Future of Europe

Differentiation, not Disintegration

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This paper reflects on the notion of differentiated integration in the context of the future of Europe. It argues that differentiation is only acceptable as an instrument of 'unity in diversity' and within strict limits. All forms of differentiation that risk fragmenting the Union and its institutional framework should be excluded. In the field of external policies existing treaties and the recent jurisprudence of the European Court of Justice allow the Union to speak with one voice and to privilege unity over differentiation. As far as internal EU divides are concerned– from divisions over migration to those involving the rise of regional groups of countries—they are all transient and changeable and are not relevant subjects for differentiation. Finally, attempts to redefine the euro area as the new 'hard core' of European integration should be rejected, as they can only lead to the disintegration of the European project. Out of all the available legal techniques of differentiation, enhanced cooperation carries the lowest risk.

Wilfried Martens Centre for European Studies

Introduction

‘Renewal’, ‘reinvention’, ‘refoundation’, ‘restart’, ‘reset’, ‘renovation’—these are just a few of the words most frequently used to describe what the European integration process urgently needs. Words multiply, meanings are hazy and terms convey multiple messages. However, in the midst of the semantic inflation, certain basic ideas or directions seem to be emerging, and this points to the possibility of a limited area of consensus. Conceptual clarification is key to successfully making political decisions that may involve changes to the institutional and legal system of the EU.

Among the large number of words and concepts with multiple meanings, ‘differentiation’ is one that needs to be clarified with a view to reaching some degree of consensus. The current paper represents an attempt to provide such clarification. It is divided into four parts. The first illustrates the legitimacy and limits of differentiation as an instrument of ‘unity in diversity’. The second assesses the prospects for differentiation in the EU’s external action and areas of internal competence in light of recent developments and the debate on the future of Europe. The third part delves into the problematic notion of ‘Kerneuropa’ and the misguided idea that the euro area could constitute such a ‘Kern’. Conclusions follow in the fourth and final section.

Differentiation as an instrument of 'unity in diversity'

Differentiation has an established place in the European project. It has been around—to varying extents and in different forms—almost from the very beginning of the integration process. It has essentially been considered a useful device stemming from economic and political realities such as the differences in the conditions, interests, positions, ambitions and aspirations of individual member states. As a device or instrument, it has been used to resolve difficulties ensuing from the inherent diversity of the political entities—sovereign states—participating in an unprecedented historic process. This means, first and foremost, that it has never been and must never become a goal or constituting principle in itself. It has to remain an instrument that can be tolerated when it is made necessary by concrete situations that have to be resolved in order to promote the basic objectives and principles of the integration process. As a means, it should be transitional, a 'second-best solution' to dilemmas that cannot be solved otherwise, a stepping stone to finding permanent and generally accepted solutions.

While differentiation can be a useful device, it also carries very serious risks that could jeopardise the very objectives and principles it is supposed to promote. This is why this instrument has always been resorted to with extreme caution. Before adopting a specific form of differentiation, it has always been necessary to scrutinise it carefully, both the form and the content. As regards the various legal techniques of differentiation (special or transitional arrangements, opt-outs, enhanced cooperation or out-of-treaty legal instruments),[1] it has therefore been a generally recognised principle that preference is to be given to the technique which creates the least possible divergence in the system and minimises the risk of fragmentation.

This is why it has always been necessary to interpret differentiation in a restrictive manner. It is supposed to be limited in scope, both in duration and in its overall impact on the ongoing integration process. It has been necessary to exclude, both politically and legally, certain core areas from its application. These areas include policies falling under the exclusive competence of the EU (e.g. trade and competition), any acts or measures having an effect on the functioning of the single market, and anything that affects and possibly changes the institutional system. The purpose of differentiation is to promote the inclusion of member states based upon the basic principle of unity in diversity. It is not meant to exclude them. This is what gives it political legitimacy, but only within the framework of the treaties and under the conditions established by them.

[1] On the various techniques of differentiation, see S. Blockmans (ed.), *Differentiated Integration in the EU: From the Inside Looking Out,* Centre for European Policy Studies (Brussels, 2014).

In sum, differentiation is acceptable only as an instrument of 'unity in diversity'. All forms of differentiation that risk fragmenting the Union and its institutional framework should be excluded. In all fields where differentiated integration is now under consideration, it is from this perspective that we should deal with the question of what can and cannot be done.

Differentiation in the 'future of Europe' debate

If most of the above-mentioned, fairly well-known elements of differentiation are subject to broad agreement, why has differentiation recently become one of the most relevant and controversial issues pertaining to the renewal of European integration? The reason for this is complex and manifold. External and internal challenges have together brought about a fundamentally new situation, imposing unprecedented constraints on the Union and creating new risks and opportunities. Economic and geopolitical shifts, a more fragmented world order both in geopolitics and in international trade, devolution of power, re-emerging spheres of influence and the unprecedented challenge of migration all make it imperative for the Union to 'reinvent' itself at least in the field of external action. The basic question before the Union is how this 'reinvention'—most notably the strengthening of its external powers and capabilities—can be carried out in specific policy areas.

Common security and defence

All the above-mentioned constraints have been reinforced by recent developments. The first such development concerns new uncertainties about the nature of the US commitment to European defence in the framework of the Atlantic alliance: how unconditional is this commitment? The second centres on the urgent need to speed up the development of 'strategic autonomy' for Europe. The various areas of external action need different solutions, but the need for substantial reinforcement and for the creation of the necessary instrument for this reinforcement is absolute in nature, since it applies equally to foreign policy, security and defence, and the other areas of external action (common commercial policy, development cooperation and humanitarian aid).

There is, however, another need that has this same absolute character: the need for full compliance with the treaties. Article 329 of the Treaty on the Functioning of the European Union (TFEU) clearly lays down the limits of enhanced cooperation, excluding from it the fields of exclusive competence and the common foreign and security policy. Although Article 329 only deals with enhanced cooperation, it will be clear that any more excessive technique of differentiation is a priori excluded in all these policy areas.

Security and defence policy, however, is a special area where the TFEU itself provides for special forms of differentiation in the sense that a group of member states executes certain tasks entrusted to it by the Council (art. 42(5)) or establishes permanent structured cooperation (the conditions and modalities of which are governed by art. 46).

Despite the special treatment given to the common security and defence policy, it is quite clear that the special provisions are integral parts of this policy. The purpose of the provisions in Paragraphs 5 and 6 of Article 42 is not to create or increase differences but, quite to the contrary, to strengthen the external policies and operational capacities in this vital area by widening and diversifying the resources and forms of action that can be taken.

The right response to the new challenges and opportunities in the external area is not differentiation—whatever form it might take—but policies and actions that foster unity. As for security and defence, the basic objective must be to progressively establish strategic autonomy for Europe in the framework of the transatlantic alliance. The meaning of this autonomy needs further clarification and more precise definition with regard to policies, responsibilities and capabilities. The first important step in the right direction has already been taken. The European Commission's *Reflection Paper on the Future of European Defence*[2] is a good basis for further work, provided the ambitions do not stop with Scenario A or B—Security and Defence Cooperation and Shared Security and Defence, respectively—but unwaveringly aim for Scenario C, the Common Defence and Security option. Professor Jolyon Howorth's contribution to the Martens Centre's Future of Europe series also provides excellent food for thought, making the case for 'a true European Defence Union'.[3]

If the EU member states genuinely want to confront the new and rapidly changing threats coming from without and if they realise that the 'peace dividend'—while averting the risk of internal conflicts—does not protect them from external threats, they will have to take much greater responsibility for their own security. Article 42 of the Treaty on European Union must be fully implemented, and a common defence policy must be established that leads to a common defence with all the necessary structures and capabilities. At the same time, as the *Reflection Paper on the Future of European Defence* underlines, the 'protection of Europe would become a mutually reinforcing responsibility of the EU and NATO', and cooperation between the EU and NATO[4] should be raised to a qualitatively higher level.

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[2] European Commission, *Reflection Paper* on the Futu*re of European Defence* (June 2017), accessed at https://ec.europa.eu/commission/sites/beta-political/files/reflection-paper-defence_en.pdf on 10 September 2017.

[3] J. Howorth, *For a True European Defence Union*, Wilfried Martens Centre for European Studies, Future of Europe Series (Brussels, 2017), accessed at https://www.martenscentre.eu/sites/default/files/publication-files/european-deefence-union-future-europe.pdf on 10 December 2017.

[4] European Commission, *Reflection Paper on the Future of European Defence,*14.

Common commercial policy

It is not only in the field of security and defence that the growing external challenges and opportunities, and the need to respond to them, require reinforcing the political and legal instruments that belong to the Union's external action. Opinion 2/15 of the Court of Justice of the European Union on the free trade agreement with Singapore should be considered the most important milestone on the road to strengthening the common commercial policy.[5] That this policy area falls under the exclusive competence of the EU is made clear both by the primary legislation and by the ever broader interpretation of this legislation in the case law of the Court of Justice. The importance of Opinion 2/15 can hardly be overestimated. From public procurement to intellectual property rights, from rules on competition to sustainable development (including environmental protection and the social protection of workers) as well as to foreign direct investments, the commitments contained in free trade agreements with third countries fall within the field of common commercial policy—which, again, falls within the exclusive competence of the Union. That a similar conclusion applies to transportation (by railway, road and inland waterways) is shown by Article 3(2) of the TFEU,[6] that is, by the principle of the fundamental parallelism between internal and external competences.

The court found only two commitments that fall outside the EU's exclusive competence, where the Union can only conclude an agreement together with the member states. One is the protection of non-direct foreign investments,[7] which are also covered by the envisaged agreement with Singapore but are not direct foreign investments within the meaning of Article 207(1) of the TFEU.[8] The other is the regime for the settlement of investor–state disputes, which—in the view of the Court—removes disputes from the jurisdiction of the courts of the member states without their consent. Therefore, the approval of the relevant provision does not fall within the exclusive competence of the Union.

In a strictly procedural sense, the opinion is in favour of the Council, as agreements falling within these two fields of competence shared by the Union and its member states cannot be concluded exclusively by the Union. In reality the opinion gives a fundamentally important push to strengthening the external action of the Union. The legal arguments of the opinion in support of exclusive Union competence in various areas will be subject to much scholarly discussion. At the same time it is quite clear that the court stepped into an economic and geopolitical situation where the instruments of external action need

[5] Case C-2/15, *Opinion 2/15 of the Court (Full Court)* [16 May 2017] ECLI:EU:C:2017:376.

[6] 'The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope.'

[7] This includes real-estate investments or 'portfolio' investments where the investor acquiring company securities has no influence over the management or control of the undertaking.

substantial reinforcement within the framework of the treaties. This is exactly what has resulted from the opinion. By intelligently adapting the scope of the 'new generation' free trade agreements to its conclusions on the boundaries of exclusive competence, the court ensured that future agreements will not need to be ratified by 38 national and regional parliaments, and that the Union will once again become a powerful player (and negotiator) in the field of trade relations. This appropriately reflects the EU's economic weight in the global order, reinforces the most effective and successful device belonging to its external action and enables the Union to benefit from the opportunities offered by recent developments in the international trading system, notably the measures that the new US administration has taken or is likely to take. The new external economic and geopolitical opportunities are now coupled with a strong internal legal instrument, and altogether they will significantly strengthen the Union's external action.

Why is this matter relevant for the question of differentiation? There are several reasons. The external constraints and opportunities are fostering stronger external action, and stronger external action supports a more cohesive, more united Union. In the field of external policies—foreign policy, security and defence policy, or common commercial policy—the Union must speak with one voice if it is to enforce its interests successfully and project its economic and political power.

At the same time, the treaties (art. 3(2) TFEU[9]) and the settled case law of the Court of Justice (Case C-22/70, Commission v. Council; and a series of subsequent judgements and opinions) establish a clear link between internal and external competence. The basic principle is that 'when the European Union has thus exercised its internal competence, it must, in parallel, have exclusive external competence in order to prevent the Member States from entering into international commitments that could affect those common rules or alter their scope' (Opinion 2/15, para. 233). Excessive differentiation in areas of internal competence would therefore have an impact upon external competence as well and might weaken the Union's external action, and thus its economic weight and political clout. Here is one important barrier that can be employed to prevent excessive differentiation, whatever specific means are resorted to. Differentiation must not, directly or indirectly, adversely affect the Union's external action.

[8] 'The common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of t ariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action.'

[9] See n. 6.

Internal challenges: real and perceived divides

The current internal challenges to European integration are manifold, overlapping and, in some respects, unprecedented. The future of Europe will be decided by the way in which these challenges are approached and tackled: by what vision and principles form the basis of the response and what institutional and legal techniques are brought to bear. Different types of divides have emerged within the integration structure, and the centrifugal forces entailed by these divisions are intensifying. This is what now gives special importance to the role, objectives, limits and techniques of differentiation. This is also why the scope of differentiation and the way it is implemented will have a major impact on the path to be followed. It can be a useful device, helping to keep everyone on board, facilitating progress in special situations and bringing more flexibility into the system while fully respecting the existing institutional and legal framework. It can also be a toxic means of progressively dismantling the existing structure, ultimately leading to disintegration. The stakes as well as the risks are, therefore, extremely high.

The divides referred to above are of different kinds but are interrelated. Geography is one factor (North–South, East–West), but it is combined with factors related to the level of economic development and to the economic and fiscal policies involved. None of the geographic divisions are carved in stone. Social and economic policies change, as do the governments that set them. Differences between the policies of various groups of member states may increase or decrease depending upon the changing economic, social and political conditions.

It is important not to equate geographic divisions with the various schemes of regional cooperation. This holds for, inter alia, the Benelux Union, the Nordic countries, the Baltics and the Visegrád Four, even though all these alliances also have a geographic dimension. They essentially promote the interests of the groups' members in those areas where they have the same or similar interests based upon historical, geographic, economic, geopolitical or security-related factors. Despite suspicions raised notably regarding the Visegrád Four, all these regional alliances should be considered useful building blocks of the overall European project, facilitating the working out of common positions among all member states. In any case, the principle of equal treatment should apply irrespectively of whether the cooperating states are big or small.

As for the Visegrád Four, the argument is sometimes put forward that the only, or at least the most important, glue holding this alliance together is the common stance on migration. This position deviates from the mainstream and thereby obstructs the establishment and reinforcement of a common migration and refugee policy. While the reality of the matter is much more complex, it has to be clearly seen that to the extent migration has security aspects it remains the sole responsibility of each member state (art. 4(2) TFEU). Those aspects of the migration issue that fall outside of the scope of the common security and defence policy and are not subject to other common policies belong to the

national competence of member states and consequently do not raise the need for or possibility of the application of any form of differentiation.[10] Without going into detail, the conclusion can be drawn that migration policy—as distinct from the treatment of refugees—is not an area to which differentiation is relevant.

On top of the geographical divisions that have been identified, one finds in the EU—and indeed, in the Western world as a whole—a more complex ideological divide, though one that is generally oversimplified and exaggerated. The dividing line itself is blurred and not easy to trace. However, the trendiest line of separation—ardently put forward by both 'sides'—is drawn between the isolationist, nativist, nationalist 'populists', on the one hand, and the 'politically correct', internationalist, globalist, progressive, elitist liberals, on the other. The problem with this artificial distinction is not only that it leads to mutual stigmatisations and insinuations and to a battle of words, the meanings of which are unclear. The problem, rather, is that it makes it impossible for a significant number of people to choose between the two sides. Where do those fit in who believe in both a national and a European collective identity rooted in historical and cultural legacies; respect traditional values; and at the same time fervently support an open and free market economy, global competition, and free, fair and rule-based multilateral trade? The divides may be real, but they are all vastly overblown and are perceived to be much deeper than they really are.

The spectre of 'Kerneuropa'

'Two-speed', 'multi-speed', 'two-tier', 'multi-tier', 'variable geometry', 'concentric circles': all these terms are frequently used in the debate on differentiated integration. Whatever the words used and whatever the meanings attributed to them, differentiation need not and should not produce any of the realities they refer to. Behind all these concepts there is a growing political ambition to react to the multiple divides and to the crisis by introducing a qualitatively new level of differentiation. The idea is to introduce a new two-tier or multi-tier Union and to make all the necessary institutional changes, including a substantial overhaul of the treaties. These concepts are not new, but they have been rejuvenated and are now being pushed to the fore with multiplied force. The history of these proposals goes back several decades. It includes Schäuble-Lamers's 'Kerneuropa' proposal

[10] The exception to this would be a situation where certain member states decided to opt for an out-of-treaty solution, that is, to enter into separate international treaties. This would raise very serious legal and political issues.

in 1994, Chirac's idea of 'pioneer groups' in 2000, Fisher's proposal in 2000 to develop a 'centre of gravity' and Delors's 2001 proposal for an 'avant-garde'.[11] All of these ideas were rooted in the notion of returning to the 'golden age' of a small group of countries and in this way to reduce the dilution of the integration project that the upcoming Eastern enlargement was expected to produce. It was assumed that the increase in the number of countries involved in European integration would make the continuation of this process more difficult, if not stall it altogether. Another unspoken assumption seems to have been that the 'new' member states, having long suffered under the Soviet yoke, would be more reluctant to share sovereignty at the European level than the 'old' member states had been. All these proposals ultimately failed to bring about any significant political decisions and institutional changes. Instead, the Constitutional Treaty ended with a reasonable and well-balanced outcome, which was essentially taken over by the Treaty of Lisbon.

The brief history of these Kerneuropa projects fortunately makes the success of present efforts in the same direction more than doubtful. But why did all these radical proposals eventually fail, or at best become reduced to generally accepted forms of enhanced cooperation? One reason is that some of the most decisive blows to the advancement of European integration came from the core. For example, it was two 'avant-garde', 'hard-core', 'Kerneuropa' founding member states that rejected by referendum the treaty that aimed to establish a stable constitutional framework for the integration project. Another reason is that the divides, whether real or perceived (and overblown), are not carved in stone. They are temporary in nature and subject to short-, medium- or long-term changes arising from internal and external developments. Differences in the levels of member states' economic development are not permanent, and the same holds for economic philosophies and fiscal policies. Member states enjoy different growth rates, and policies change even when governments do not. Even cultural differences have been modified by time throughout European history. The divides are not only temporary, but also manifold and of differing kinds. There is no single economic, political or geographic dividing line. Accordingly, the existing differentiation schemes constitute different configurations that cannot be described as a single fixed-boundary division, whatever word is now used to designate such a structure. Some of the perceived divides are based on deep-rooted preconceptions. Ignorance, lack of trust, and superiority and inferiority complexes all contribute to the recurring advocacy of the idea of 'Kerneuropa'.

[11] T. Chopin and C. Lequesne, 'Differentiation as a Double-Edged Sword: Member States' Practices and Brexit', *International Affairs* 92/3 (2016), 531–45.

The Eastern enlargement—a process whose proper name is 'the Reunification of Europe'—was no doubt a factor in the revival of the old dream of bringing back the good old times when we could sit around a much smaller table because fewer countries were involved in European integration. Then came the sequence of multiple and overlapping crises. Their economic and political consequences are well-known, but the crises had nothing to do with the Eastern enlargement.

Still, that the reunification of Europe is to blame for the difficulties of the integration process remains a widely accepted theory, albeit one that cannot be voiced openly in respectable European circles. In reality, it is only a convenient excuse.

While the mood has improved recently, the old–new panacea of establishing a hard core seems to have growing political support. Instead of the variety of words used for the idea of (re)establishing Kerneuropa, a single expression should be used: 'fragmentation', the progressive dismantling and eventual disintegration of the whole project.

The eurozone is not the *Kern*

The focal point of the most recent Kerneuropa theories and of the political vision based upon them is, of course, the euro area. Deepening and completing the Economic and Monetary Union (EMU) is an objective shared by all, including the non-euro countries. The question is whether this objective can be achieved within the framework of the treaties or whether they would have to be amended to make way for the proposed institutional changes. How the economic, political and legal consequences of these developments will be tackled will have a decisive impact on the future of European integration.

Strengthening the euro and completing the EMU are interests shared by all 27 member states. However, if certain basic conditions are not met, this objective will not be accomplished. Quite to the contrary, the whole structure will be weakened and dismantled. The conditions are well known. They have frequently been referred to and reconfirmed not only by the member states with derogation, but also in important documents, such as the Commission's *Reflection Paper on the Deepening of the Economic and Monetary Union*.[12] The first condition is that the EMU and its completion must remain open to all EU member states. The second is that the integrity of the single market must be preserved.

[12] European Commission, *Reflection Paper on the Deepening of the Economic and Monetary Union,* COM (2017) 291 (21 May), accessed at https://ec.europa.eu/commission/sites/beta-political/files/reflection-paper-emu_en.pdf on 10 September 2017.

A further condition should be that the measures needed to complete the EMU must not create permanent institutional structures separate from the institutional system of the EU as a whole. Duplicating the system by creating parallel permanent institutions would go against the first condition (the openness of EMU), increase the much (and rightly) criticised complexity of the EMU and aggravate the lack of transparency and accountability. All the steps towards completing the EMU—whether in the first or the second of the phases envisaged in the Commission's *Reflection Paper on the Deepening of the Economic and Monetary Union*—should be carried out within the existing framework of treaties. But this is not the primary issue. Much more important is the need to refrain from cutting the overall structure in half; dismantling the unity of the system; and, ultimately, disrupting the functioning of the single market and thereby also violating the second basic condition set forth in the Commission's Paper.

The temporary and shifting nature of the divides is shared by the euro-ins/euro-outs division. The relationship between the euro area and the other member states is continuously changing both in numbers and in economic weight. After Brexit 85% of the EU's GDP will be produced by the euro area, and only one of the member states will have a permanent opt-out—all the others are legally obliged to join. This further strengthening of the euro area will likely raise the question of the democratic legitimacy of the currency area and all the institutional and legal issues regarding the relationship between the euro area and the EU. Whatever the final outcome of this process, the euro area cannot be considered a kind of hard core. Quite to the contrary, the euro area will have to be identified more and more with the Union as such, and the necessary legal conclusions will have to be drawn. This was very clearly stated by Commission President Juncker in his 2017 State of the Union Speech.[13] This, however, is a story for tomorrow. At present the main task is to preserve the unity of the Union, including that of the single market and of the institutional system.

[13] J.–C. Juncker, 'President Jean-Claude Juncker's State of the Union Address 2017', speech made at the European Parliament in Brussels on 13 September 2017, SPEECH/17/3165 (19 February 2018), accessed at http://europa.eu/rapid/press-release_SPEECH-17-3165_en.htm on 15 September 2017.

Conclusions

1. The concept of differentiation can only be analysed in the general context of the European integration project. The renewal and strengthening of the project needs a long-term vision that takes due account of the external and internal challenges and opportunities.
2. Despite the various divides, the internal cohesion of the 27 member states has been increasing due to external threats and constraints, as well as the 'Brexit glue'. This is creating a better mood and is improving the chances of finding a basic consensus on the long-term vision.
3. What is required is a vision for the future of the EU that is based on universal values but also on the European cultural heritage and identity. This vision must become the foundation of a permanent constitutional framework that completes the supranational institutional structure. This framework must respect the areas of national competence and the principle of subsidiarity.
4. A stable constitutional framework cannot dispense with a reasonable degree of flexibility. This is bound to involve some form of differentiation among the member states. The techniques for this differentiation must be selected, scrutinised and shaped with utmost care and caution, given the high stakes and risks involved.
5. Out of the existing techniques of differentiation, preference must be given to those that carry the lowest risk of fragmenting the structure. This excludes the possibility of developing a two- or multi-tier EU, which would have a lasting fragmented structure.
6. It is the legal device of enhanced cooperation that carries the lowest risk, as it does not create across-the-board divides between different groups of member states participating in various enhanced cooperation schemes. Any other technique of differentiation would likely raise more general and persisting barriers between member states. In any case the most undesirable form of differentiation would be an 'out-of-treaty' instrument resorted to by a group of member states.
7. Limits to and conditions for enhanced cooperation must be strictly interpreted, especially with a view to preserving the unity of the single market. The risk of triggering a negative spiral of disintegration needs to be averted.
8. Differentiation does not have anything to do with the existing or future regional cooperative alliances, such as the Benelux Union, the Baltics, the Nordic countries and the Visegrád Four. These alliances serve to promote and facilitate cooperation among member states. They do not provide criteria for any form of differentiation.

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Credits

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