



Book review: Die Rechtsperson der Europäischen Union im Wandel. Auswirkungen differenzierter Integration durch Völkerrecht auf die Europäische Union, Jonathan Bauerschmidt, Mohr Siebeck, 2019, 502 pp.

Diane Fromage

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Die Rechtsperson der Europäischen Union im Wandel. Auswirkungen differenzierter Integration durch Völkerrecht auf die Europäische Union,
Jonathan Bauerschmidt, Mohr Siebeck, 2019, 502 pp.

Diane Fromage, Sciences Po, Law School, Paris, France

Marie Skłodowska-Curie Individual Fellow, Law School, Sciences Po Paris. The present book review was prepared as part of “IMPACTEBU”, a project that has received funding from the European Union’s Horizon 2020 research and innovation programme under the Marie Skłodowska-Curie grant agreement No 895841.

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This book by Jonathan Bauerschmidt considers the evolution of the legal person (*Rechtsperson*) of the European Union (EU) through the lens of differentiated integration by means of the conclusion of international agreements during the euro area crisis especially. Put differently, it asks whether the EU’s legal person has been affected by the conclusion of said agreements by some of its Member States and if so, how and to what extent.

Although this volume was published in 2019, it remains acutely topical. This is so not only because research on the consequences on the EU of the imaginative solutions devised a decade ago to save the common currency is still needed, but also because when the COVID-19 crisis is over, a reflection on the feasibility and the opportunity to follow the path of (further) differentiated integration will arguably be necessary. Indeed, the responses devised at the EU level to counter the economic downturn of the COVID-19 pandemic have had as a consequence that the distinction between euro area and EU27 Member States has diminished. Nothing guarantees though that this evolution will endure in the future. Furthermore, this analysis is also interesting against the background of the quasi lack of resort to *inter se* agreements to counter the COVID-19 crisis (contrary to what had been the case when the euro area crisis struck the EU, as is well-known): on this occasion, it is only the specific possibility to resort to European Stability Mechanism funding that was added, and none of the euro area Member States has used this possibility to date.

This book is divided into three main parts: the first one focuses on setting the constitutional theoretical foundation for the analysis proposed, the second one addresses the issue of the legal person of the EU and differentiated integration, whilst the third and last one is devoted to differentiated integration by means of international agreements and provides an analysis of three specific examples.

The first part offers a far-reaching, historical and theoretical discussion of the concept of legal person, in the EU and generally. It notably recalls how this under-researched concept emerged and has evolved over time, and underlines its meaning from a constitutional law perspective. It also introduces the concept of *dédoublement fonctionnel* (*funktionelle Verdoppelung*, functional duplication), which Georges Scelle originally pinned down, to show how States are currently in a transitionary state characterized by the melting down of the difference between “in” and “out”, that is between domestic and foreign. In a nutshell, this concept refers to the fact that national organs are attributed an additional function where they apply norms that stem from an extra-national (or supranational) organisation, as is also the case within the EU, and a section dedicated to the German and the US-American examples illustrates this phenomenon.

The second main part of this book turns to the legal person of the EU and differentiated integration. The legal person is defined here as the interconnection between law and organisation in Union law, and this organisation is found to be characterised by the existence of a structure (*Organisationsstruktur*). This section very interestingly offers a historical overview of the evolution of the institutional/organizational framework first within the European Communities and later within the EU.

It is argued that the EU is, up until today, an example of a layered organization, characterized by the co-existence of its Member States and legally independent subdivisions. At Maastricht, it is found that the Communities though members of the Union, still enjoyed autonomy in terms of procedure and competence towards the Union. Hence, where the Community organs acted within the Union policy domains (e.g. Common Foreign and Security Policy and Justice and Home Affairs) they exercised a dual function, a situation which only Scelle's theory of functional duplication could adequately capture in the view of the author. After Lisbon, the EU is still depicted as a layered organization now characterized by the co-existence of four structural layers, which are interlinked by and have the goals of the EU in common. Interestingly, the fourth layer is not formed by institutions or bodies that are enshrined in EU primary or secondary law. It is composed of organizations whose function closely relates to the EU, but which are commonly anchored in *inter se* agreements, as is the case of, for example, the European University Institute in Florence. Further to these layers, this study considers (organisational and constitutional) principles as elements that domesticate the structure of the EU as a legal person. These include, for instance, the autonomy of the EU legal order, the primacy of EU law, or the principles of subsidiarity and proportionality. The phenomenon of differentiated integration is subsequently defined and analysed from the perspective of the challenge it poses to the existing structure.

The last part of this volume zooms in on some examples of differentiated integration by means of international agreements with a view to illustrating the relationship between institutions analyzed from a theoretical perspective in the preceding subsections. Perhaps this section is the one that is most relevant for current and future discussions on the future of the EU post-pandemic and post-Brexit. The focus is set here on three specific international Treaties concluded by some of the Member States during the euro area crisis (the European Stability Mechanism, the Treaty on Stability, Coordination and Governance and the Agreement on the transfer and mutualisation of contributions to the Single Resolution Fund), which all "borrow" EU institutions and were all designed in the framework of a forum that brought together Member States representatives whose precise nature may only be defined with difficulty. Indeed, Member States representatives commonly gather in the framework of the Council and the European Council. Yet, these representatives also have a "Chameleonic" character as they may also meet outside of these instances, a situation which further illustrates their capacity of *dédoublement fonctionnel* and which exists in Germany as well where the representatives of the *Länder* may form a federal organ, the Bundesrat, or come together in the framework of the Conference of the regional minister presidents or ministers. Interestingly, this "Chameleonic" character not only affects Member States representatives, but also applies to the legal acts they adopt for these are considered as national acts by EU law, and oftentimes as EU legal acts within national legal orders. The EU institutions' *dédoublement fonctionnel* in the form of their involvement in the implementation of these Treaties, and its limitations are, too, considered in this section.

This volume concludes by turning back to its main research question, namely the consequences of differentiated integration by means of international treaties on the constitutional architecture of the Union, and beyond this on its legal person. This notably demands that the legality *per se* of the resort to these treaties (as opposed to ordinary reforms of the EU Treaties) be first examined, and that the question of whether these treaties have provoked a constitutional mutation or transformation (*Verfassungswandel*) be asked. This is not the case according to the author, although the legal person of the EU has indeed undergone some change. Rather, the role assumed by national governments within and outside the Union should be viewed, in Jonathan's opinion, as compatible with the role ascribed to them by the EU Treaties. Also, the evolution of the concept of stability, which had mainly referred to price stability prior to the euro area crisis, is considered as one illustration of the change of the EU's legal person.

The international treaties are found to contribute to the achievement of EU-wide goals in terms of financial stability and stability of the euro area that are anchored in the Treaties, rather than to amount to a constitutional mutation. In conclusion, the author posits that like national constitutions, EU Treaties, too, allow EU institutions to be “borrowed” in the implementation of international Treaties concluded by some of the Member States. The EU legal order though simultaneously sets some boundaries to their involvement in these initiatives that complement EU norms in the form of principles that had to be developed as those treaties arose.

As mentioned in the introduction to this short review, although the existing case law has somewhat contributed to clarify the relationship and intertwinement between the EU and the international legal orders, numerous questions remain unanswered, which this volume usefully serves to analyse. As such, it is of interest to all – academics and practitioners alike – interested in Differentiated integration within the EU, the relationship between the EU and its Member States and between EU and international legal orders, and the Economic and Monetary Union.