroforum Paper, September 2014, p. 3.

well as legal point of view, we will examine how and to what extent lessons can be learned from the Fiscal Compact.

The Fiscal Compact is a Treaty concluded in the spring of 2012 between all EU MS minus the UK and the Czech Republic. It aims to tackle the structural shortcomings of economic and monetary integration by introducing, among other things, an enforceable balanced budget rule. Because the Fiscal Compact is a relatively recent example of how to solve the problem of asymmetric integration in one particular policy area we will examine whether this model is applicable to the social area. In other words, whether a 'Social Compact' would bring us any closer to a European Social Union. In our conclusion we will discuss the legal and political caveats, whether a Social Compact is possible, feasible and desirable and under what circumstances.

1. Differentiated Integration: Lessons from the Literature

The debate about differentiated integration suffers from so-called semantic indigestion: an excess of concepts and definitions. In his categorisation of differentiated integration, Stubb identifies no less than 66 different terms in three languages used for differentiation.³ This proliferation of terminology does not only stem from academic quarrelling but also from the various ways in which policy makers themselves have tried to capture the nature and practice of the EU. Differentiated integration has become an umbrella term that covers a diversity of concepts and models, yet "so different are these models that in fact it is increasingly common for one of them – multi-speed integration – to be accepted as an inevitability, while another – the à la carte model – is almost universally derided".⁴

The literature on differentiation is generally unanimous that it is a solution to the problem that "not all member states are equally eager to participate in all aspects of integration" Svein S. Andersen and Nick Sitter, 'Differentiated Integration: How Much Can the EU Accommodate?', *Paper Presented at the World Congress of the International Institute of Sociology, Stockholm, Sweden, 2005*.. In essence, differentiation is thus a response to the "integration paradox": the member states' simultaneous recognition of a functional need for deeper integration, and their aversion to cede political sovereignty Uwe Puetter, 'Europe's Deliberative Intergovernmentalism: The Role of the Council and European Council in EU Economic Governance', *Journal of European Public Policy*, 19 (2012), 161–78.. On the one hand, as a *political tool* differentiation is defined as a "tool for managing integration in the presence of diversity of interests" Alex Warleigh, *Flexible Integration. Which Model for the European Union?* (Sheffield Academic Press, 2002).. On the other hand, as an *institutional reality* differentiation is defined as "the general term for the possibility of member states to have different rights and obligations with respect to certain common policy areas" Alkuin Kölliker, 'Bringing Together or Driving Apart the Union? Towards a Theory of Differentiated Integration', *West European Politics*, 24 (2001), 125–51.. With the prospect of the eastern enlargement, the principle of differentiation was accordingly introduced in the Treaty of Amsterdam in 1997, "allowing for flexibility in participating in the activities of the EU on a more systematic basis than ever before".⁵

Still, despite this rather straightforward purpose of differentiation, its definition posed quite a challenge. Stubb looked particularly at differentiation as a tool used to advance integration and

³ See: A. Stubb, *A Categorisation of Differentiated Integration*, [in:] *Journal of Common Market Studies*, Vol. 34, Nr. 2, 1996.

⁴ A. Warleigh, *Flexible Integration: Which Model for European Integration?*, Sheffield Academic Press 2002, p.9.

⁵ J. de Neve, *The European Union: How Differentiated Integration is Reshaping the EU*, [in:] *Journal of European Integration*, Vol. 29, Nr. 4, 2007, p.505.

defined it as "the general mode of integration strategies which try to reconcile heterogeneity within the European Union".⁶ In the same vein, Dyson and Sepos say that differentiated integration "is the process whereby European states, or sub-state units, opt to move at different speeds and/or towards different objectives with regard to common policies".⁷ An albeit different view on differentiation is taken by Leuffen, Rittberger and Schimmelfennig, who consider differentiation more as an institutional reality of the Union rather than a strategy or tool. They focus on differentiated integration as "one Europe with an organisational and member state core but with a level of centralisation and territorial extension that vary by function".⁸ Similarly, Kölliker defines differentiation as "the general term for the possibility of member states to have different rights and obligations with respect to certain common policy areas".⁹

Most of the effort, however, went to designing models of differentiated integration that either try to capture the Union as it is or propose models for future integration. Although the debate about differentiation did not really start until the 1990s, the idea was first introduced in the 1975 Tindemans Report on European Union. In his chapter on A New Approach for Europe, then Belgian Prime Minister Leo Tindemans argued that "it is impossible at the present to submit a credible programme of action if it is deemed absolutely necessary that in every case all stages should be reached by all States at the same time" and consequently that "those States which are able to progress have a duty to forge ahead".¹⁰

Tindemans' report was buried, but the ball was set rolling again by Wolfgang Schäuble and Karl Lamers, whose 1994 paper on a *Kerneuropa* "foresaw the creation of a more tightly integrated 'hard core' of member states"¹¹ centred around the Franco-German tandem.¹² Soon others followed: Edouard Balladur considered 'concentric circles'¹³, Joschka Fisher talked of a 'centre of gravity'¹⁴, Jacques Chirac preferred a 'pioneer group'¹⁵, Jacques Delors referred to the 'avant-garde' of European integration¹⁶, and Jean Pisani-Ferry highlighted the 'variable geometry'¹⁷ of the Union.¹⁸ Scholars added to this plethora with a set of concepts of their own: Frey and Eichenberger developed the idea of functional, overlapping and competing jurisdictions, Schmitter described the *condominio*

⁶ A. Stubb, *A Categorisation of Differentiated Integration*, [in:] *Journal of Common Market Studies*, Vol. 34, Nr. 2, 1996, p.283.

⁷ K. Dyson and A. Sepos, *Which Europe? The Politics of Differentiated Integration*, Palgrave Macmillan 2010, p.4.

⁸ B. Rittberger, D. Leuffen, and F. Schimmelfennig, *Differentiated Integration: Explaining Variation in the European Union*, Palgrave Macmillan 2013, p.10.

⁹ A. Kölliker, *Brining Together or Driving Apart the Union? Towards a Theory of Differentiated Integration*, [in:] *West European Politics*, Vol. 24, Nr. 4, 2001, p.127.

¹⁰ See: L. Tindemans, *European Union: Report by Mr Leo Tindemans, Prime Minister of Belgium, to the European Council, 1975*.

¹¹ D. Webber, *Successful and Genuine Failures: France, Germany and the Others in the History of 'Multi-Speed' European Political Integration*, Paper presented at the 4th pan-European Conference on EU Politics, Riga, Latvia, 2008, p.3.

¹² See: W. Schäuble and K. Lamers, *Überlegungen zur europäischen Politik*, [in:] *CDU/CSU Papers*, 1994.

¹³ See: E. Balladur, *Trois Cercles Concentriques*, [in:] *Le Figaro*, 30 august, 1994.

¹⁴ A speech by: J. Fischer, *From Confederacy to Federation - Thoughts on the Finality of European Integration*, Humboldt University, Berlin, 2000.

¹⁵ A speech by: J. Chirac, *Notre Europe*, German Bundestag, 27 June, 2000.

¹⁶ A speech by: J. Delors, *Die europäische Avantgarde – Für Eine neue dynamik im integrationsprozess*, Paris, 29 June, 2000.

¹⁷ A speech by: J. Pisani-Ferry, *L'Europe à géométrie variable: une analyse économique*, CEPII, Paris, 1996.

¹⁸ See: F. de la Serre and H. Wallace, *Flexibility and Enhanced Cooperation in the European Union: Placebo rather than Panacea?*, [in:] *Notre Europe Research and Policy Papers*, Nr. 2, 1997; K. Holzinger and F. Schimmelfennig, *Differentiated Integration in the European Union: Many Concepts, Sparse Theory, Few Data*, [in:] *Journal of European Public Policy*, Vol. 19, Nr. 2, 2012; J.C. Piris, *The Future of Europe. Towards a Two-Speed EU?*, Cambridge University Press, 2011; A. Stubb, *A Categorisation of Differentiated Integration*, [in:] *Journal of Common Market Studies*, Vol. 34, Nr. 2, 1996; D. Webber, *Successful and Genuine Failures: France, Germany and the Others in the History of 'Multi-Speed' European Political Integration*, Paper presented at the 4th pan-European Conference on EU Politics, Riga, Latvia, 2008.

of many Europes, Marks and Hooghe distinguished two types of multi-level governance, Rittberger et al. consider Europe as a system of differentiated integration, while Zielonka describes the EU as a neo-medieval empire.¹⁹ The list goes on and is too long to fully explicate here.

Essentially, however, differentiated means the abandonment of the principle of unitary integration, i.e. that all MS have the same rights and obligations at the same time. Challenged by the increased heterogeneity of the Union, divergence in political ambitions, disparities in cultural identities and economic realities, different geo-strategic interests and political preferences, free-riding and institutional capacities, this unitary principle became impossible to sustain.²⁰ Differentiation effectively cancelled this principle by allowing MS to have different rights and obligations at different times. Originally, the political tool was considered a momentary measure – for example, in order to allow newly accessed states some transition time in transposition of legislation. As such, it was seen as "a temporary and unfortunate necessity".²¹

However, as Přibáň argues, "the indefinite design and persistence of some clauses, such as the Irish and UK opt-out from the Schengen Zone or the UK opt-outs from the Union's protection of social rights, have gradually weakened the original idea of flexibility as a transitional measure and made it an intrinsic feature of European legal integration".²² The differentiation of Europe is thus a highly complex phenomenon that is not easily captured and will only increase in importance in the years to come. Indeed, "differentiated integration was gradually transformed from familiar political practice within EU institutions into a rule in intergovernmental negotiations and a guiding European treaty principle".²³ The history of differentiation shows that it is no longer a "transitional phenomenon" but a permanent and important feature of European integration.²⁴

2. A Review of the Fiscal Compact Saga

The history of the EMU and the Fiscal Compact is a good background to which to relate the possibilities of a Social Compact. This section of the paper will briefly set the scene and describe the saga of EMU integration and the Fiscal Compact.

2.1. The Economic and Monetary Rift

In the broad sense, economic union entails all aspects of the internal market, but in the narrower context of the EMU, it mainly refers to fiscal policy – read 'national taxes and budgets'. It then comes

¹⁹ See: B.S. Frey and R. Eichenberger, *FOCJ: Competitive Governments for Europe*, [in:] *International Review of Law and Economics*, Vol. 16, 1996; P. Schmitter, *Imagining the Future of the Euro-Polity With the Help of New Concepts*, [in:] *Governance in the European Union*, (ed.) G. Marks, F. Scharpf, P. Schmitter and W. Streeck, Sage Publishing 1996; G. Marks and L. Hooghe, *Unravelling the Central State, but How? Types of Multi-Level Governance*, [in:] *American Political Science Review*, Vol. 97, Nr. 2, 2003; B. Rittberger, D. Leuffen, and F. Schimmelfennig, *Differentiated Integration: Explaining Variation in the European Union*, Palgrave Macmillan 2013; J. Zielonka, *Europe as Empire: the Nature of the Enlarged European Union*, Oxford University Press 2006.

²⁰ K. Dyson and A. Sepos, *Which Europe? The Politics of Differentiated Integration*, Palgrave Macmillan 2010, p.8.

²¹ A. Warleigh, *Flexible Integration: Which Model for European Integration?*, Sheffield Academic Press 2002, p.10.

²² J. Přibáň, *Legal Flexibility, Governance and Differentiated Integration: On Functional Differentiation of EU Law and Politics*, [in:] *Which Europe? The Politics of Differentiated Integration*, (eds.) K. Dyson and A. Sepos, Palgrave Macmillan 2010, p.28.

²³ J. Přibáň, *Legal Flexibility, Governance and Differentiated Integration: On Functional Differentiation of EU Law and Politics*, [in:] *Which Europe? The Politics of Differentiated Integration*, (eds.) K. Dyson and A. Sepos, Palgrave Macmillan 2010, p. 26.

²⁴ K. Goetz, *The Temporal Dimension*, [in:] *Which Europe? The Politics of Differentiated Integration*, (eds.) K. Dyson and A. Sepos, Palgrave Macmillan 2010, p.68.

as no surprise that the economic branch is far less developed than the monetary branch, as the former is a core area of national sovereignty. Clearly, the 'E' and the 'M' are progressing in different ways and at different speeds towards the 'U'. While monetary integration has been preceded by years of experience with monetary coordination, fiscal policy was more or less avoided over the years. While the 1970 Werner Plan for economic and monetary integration called for "fiscal harmonisation (...) in order to permit the progressive and complete suppression of fiscal frontiers", after its unceremonious abolition the issue of fiscal harmonisation was quietly put to rest.²⁵ Even the ever-ambitious Jacques Delors didn't raise the subject that pointedly in his 1989 report on EMU. As such, fiscal integration was an area of loose intergovernmental coordination.

Things changed when the SGP was agreed upon in the 1997 European Council amidst much political turmoil, and established the 3% GDP cap on budget deficits – a fiscal straightjacket "which was supposed to constrain member states' budgetary policy to prudence" through financial sanctions in case of non-compliance.²⁶ However, the SGP proved insufficient when an increasing amount of Member States breached the 3% rule in the early 2000s. Contrary to the monetary part of EMU that was ruled by the iron hands of the ECB, the SGP lacked oversight and sanctions were limited mainly to political peer pressure in the Council.²⁷ The process of sanctioning at that time was that the disciplinary actions proposed by the Commission had to be adopted in the Council by qualified majority voting (QMV).

When both France and Germany exceeded the 3% limit for the second year in a row, the bomb burst. At the November 2003 Ecofin Council the Commission was blocked in its attempt to start disciplinary action against the two giants. In turn, the Commission took the case to the European Court of Justice. In 2004 the Court ruled more or less in favour of the Commission. While the Court could not annul the Council decision as such, it clarified that, in principle, because France and Germany did not take effective measures to adapt their deficits they are subject to disciplinary action. Yet it proved to be a Pyrrhic victory, as "political realities then led not to the disciplinary action being imposed but to the terms of the Pact being changed"²⁸. As a result, the fiscal straightjacket was loosened and the rules were downgraded to guidelines.

2.2. Emerging Crisis and the Fiscal Compact

However, all good things must come to an end and as the global financial markets collapsed following the bankruptcy of the Lehman Brothers in 2008, by late 2009 the Eurozone found itself in a sovereign debt crisis. At that time the Eurozone gross public debt approached 90% of gross domestic product (GDP) – "a level that is uncomfortably high, even if there are other advanced countries with similar levels of public debt".²⁹ The roots of the crisis are manifold and complementary, including, but not limited to, "excessive financial leverage and poor risk management, lenient fiscal policies and vulnerable sovereigns, divergent competitiveness positions and differing views over crisis

²⁵ P. Werner, *Report to the Council and the Commission on the Realization by Stages of Economic and Monetary Union in the Community*, 1970.

²⁶ P. de Schoutheete and S. Micossi, *On Political Union in Europe: the Changing Landscape of Decision-Making and Political Accountability*, CEPS Essay, 2013.

²⁷ A. Verdun and M. Heipertz, *Ruling Europe: The Politics of the Stability and Growth Pact*, Cambridge University Press, 2010.

²⁸ N. Nugent, *The Government and Politics of the European Union*, Palgrave Macmillan, 2010.

²⁹ M. Buti and N. Carnot, *The EMU Debt Crisis: Early Lessons and Reforms*, [in:] *Journal of Common Market Studies*, Vol. 50, Nr. 6, 2012.

management"³⁰. The SGP was originally designed specifically to prevent these things from happening, but clearly failed its purpose.

As a response, MS agreed to strengthen to regulatory package that managed the Eurozone's economies. First, MS upgraded the SGP with the 'Six-Pack' regulations in 2011 and again with the 'Two-Pack' regulations in 2013. Second, MS signed the intergovernmental Treaty on Stability, Coordination and Governance in the Economic and Monetary Union – better known as the Fiscal Compact – in 2013. Overall, these new initiatives aimed at strengthening coordination and surveillance in the Eurozone in order to prevent MS from yet again reaching risky levels of public debt and also to better harmonise national fiscal policies. The Fiscal Compact strengthens not only the preventive but also the corrective arm of EMU supervision. Particularly the creation of the European Semester would push in the direction of a revised and stronger EMU governance.

2.3. Aftershocks of the Crisis

However, while the Council's hold on EMU decision-making was somewhat diminished by the introduction of Reversed QMV in the Six-Pack – a particular accomplishment of the European Parliament – the Fiscal Compact remains an intergovernmental treaty and is consequently entirely subject to the will of the treaty masters. Moreover, the intergovernmental nature of the Compact adds significantly to the differentiated nature of the EU – and not in the temporary but the permanent way. Considering how all EU member states apart from the UK and Denmark are obliged to at a certain point in time introduce the euro as a currency, for example, it is rather odd that Denmark would have signed and ratified the Fiscal Compact while the Czech Republic opted out.

Nonetheless, the Fiscal Compact is widely agreed to have a very intruding impact on national economic, fiscal and budgetary policies. For example, in the context of the European Semester, the European Commission makes country-specific recommendations based on the economic priorities set by the Council – not national governments. The Commission then assesses the implementation of its recommendations, on the basis of which whether or not to accept the proposed national budget is decided upon by the Eurogroup – not national governments. As such, at no point are national governments free to decide independently from their euro-partners: not in the setting of the overall economic priorities, nor in the articulation and implementation of the Commission recommendations.

Although many would consider these strict measures necessary for the survival of the euro, the loss of sovereignty on behalf of national governments has sparked outrage with many among the disgruntled population, particularly in debt-stricken countries. After all, MS governments are to present their budgets to the Commission and the Eurozone finance ministers first, and only in a second phase to their own national parliaments. Moreover, on top of any political reservations, the Fiscal Compact has also been described a "legal monster" by prominent legal scholars.³¹ Hence, many both political and legal lessons can be learned from the Fiscal Compact saga, as – much like with the Star Wars saga – an unexpected sequel might still be in the making.

³⁰ M. Buti and N. Carnot, *The EMU Debt Crisis: Early Lessons and Reforms*, [in:] *Journal of Common Market Studies*, Vol. 50, Nr. 6, 2012.

³¹ A. Kocharov, *Another Legal Monster? An EUI Debate on the Fiscal Compact Treaty*, EUI Working Papers, 2012.

3. Legal Lessons To Be Learned

Although our proposal has the intention of thinking outside of the institutional box, it is instructive to take into account the specific debate surrounding the actual Fiscal Compact.³² If a Social Compact modelled after the Fiscal Compact would be concluded, some important lessons might be learned from discussions surrounding the latter.

3.1. Respect for EU Competences

An international treaty concluded between EU MS must respect the competences of the EU.³³ This means that in fields where the Union enjoys exclusive competences according to art. 3 TFEU, a 'compact' would be in violation of art. 2(1) TFEU. Due to the exclusive Union competence over monetary policy, the provisions of the Fiscal Compact could not and did not touch upon that field.

As regards a Social Compact, art. 4(2)(b) TFEU provides "social policy, for the aspects defined in this Treaty" to be a shared competence. To the extent that a Social Compact would touch upon aspects not defined in the TFEU, no specific limitation seems to be provided for in the TFEU.³⁴ Where the measures taken in a Social Compact would touch upon aspects of social policy defined in the TFEU, the MS can only "exercise their competence to the extent that the Union has not exercised its competence."³⁵ Since the inability or unwillingness of the EU to develop a real social policy is exactly why MS would opt for a Compact, these provisions will not likely hinder its adoption.

3.2. Delegation to EU Institutions

With a Social Compact aiming to add a new layer of integration to the existing EU structure, it seems desirable to use the existing institutional structure of the Union for the operationalization of the social measures. The alternative would be to create a Social Union apart from the EU, with its own Court, Commission and other bodies.

In the doctrinal debate about the Fiscal Compact, specific attention was paid to the delegation of tasks by an international treaty concluded outside of the EU framework to the EU institutions. In this respect, a distinction should be made between the delegation of tasks to the Court of Justice on the one hand, and the European Commission on the other hand. Although delegation of tasks to the European Parliament was limited, if not non-existent, under the Fiscal Compact, it is interesting to also explore the possibilities of delegation to this third European institution in the light of democratic legitimacy of the measures taken under the new Compact.³⁶

3.2.1. Delegation to the Court of Justice of the European Union

It is not easy to formulate a conclusion about the possibility of the delegation of tasks to the Court of Justice of the European Union, as much would depend on the precise content of a potential Social Compact. It is nevertheless clear that art. 273 TFEU poses a number of legal obstacles for CJEU jurisdiction.

³² Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, http://european-council.europa.eu/media/639235/st00tscg26_en12.pdf (12.02.2014) (hereafter: Fiscal Compact).

³³ S. Peers, *Towards a New Form of EU Law? The Use of EU Institutions outside the EU Legal Framework*, [in:] European Constitutional Law Review, vol. 9, 2013, p.48.

³⁴ See: art. 4(1) TEU.

³⁵ See: art. 2(2) TFEU.

³⁶ See for a more extensive disuccsion: J. Lievens, S. Van Hecke, S. Sottiaux & W. Wolfs, *A Social Compact for a Social Union?*, KU Leuven: Euroforum Paper, September 2014, pp. 8-11.

Three clear alternatives seem possible. A first alternative is the establishment of a separate Social Union Court. Second, the Social Compact could rely on national court jurisdiction. This is also part of the Fiscal Compact system, in so far as it obliges MS to introduce a constitutional balanced budget rule into their domestic legal system. This of course could never completely replace the harmonising role of a European court. A last alternative would be to simply change the European treaties in order to allow for CJEU jurisdiction over Social Compact matters.

The question remains if there is no alternative to art. 273 TFEU to confer jurisdiction to the CJEU over a treaty concluded outside of the EU system. This question seems to be part of the broader issue of whether delegation of tasks to EU institutions is possible in general. In what follows the potential delegation of tasks on the Commission will be considered. The same reasoning can be applied to a delegation to the CJEU.

3.2.2. Delegation to the European Commission

In *Pringle*, the CJEU's judgment on the ESM Treaty, the Luxembourg Court confirmed the possibility to delegate tasks to the EU institutions in a treaty concluded outside of the EU legislative framework.³⁷ However, this ESM Treaty cannot be placed on the same footing with the Fiscal Compact or a potential Social Compact, since delegation of tasks within the framework of the former was based on collective action of representatives of all MS.³⁸ The problem of a Social Compact lies exactly in the lack of unanimous support.

Piris points out that if MS wish to rely on EU institutions in a process of differentiated integration, they need the support of all MS, since EU institutions can be considered "common property" of the MS.³⁹ In a similar vein, Craig signals some serious concerns about the use of EU institutions without the proper consent of all the MS.⁴⁰ He nevertheless suggests that the use of EU institutions in the case of the Fiscal Compact might pass without problems since no explicit objection was formulated by the UK Prime Minister on the use of EU institutions.⁴¹ Although in theory unanimity might be required to confer extra powers upon EU institutions, in practice an abstention, or a lack of objection, would not preclude the use of EU institutions.⁴²

Ironically, where the conclusion of a Compact is meant to circumvent the unanimity requirement necessary for treaty change, unanimity seems still required within the Compact option. Although the lack of clear objections by the UK and the Czech Republic has allowed the Fiscal Compact to rely on EU institutions, it remains to be seen whether non-participating states will take a similar stance with respect to a Social Compact. It is not unthinkable that the non-participating MS would protest against

³⁷ CJEU 27 November 2012, *Pringle*, C-370/12.

³⁸ Opinion by: A.G. Kokott, 6 October 2012 in Case C-370/12, *Pringle*, §§172-175.

³⁹ See: J.C. Piris, *The Future of Europe: Towards a Two-Speed EU?*, Cambridge University Press 2012, p.65. *Contra* S. Peers, *Towards a New Form of EU Law? The Use of EU Institutions outside the EU Legal Framework*, [in:] *European Constitutional Law Review*, vol. 9, 2013, p.54; who derives from the Opinion of the Advocate-General in *Pringle* that possibly only the approval of the *participating* member states' representatives would be necessary.

⁴⁰ P. Craig, *The Stability, Coordination and Governance Treaty: Principle, Politics and Pragmatism*, [in:] *European Law Review*, Vol. 37, Nr. 3, 2012, pp.237-245. See in the same sense the British point of view expressed in House of Lords, European Union Committee, *The Euro Area Crisis*, 2012, §89.

⁴¹ P. Craig, *The Stability, Coordination and Governance Treaty: Principle, Politics and Pragmatism*, [in:] *European Law Review*, Vol. 37, Nr. 3, 2012, p.238. See: footnote 27, with referral to House of Lords, European Union Committee, *The Euro Area Crisis*, 2012, §89.

⁴² Compare with arts. 235(1) and 238(4) TFEU about the unanimity requirement within the European Council and the Council respectively.

the use of EU institutions, for instance because they might fear to be marginalised within the EU.⁴³ They might fear that in a multispeed Europe, only nationals from the 'core group', participating in all forms of integration, are eligible to be appointed as president of the European Parliament, the European Commission, the European Council and the Eurozone. It seems essential to take the wishes of non-participating MS into account so as to keep them involved⁴⁴ in developing paths of differentiated integration.⁴⁵

3.2.3. Delegation to the European Parliament

The same problem arises with respect to the involvement of the European Parliament. Roughly three options for parliamentary involvement within a context of differentiated integration appear to be available.⁴⁶ A first option is to rely on the European Parliament as a whole, including MEP's from non-participating MS. A second option would be to organise a special session of the European Parliament, involving only MEP's from participating MS. Not only is it unclear whether parliamentary involvement could be limited to the participating MS, since also nationals from non-participating MS are part of the European Parliament,⁴⁷ it also seems unlikely that non-participating MS would support the creation of a parliamentary session, excluding their MEP's.⁴⁸ Hence, the first two options clearly reflect the 'we are in this together'-lesson drawn above. Only the third option, i.e. the creation of a new parliamentary institution outside the existing EU framework, allows for excluding the involvement of non-participating MS.

In the Fiscal Compact, parliamentary involvement was limited to the attendance by three Members of the European Parliament of the final round of negotiations, and the involvement of national parliaments in the (national) ratification procedure.⁴⁹ Although article 13 of the Fiscal Compact refers to both the European Parliament and national parliaments, it does only rephrase the ambition of Title II of Protocol (No 1) on the role of national Parliaments in the European Union, to organise effective and regular inter-parliamentary cooperation with regard to budgetary policies. It limits the role of parliaments to 'discussing' the issues covered by the Fiscal Compact. This limitation should not, however, be automatically transposed to a potential Social Compact. As critical legal doctrine suggests, more parliamentary involvement is possible within the current framework.⁵⁰

⁴³ Although Steve Peers agrees that already in the case of the Fiscal Compact the UK could have legally challenged the delegation of tasks to EU institutions, he does not agree that the approval of all member states is required. (See: S. Peers, *Towards a New Form of EU Law? The Use of EU Institutions outside the EU Legal Framework*, [in:] *European Constitutional Law Review*, vol. 9, 2013, p.54).

⁴⁴ This is the case within the procedure of enhanced cooperation, which allows all members of the Council to participate in deliberations about enhanced cooperation policy (arts. 20(4) TEU and 330 TFEU).

⁴⁵ See: J.C. Piris, *The Future of Europe: Towards a Two-Speed EU?*, Cambridge University Press 2012, pp.140-142; B. Fox, *'Reform or We Leave EU,' Warns British Chancellor*, [in:] *EUobserver*, January 2014, <http://euobserver.com/news/122734>.

⁴⁶ See: I. Pernice, M. Wendel, L.S. Otto et al., *A Democratic Solution to the Crisis. Reform Steps towards a Democratically Based Economic and Financial Constitution for Europe*, Baden-Baden, Nomos, 2012, pp.122-123.

⁴⁷ A. Kocharov (ed.), *Another Legal Monster? An EUI Debate on the Fiscal Compact Treaty*, [in:] *European University Institute Working Papers*, Vol. 9, 2012, p.14.

⁴⁸ See: reaction of British conservatives to proposals of creating an economic and monetary union subcommittee within the European Parliament: *UK Conservatives Balk at Plans for Eurozone Parliament*, [in:] *EurActiv*, January 2014, <http://www.euractiv.com/uk-europe/uk-conservatives-balk-plans-euro-news-533273>.

⁴⁹ I. Pernice, M. Wendel, L.S. Otto et al., *A Democratic Solution to the Crisis. Reform Steps towards a Democratically Based Economic and Financial Constitution for Europe*, Baden-Baden, Nomos, 2012, pp.100-101.

⁵⁰ I. Pernice, M. Wendel, L.S. Otto et al., *A Democratic Solution to the Crisis. Reform Steps towards a Democratically Based Economic and Financial Constitution for Europe*, Baden-Baden, Nomos, 2012, p.119.

4. Political Lessons To Be Learned

In addition to the abovementioned legal lessons that can be learned from the Fiscal Compact saga, the Fiscal Compact also proves exemplary of the difficulties of a differentiated approach. Differentiation is undoubtedly a useful political tool, but can both adversely affect the efficacy of the legal framework and lead to an enforced de-democratisation.

4.1. Weakened Efficacy

Paul Craig notes that in terms of efficacy, the Fiscal Compact offers "an object lesson as to how tough talk at the outset can be watered down through successive changes to its wording."⁵¹ Although it might be too pessimistic to conclude from the experience with the Fiscal Compact that the intergovernmental bargaining process of detailed measures automatically results in the watering down of the content, it does offer an example of how this can be the case if the MS appropriate the rule making process, excluding both the European Parliament and the European Commission.⁵² Fabbrini goes even further, stating that intergovernmentalism decreases the rule of law.⁵³ To underpin this claim he refers to the lack of compliance with the Stability and Growth Pact.

However, things might be more nuanced. Steve Peers for example suggests that under certain conditions intergovernmentalism might be the best way to achieve supranational cooperation.⁵⁴ If MS are able to use the institutions of the European Union those can function as "ready-made 'motors of integration'". The MS will then be saved from having to build up parallel mechanisms "from scratch".

4.2. Democratic Deficits

The process of international bargaining might not only water down the content of the measures concerned, it also suffers from a lack of democratic legitimacy, excluding parliamentary involvement and dialogue with civil society.⁵⁵ International bargaining leads to decisions determined by political imperatives, leaving no room for political discussion at the parliamentary level.

The lack of democratic legitimacy is all the more striking if one realises that the alternative options would have allowed for more democratic support. In this regard, Fabbrini points out that the measures taken in the Fiscal Compact could also have been adopted through the enhanced cooperation procedure, which would have provided for a higher degree of democratic legitimacy.⁵⁶

⁵¹ P. Craig, *The Stability, Coordination and Governance Treaty: Principle, Politics and Pragmatism*, [in:] *European Law Review*, Vol. 37, Nr. 3, 2012, p.235.

⁵² See: I. Pernice, M. Wendel, L.S. Otto et al., *A Democratic Solution to the Crisis. Reform Steps towards a Democratically Based Economic and Financial Constitution for Europe*, Baden-Baden, Nomos, 2012, p.98, p.129.

⁵³ A. Kocharov (ed.), *Another Legal Monster? An EU Debate on the Fiscal Compact Treaty*, [in:] *European University Institute Working Papers*, Vol. 9, 2012, p.17.

⁵⁴ S. Peers, *Towards a New Form of EU Law? The Use of EU Institutions outside the EU Legal Framework*, [in:] *European Constitutional Law Review*, vol. 9, 2013, p.40.

⁵⁵ See: S. Peers, *Towards a New Form of EU Law? The Use of EU Institutions outside the EU Legal Framework*, [in:] *European Constitutional Law Review*, vol. 9, 2013, p.40; Editorial Comments, *Some thoughts concerning the Draft Treaty on a Reinforced Economic Union*, [in:] *Common Market Law Review*, vol. 49, Nr. 1, 2012 (49), p.9; I. Pernice, M. Wendel, L.S. Otto et al., *A Democratic Solution to the Crisis. Reform Steps towards a Democratically Based Economic and Financial Constitution for Europe*, Baden-Baden, Nomos, 2012, p.101, p.131, p.135; J. Habermas, *Zur Verfassung Europas – Ein Essay*, 2011, p.8.

⁵⁶ F. Fabbrini, *The Euro-Crisis and the Courts: Judicial Review and the Political Process in Comparative Perspective*, [in:] *Berkeley Journal of International Law*, Vol. 32, Nr.1, 2014, p.1, p.65.

Also a reform of the treaties by way of art. 48 TEU would imply a higher degree of parliamentary involvement, both by the European Parliament and the national parliaments.⁵⁷

As the foregoing shows, the second option of a Treaty amendment, affecting only certain MS ('the Schengen option') might be preferable from the point of view of efficiency and democratic legitimacy. Nevertheless, when this scenario would appear to be impossible, as was the case with the Fiscal Compact, a separate treaty may be concluded outside of the EU framework. The main advantage of this option seems to be of a symbolic nature. Although the support of the MS is still needed to rely on the EU institutions, this support can be given more subtly by abstaining from objecting, whereas a treaty change would require express consent. Nevertheless, it seems important to allow non-participating MS to remain involved in developments of differentiated integration.

Conclusion: What Model for a Social Union?

It is important to first consider the political differences between the conclusion of the Fiscal Compact and the potential adoption of a Social Compact. First, whereas the Fiscal Compact is merely a symbolic confirmation or a tightening version of existing EU law measures,⁵⁸ a Social Compact would substantively change the European constitutional order. By adding social policy objectives, it would add a whole new layer to the EU that is up to now rather economically focussed. A second difference might lie in the support of non-participating MS. Although the UK and the Czech Republic decided not to sign the Fiscal Compact Treaty, both countries were very much in favour of its conclusion, as they wanted the Euro area countries to tackle the structural problems underlying the EMU. By stabilizing the Eurozone, the Fiscal Compact was to the advantage of all MS, including the non-participating ones. This might be different with regard to a Social Compact, which is less of direct concern to non-participating MS. Furthermore it does not seem to be an unrealistic prophecy that non-participating MS would feel uncomfortable with the idea of being partly excluded from the decision-making table,⁵⁹ a problem to which we will come back later on. A last difference might be found in the events leading towards the conclusion of the Fiscal Compact. Without the heightening pressure from the markets and from "principal paymaster" Germany, the EU might have limited itself to the existing measures or to secondary EU law.⁶⁰

4.3. Advantages of a Differentiated Approach

4.4. Pitfalls of a Differentiated Approach

⁵⁷ I. Pernice, M. Wendel, L.S. Otto et al., *A Democratic Solution to the Crisis. Reform Steps towards a Democratically Based Economic and Financial Constitution for Europe*, Baden-Baden, Nomos, 2012, p.103, p.135.

⁵⁸ The Fiscal Compact does not seem to advance matters very much from what is determined in the Stability and Growth Pact, in art. 126(1) TFEU, in the so called six-pack and two-pack of EU legislation enacted in November 2011 and May 2013 (P. Craig, *The Stability, Coordination and Governance Treaty: Principle, Politics and Pragmatism*, [in:] *European Law Review*, Vol. 37, Nr. 3, 2012, p.234; I. Pernice, M. Wendel, L.S. Otto et al., *A Democratic Solution to the Crisis. Reform Steps towards a Democratically Based Economic and Financial Constitution for Europe*, Baden-Baden, Nomos, 2012, p.101).

⁵⁹ J.C. Piris, *The Future of Europe: Towards a Two-Speed EU?*, Cambridge University Press 2012, p. 63.

⁶⁰ P. Craig, *The Stability, Coordination and Governance Treaty: Principle, Politics and Pragmatism*, [in:] *European Law Review*, Vol. 37, Nr. 3, 2012, p.332.

1. Lessons to be learned from what we know about differentiated integration

Yet despite all the different concepts, the many models of differentiated integration can be sorted in three main categories divided along time, territory and function.⁶¹ The temporal dimension is captured mainly by those concepts relating to a two-speed, multi-speed, or 'vanguard' Europe. The principle idea underlying temporal differentiation is that not all MS have the capacity to submit themselves to the same rules at the same time. Hence, as a way to meet the limitations of these MS, a temporary exception is given to them, on the condition that they will in time live up to the same rules as the others. Policy that is temporally differentiation will thus be implemented "only by those member states immediately capable of so doing, and the subsequent implementation of the relevant policies by member states without the initial capacity as soon as they have it".⁶² Critical about temporal differentiation is that essentially the unitary principle of integration is not abandoned. All MS are still, in due time, obliged to submit themselves to the same right and obligations, and differentiation is

Table 1: Three Dimensions of Differentiated Integration

Dimension	Temporal Differentiation	Territorial Differentiation	Functional Differentiation
Definition	Differentiation that maintains common overall objectives, which MS are allowed to achieve in their own time according to their own capabilities. Differentiation is temporary as MS are subject to the same rights and obligations in due time.	Differentiation that separates between a hard core of MS and a periphery of lesser integrated states. Differentiation is permanent and takes place through various tiers of integration.	Differentiation that allows MS to pick and choose each policy area separately, with a minimum of common long-term objectives.
Main concepts	multi-speed, two-speed, vanguard	variable geometry, core Europe, Kerneuropa, directoire	Europe à la carte, pick-and-choose, opt-out

⁶¹ See: K. Dyson and A. Sepos, *Which Europe? The Politics of Differentiated Integration*, Palgrave Macmillan 2010; A. Stubb, *A Categorisation of Differentiated Integration*, [in:] *Journal of Common Market Studies*, Vol. 34, Nr. 2, 1996; A. Warleigh, *Flexible Integration: Which Model for European Integration?*, Sheffield Academic Press 2002.

⁶² A. Warleigh, *Flexible Integration: Which Model for European Integration?*, Sheffield Academic Press 2002, p.10.

Examples	OMC, accession transition, transposition periods	Schengen Area, enhanced cooperation, WEU, <u>Fiscal Compact</u>	derogations, opt-outs
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Source: based on Stubb 1996; own update

Yet the principle of temporal differentiation is standard practice and a "fundamental condition of the project of European integration".⁶³ Temporal differentiation is by definition only possible when new MS accede or when new policy is agreed upon. The best examples of temporal differentiation are the transition periods granted to new MS after accession. They are granted some time to implement the *acquis communautaire*, but it is by definition limited in time. Temporary derogations also exist in the more common day-to-day policy-making of the Union, e.g. with regards to the transposition of and compliance with new directives or the application of the Open Method of Coordination (OMC). The Union also has specific policy aimed at limiting these temporary derogations as much as possible, e.g. cohesion funds aimed at lesser developed economies to catch up.

This brings us to the other two dimensions of differentiation, territorial and functional, which, unlike the temporal dimension, accept the permanent nature of differentiation within the Union.

The territorial dimension of differentiation is captured best by the concentric circles approach, variable geometry, core Europe or *directoire*. The dimension is aptly described by Stubb, who defines it as "the mode of differentiated integration which admits to unattainable differences within the main integrative structure by allowing permanent or irreversible separation between a core of countries and lesser developed integrative units".⁶⁴ This thus creates a layered or concentric model of integration with a hard core of MS pursuing deeper integration, often built around the Franco-German axis. De Neve explained this through his metaphor of the 'European Onion', with an inner core that drives deeper integration and keeps the whole together.⁶⁵ This idea was put into the treaties by way of the procedure for enhanced cooperation.⁶⁶ This procedure allows a small group of MS to cooperate more closely "under the auspices of the Union, through its institutions and procedures, without having to abandon the legal framework of the EU or to restrict the scope of application of primary law".⁶⁷

⁶³ K. Goetz, *The Temporal Dimension*, [in:] *Which Europe? The Politics of Differentiated Integration*, (eds.) K. Dyson and A. Sepos, Palgrave Macmillan 2010, p.79.

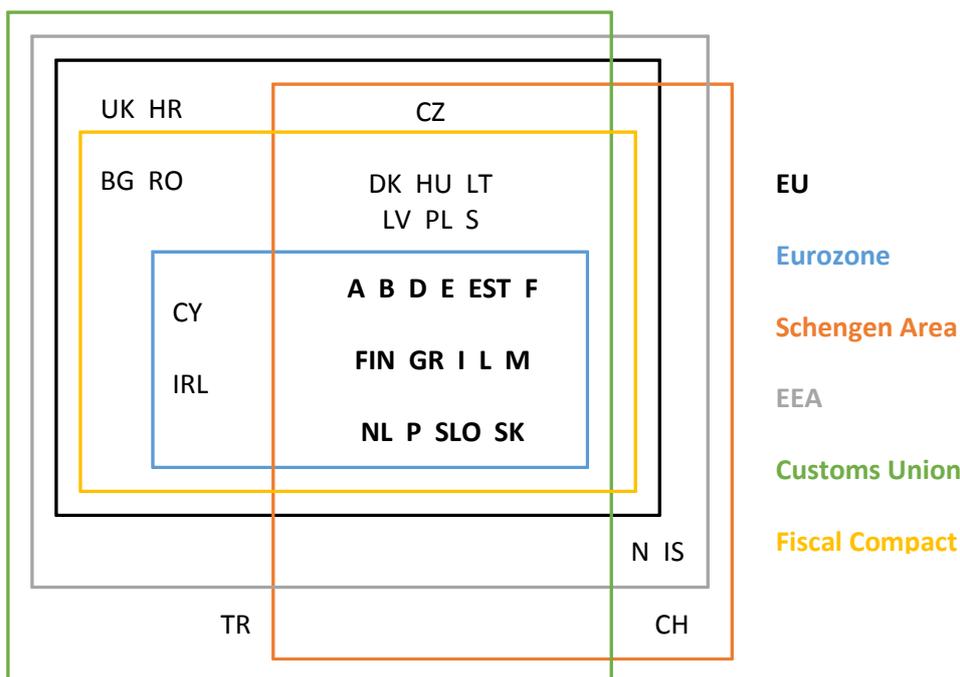
⁶⁴ A. Stubb, *A Categorisation of Differentiated Integration*, [in:] *Journal of Common Market Studies*, Vol. 34, Nr. 2, 1996, p.287.

⁶⁵ See: J. de Neve, *The European Onion: How Differentiated Integration is Reshaping the EU*, [in:] *Journal of European Integration*, Vol. 29, Nr. 4, 2007.

⁶⁶ See: art. 20 TEU and arts. 326-334 TFEU.

⁶⁷ M. Lamping, *Enhanced Cooperation: A Proper Approach to Market Integration in the Field of Unitary Patent Protection?*, [in:] *Max Planck Institute Online Papers*, 2011, p.3

Figure 1 – Differentiated Membership in the EU



Source: Rittberger, Leuffen and Schimmelfennig 2013, own update

However, the territorial dimension of differentiation cannot be put simply in terms of 'the core and the rest'. The participation of states in policy areas is highly differentiated both within and without the Union. As figure 1 shows, in some policy areas not all EU MS participate, while in others non-EU states do participate. Territorial differentiation thus has an internal as well as an external dimension, rendering to territorial borders of the EU rather "fuzzy" and making the identification of the "political territory" where EU rules apply a highly complex issue.⁶⁸ For example, in the area of the free movement of goods many non-EU states of the European Economic Area (EEA) have nonetheless enacted EU legislation, thereby effectively externally differentiating EU rules. Contrarily, on the area of defence, for example, EU MS highly internally differentiated through varied participation in the West-European Union (WEU). The varied participation to the EMU and the Fiscal Compact further complicates the internal territorial differentiation of the Union. The neat distinction between the various concentric circles of European integration is thus more theory than practice.

While temporal differentiation more or less maintains the unitary principle of integration 'in due time' and territorial differentiation essentially provides unity within different circles, the functional dimension of differentiation entirely abandons this unitary idea. Functional differentiation is best captured by the concepts of Europe à la carte, pick-and-choose and opt-outs. Europe à la carte basically means that MS can simply pick and choose for which policy area they wish to participate in integration. If MS do not want to participate, they can negotiate an opt-out from that policy area. For example, Denmark and the UK have obtained opt-outs from the EMU, and the UK and the Czech

⁶⁸ B. Rittberger, D. Leuffen, and F. Schimmelfennig, *Differentiated Integration: Explaining Variation in the European Union*, Palgrave Macmillan 2013, p.15.

Republic have one with regard to the Fiscal Compact. Although these opt-outs are permanent in nature, nothing prevents non-participating states from opting back in at any later stage.

Functional differentiation varies significantly from the temporal differentiation in the sense that functional differentiation does not assume any long-term overarching goals to be achieved, as "common objectives are sacrificed on the altar of national interests".⁶⁹ It is similar to territorial differentiation in that it also accepts the permanence of such differentiation and even advocates a core-periphery vision of the Union. However, unlike a Europe of concentric circles, an à la carte Europe differentiates between the core and the periphery "according to the policy issue, and not a formal separation of the EU into different and essentially permanent tiers of membership".⁷⁰

Of course, these three types and according models of differentiation cannot be entirely separated from each other. The EMU, for example, is differentiated along all three dimensions. It is territorially differentiated in that the EMU forms the 'hard core' of European integration. It is functionally differentiated in that some MS obtained opt-outs for some of the arrangements. And it is temporally differentiated in that all new MS are expected to introduce the euro when they are capable of doing so.

Conclusion

The previous section has explored whether the Fiscal Compact might be a model for our Social Union, therefore the reference in the title of the article to 'A Social Compact', but not without a number of serious legal considerations. Also at the political level, one should raise the question whether a Social Compact is feasible, whether it poses a window of opportunity that should not be missed. Among other things, as with EMU a difficult decision to make is establishing the criteria for participation (also in terms of the basic levels of convergence), which MS will be able to join and how many will be willing. One might end up with a Social Union of two or three MS. For obvious reasons, this is not what we have in mind, nor how social policies in the EU will easily and rapidly advance. Another issue to tackle is the question whether MS that do not wish to join have political reasons (policy preferences) or strategic reasons (non-participation avoids the costs without being totally excluded from the benefits) to do so. These problems will need to be explored further as well as the substance of such a Social Union.

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⁶⁹ A. Stubb, *A Categorisation of Differentiated Integration*, [in:] Journal of Common Market Studies, Vol. 34, Nr. 2, 1996, p.288.

⁷⁰ A. Warleigh, *Flexible Integration: Which Model for European Integration?*, Sheffield Academic Press 2002, p.11.

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