External Differentiation in Access to the Single Market: Effectiveness, Accountability and Political Unity

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EU Integration and Differentiation for Effectiveness and Accountability

Policy Papers No. 9

October 2020

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This project has received funding from the European Union's Horizon 2020 research and innovation programme under grant agreement No 822622

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Abstract

This policy paper studies external economic differentiation – that is, the various forms of third-country access to the European Single Market. It analyses their accountability mechanisms and evaluates their effectiveness – defined as the capacity to foster long-term economic integration and cooperation – as well as their potential effects on the EU's political unity. The paper identifies three key problems with existing external economic differentiation: overly static agreements, complex and fragmented institutional frameworks, and imbalances between rights and obligations in relation to the Single Market. Based on these findings, the policy paper highlights the importance of continuous market homogeneity for the effectiveness of external economic differentiation. Agreements that allow for the dynamic integration of the evolving EU *acquis*, that include mechanisms for its uniform interpretation and implementation and that are based on unified, simple and clear governance frameworks better achieve such homogeneity. In addition, agreements that are adaptable to evolving objectives and tailored to the size of individual third countries are more effective. The analysis of accountability mechanisms shows room for improvement in their deepening and extension to additional third countries. In terms of political unity, centrifugal forces can be contained through an adequate balance of rights and obligations in Single Market access.

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Executive summary

The United Kingdom's withdrawal from the European Union and the negotiations on the future economic relationship between the two parties have put renewed interest on external economic differentiation. The dispute reveals deeper questions about the economic and political effects of specific forms of third-country access to the European Single Market. This policy paper aims to address these issues by studying their accountability mechanisms as well as analysing their effectiveness – defined as the capacity to foster long-term economic integration and cooperation – and their potential effects on the EU's political unity.

Since the establishment of the Single Market in the 1980s and 1990s, a complex ecosystem of external economic differentiation has developed, including the European Economic Area, the EU–Swiss bilateral agreements, several EU Customs Union bilateral agreements, the deep and comprehensive free trade areas, the stabilisation and association agreements, and comprehensive free trade agreements. In regulatory terms, these agreements differ in the extent of covered policy areas, "level playing field" requirements, dynamic alignment obligations and financial contributions to EU programmes. In organisational terms, there are differences in the institutional set-up, the type of monitoring, dispute settlement and enforcement mechanisms, as well as the participation in EU decision-shaping forums.

Drawing on the existing literature, an analysis of agreements and negotiating mandates, and interviews with public officials and politicians, this policy paper identifies three central problems hampering the effectiveness of existing external economic differentiation regimes: overly static agreements, complex and fragmented institutional frameworks, and imbalances between the rights and obligations attached to accessing the Single Market. To address these problems, the policy paper highlights the importance of guaranteeing continuous market homogeneity in third-country access to the Single Market. Agreements that allow for the dynamic integration of the evolving EU *acquis*, include mechanisms for its uniform interpretation and implementation, and are based on unified, simple and clear governance frameworks better achieve such homogeneity. In addition, agreements that are adaptable to evolving objectives and tailored to the size of individual third countries are more effective. Analysis of accountability mechanisms shows room for improvement regarding their deepening and extension to additional third countries. In terms of political unity, centrifugal forces can be contained through an adequate balance of privileges and requirements, given the depth of third-country access to the Single Market. New and renegotiated forms of external economic differentiation should follow these suggestions to be sustainable over the long run.

Introduction

The creation of the Single Market of the European Union (EU) has been one of the most important integration projects of its member states. The Single Market has established the so-called "four freedoms" – free movement of goods, persons, services and capital – across all 27 EU countries. Over time, numerous European directives and regulations have further specified and deepened the Single Market, which is monitored and enforced by the European Commission and the European Court of Justice (ECJ). However not only EU member states, but also third countries have gained preferential access to the Single Market through international treaties and agreements. To a varying extent, they thus participate in a "frictionless" common market.

Brexit and the negotiations on the future relationship of the United Kingdom (UK) with the EU have increased attention to these existing forms of third-country access to the Single Market. They reach from a virtual extension of the Single Market (e.g., Norway) to more partial forms of market access through the establishment of customs union agreements (e.g., Turkey) or different types of trade and cooperation agreements (e.g., Ukraine, Serbia, Canada). With the beginning of 2021, the United Kingdom will add to this ecosystem of external economic differentiation regimes after its departure from the EU.[1]

This policy paper analyses and compares the legal features and functioning of all major formal arrangements providing third-country access to the Single Market. This includes the European Economic Area (EEA) Agreement, the EU–Swiss bilateral agreements, the various EU customs union bilateral agreements, as well as different types of deep trade and cooperation agreements such as the deep and comprehensive free trade areas (DCFTAs), the stabilisation association agreements (SAAs) and comprehensive free trade agreements (CFTAs). Beyond the status quo, the paper also considers the content of ongoing negotiations of third-country access to the Single Market for Switzerland, the European microstates (Andorra, San Marino, Monaco) and the UK. It compares the various agreements along their key regulatory and organisational dimensions. Based on this analysis, the policy paper evaluates how well various forms of external economic differentiation perform, as well as their consequences for EU political unity, and studies their inbuilt accountability mechanisms. This assessment reveals several problems and challenges for external economic differentiation, for which the policy paper provides concrete policy suggestions.

The analysis relies on an examination of the main treaties and agreements, negotiation mandates, decisions of joint committees and other types of written documentation. Another key source are ten semi-structured interviews with representatives of EU and national institutions that have been or are involved in the negotiations and management of different forms of external economic differentiation (see the

1 As set out in the Withdrawal Agreement, Northern Ireland will have a special status in the Single Market while the rest of the United Kingdom will likely diverge from Single Market regulation in major policy areas from 2021 onwards.

Annex).[2] The policy paper also draws on the findings of the existing literature. Its comparative approach goes, however, beyond many of these studies, which tend to focus on individual forms of third-country access to the Single Market.

The rest of the policy paper is organised as follows. Section 1 provides a concise overview of the main forms of external economic differentiation, tracing the evolution of an increasingly complex ecosystem of third-country access since the 1990s. It identifies their key regulatory and organisational dimensions and highlights how differences in the depth and width of third-country access to the Single Market correspond to three circles of external economic differentiation. Section 2 extends the descriptive analysis of differentiated institutional arrangements and policy practices to the issue of accountability. It identifies the different mechanisms through which the decisions and actions of policymakers and public officials can be monitored and potentially sanctioned. Section 3 assesses the effectiveness of different forms of external economic differentiation. It stresses the importance of agreements that allow ensuring market homogeneity over time, that can adapt to changing objectives and that take into account the size of third countries. Section 4 looks at the implications for the EU's political unity and its relationship with third countries. It highlights the importance of "balanced" agreements in terms of rights and obligations to ensure the long-term cohesion of both the EU and the ecosystem of third-country access to the Single Market. The final section summarises the key findings of the policy paper. Based on the empirical analysis, it provides advice on how to improve the existing forms of external economic differentiation and discusses which broader reforms would help maximise the benefits and minimise the risks of differentiated third-country access.

1. External differentiation in Single Market access

In the 1980s and 1990s, the process of European economic integration intensified with the creation of the Single Market and Economic and Monetary Union (EMU) (Jabko 2006). These reforms not only implied massive harmonisation efforts inside the nascent EU but also strongly affected its relationship with third countries across the European continent and beyond. International cooperation was further impacted by the end of the Cold War, the breakup of Yugoslavia and increasing globalisation.

The establishment and gradual deepening of the Single Market created third-country demands for access. These demands were driven by both necessity and opportunity. On the one hand, especially non-EU countries with strong ties to specific member states had to adapt to the EU's internal harmonisation process which also affected their bilateral relationships (Interview 9, European Commission 2012). On the other hand, access to the sizable and continuously growing Single Market became more

2 Interviews have been conducted in a largely exploratory fashion. Interviews are cited in abbreviated form, for more details on the interviewees see the Annex.

attractive to non-EU countries. At the same time, the establishment of the Single Market gave the EU an important tool to align third countries to its rules and values, often through conditionality in exchange for market access (Schimmelfennig and Sedelmeier 2004). For many EU candidate countries, participation in the Single Market was considered a reward for reforms and an intermediate step in the preparation for full membership.

Over the course of the last three decades these mutual interests have fostered the development of an increasingly complex ecosystem of EU external economic differentiation regimes (see Lavenex 2011 and 2015, Gstöhl 2015, Schimmelfennig 2018). Although this list is not exhaustive, the main formal arrangements providing third country access to the EU Single Market[3] are:

- the *European Economic Area (EEA) agreement* concluded with Norway, Iceland and Liechtenstein;
- the *bilateral agreements governing the EU–Switzerland relationship*;
- the *EU Customs Union bilateral agreements* concluded with Turkey and the micro-states Andorra and San Marino;
- the so-called *deep and comprehensive free trade agreements* (DCFTAs) signed with the Eastern European countries Ukraine, Georgia and Moldova;
- the *stabilisation and association agreements* (SAAs) with the Western Balkan states Serbia, Bosnia and Herzegovina, Albania, North Macedonia, Montenegro and Kosovo;[4]
- the *comprehensive free trade agreements* (CFTAs) established with countries beyond the European continent such as Japan, South Korea and Canada.

A first wave of external economic differentiation took place in the early 1990s, following the launch of an ambitious project to complete the Single Market by 1992 and the fall of the Iron Curtain. The European Free Trade Association (EFTA) member states sought to join the EU or to integrate more closely with it. Three of them (Austria, Sweden, Finland) joined the EU in 1995. Norway, Iceland and Liechtenstein signed the EEA agreement in 1992, deeply integrating into the Single Market.[5] In Switzerland, a national referendum on EEA membership failed. The EU subsequently negotiated numerous bilateral agreements with the Swiss government, mainly covered by the bilateral agreements I (1999) and II (2004). Due to the completion of the Single Market, the microstates Andorra and San Marino saw the need for a closer alignment with the EU. Previously integrated through bilateral agreements with France/Spain and Italy, they joined the EU Customs Union[6] (Interview 9). Turkey also concluded

3 For more detailed descriptions of these different forms of external differentiation see the following literature: on the EEA (Egeberg and Trondal 1999, Gstöhl and Frommelt 2017), on the EU–Switzerland bilateral agreements (Vahl and Grolimund 2006, Schimmelfennig 2014, Jenni 2015), on the different EU customs union agreements (Willems and Kamau 2019, Müftüler-Baç 2017, Karakas 2013, Emerson 2007, Dózsa 2008), on DCFTAs (Van der Loo 2016), on the SAAs (Osbild and Bartlett 2019) and on comprehensive FTAs (D'Erman 2016, Frenkel and Walter 2017).

4 Croatia had signed an SAA before joining the EU in 2013.

5 As an EU accession referendum in Norway in 1994 did not pass, the country remained a member of the EEA.

6 The microstate Monaco is part of the EU Customs Union through its bilateral customs union with France.

a customs union agreement with the EU after lengthy negotiations in 1995. And following independence after the dissolution of the USSR, numerous Central and Eastern European countries signed Europe Agreements establishing an association with the EU as a means of closer integration towards potential membership, also through regional integration.[7] This process was continued with the Western Balkans countries, which signed SAAs with the EU from 2001 onwards (Interview 4).

A second wave of external economic differentiation came after the Great Recession of 2007–2008, leading to further economic integration inside the EU. The EU established DCFTAs with the Eastern European countries Ukraine, Georgia and Moldova. In contrast to the SAAs, these free trade areas do not include an EU accession perspective. Beyond the European continent, the EU also concluded several comprehensive free trade agreements, such as the EU–South Korea FTA (2010), the Comprehensive Economic and Trade Agreement with Canada (2016) and the EU–Japan Economic Partnership Agreement (2019). During this period, the EU institutions also initiated a broader reflection process, critically evaluating the functioning of existing external economic differentiation regimes and the lessons of the Eastern Enlargement. Based on the results of this review, the EU set out to renegotiate several forms of existing third-country access to the Single Market. First, following Switzerland's abandoning of an EU accession perspective in the late 2000s and growing EU concerns about an unbalanced functioning of the different agreements, the EU negotiated a new framework agreement with the Swiss government from 2014 to 2018[8] (Interviews 1, 2, 3, 8). Second, the EU is currently negotiating a closer relationship with the microstates Andorra, San Marino and Monaco, resembling in many regards the EEA (Interview 5). Third, following Brexit in January 2020, the EU and the UK are in difficult negotiations on their future economic relationship.

All these different agreements correspond to specific moments in the process of European integration and the broader global context. They are also shaped by the economic and political characteristics of the third countries involved, their relationship with the EU and the objectives underlying their establishment (Interviews 1, 2, 3). This also explains the increasing diversity and complexity of the ecosystem of external differentiation in recent years. In addition, the different agreements have also evolved through the developing EU *acquis* and joint committee decisions, often enlarging the scope of agreements over time. External differentiation thus comes with substantial variation in its regulatory and organisational dimensions (see Lavenex and Križić 2019).[9]

7 Both the Central European Free Trade Agreement and the Baltic Free Trade Area are examples of such regional integration.

8 Since the conclusion of negotiations in 2018, Switzerland has not yet ratified the new framework agreement.

9 For a different categorisation of different external economic differentiation regimes see the work by Pedreschi and Scott (2020), which discusses three dimensions of their legalisation: obligation, precision and delegation.

From a *regulatory perspective*, the different forms of external economic differentiation in Single Market access vary as regards to:

- the *covered policy areas* (whether a third country is bound by all rights and obligations concerning the four freedoms and related directives, or only by some of them);
- the *extent of level playing field requirements* (commitments to respect certain EU minimum standards in areas such as competition, social or environment policy);
- the *extent of dynamic alignment* (procedures to continuously update the agreement to adjust to new EU legislation);
- whether the agreement foresees (formally or informally) *financial contributions* and participation in EU programmes.

From an *organisational perspective*, there are significant differences in the institutional framework and committees governing agreements. The different models vary with regard to:

- the i*nstitutional set-up* managing and adapting individual agreements over time;
- the *type of monitoring, dispute settlement and enforcement mechanisms*, and particularly the role of the ECJ in interpreting EU law and creating binding rulings;
- the extent to which the third country participates in *decision-shaping* forums.

While there is great variation across the different forms of third-country access to the Single Market, this paper considers that they can be grouped in three circles of external economic differentiation for more analytical simplicity and clarity. These circles reflect different degrees of proximity or distance to the EU *acquis* and the accompanying governance mechanisms.

The first circle of Single Market access (close relationship) includes the EEA member states and Switzerland, and will likely be enlarged by the microstates Andorra, San Marino and Monaco after the conclusion of a new Association Agreement with the EU, which is planned for 2021 (Interview 5). In addition, Northern Ireland will remain closely aligned to the Single Market after the end of the transition period following Brexit in 2020, no matter what comes of the ongoing negotiations on the future EU–UK economic relationship. In general, members of the first circle of external Single Market access possess highly developed economies, functioning democracies and are often enclaved within the EU. These countries either do not intend to join the EU or are not given an accession perspective by the EU due to their small size (Interviews 5, 9, 10). The second circle (intermediate relationship) covers a varied group of agreements with third countries such as the existing customs unions agreements (especially with Turkey), the SAAs with the six Western Balkans countries and the DCFTAs with three Eastern European countries: Ukraine, Moldova and Georgia. In comparison to the countries belonging to the first circle, these countries have less developed economies and democracies and are situated closer to the geographical borders of Europe and the EU.[10] While there is an explicit EU accession perspective for the SAA members and Turkey is formally still negotiating for EU membership, this is not the case for the DCFTA signatories. The third circle (distant relationship) entails comprehensive FTAs with countries beyond the European continent such as

10 This last point does not apply to the Western Balkans countries.

Canada, Japan and South Korea. These recent FTAs go further in terms of integration than traditional FTAs, e.g., regarding level playing field requirements and institutional frameworks. The mentioned partners have advanced economies and democratic polities but are situated considerably beyond the European continent.

2. Challenges to the effectiveness of external economic differentiation

In the previous section we have discussed that different types of external economic differentiation regimes differ along several regulatory and organisational dimensions. But how effective are these various forms of third-country access to the Single Market in practice? It is difficult to judge and compare their functioning and impact as each of these agreements has been concluded under particular circumstances and with different goals; some are expected to promote alignment to EU legislation in view of future accession, others basically aim at intensifying trade relations. The common dominator in all cases, however, is the willingness to foster long-term economic integration and cooperation between the EU and third countries without endangering the functioning of the Single Market. From this perspective, an effective arrangement is one that allows for the pursuance of (perceived) mutual benefits across time. In contrast, ineffective institutional arrangements and policy practices would tend to undermine the functioning of the Single Market and the broader ecosystem of external economic differentiation.

Interviews conducted with actors participating in these arrangements reveal different degrees of satisfaction with their functioning and highlight varying levels of political conflict between the EU and third countries. Especially recent and ongoing (re)negotiations of external economic differentiation can help us to identify key problems and challenges for the agreement signatories to ensure long-term economic integration and cooperation (e.g., the EU–Swiss bilateral agreements). At the same time, forms of third-country access that have seen little contestation since their establishment allow us to discern regulatory and organisational features that have helped render these agreements effective across prolonged periods of time (e.g., the EEA). According to our interviewees, several problems with existing agreements have hampered their ability to foster long-term economic integration and cooperation over the last years. The following subsections pick out a few examples from different existing forms of third-country access to the Single Market. As the EU–Swiss bilateral agreements have shortcomings on several fronts, they are discussed several times. This can also be seen as a reason why the EU has been particularly keen on renegotiating the existing external economic differentiation regimes with Switzerland in recent years.

First, *overly static agreements tend to undermine the adequate functioning of agreements over time*.[11] On the one hand, the legal foundations of the Single Market themselves are constantly evolving, which can lead to growing divergences and loss of homogeneity between the EU and the respective third country if no counteractions are taken. On the other hand, also the broader economic and geopolitical context is permanently subject to change, leading to suboptimal policy outcomes when agreements of third-country access are difficult to adapt to respond to such evolutions. The absence of dynamic alignment to the developing EU *acquis* and the lack of institutional mechanisms to integrate changes in the framework of the Single Market can hamper the proper functioning of agreements in the long run.

Interviewees have identified the static nature of the vast majority of EU–Swiss bilateral agreements and the lack of adequate dispute settlement mechanisms as problematic in this regard.[12] According to members of the DG TRADE and other EU institutions, this allowed Switzerland to cherry-pick alignment to the EU *acquis* in some areas while disregarding it in others (Interviews 1, 2, 3, 5). This was acknowledged even on the Swiss side. A member of the EFTA/EP delegation acknowledged that while mixed committees were implemented to resolve disputes, if there was no agreement the procedure would simply stop there, leaving concerns about unfair market access unresolved.

Second, *complex and fragmented institutional frameworks hamper the timely adoption of decisions and increase opportunities for the exploitation of ambiguities and incoherencies in their institutional set-up*,[13] potentially compromising the adequate functioning of agreements over time. If a multitude of different institutions are created, this might lead to varying interpretations of Single Market rules across different policy fields, threatening the homogeneity of the market inside and across different forms of external economic differentiation. This is especially problematic when there is no unique interpreter of EU law, such as the ECJ, to arbitrate disputes over legal interpretation. Institutional complexity might also contribute to "lengthy decision-making procedures" which in turn do not allow for a timely adaptation of agreements and joint decisions (Frommelt 2017: 238).

With more than 100 different agreements without an overarching governance structure, the EU–Swiss bilateral agreements are surely the key example of complex and fragmented third-country access to the Single Market. As a Swiss interviewee has pointed out, this external economic differentiation regime lacks mechanisms to ensure a coherent interpretation of EU law (Interview 8). He stated that this problem is so severe that, in the meantime, an informal two-pillar model has formed, whereby the Swiss Federal Tribunal refers for legal interpretation to the superiority of international law over national law (as fixed in the bilateral agreements, and accordingly aims at interpreting EU law in accordance with the European Court of

11 Streeck and Thelen (2005) describe such situations as institutional drift.

12 An exception among the different EU–Swiss bilateral agreements is the Agreement on Air Transport, which includes dynamic adaptation to the evolving EU *acquis*.

13 Sheingate (2010) has discussed the opportunities for exploiting complex institutional frameworks in the case of the house rules of the US Congress.

Justice (Interview 8). This can, however, not replace a properly formalised process. In terms of regulatory and institutional complexity, the DCFTA with Ukraine is also seen as a negative example, even though more policy areas are subject to dynamic alignment with the EU *acquis* (Van der Loo 2016). The main problem in this case stems from the complexity and high degree of variation in the depth of market access across different and often very precise sub-policy areas. As interviewees from the DG TRADE highlighted, there are lengthy discussions between the EU and Ukraine about the interpretation of new legislation and whether it is covered by the topics and obligations of the agreement, and subsequent discussion on how to integrate the new EU *acquis* (Interviews 1, 2, 3).[14] They stressed that the complexity in covered and excluded policy areas (in the scope of the agreement) would lead to a bigger backlog than for other kinds of third-country access to the Single Market (Interviews 1, 2, 3).

Third, all of the recent or ongoing (re)negotiations of external economic differentiation have also been driven by *concerns over the adequate balance between the depth of granted Single Market access and the regulatory, institutional and financial obligations in return*. A key aspect of these concerns regards the internal market's level playing field. For existing external economic differentiation regimes, an adequate balance of rights and obligations has also depended on broader economic and political objectives for the EU and the respective third countries, such as EU membership. For certain EU candidate countries, the EU has traditionally shown more leniency in terms of obligations, as interviewees from the DG TRADE have pointed out (Interviews 1, 2, 3). When broader objectives change, however, this can also lead to – at least perceived – disequilibrium between rights and obligations in third-country access to the Single Market. If not addressed, these evolutions can potentially endanger long-term economic integration and cooperation. According to a Swiss interviewee, the bilateral agreements granted by the EU can be seen as "historic bridge-building" from the side of the EU. While citizens were not yet ready to support EEA or EU membership in a public referendum, the Swiss government stated until 2008 in its foreign policy reports that it was examining different options for integrating into the EU (Interview 8). When the Swiss government finally abandoned this stance in the late 2000s, viewing the "bilateral path" as the right one for Single Market access, this changed objective lowered incentives for the EU to provide privileged access to aid supportive Swiss political forces on the path to membership (Interview 8). The Council of the European Union (2014: 1) thus already saw in 2008 "the need for an overarching institutional framework for EU-Switzerland relations […] with the aim of in particular protecting the homogeneity of the internal market and ensuring legal certainty for authorities, citizens and economic operators". The existing regulatory and institutional framework in place, however, has made it unattractive for the Swiss government to ratify an institutional framework agreement that was negotiated in the meantime. Imbalances in rights and obligations can disadvantage not only the EU but also third countries. Turkey's membership in the EU Customs Union is an example of such a situation. As interviewees from the DG TRADE have pointed out, in this arrangement Turkey has to follow the EU on its common commercial policy, even

14 Interviewees discussed the example of the postal services section of the DCFTA with Ukraine, where there was a dispute over whether the new EU *acquis* on cross-border packaging would be covered by the agreement.

if that could be problematic for Turkey (Interviews 1, 2, 3). According to the existing set-up, Turkey should not sign free trade agreements with other third countries before the EU has done so. While Turkey is an EU candidate country, objectives of the EU have changed significantly over the last years, partly linked to political confrontations following the increasing authoritarianism in Turkey. With the accession process basically halted and with perceived imbalances in rights and obligations for Single Market access, Turkey has recently signed a free trade agreement with Malaysia before the EU. In addition, the free circulation of goods between the EU and Turkey covered by the Customs Union has been partially stopped (Interviews 1, 2, 3), showing the dysfunctionality of the existing third-country access to the Single Market.

From these different problems we can draw several lessons for improving effectiveness across the various external economic differentiation regimes. These can also serve as criteria for evaluating renegotiated or future types of third-country access to the Single Market, such as the EU–Swiss framework agreement and the eventual new EU–UK economic relationship. The following three points do not correspond exactly to the three key challenges laid out above. They partly integrate the different elements, but also take into account broader interview findings.

First, *continuous market homogeneity between the EU and third countries helps to foster long-term economic integration and cooperation* (Gstöhl and Frommelt 2017, Frommelt 2017). This homogeneity can be supported by agreements that are adaptable over time, both through the dynamic (or "automatic") integration of the evolving EU *acquis* and through its uniform interpretation and implementation (e.g., via common interpretation by a single competent institution such as the European Court of Justice or of a comparative nature in dispute settlement mechanisms). Experience with existing forms of external economic differentiation also shows that agreements with a uniform, simple and clear governance framework are more effective (Interviews 1, 8). They are better suited to implementing changes in the EU *acquis* and joint decisions in a more timely and coherent manner across different policy areas, thus ensuring market homogeneity across the different participants. A key example for such an external economic differentiation regime is the EEA. Since the 1990s, this form of third-country access to the Single Market includes the dynamic adaptation of the agreement to the evolving EU *acquis*, has a unified governance structure, allows for a coherent interpretation of law through the EFTA Surveillance Authority and the EFTA Court, and covers a large majority of policy areas of the European Union. While there have been some problems with market homogeneity even for this form of external economic differentiation (see Gstöhl and Frommelt 2017, Frommelt 2017), interviewees from both the EU (Interviews 1, 2, 3) and the EEA side (Interviews 6, 7) have stressed that the agreement was working very well in comparison.

Second, *forms of third-country access to the Single Market that can account for changing EU and third country objectives over time are more effective*, for example through joint committee decisions that can modify the scope of existing agreements without the necessity to completely renegotiate a specific form of external economic differentiation. Full renegotiations of third-country access tend to become heavily politicised as especially the Swiss case is showing. While there are surely questions

about political legitimacy and accountability to answer (see Fossum 2019b), politicisation might hinder rather than foster long-term economic integration and cooperation in external economic differentiation, as the difficult discussions between the EU and the UK highlight.

Third, *external economic differentiation regimes are more effective when they are tailored to the size of individual third countries*. As interviews with representatives of the microstates Liechtenstein (an EEA member state), Andorra and San Marino have shown, long-term economic integration and cooperation can only be ensured when certain aspects of mutual market access are adapted to country-specific features. Exceptions to the free movement of persons are key for countries with a very small population (Interviews 7, 9, 10), while strong measures against the positioning of such countries as tax havens are important to the EU (Interview 5). As the EU has taken such concerns into account already in the past (Interview 1), there have not been any immediate problems with this issue.

3. Restricted accountability mechanisms in external economic differentiation

Different forms of external economic differentiation have specific consequences for the national sovereignty and democracy of third countries. Depending on the extent and depth of Single Market access, decision-making, monitoring and enforcement powers are held, to a varying extent, by European institutions (such as the European Commission or the EJC) or by joint committees composed of the EU and the concerned third country (see Lupia 2000). Given this relocation of national executive, parliamentary and judiciary powers to other institutions, additional accountability mechanisms and procedures are important to ensure the continued participation of domestic actors in the control of specific external economic differentiation regimes[15] (see Fossum 2019a). This participation might also improve the effectiveness of different forms of third-country access to the Single market through strengthened transparency, valuable feedback and a better acceptability of economic integration and cooperation by domestic actors.

Our analysis of the different agreements of third-country access to the Single Market reveals that most regimes possess accountability mechanisms. These vary, however, according to the scope and depth of individual agreements. More extensive external integration and cooperation coincide with more encompassing accountability mechanisms. In addition, more recent agreements include more formalised accountability procedures.

15 In this policy paper, accountability is understood as "a relationship between an actor and a forum, in which the actor has an obligation to explain and to justify his or her conduct, the forum can pose questions and pass judgement, and the actor may face consequences" (Bovens 2007: 450, see also Nguyen 2020).

A key tool for controlling the actions and decisions of the EU and national governments is joint parliamentary committees. These committees are composed of members from the EU parliament and the respective national parliaments of third countries, representing the different political factions of these parliaments. While such committees fulfil several functions (for example, to facilitate exchanges between the European and the national level), they also play a role in ensuring accountability. For example, according to the EEA Agreement, the EEA Joint Parliamentary Committee is to examine "the annual report of the EEA Joint Committee […] on the functioning and the development of this Agreement" and can request the President of the EEA Council to appear before the Committee (EEA Agreement Art. 95(4)). The EEA Joint Parliamentary Committee can further "express its views in the form of reports or resolutions" (EEA Agreement Art. 95(4)) and thus "aims to monitor and scrutinise EEA-relevant EU policies and decisions adopted in the EEA Joint Committee".[16] While several other agreements with third countries include joint parliamentary committees, most of them have less explicitly defined control rights than in the EEA or are based on a less formal legal basis. The Parliamentary Association Committee of the EU–Ukraine DCFTA can, nevertheless, "request relevant information regarding the implementation of this Agreement from the Association Council, which shall then supply the Committee with the requested information" (DCFTA EU–Ukraine Art. 468). It is also authorised to "make recommendations to the Association Council" and can establish sub-committees. Other parliamentary committees such as the Stabilisation and Association Parliamentary Committee of the EU–Serbia SAA do not have such codified control mechanisms (SAA EU–Serbia Art. 125). While many agreements establish joint parliamentary committees directly, in some cases they are based on subsequent decisions of the committees/councils that govern these agreements. The Turkey–EU Joint Parliamentary Committee, for example, was created following parliamentary resolutions and a decision of the respective Association Council. Due to its membership in EFTA, Switzerland has been given an observer role in the EEA Joint Parliamentary Committee. In the new but not yet ratified institutional agreement with the EU, a proper Joint Parliamentary Committee would be established, which would be allowed to express itself with reports and resolutions (EU–Swiss Institutional Agreement Art. 16).

Beyond Joint Parliamentary Committees, some forms of external economic differentiation also include additional institutions that could provide for more accountability. These institutions can include the social partners (e.g., the EEA Consultative Committee), civil society organisations (e.g., the EU–Ukraine Civil Society Platform), or the regions and municipalities (e.g., the EEA EFTA Forum). These institutions, however, possess less explicitly defined rights and functions than the joint parliamentary committees.

Finally, EEA member states also have access to the decision-shaping process of new European Union legislation. They have the right to send experts to commission committees that develop laws and can submit comments expressing the concerns and suggestions of the EEA countries.[17] While not being allowed to take part in the

16 EFTA website: *EEA Joint Parliamentary Committeee*, https://www.efta.int/node/1317.

17 EFTA website: *Decision Shaping*, https://www.efta.int/node/992.

decision-making procedures, participation in decision-shaping constitutes a form of *ex ante* accountability (see Pollmann et al. 2014) that is not available to other third countries seeking access to the Single Market. With the ratification of the new institutional agreement, Switzerland would also gain access to this accountability procedure.

Overall, the various external economic differentiation regimes include a set of accountability mechanisms and procedures. These are, however, largely restricted to information and monitoring rights and do not allow the exercise of any strong veto rights or correction mechanisms. Only the EEA member states can make themselves formally heard on new law initiatives on the European level through their participation in the decision-shaping process. In our view, accountability mechanisms across external economic differentiation regimes could be improved by giving joint parliamentary committees more formal rights and explicit tasks, such as information rights, the possibility to request executive actors to appear before the committee and the obligation to write reports on the functioning of individual agreements. One could also consider including not only third countries from the first, but also from the second circle of external economic differentiation in the European decision-shaping process. Countries in customs unions with the EU, countries that have at least partial dynamic alignment obligations, and countries that are on the path to EU membership would profit from such an expansion of accountability mechanisms beyond the EU and could help the EU to draft more mutually beneficial legislation and agreements.

4. EU political unity not under threat from external economic differentiation

External economic differentiation regimes could also have an impact on the EU's long-term political unity. Certain models could spark centrifugal or centripetal forces within the EU (see Cini and Verdun 2018). They could also affect the relations of the EU with other third countries and thus alter the whole ecosystem of external economic differentiation. Overall, our analysis suggests however that the EU's political unity is not under immediate threat from external economic differentiation, especially when the EU ensures a balance between rights and obligations in third-country access to the Single Market. Such a balance can also help to stabilise the existing ecosystem of external economic differentiation regimes.

Various interviews revealed that third countries have indeed closely observed the renegotiations of other external economic differentiation regimes. The EEA countries scrutinised the discussions on a new EU–Swiss institutional framework, assessing whether there was a balance between the depth of market access and the scale of obligations, which did not favour Switzerland vis-à-vis the EEA (Interview 6). At the same time, the Swiss government (and this also applies to the EEA member states) is being attentive to the negotiations between the EU and the UK on their future economic relationship, driven by similar concerns (Interview 8).

There are also concerns among European actors and certain member states that an unbalanced deal with the UK in terms of rights and obligations could incite other member states to similarly leave the EU and seek preferential access to the Single Market as a third country. Another risk for EU political unity could be forms of external economic differentiation that have strongly differing effects on individual member states, creating large economic benefits for some while punishing others.

The recent and ongoing (re)negotiations of external economic differentiation, however, show that the EU has been – at least so far – careful to ensure balanced agreements in terms of rights and obligations, for both internal and external reasons. Especially in the negotiations with Switzerland, the EU has attempted to recalibrate this balance linked to changed objectives in the EU–Swiss relationship (Interviews 1, 8). The final outcome of the discussions between the EU and the UK on their future economic relationship will reveal whether the EU is also able to uphold such a standard vis-à-vis a former member state with considerably bigger political and economic clout. At least during the last years, the EU has hardened its stance regarding concessions towards other third countries to signal to the UK that a cherry-picked form of external economic differentiation would not be on the table (see Atkins and Khan 2018). In the negotiations with the UK, the EU has also been insistent on level-playing-field requirements and a common institutional framework. In addition, it has strongly protested against recent British legislation unilaterally reneging on the Withdrawal Agreement's Northern Ireland protocol, which could blur the borders of the European Single Market.

Overall, the EU's political unity does not seem to be endangered by the current ecosystem of external economic differentiation. The withdrawal of the UK was due to different factors and its departure actually led to increased cohesiveness of the remaining EU27 (Chopin and Lequesne 2020) as has been visible from their common position towards the UK, but also towards other third countries with regard to their access to the Single Market. Over the course of the last three decades, external economic differentiation has generally led to stable or increased integration and cooperation. Ongoing renegotiations of existing forms of external economic differentiation tend to include deeper access to the Single Market in exchange for more robust requirements in terms of level playing field and the institutional framework. This applies, for example, to the new institutional framework with Switzerland but also to the likely outcome of the ongoing negotiations with the microstates.

Conclusion

As highlighted in the previous sections, the effectiveness of EU's external economic differentiation depends on several elements. First, long-term economic integration and cooperation between the EU and third countries can be fostered by continuous market homogeneity. This homogeneity can be better established and maintained by forms of third country access to the Single Market that include dynamic alignment to the evolving EU *acquis* in those policy areas covered by agreements, that contain mechanisms for the uniform interpretation and implementation of the legal

requirements of specific external economic differentiation regimes and that are built on unified, simple and clear institutional frameworks to govern them. To be effective, agreements should also have inbuilt procedures to account for evolving objectives of the EU or third countries, and be tailored to the size of individual third countries.

The policy paper has also identified accountability mechanisms across different forms of third-country access to the Single Market. The overall effectiveness of external economic differentiation regimes could be further improved by accountability mechanisms that give more formal rights and explicit tasks to joint parliamentary committees and that broaden the access to the EU's decision-shaping process. The analysis has also highlighted that risks to the EU's political unity due to external economic differentiation remain low as long as the EU seeks to conclude agreements that entail a balance of rights and obligations corresponding to the depth of Single Market access granted to third countries.

The ongoing (re)negotiations of third-country access to the Single Market show that the EU has learned from the experiences of the last decades. It aims to respond to existing problems and modify the complex ecosystem of external economic differentiation largely in line with the suggestions made in the previous sections. Two of the EU's key demands for the UK's access to the Single Market are indeed related to the establishment of a unified governance framework (similar to the institutional set-up adopted for the management of the Withdrawal Agreement) and to ensuring a level playing field over time, especially regarding state aid, but also on environmental and labour standards. What is also revealed by the dispute with the UK over the future economic relationship with the EU, however, is that this more "principled" approach of the EU might come at the cost of a "no-deal" with the UK. In contrast to making considerable concessions, and whereas this more hard-line approach might help to protect the existing forms of external economic differentiation, it may also create further problems down the line as witnessed by the dispute over the Northern Ireland protocol and the border issues on the Irish island and in the Irish sea that could ensue.

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Annex

List of interviews

1: Deputy head of unit, DG TRADE, 27 February 2020 (personal)

2: Policy coordinator, DG TRADE, 27 February 2020 (personal)

3: Policy coordinator, DG TRADE, 27 February 2020 (personal)

4: Deputy head of division, EU institution, 4 June 2020 (phone)

5: Desk officer, EU institution, 4 March 2020 (phone)

6: Member (from Norway), EEA Joint Parliamentary Committee, 26 February 2020 (phone)

7: Member (from Liechtenstein), EEA Joint Parliamentary Committee, 23 March 2020 (written)

8: Member (from Switzerland), EFTA/EP Delegation / Foreign Policy Committee, 12 March 2020 (phone)

9: High-level representative, National government (San Marino), 10 June 2020 (written)

10: High-level representative, National government (Andorra), 12 June 2020 (phone)

Details on data collection via interviews

Interviews for this policy paper were conducted in a semi-structured format. Due to the coronavirus crisis, most interviews took place over the phone. While a few respondents preferred to answer interview questions in written form, oral interviews lasted between 40 minutes and two hours. In line with the data protection requirements of the EU IDEA research project, interviews were not recorded. Information was gathered through written notes. To ensure the full anonymisation of interviewees, the table in the Annex does not detail functions and institutional affiliations further than the degree of consent given by each interviewee. Interview notes are available to all members of the EU IDEA consortium. They can also be accessed by third parties if necessary.

EU Integration and Differentiation
for Effectiveness and Accountability

Differentiation has become the new normal in the European Union (EU) and one of the most crucial matters in defining its future. A certain degree of differentiation has always been part of the European integration project since its early days. The Eurozone and the Schengen area have further consolidated this trend into long-term projects of differentiated integration among EU Member States.

A number of unprecedented internal and external challenges to the EU, however, including the financial and economic crisis, the migration phenomenon, renewed geopolitical tensions and Brexit, have reinforced today the belief that **more flexibility is needed within the complex EU machinery**. A Permanent Structured Cooperation, for example, has been launched in the field of defence, enabling groups of willing and able Member States to join forces through new, flexible arrangements. Differentiation could offer a way forward also in many other key policy fields within the Union, where uniformity is undesirable or unattainable, as well as in the design of EU external action within an increasingly unstable global environment, offering manifold models of cooperation between the EU and candidate countries, potential accession countries and associated third countries.

EU IDEA's key goal is to address **whether, how much and what form of differentiation is not only compatible with, but is also conducive to a more effective, cohesive and democratic EU**. The basic claim of the project is that differentiation is not only necessary to address current challenges more effectively, by making the Union more resilient and responsive to citizens. Differentiation is also desirable as long as such flexibility is compatible with the core principles of the EU's constitutionalism and identity, sustainable in terms of governance, and acceptable to EU citizens, Member States and affected third partners.

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This project has received funding from the European Union's Horizon 2020 research and innovation programme under grant agreement No 822622