

# Decisions Concerning the 'Opt-Out' as an Instrument for Protecting National Interests

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## Introduction

Various aspects of European integration are a long-term dominant theme in European political science. One of the relatively new areas of problems, which gradually gets to the forefront of interest of academic scholars, is the flexible or differentiated integration<sup>2</sup> as one of the optional models for further intensification of the European integration process. Contemporary literature shows that the problem can be studied from three theoretical approaches, legal, politological and economic.

The main objective of this study is an explanation of the main theoretical principles and models of flexible/differentiated integration and their place in the historical development of the EU on the basis of political science. The study is mainly a historical and politological analysis and synthesis of the development of Europe's integration viewed from the aspect of differentiated and flexible integration. On this basis we want to define the so-called wide and narrow conceptions of differentiated and flexible integration, including its partial models, while paying special attention to the theoretical model of the 'opt-out' decision.

The study is divided into four principle parts. First we shall deal with the theory of flexible/differentiated integration, next comes a short historical account of the different approaches by European politicians and academics to the issue of flexible/differentiated integration. The third part will focus on the principle theoretical models of differentiated integration and in the subsequent, fourth chapter we shall concentrate on a specific type of differentiated integration, the decision to 'opt out'.

As was said above, this is a relatively recent phenomenon in the research in European integration, but several general studies and a few minor studies from the 1970s and 1980s

have already discussed the issues, though only marginally. (Dahrendorf 1979, Wallace–Wallace–Webb 1983, Wallace–Ridley 1984, Ehlermann 1984) Differentiated integration and flexibility only become a major topic in professional literature in the first half of the 1990s, in connection with the publication of the CDU/CSU proposal (1994) and in particular when it entered the primary union law. (Ehlermann 1995, Wallace–Wallace 1995, Schutz 1999, Lynch – Neuwajl – Rees 2000, de Búrca–Scott 2000, Stubb 2002, Warleigh 2002, Kölliker 2006 and several more)

Czech literature has thus far been dealing with this theme only marginally. However, an extensive study by Ivo Šlosarčík and David Král (2004) as well as a few minor articles by the former author (2002, 2004) and by Adéla Kadlecová (2006)<sup>3</sup> should be mentioned. Most of these texts are more or less only surveys and do not come forward with any new conclusions or proposals. It is of some interest that I. Šlosarčík (2002) and A. Kadlecová (2006) widely differ in their understanding of the fundamental categories of differentiated integration.<sup>4</sup>

The present paper is merely a preliminary attempt at defining some principle features and categories of the theory of flexible/differentiated integration, with focus on the opt-out decision. For this reason, many views presented by the author may be debatable and he only hopes that they will lead to a professional discussion in this country as well as abroad.

## 1 The Theory of Flexible and Differentiated Integration

Methodologically, it is first necessary to define this term and its real content. Political discussions in the middle of the 1990s clearly showed that many top political representatives, members of staffs of European institutions and European deputies often failed to understand the vital difference between the fundamental terms of flexible and differentiated integration. A classical example is the mixing of the terms of multi-speed integration and variable geometry, in the CDU/CSU proposal of September 1994, these are, as we are going to demonstrate, two completely different concepts. Likewise, A. Stubb points out the ignorant discussion in the European Parliament (28 Sept. 1994), responding to French and British attitudes (Balladour, Major) to differentiated and flexible integration. (Stubb 1996: 284)

Before we define these integration concepts, we should define the wide and the narrow conceptions of differentiated and flexible integration. Most specialists dealing with this issue usually accept the narrow conception, i.e., they restrict themselves to the enforcement of national interests by various methods of differentiated or flexible integration only from the aspect of EU member countries. A special group within the EU is comprised of the member countries for which various transitional periods are available or the measures are applied against them (e.g., restrictions on movement of the workforce), which put them into a category of not-full members of the EU (especially the ten countries after the eastern extension, including newly admitted Bulgaria and Romania).

This problem, however, has another, wider dimension, which means that European integration theories should not apply to EU members only but should count for the countries that in the past decades considered joining or even repeatedly attempted to join the EU

(Great Britain, Eire, Denmark and Norway). A special category of non-member countries is for the associated candidate countries and European countries that are in various ways and on various levels linked to the legal, institutional, security and economic system of the EU. (Kölliker 2006: 51) The meanings of the terms flexibility and differentiation are thus much wider than may appear at first sight. European integration theories using the differentiation and flexibility models should be expanded by these categories of non-member and candidate countries.

Modern politological, legal and economic literatures, in addition to the terms flexibility or differentiated integration, introduce a few other terms. Numerous authors vie with one another in the use of such terms as: two-speed, multi-speed, step-by-step, graduated integration, concentric circles, opt-in, opt-up, opt-out, opt-down, two-tier, multi-tier, swing wing, avant-garde, multi-track, hard core, kern Europa, harter kern, pick and choose, à la carte, variable geometry, etc. (Stubb 1996: 283–284) Many of these terms represent different concepts and analytical models of flexible, differentiated integration or closer cooperation, various forms of integration, differ in their content or only suggest a method or its result and are based on such variables as time, space and content of cooperation.

One of the most systematic models of flexible and differentiated integration was developed by Alexander Stubb in his paper *'A Categorization of Differentiated Integration'* (1996), where he tried to classify and distinguish all the known models and manners of differentiated integration, using three principle categories: time, space and area of cooperation. This classification then underwent a detailed politological analysis in one of the most important books on this issue, *'Negotiating Flexibility in the European Union, Amsterdam, Nice and Beyond'*, published in 2002. Using the three aspects, A. Stubb distinguishes the multi-speed model (time), the model of variable geometry (space) and the model a la carte (area of cooperation). (Stubb 2002: 45–55)

Within the multi-speed model the shared integration objectives are determined by a group of member countries, known as the Union core. They meet certain socio-economic criteria and have the political will to advance in agreed spheres of policy faster than the rest, while it is assumed that countries that are not part of the core will, in due time, join the policy. Thus, the main variable here is the category of time.

The length of this transitory period is usually individual and often depends on the ability of a particular country to meet the general criteria. In general it holds that all countries have the same goals and integration policy on which they agree, though the time of reaching the goal may differ. The Economic and Currency Union (e.g., the ways of admitting Greece and the eastern countries)<sup>5</sup> or, e.g., some transitional periods and access treaties are classic examples. (Stubb 2002: 32)

The model of variable geometry makes possible permanent differences in various areas of cooperation and Union policy between the integration core and the less integrated countries, sometimes seen as the EU periphery. The integration core wants to achieve a maximum intensity of interlinking, while from this core toward the periphery the level and intensity of cooperation gradually decreases.

Between the inner core and the outer borderland of the integrating space, various coalitions arise, according to areas of cooperation. Unlike the multi-speed model it is reckoned

with permanent differentiation of the status of each country, depending on the degree of integration, while it is admitted that some countries will never achieve the capacity of joining the core. As a classical example, the West European Union<sup>6</sup>, in whose activity some member countries (Sweden, Austria, Finland, Denmark, Eire) never took part, due to their prolonged policy of neutrality. This model included the Schengen system before its inclusion in the Treaty of Amsterdam and other European projects (Airbus, Ariane ESA, JET EUREKA, Eurocorps, EUROFOR, EUROMARFOR). (Stubb 2002: 32) In this category one can add the newly included neighborhood policy, which offers various options for the non-member states, though full EU membership is practically out of question.

The so-called a la carte model assumes cooperation of member countries according to strictly defined, relatively narrow, common rules, representing a kind of smallest common denominator, within which the homogenous integration proceeds. In other spheres of cooperation the member countries can behave according to their interests and needs. The a la carte model then represents a rather wide list of spheres of cooperation and the member countries decide according to their national interests whether they will take part or not. The opt-out in a particular sphere of cooperation need not be permanent and does not depend on meeting some objective conditions. The member country can at any time, according to its political will, join a particular area of cooperation.

A classical example is Great Britain's lack of interest to take part in social policy while the Conservative Party ran the country. When the Labour Party under Tony Blair came to power, the British government signed the Social Charter. Other examples include the opt-out of Britain and Denmark in the Currency Union, Britain, Denmark and Eire in the Schengen system, the exception for Denmark in European defense policy, etc.

The criteria of A. Stubb enable making a table in which the principle differences between the three models can be seen:

Table 1 – The criteria of A. Stubb

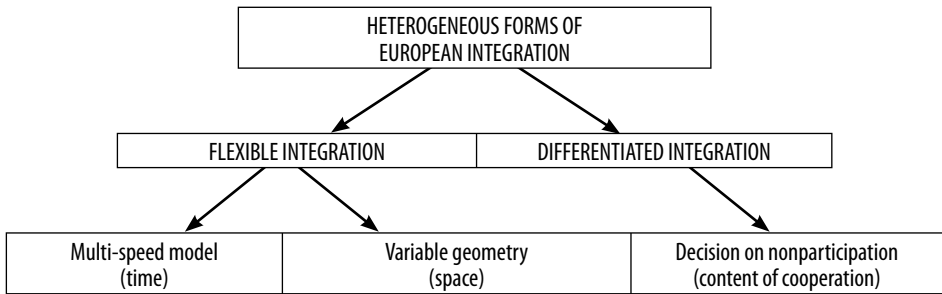
	The multi-speed model	The variable geometry model	The a la carte model
Participation	All member countries	At least 8 member countries	Usually individual member countries
Place of acception	Usually intergovernmental conference, sometimes within the EU structures	Decision according to the SE rulings	Usually inter-governmental conference, sometimes within the common decision-taking in the Union, the exception being constructive absence in the decision about the 2nd pillar
Decision	Unanimous	Qualified majority	Unanimous
Budget	Union budget	Funded by member countries, administration from the budget, after unanimous consent, EU budget can be used	Funded by member countries, administration from the budget, after unanimous consent, EU budget can be used
Community law	Within <i>acquis</i>	Outside <i>acquis</i> <sup>7</sup>	Breaking of <i>acquis</i> <sup>8</sup>
Goals	Common goals preserved	Outside common goals	Breaking of common goals

Source: Stubb 2002: 45–55

The greatest methodological problems are obviously connected with precise distinction between the multi-speed model and the à la carte model. In our view the subdivision of particular cases into these two categories must be primarily based on the character of the actual decision. In the first case there are usually objective barriers, preventing some member countries from achieving full integration in a particular area of cooperation, i.e., there is no political will there to do so (national interest). On the other hand, in the a la carte model it is usually a subjective attitude of the political elites of the member country at a particular period. This elite usually decides to use the opt-out model in order to protect national interests but the government can change its political decision and later join an area of cooperation.

Literature dealing with integration theories usually presents two principle forms of integration, the homogenous and the heterogeneous forms. The main feature of the homogeneity of European integration is the acceptance of the community law to the full extent and with the same approach by all member countries. Heterogeneous integration includes various forms of differentiated and flexible integration encountered practically since the integration of Europe started. In our study, however, we are mainly interested in the second form and we believe that it can be subdivided into the following groups:<sup>9</sup>

Scheme 1: Heterogeneous Forms of European Integration



Source: author

As stated above, in modern literature the terms differentiated and flexible integration are usually thought to be synonymous. We believe, however, that this term includes two contrasting fundamental theoretical levels of understanding European integration, which should be kept separate. The first one is usually linked with the older (negative) term of differentiated integration and its analysis is the aim of the present study. It represents the seeking of manners and ways of protecting various national interests of the member countries in the form of political decision-making on opt-out (negotiations concerning exceptions to the policy or from a shared decision).

The second main aspect of this term, for which we will use the positive term flexibility, represents the effort of some advanced member countries to develop a mechanism for more rapid integration in some areas of ES/EU. (Plechanová 2004: 139) In other words, it starts from the hypothesis that a group of member countries attempting a more intensive integration, can establish a new institution or policy inside the EU structure, without interfering with the operation of EU, even though other countries may have decided not to

support this activity. In the Union documents this tactic is referred to as closer or enhanced co-operation).<sup>10</sup>

The division of the two so far synonymous terms is quite logical because in the former case (negative differentiation) all member countries take part in the formulation of the particular area of cooperation, but due to the protection of their national interests during the negotiations each country may require special conditions (complete opt-out or special terms on a particular issue), without, however, putting any doubt on the general interest in developing cooperation in the area or preventing cooperation with the rest of the countries. On the other hand, the flexibility model is applied (when various difficult conditions must be met and barriers overcome) in a situation when it is evident that the goal set cannot be reached by a common approach as formulated in the Union treaties. Moreover, the differentiation of the two terms supports their semantic interpretation. While the term differentiation clearly suggests difference, the term flexibility additionally emphasizes flexibility or variability.

A quite fundamental difference between the two methods is particularly the fact that while in the first case the common policy is unanimously approved by all member countries (even though they enforce some limitations and exceptions, or even opt-outs), in the second case the policy is shared either by all the countries (the multi-speed model) or a group of countries (the model of variable geometry). The mechanism of looser cooperation was, for the first time, officially included in the Treaty of Amsterdam (paragraphs 40, 43 a 44, see Treaty of Amsterdam 1999: 20–22), which at first set as a condition the participation of the majority of member countries, but the subsequent Treaty of Nice fixed the number of countries at eight (Nice Treaty 2001: 11).

Prior to the eastern expansion in 2004, eight countries (out of 15) was practically the same as the originally required majority, but no longer with an EU comprising of 25 countries; the eight countries are only one third of the EU. After the substantial eastern expansion, the old member countries appear to want to keep the power and mechanisms of a more operative decision in issues of the future intensification of European integration in case the newly admitted countries want to block the process, for various reasons of their own.<sup>11</sup>

This interpretation of flexibility produced, at the intergovernmental conference in 1996–1997, a heated discussion among the member countries,<sup>12</sup> because it basically disturbs the so far generally accepted union principle: namely that all countries take a share in the approval and enforcement of Union policy (Stubb 2002: 58–82). Nevertheless, about one year before the conference leading to the signing of the Treaty of Amsterdam was opened, the final process of approval of the Schengen Treaty was already in progress—a treaty concluded in 1985, outside the EU, by Germany, France, Belgium, the Netherlands and Luxembourg.<sup>13</sup> This Schengen Treaty from the period before it was included in the primary law is the principle example of closer cooperation, when a group of member countries, outside the EU structure, agreed on cooperation, though its enforcement through community law was at that time (the second half of the 1980s and the early 1990s) virtually imaginary. (Kölliker 2006: 211–219)

European politicians thus faced the problem of how in the future such special agreements outside EU can be prevented from taking place among the member countries, agreements that in the long run have a direct impact on Union integration. After a long and complex

discussion, the Schengen Treaty was finally incorporated into European legislation in the form of the so-called second protocol, thus de facto confirming the à la carte method, because Great Britain and Eire do not take part in the Schengen cooperation and Denmark has a specific position. (Amsterdam Treaty 1999: 214)

The subsequent incorporation of Head VII and paragraphs 43–45 on closer cooperation, European politicians virtually legalized the theoretical principle of flexibility. Here it should be pointed out that differentiated integration was already officially anchored in the Maastricht Treaty<sup>14</sup> and that many special protocols on the 'opt-out' principle can be found in the primary union law as well as in many preceding treaties.

## 2. Principle Stages in the Development of Attitudes to the Differentiated and Flexible Development of the EU

Although at first sight differentiated integration and flexibility may appear to be new political phenomena, various forms of integration can already be found in the very beginnings of European integration. Practically from the birth of the first European integration groupings after World War II, different approaches to the way of enforcement, expansion and intensification of integration in Europe can be noticed. When the flexibility problem is viewed in the most general way, then the rejections by the British government in the 1950s and the foundation of the organization of the European Free Trade Association – EFTA) can be seen as one of the first variants of a differentiated and flexible approach to European integration (opt-out in participation in ECSC and EHS) and variable geometry (foundation of EFTA).

The subsequent history of European integration knows numerous examples when the EU made it possible for some members not to take part in some area of cooperation or participate only to a limited degree. In the 1970s and 80s there was a large discussion about it both among academics and leading European politicians. The Den Haag summit in 1969 started a new stage in European integration, marked by great optimism, in the discussion of new European policy as well after the initial expansion of the EU by Great Britain, Eire and Denmark, who joined at the beginning of 1973. Their acceptance into the EU, however, generally strengthened the supporters of intergovernmental cooperation and careful integration steps. In general it can be said that against the so-called French-German integration machine a new group of countries came into existence, headed by Great Britain, who succeeded in restoration of the disturbed balance between the supporters of the supranational and the intergovernmental approaches. The failure of long EU discussions on new policies of European cooperation in the end led to the French-German effort at seeking other models of European integration. They were outlined by the former German Chancellor Willy Brandt in his speech in the Paris branch of the European movement on 19 November 1974. He required differentiated integration in economy by the method of a multi-speed Europe,

when the more advanced countries could integrate faster than other countries that were uninterested in faster integration either politically or economically.

The next Paris summit in December 1974 charged the former Belgian Prime Minister Leo Tindemans with reform of the EU. His committee finished its proposal in December 1975, but it entered the agenda of European institutions only in the next year.<sup>15</sup> The report said, among other things, that “it is impossible to present trustworthy programs if it is thought that in each case each stage should be reached by all member countries at the same time.” (Tuytschaever 1998:138) For this reason the Tindemans report suggested that some group of countries should be allowed to integrate faster, while meeting special conditions. L. Tindemans does not speak openly of multi-speed Europe but proposes delays for economically weaker countries in their participation in common activities. However, at the same time he proposed that economically stronger countries should pledge to assist these weaker countries in joining of a particular policy. These countries should have an opportunity to take part in the negotiations on the policy, but without the power of the veto (Wallace – Ridley 1985: 32) Tindemans clearly emphasized the fact that each member country was bound by the agreed final goal and only the time schedule should differ for each country. (Tindemans 1996: 20–21)

Both of these conceptions of differentiation and flexibility were based, in an orthodox way, on the assumption that all countries must agree on a common policy and that opt-out, limited in time, of a member country could be tolerated only for objective socio-economic reasons. As late as in the second half of the 1970s, in academic discussions for the first time an opinion appears that the decision to opt out may also be a product of the political will of a member country.<sup>16</sup>

New motives were brought into integration in the late 1970s by Ralph Dahrendorff, one of the first to enforce into the European integration the *a la carte* method.<sup>17</sup> In his lecture at the university in Florence, Italy he sharply criticized the EEC for setting unrealistic goals and for launching too ambitious projects, while the political reality of the prevailing inter-governmental approach would never give consent to a „superstate“ strategy. Moreover he believed that the effort at a common procedure at any cost would threaten some sensitive and important areas of cooperation where gradual cooperation between individual countries would be possible. He also attacked one of the main pillars of the European community, the communitary law, which he claimed to be rigid and stunted. Helen Wallace and Adam Ridley believe that R. Dahrendorf brought into academic (and political) discussions a much-needed dose of realism and radicalism. (Wallace-Ridley 1985: 34) R. Dahrendorf in his noted lecture came to the conclusion that in the EEC there must be a list of clearly defined common interests to be accepted by all participants. This list, however, should not be very long and should be restricted to basic policies.<sup>18</sup> In other cases the member countries should have the right to voluntarily decide in favor of a particular area of cooperation from the wider list of common policies (*a la carte*).

Academic discussions on differentiated integration and flexibility developed in the first half of the 1980s especially in literature written in German and French, whose authors tried to define the variants and ways of future integration. They are primarily the works of H. E.



Scharrer, C.D. Ehlermann, E. Grabitz and W. Wessels and from the French authors J. V. Luis and P. Manin.

The next dramatic stage in the discussion on flexible integration opened in the second half of the year 1994. Two prominent members of the German political party CDU-CSU, Wolfgang Schäuble, who was thought of as the future successor to Chancellor Helmut Kohl, and Karl Lamers, published, on September 1, 1994, a fundamental document on the future of the European Union, entitled 'Reflections on European Policy'<sup>19</sup>. This document, although it did not express the official view of the German government because of its two presenters, was the forerunner of the official German attitude and was meant for members of the intergovernmental conference, who on the same day started negotiations on the future development of European integration.

In this document, the two German politicians called attention to the growing danger of transformation of the EU into a free association of states, limited to a few economic aspects, which would practically correspond to the Free Trade Zone. In order to prevent this danger, they proposed a fundamental federal reform of the EU institutions. With this, in an effort at intensifying the efforts at integration, they recommended the creation of a group of countries of the so-called hard core, comprised of France, Germany, Belgium, the Netherlands and Luxembourg. These countries should orientate themselves to a closer integration and cooperation in EU partial policies. The document further says that 'the development of EU institutions must combine solidarity and firmness with elasticity and flexibility'. (CDU-CSU 1994: 1)

This document brought about a fierce response from the leading representatives of France, Italy and Great Britain and smaller member countries voiced apprehensions as well. The then French Prime Minister, Edouard Balladur, in the French daily *Le Monde* expressed his negative stance to the development directed toward federalism and came forward with the conception of various groupings – monetary, military, etc.<sup>20</sup> The CDU-CSU document and the, not very tactful, declaration by the German finance minister, Theo Waigel, about Italian public finances intensified the German-Italian controversies. (Dinan 1999: 174) Also, the political representatives of the Benelux, counted as members of the hard core, agreed with the Italian fears that the CDU-CSU deputies were proposing a French-German team, who would strive to a closer political cooperation outside the EU structures.

The counter-reaction of the British government at the speeding up of European integration was not long in coming. Already on September 7, 1994, the British Prime Minister John Major in Leiden in the Netherlands rejected the idea of the hard core, in his view a two-level union, in which some states would be more equal than others. Instead, he proposed a British version of the flexible development of the European Union, the *à la carte* model.<sup>21</sup> John Major rejected the idea that all EU countries should be obliged to accept, without any exception, the policies. Instead, he proposed that the member countries should have the right not to participate in specific areas of EU policy. The only exception he made applied to the common market and the environment, where all member countries should take part. (Major 1994: 1)

The speech of the British Prime Minister clearly showed the intractable attitude of the British government to the model of federalization of the European Union and until the ar-

rival to power of the Labour Party and the new Prime Minister Tony Blair in May 1997, the discussions on this topic were closed for the top political level. Before the change in government, the British Eurosceptical Conservative deputies at an intergovernmental conference in 1994–1997 successfully blocked any attempt at an intensification of the integration.

The outcome of the prolonged negotiations at the intergovernmental conference in 1994–1997 was the complicated proposal for a revision of the Maastricht Treaty, which recommended reform in three main areas: to bring the EU closer to its citizens (issues of human rights, internal security, employment, and the environment), to improve its effectiveness and responsibility (to deal with the democratic deficit) and improve the EU's ability to appear as a unified body on the international scene (strengthening of the SZBP).<sup>22</sup>

The newly adopted Treaty of Amsterdam opened the way for differentiated integration and this trend was further supported by another revision of the treaty concerning the EU, signed in Nice, including the as yet non-ratified treaties on the Constitution for Europe. European politicians demonstrated clearly that the existing orthodox adherence to the earlier integration approaches, unanimity, common progress and common goals were being gradually abandoned and member countries now could respond with much greater flexibility to political and economic events within the European Union.

The so-called flexible and differentiated model of integration became a stable part of European legislation only after 1992 and is contained in all changes of the treaty accepted after that year (in the Treaty on the European Union, the Treaty of Amsterdam, The Treaty of Nice, as well as the non-ratified Treaty on the Constitution for Europe).

The main reasons why European politicians finally anchored in the legislation of the flexible/differentiated approach to European integration are several key events in the last two decades. Originally a community of six members, in some respect a more culturally than economically homogeneous European community, it was gradually transformed into a large heterogeneous union of 25 members (de Búrca-Scott 2000: 2) The ensuing expansion, by Bulgaria and Romania and in the more distant future perhaps by Turkey, is due to strengthen this trend even more. The EU begins to be divided not only into large, medium and small member countries, with their specific national interests, but an increasing role in the integration will be played by the differences in economy, social situation and living standard. With the admission of the Balkan countries and especially Turkey, the European Union is due to lose its existing cultural homogeneity.

This very transformation of the EU into a heterogeneous community put the European politicians before a fundamental dilemma of how to proceed in further integration. The multitude of different economic and especially political interests will probably become an insurmountable obstacle for the existing enforcement of individual European policies. This flexible and differentiated approach to European integration could become a way out of the future permanent crisis.<sup>23</sup>

### 3. The Decision on Opt-Out as an Instrument of Protection of National Interests

As we showed in the historical survey, mainly British politicians, Margaret Thatcher and John Major, used the method of deciding about not taking part in the political scene in political practice. In academia it became an accepted category, never absent from any book dealing with this topic. L. Armand, M. Drancourt and especially R. Dahrendorf are regarded as fathers of this theory. Particularly R. Dahrendorf, whose celebrated lecture in 1979 got this model into the forefront of the interest of academics and European politicians.

In literature not very many terms are used that are covered by this type of model. In English the terms used are *pick-and-choose*, *maximum flexibility*, *opt-out*, *opt-down* and *bits-and-pieces*. German language is not very rich in synonyms and for this concept adopts the Latin term *ad libitum*. The small number of synonyms as compared to the previous models of multi-speed integration or variable geometry is explained by A. Stubb by the lack of ambiguity of this model, based on a selection of concrete politics from the spheres of cooperation from the uniform menu. (Stubb 2002: 53)

The main architects of European integration headed by Jean Monnet always emphasized that real European integration is unthinkable without the participation of Great Britain. When we accept this basic theoretical hypothesis we must reassess the historical roots of so-called differentiated integration. As a matter of fact, the official opening of the activity of the European Coal and Steel Community—ECSC in September 1952 launched the real process of European integration. The political representation of Great Britain believed that participation in this organization would limit British national sovereignty and be hazardous for British national interests and therefore rejected the offer to participate in this economic project. In a similar way, the British government reacted to the foundation of the European Economic Community – EEC in 1957.

With the hypothesis that real European integration is unthinkable without British participation, the attitude of the British government in the 1950s can be described as the first historical opt-out, i.e., a decision not to take part as an instrument of protection of British national interests; although, it is only a matter of time before the attitude of the British government to direct participation in European integration will change. Similar, though on a somewhat different level, are the negative national referendums in Norway in 1972 and again in 1994 (the government of Norway supported the entry into the EU).

The same political dimension (protection of national interests), but a different method of deciding about opt-out, is used by member countries in certain policies within European cooperation. These are especially the formerly officially agreed-upon exceptions for Great Britain in the adoption of EU social policy, the limited participation of Great Britain and Denmark in the economic and monetary union, the special negotiation of Denmark's opt-out in the Common Foreign and Security Policy—CFPS, the European Regional Development Fund – ERDF, the European Strategic Program for Research and Development in Information Technology—ESPRIT and in the European Security and Defence Identity—ESDI.

Many protocols should be included in this category, which are part of the primary law, such as the Irish exception for abortions, the acquisition of property in Denmark, exceptions for Greenland, the Protocol on Denmark, Portugal, Great Britain and Northern Ireland, etc. All these protocols are practical arrangements for opting-out by individual member countries in a particular sphere of cooperation.

Likewise, the last (as yet nonratified) treaty on the constitution for Europe, in addition to the earlier opt-outs, contains many new ones, which had to be given to some member countries in order to obtain their consent regarding this document. Theoretically, the so-called derogations could be put in this category, when exceptions in treaties agreed upon earlier are included so that the member countries, when meeting certain precisely specified conditions, can ban or limit the establishment of the respective treaties on the basis of their own decision.<sup>24</sup>

Another specific type of opt-out decision may be seen in the situation where new member countries, during the negotiations on admission, are awarded permanent opt-outs (e.g., the Czech Republic for plum brandy and VAT payment) or transitory opt-outs, the termination of which, however, depends on the political will of the country (e.g., Portugal's interest-free loans for the Azores and Madeira). The common denominator of these decisions must, however, be the protection of national interests. Classical exceptions of transitory periods, for the main reason that the newly admitted countries are not prepared economically and politically to meet some conditions set by the EU for this type of cooperation, especially in the economy or security, (e.g., the Schengen Treaty, HMU, etc.) belong in the category of multi-speed integration.

Even though the literature concentrates mainly on Great Britain and Denmark, the most frequent users of this model, official EU documents demonstrate that this method is occasionally exploited by practically every EU member. Besides, many key discussions on enforcement of national interests are held between European powers (especially France and Germany) behind the scenes so that the presented documents are often only the prearranged compromise between several members.

In general it can be said that this method rather corresponds to the minimalist approach to European integration, as is preferred mainly by Great Britain and a few more countries (Denmark). The decision on opt-out is usually directed not against the general conception of communitary law, because the respective area of cooperation must at first be unanimously approved (including the protocols which include decisions on opt-out), and actually confirms the common integration goal. Still, from a politological aspect, it is breaking the general principle of communitary law and common goals, because one or more countries decided not to take part in the common policy, although they do not use their right of veto. In these cases the member countries stand outside this policy (as a matter of fact, in political practice they do not accept the common integration goal) and in this area fail to be ruled by communitary law, thereby disturbing the required homogeneity of European integration.

In comparison with the multi-speed method, where the member countries continue attending negotiations on a particular agenda of cooperation, in the case of deciding to opt out the country has no right to participate in the negotiations in that particular area. Thus, e.g., in June 1998 a tragicomic situation developed when the British Chancellor of the

Exchequer, Gordon Brown, who, since Britain has the EU chairmanship, was to chair the meeting of the Euro-X committee, during which decisions were to be made concerning the introduction of Euro, was excluded from the session and replaced by the Austrian Minister of Finance, Rudolf Edlinger. (Booker-North 2006: 394)

The main theoretical frame of the opt-out decision is usually a political decision, issuing from the protection of national interests of the member countries. From the aspect of European integration, this method decisively prefers an intergovernmental approach. In the analysis of the methods applied so far in practice it can be said that they equally affect all three pillars of the European Union.

#### 4. The Typology of Opt-Out decisions

As was shown in the text above, since the start of the European integration process it is possible to distinguish several principle types of opt-out decisions. In general we can say that the main principle for being included in this category is the decision made by a member country to win exceptions in approved European legislation or in the expansion of the EU when their national interests, for various reasons, could not be included in the basic document. A special historical category exists for non-member countries before they considered joining the EU (Great Britain, Denmark, Eire, Norway).

From the aspect of typology we can consider the main criterion as the application of the principle of national interest. Another criterion used is the position of the country on the issue of membership. By using this criterion we distinguish (1) non-member countries prior to their joining the EU, candidate countries using for some common policies 'transitory' periods without time limitations, while their decisions are linked with their own decision-making, and (2) the member countries, which negotiate exceptions during the process of approval of particular union legislation.<sup>25</sup>

In our opinion, the following three principle types of opt-out decisions may be distinguished.

##### 1. Pre-admission decision on opt-out

- 1.1. Governmental opt-out (Great Britain in the 1950s)
- 1.2. Plebiscite opt-out (Norway 1972, 1994 about joining the EU)

##### 2. Admission decision on opt-out

- 2.1. Protective opt-out of new members (in the case of the Czech Republic the domestic manufacture of plum brandy, VAT payment)

##### 3. Intra-union decision on opt-out

- 3.1. Legally confirmed opt-out (Great Britain and the Social Charter /HMU, Denmark and defensive policy,<sup>26</sup> etc.)
- 3.2. Legally unconfirmed but respected opt-out (Sweden and introduction of common currency)
- 3.3. Illegal opt-out (the so-called deviant integration, member country gets round the meeting of European legislation<sup>27</sup>)

For a more detailed analysis and comparison of each concrete decision on opt-out in political practice of the ERU, which should confirm, refute or expand the typology described above; there is no space available here.<sup>28</sup> Still, we believe that further academic discussion and continuing research will contribute to a greater insight into the concepts of flexibility and differentiation.

## Conclusion

The problems of flexibility and differentiation have become one of the key themes in academic and political discussions on national and Union levels. This increasingly profound political, economic, social and cultural heterogeneity of the member countries will require more dynamic approaches to European integration, because achieving unanimous decisions and reaching common goals will become increasingly more difficult. Failure to solve the situation can quickly bring about stagnation or even a breakdown of the European integration process.

The theories of flexibility and differentiation provide opportunities for settling future conflicts and maintaining the necessary dynamic character of the European integration process. The fears of some Euro traditionalists about the basic pillars of EU integration being put into doubt are by no means relevant, because the EU has been working with these models practically from its beginning. In the past, each exception or closer cooperation was understood as a marginal affair, which did not endanger the main idea of European integration.

Their increasing number and especially the content (opt-out of some member countries in major European policies), registered since the 1990s, make theoreticians of European integration abandon their previous approach and think seriously of a new theory for this problem.

This study presents for academic discussion some new views of the heterogeneous integration and recommends distinguishing between the earlier accepted synonymous terms, flexibility and differentiation. The author also deals in greater detail with one of its parts, the differentiation, or the so-called opt-out decision. On the basis of several fundamental criteria the author comes forward with the proposal of a new typology of differentiation, which however, needs verification (to be confirmed, refuted, or supplemented) by additional research in case studies. For this reason the author does not claim to have covered the entire sphere of the issue and hopes that next academic discussions will bring greater insight into these problems.

## Notes

- <sup>1</sup> The article is a preliminary study for the project “Czech Republic in the European Union“, part of the National Research project II. The research team is headed by the present author and by Associate Professor PhDr. Pavel Šaradín, PhD.
- <sup>2</sup> In literature, both these terms are usually thought to be synonymous.
- <sup>3</sup> The list of Czech authors could include several more (e.g., J. Čelikovský), who deal with European policies (e.g., Schengen), in which models of flexibility are used. Still, they are case studies rather than complex theoretical treatments.
- <sup>4</sup> Although both authors use more or less identical categories (multi-speed Europe, variable geometry and method à la carte), I include in these categories various practical examples of European differentiation. The main reason for this distinct difference is most probably the use of a single, different main source. While I. Šlosarčík was strongly inspired by the legal publication by F. Tuytschaevera (1998), A. Kadlecová in her typology of flexibility mainly depended on the politological study by Alexander Stubb (1996). What is special about this is that the former author does not quote the important Stubs study in his bibliography, whereas for A. Kadlecová the book by F. Tuytschaever was unavailable (and so probably was the study by I. Šlosarčík 2002). Strangely enough, in writing their texts either both of them or at least one of them completely missed some fundamental theoretical studies on flexibility (e.g., Ehlerman 1984, Wallace and Ridley 1985, Dewatripont 1996, De Búrca and Scott 2000, Lynch, Neuwajl and Rees 2000, Witte, Hanf and Vos 2001, Stubb 2002, Dehousse, Coussens and Grevi 2004 as well as several minor papers and articles. The titles that appeared over the next few years are left out.
- <sup>5</sup> Neither Great Britain, Denmark nor Sweden participates in the Currency Union. This is not due to not being socio-economically prepared, but to a political decision of the government (Great Britain) or the result of an unsuccessful national referendum on joining the European currency (Denmark, Sweden). For this reason we rank these cases in the opt-out category.
- <sup>6</sup> Until the ratification of the Treaty of Nice, with which the WEU activity was finished, to be later replaced by the European Security and Defence Policy – ESDP)
- <sup>7</sup> Legal interpretation of this point will be diametrically different because theoretically the model of variable geometry (after approval of the so-called strengthened cooperation in the Treaty of Amsterdam) is part of *acquis*. Still, from the point of view of political science it should be said that now a group of countries is increasing, which avoids cooperation in a particular area and in this practically stands outside *acquis*.
- <sup>8</sup> On this politological statement the logical argument of the preceding note can be applied as well.
- <sup>9</sup> Categories of multi-speed integration (time), variable geometry (space) and decision on opt-out (content) is a minor modification of the classification by A. Stubb (1996).
- <sup>10</sup> The first case of this narrow cooperation can already be found in the original version of the Treaty on the foundation of EHS in paragraph 233, which concerns the Benelux and the currency union of Belgium and Luxembourg. (Treaties of Rome 1993: 150).
- <sup>11</sup> The problem is too complex to be adequately treated in the present study. Moreover, contemporary experts (Kortenbergh 1998, Warleigh 2002, Stubb 2002) do not agree in the general assessment of the narrow cooperation before the Treaty of Amsterdam and the Treaty of Nice. A different assessment is especially to be seen among legal representatives, who speak of a paradigmatic change in the existing application of legal instruments of integration (Kortenbergh 1998: 833–834), while political scientists rather regard narrow cooperation as a technical instrument of the administration that should remove the problematic aspects of the development of

- cooperation outside what was agreed upon, as it was in the case, e.g., of the Schengen Agreement. (Warleigh 2002). In Czech literature this problem is mainly discussed by Kadlecová (2006: 31–41).
- <sup>12</sup> Among the main defenders of this conception of flexibility were Belgium, Luxemburg, the Netherlands, partly Germany, while Italy was rather in support of it, French politicians were ready for discussions, whereas Britain and Greece were very skeptical toward the flexibility. (Economist, 22 April 2000: p. 42).
- <sup>13</sup> In 1996, the Schengen Treaties were gradually accepted by Spain and Portugal, in the next year by Greece and one year later by Austria and Italy. The Scandinavian countries went through a special process and even the non-member countries Norway and Iceland became part of the Schengen space on account of the existence of the Northern Council
- <sup>14</sup> After the inclusion of the Schengen Agreement in the Treaty of Amsterdam, this treaty, however, should serve as an example of the multi-speed model because some countries want to take part in cooperation but failed to meet some objective conditions and it is assumed that when they meet them (in an exactly set interval) they will fully join the policy. In contrast, due the political attitude of Britain, Eire and Denmark, the Schengen Treaty must be classified under the à la carte model.
- <sup>15</sup> They are: e.g., the protocols on the specific participation of Great Britain and Denmark in the Economic and Currency Union.
- <sup>16</sup> Šlosarčík's article (2002) implies that Tindemans's report was issued in 1974 (Šlosarčík 2002: 57). Moreover, his quotation from Tuytschaever 1998: 136 is incorrect. Details from Tindemans's report were dealt with on pp. 138–139. Tindemans's report was officially published in the EU Bulletin, Supplement 1/76. Sometimes it is dated 1975, because it was presented to the Council of Europe on 29 December 1975. The first mention thus comes from the official documents of the Council of Europe: Tindemans, L. (1975). The European Union. Memo from Belgium: Views and Surveys, Report to the European Council on 29 December. (See Stubb 2002: 203).
- <sup>17</sup> See, e.g., the infrequently quoted study Scharrer, H. E. (1977). 'Differenzierte Integration im Zeichen der Schlange. Utopie und Dogma in Tindemans Vorschlägen zur Wirtschafts- und Währungsunion'. In: Schneider, H. – Wessels, W. (eds.). Auf dem Weg zur Europäischen Union? Diskussionsbeiträge zum Tindemans Bericht. Bonn: Institut für Europäischen Politik. Adopted from Kadlecová 2004: 30. H. E. Scharrer later developed his theoretical conception in several more studies from the early 1980s. See Stubb 2002: 201.
- <sup>18</sup> F. Tuytschaever in his work of 1998 proves that the model originated due to two French authors, L. Armand and M. Drancourt, who already in 1968 defined this method. (Tuytschaever 1998: 157)
- <sup>19</sup> It is very interesting that the Dahrendorf list contained only foreign policy, trade policy, development of cooperation with developing countries, and currency policy. R. Dahrendorf did not regard this list as dogmatic, he thought it should respond to current political and economic situation in Europe and in the world. (Wallace-Ridley 1985: 35)
- <sup>20</sup> Christian Democratic Union/Christian Social Union Group in the German Lower House (1994). *Reflections on European Policy*. Bonn, September 1.
- <sup>21</sup> Balladur, Edouard in *Le Monde*. Adopted from Gerbet 2004: 391.
- <sup>22</sup> John Major's predecessor, Margaret Thatcher, already defined this British attitude. See, e.g., Young 1999: 306–374
- <sup>23</sup> The complete report of the Reflex Group was published in European Parliament (1997). Official Texts, pp. 149–212
- <sup>24</sup> According to a recent study by the CIA, American experts expect that EU will not survive the next two decades. See CIA 2005.



- <sup>25</sup> See, e.g., paragraph 36 of the Treaty of Rome, paragraph 30 SES in the valid version (ex 36). ‘Paragraphs 28 and 29 on quantitative limitation of imports and exports – VF) do not exclude bans or restrictions on imports, exports and transit when the reasons are public morality, public order, public security, protection of health and life of people and animals, protection of plants, protection of cultural property with artistic, historical or archaeological value, protection of industrial and commercial ownership. These bans or restrictions, however, must not serve as instruments of willful discrimination or masked restrictions on trade between member countries.’
- <sup>26</sup> Sometimes this decision is changed when a new national government comes to power, see, e.g., the attitude of Great Britain to social policy under the Conservatives and the Labour Party, i.e., the national interest of a member country undergoes a change, which is often connected with the ideology of the respective political elites.
- <sup>27</sup> Other examples of the differentiated approach may already be found in the Treaties of Rome, in paragraph 226, dealing with the mechanism of the solution of ‘serious and lasting difficulties in some sector of economy’ and paragraph 227, which defined the relations with the overseas territories of France, Italy and the Netherlands (enumerated in Appendix IV.) (Treaties of Rome 1993: 148, 154). Other exceptions from the Treaties of Rome for various countries (France, Germany, the Benelux, Italy) were included in the attached protocols.
- <sup>28</sup> The problem of deviant integration is mainly discussed by Andersen-Sitter (2006)
- <sup>29</sup> In literature a number of analyses are found of various areas of the Union policies, in which opt-out decisions were taken. See, e.g., Heritier, A. (2001). *Differential Europe: The European Union Impact on National Policymakers*. Lanham: Roman; Jordan, Andrew (2005). *Environmental Policy in the European Union: Actors, Institutions and Processes* (London: Earthscan); Westlake, M. (ed.) (1998). *The European Union Beyond Amsterdam: New Concepts of European Integration*. London: Routledge and many others.

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