Research for Policy

Ernst Hirsch Ballin
Emina Ćerimović
Huub Dijstelbloem
Mathieu Segers

European Variations as a Key to Cooperation

Summary

WRR
THE NETHERLANDS SCIENTIFIC COUNCIL FOR GOVERNMENT POLICY

Springer Open

About the Netherlands Scientific Council

The Netherlands Scientific Council for Government Policy (WRR) is an independent strategic advisory body for government policy in the Netherlands. It advises the Dutch government and Parliament on long-term strategic issues that are of great importance to society. The WRR provides science-based advice aimed at opening up new perspectives and directions, changing problem definitions, setting new policy goals, investigating new resources for problemsolving, and enriching the public debate.

The studies of the WRR do not focus on one particular policy area, but on crosscutting issues that affect future policy-making in multiple domains. A long-term perspective complements day-to-day policy-making, which often concentrates on the issues that dominate today's policy agenda.

The WRR consists of a Council and an academic staff who work together closely in multidisciplinary project teams. Council members are appointed by the Crown, and hold academic chairs at universities, currently in fields as diverse as economics, sociology, law, public administration and governance, health, and water management. The WRR determines its own work programme, as well as the content of its publications. All its work is externally reviewed before publication.

This is a summary of the book *European Variations as a key to cooperation,* available via www.springer.com. The book is a translation and adaptation of the Dutch report *Europese variaties*, published by the Netherlands Scientific Council for Government Policy (WRR) in 2018.
The Dutch report can be downloaded free of charge in PDF format from www.wrr.nl.

Content design: Today, Utrecht
Cover image: VormVijf, The Hague
Figures and tables: Textcetera, Inspiring Data John Verhoeven
Translation: Balance Maastricht

In this book, the Netherlands Scientific Council for Government Policy (WRR) considers what the European Union can do to better meet the needs and valid expectations of its citizens. The WRR's proposal for the Union's development going forward emphasises variation more than has been the case thus far. By variation, the WRR means:

- accepting that not all tasks for which governments are responsible need to be based on the same relationship between European, national and regional or local policy;
- recognising the value of having different patterns of cooperation between the EU Member States.

Different structuring principle

Unlike the existing differentiation by means of opt-outs and deviations, variation is not a concession intended to resolve impasses in negotiations; it is, rather, a different structuring principle. It takes differences in needs and in democratically supported convictions seriously. A common core remains necessary, specifically concerning the basic principles of democracy, rule of law, fundamental rights and freedoms, and the common market. By taking this approach, the WRR aims to remove the pressure to embrace uniformity from the debate about the EU's future.

The world order is changing

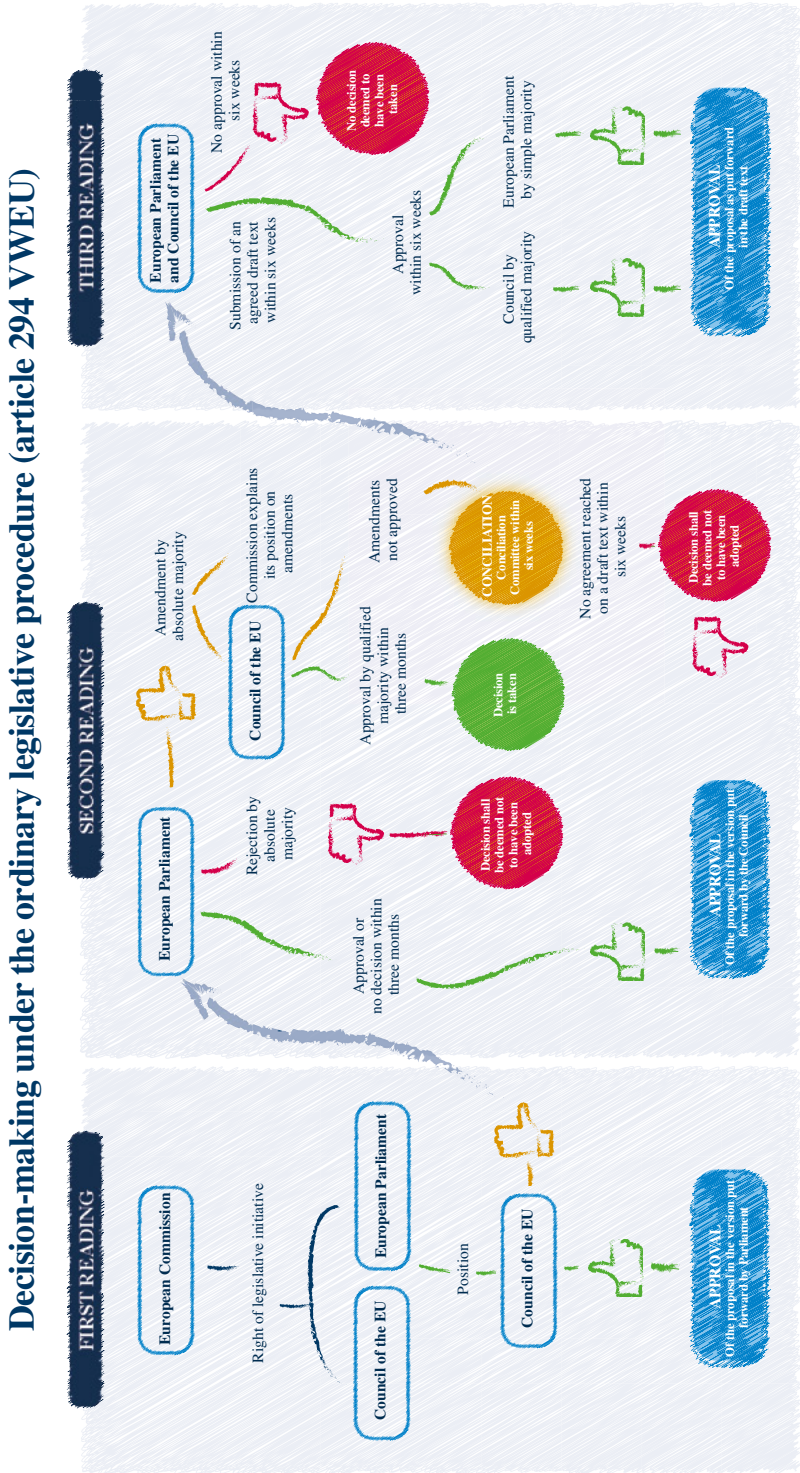
In the past decade, the European Union appeared to be in the centre of a vortex of crises: the financial crisis, the currency crisis, the refugee crisis, Brexit, and the undermining of the rule of law in some Member States. The nature of the world order within which the EU and its Member States operate is also changing dramatically: tensions have arisen owing to Russia's invasion of Ukraine and the war in Syria; relations with Turkey have grown strained; transatlantic relations are being disrupted; and there is pressure on NATO, the alliance to which most Member States belong. Opinions differ widely as to how the Union and its Member States should respond to these forces: some think the answer is closer European integration, while others argue that it is time for the EU to develop a policy of disintegration and for the Member States to invest in reclaiming their individual sovereignty.

Fundamental question of uniformity and diversity

To overcome this impasse, we need to readdress the fundamental question of uniformity and diversity in the Union. Intra-EU cooperation leaves much greater scope for variation than is often thought. As the number of Member States has increased along with the differences between them, there is more reason to make use of the option of variation. The Union can reduce tensions in this way and avoid having its credibility undermined by major disparities lurking beneath a show of unity. There is absolutely no need to choose between the extremes of full integration or disintegration. Intra-EU cooperation is based on the principle of openness. The Union has a common legal order that governs relations between its own institutions and between itself and the Member States, but also between itself and its citizens. The Member States can implement this in various different ways, making it easier for democracy at European level to build on the democratic structures of the Member States, with the European Union as a 'demoicracy', a polity of multiple peoples (*demoi*, the plural of demos). Taking variation seriously precludes its being used only as an emergency solution or as a stopgap in times of crisis, and as a last resort in the event of deadlock in decision-making.

The WRR's analysis is based on the historic changes that followed the fall of the Berlin Wall in 1989 and that are associated with the Maastricht Treaty (1991-1993). Following its prelude, the Single European Act (1986), the Maastricht Treaty marked a turning-point in the pattern of European integration. It was followed by further substantial changes, sealed in the Treaty of Lisbon (2007), which taken together determine the nature of European integration today.

See the diagram on the next page.


Decision-making under the ordinary legislative procedure (article 294 VWEU)
FIRST READING
European Commission
Right of legislative initiative
Council of the EU
European Parliament
Position
Council of the EU
APPROVAL
Of the proposal in the version put forward by Parliament
SECOND READING
European Parliament
Amendment by absolute majority
Rejection by absolute majority
Approval or no decision within three months
Decision shall be deemed not to have been adopted
Council of the EU
Commission explains its position on amendments
Approval by qualified majority within three months
Decision is taken
Amendments not approved
CONCILIATION
Conciliation Committee within six weeks
No agreement reached on a draft text within six weeks
Decision shall be deemed not to have been adopted
APPROVAL
Of the proposal in the version put forward by the Council
THIRD READING
European Parliament and Council of the EU
Submission of an agreed draft text within six weeks
No approval within six weeks
No decision deemed to have been taken
Approval within six weeks
Council by qualified majority
European Parliament by simple majority
APPROVAL
Of the proposal as put forward in the draft text

Room for variation in the European Union

The European Union will have to offer more room for variation. That is the main thrust of this book, which we are presenting at a time when the European Union is under pressure, both internally and externally. Two decades of growth, both in the number of Member States and in its tasks, have placed so great a strain on the Union's internal resilience that cracks have begun to appear in its basis of support and even in respect for its democratic foundations under law. Both the current policy of the President of the United States and Russia's policy respond to trends that are weakening the position of the European Union, such as Brexit, internal political controversies concerning migration and economic policy, and external trade conflicts. In this book, we argue that more flexibility is needed in the Union's structure to bolster it in its critical tasks, including the internal market and protection against crime and social injustice. This is the lesson that we should be drawing from the experiences of the past 25 years, since the Maastricht Treaty took effect on 1 November 1993.

Upheaval in Central and Eastern Europe

The Maastricht Treaty followed the upheaval in Central and Eastern Europe, which had changed the balance of power dramatically on the continent. At that time, few questioned that the process of European integration should continue. The Treaty integrated the European Communities and the new domains ('pillars') of European policy – law enforcement, migration, and foreign and security policy – into a broad new framework: the European Union (EU). Much has changed since then, not only because 16 new Member States have acceded but also because the content of its policy has 'deepened', for example the introduction of the euro and a common asylum system. In virtually every domain, the European Parliament, which is elected directly by the people, is now a co-legislator, together with the Council, composed of ministers representing the Member States. Moreover, since the entry into force of the Treaty of Lisbon on 1 December 2009, the institutional structure has been simplified by merging the three pillars into one revitalised European Union.

The European Union must overcome the conflicts about its future that have arisen ever since. To be persuasive, changes must be driven by a realistic view of the European Union, which, despite Brexit, has almost 30 Member States. The Netherlands' position and the contribution it makes to the inevitable changes in the EU's functioning matter.

Protection of the individuality of the Member States

Uncertainty about the future of the European Union has arisen in a changed political environment. Today, European integration no longer goes without saying. The relief with which Europe welcomed the creation of a common market with free movement of persons, goods, capital and services – not least in Central Europe, with its recent history of closely guarded borders – has given way to a desire for greater protection of the individuality of the Member States. The introduction of rules and authorities to guarantee the functioning of the market is viewed on the one hand as interference and on the other as the dismantling of existing protective institutions such as state-owned companies and the ban on dismissals. Faltering 'Europeanisation', for example an asylum policy that is only partially harmonised, or the rather noncommittal coordination of foreign policy, has made the EU's institutions responsible for their own weakness. That weakness was laid bare by a series of dramatic events, from the repercussions of the Yugoslav Civil War (already raging at the time of the Maastricht Treaty), through the deep divisions over the Iraq War and the financial crises, to the current Syrian catastrophe and its consequences for migration.

Capable of rebalancing

And yet the institutions of the European Union perform vital tasks, day in, day out, to organise economic life and guarantee an area of freedom, security and justice for people and businesses. The fact that many are now questioning and have lost confidence in the EU shows that a Union of so many and such different Member States as the current 28 cannot be built on the idea that all of them, even after their transitional periods, will be integrated on an equal footing. Despite the aforementioned tensions, however, the enlargement of the Union to include Member States with disparate economies, histories, and legal and administrative cultures has given many people a more solid economic and social basis. The Union has shown itself capable of rebalancing after crises. That has had consequences, however. Often, and perhaps increasingly, it has had to accept the withdrawal of some Member States from certain aspects of EU legislation and policies. With regard to the Schengen Agreement, the euro, migration and asylum policy, and even the enforcement of fundamental rights and freedoms, it has, more or less reluctantly, accepted differences between Member States or conceded during tough negotiations. These are powerful indications that there is a need for variation between Member States. That is true not only of the new Member States, moreover. Differences of opinion that have arisen between the initial six Member States in new policy domains, such as monetary union and migration policy, also indicate a need for variation.

Opening positions in the debate on the future of European integration

The time when the process of European integration was clearly charged to the positive side of the political balance sheet is over. But the direction in which changes are to be made – less integration, transformation, deepening or variation – is controversial. The reasons for criticising the current state of affairs vary. Some emphasise the restrictions placed on national policymaking, others the lack of solidarity on the most pressing issues, and yet others the absence of democratic foundations or the inability of the Union to stop democracy from declining into authoritarianism in some Member States.

Relinquishing an all-too-common fixation on uniformity opens up new opportunities for a debate on the future of European integration. A 'freer' perspective that allows for more variation can foster a more realistic debate. The perspective proposed in this book makes it possible to move beyond the over-simplified debate that pits nation state against federation. While the contrast seems clarifying, it does not do justice to the multifaceted nature of reality. Many European citizens, politicians and policy-makers concerned about dichotomous thinking are extremely sensitive.

Variation is not a sign of weakness

Variation in European integration is not a sign of weakness. European integration seems to have reached a point where solidarity, resolve and national engagement will in fact benefit from specific forms of cooperation. Variation supports the provision of public goods such as security, stability, prosperity and social protection. Accepting it can thus be a proactive means of revitalising the relationship between internal and external, between institutions and citizens, and between public tasks and perceived needs.

The trio consisting of the Treaty on European Union, the Treaty on the Functioning of the European Union, and the Charter of Fundamental Rights of the European Union provide the constitutional basis for the relationship between its own institutions, between those institutions and the Member States, and between those institutions and the citizens of those Member States. Although there are only minor differences between this trio and the unsuccessful Treaty establishing a Constitution for Europe with regard to their legal implications, the system that has been accepted is more open in purpose and therefore less specific and unequivocal. Continuing to see the European Union as a set of institutions serving a non-exclusive European legal order has given rise to openness as a principle. That is what we wish to elaborate on in this book.

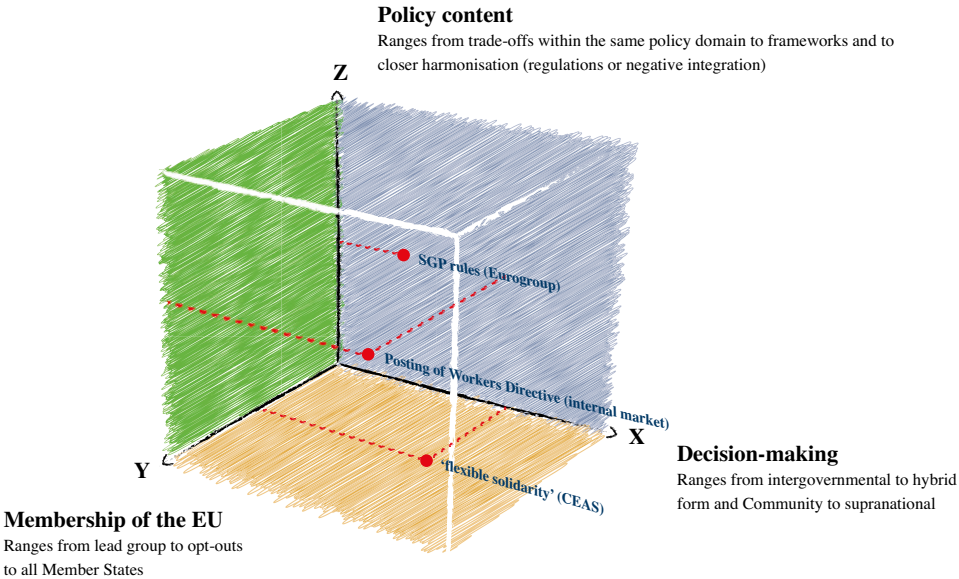
Based on common values

The guiding principles enshrined in Articles 1 to 6 of the Treaty on European Union have been respected and put into practise: the European Union is a union among peoples – note the plural – based on common values such as respect for human dignity, democracy and the rule of law, but also characterised by pluralism and respect for equality between the Member States and their national identities. The constitutional principles governing the Union's competences (Articles 4 to 6) mean that the Union has no more power than that which the Member States have conferred on it by treaty, that the Member States are expected to be loyal to one another, and that the Union must adhere to the principles of subsidiarity and proportionality in its actions.

These principles must do more than merely pay lip service to national diversity. With the European Union now encompassing a wide variety of Member States, tasks, and therefore societal problems – the result of the changes that occurred in the 1990s and 2000s – the need for variation must be acknowledged. This book considers the notion that, if these constitutional principles are taken seriously, then the process of European integration might not only mean entrusting more competences to the Union and increasing the level of uniformity, but also giving the Member States scope to take responsibility for themselves and therefore allowing for pluralism within the Union.

Tailored to the situation

It is not only jurists trained in a single legal system but also many others who are inclined to see legal and political orders as pyramids: the top is more important than the base, and the intermediate levels carry the weight of the top and pass on the instructions issued from there. Regardless of whether this image was ever completely accurate, it is in any case not up to date. International, supra-state, national and regional decision-making influence one another. The standards established in a broader context can only work if they are interpreted in smaller circles and are tailored to the situation in which they are applied – i.e. in different ways. Multi-level governance of this kind is the actual but also necessary form of governance and administration in the European Union. Our view of this reality becomes blurred because we see the European Union as a kind of state, but also because we deny what has been the case since 1957, namely that the sovereignty of the Member States is limited because they have transferred legislative, executive and judicial competences to EU institutions. It is important to note that even when competences are transferred in this manner, the Member States exercise considerable influence on the drafting of legislation and the resolutions adopted within the Council of Ministers.



Pressure on protective legislation

The integration process has become increasingly controversial over time, however. From the mid-1990s onwards, the emphasis shifted from a liberalism based on European traditions and embedded in social guarantees to more vigorous privatisation and market forces. This shift put pressure on protective legislation and provoked dissatisfaction and alienation in many Member States, weakening solidarity between the populations within and between them.

As a result, functional progress, which had long been a determining factor for the EU, stagnated. Some key elements of the integration process remain intact, such as reciprocity as a basis for mutual market access, convergence driven by market integration, and the Community legislative system as a driving institutional force. But the triad of (1) market integration momentum, (2) dissemination of integration practices from one policy domain to another, and (3) their enshrinement in supranational legislation is no longer self-evident.

More scope and flexibility

Instead of stressing functional progress, the WRR believes that the Union needs an approach that allows for variation. Variation in European integration is not a sign of weakness. European integration has reached a point where solidarity, resolve and national engagement will in fact benefit from embracing different forms of cooperation. By accepting variation, the Union can avoid wasting energy and political credit to attain a level of uniformity that is not really necessary. There would then be more scope and flexibility to provide for public goods such as public safety and security, stability, prosperity and social protection. Variation can thus be a proactive means of revitalising the relationship between institutions and citizens, and between public tasks and needs.

This book discusses forms of variation that fall both within and outside the current framework of European Union Treaties. There are three dimensions to variation, related to:
1) policy content,
2) decision method, or
3) included Member States.

Scope for these variations is mapped out in three domains, i.e.:
1) the internal market;
2) the euro;
3) asylum, migration and border control.

Although this report limits its analysis to the aforementioned subjects and policy domains, the variation perspective is likely to be relevant to other policy domains as well.

Common, non-negotiable foundations

It would be both impossible and undesirable to permit the same degree of variation in every domain. Variation also has its limitations and baseline requirements. A common market can only function if products and services are subject to the same quality requirements. Cooperation within the Union will always be based on the principles of democracy, the rule of law and fundamental rights and freedoms, including social rights and the right to protection against persecution. If we do allow variations to be a feature of the European Union, then we must also bear in mind that these principles are its common, non-negotiable foundations.

The Netherlands Scientific Council for Government Policy
Buitenhof 34
P.O. Box 20004
2500 EA The Hague, The Netherlands
Telephone +31 (0)70 356 46 00
Email info@wrr.nl

***European Variations as a Key to Cooperation*, focuses on the way in which the Member States can continue cooperating in a productive and constructive manner and the degree to which they should or should not strive to achieve uniformity in that cooperation.**

By accepting variation, the Union can avoid wasting energy on attaining a level of uniformity that is not really necessary. Variation makes it possible to forge credible ties with the democracies of the Member States. It offers scope and flexibility to provide collectively for public safety and security, stability, prosperity and social protection. Accepting variation as a structuring principle reduces tensions and prevents major disparities lurking beneath a show of unity from undermining the credibility of the Union.

The book's proposal for the Union's development going forward emphasises variation more than has been the case thus far. Recognising and accepting variation means that differences in needs and in democratically supported convictions are taken seriously. Variation is not a sign of weakness; rather, it avoids wasting energy and political credit to attain a level of uniformity that is not really necessary. Variation can thus be a proactive means of revitalising the relationship between institutions and citizens, and between public tasks and needs.

The publication *European Variations as a Key to Cooperation* is available via www.springer.com. For further information send an email to dijstelbloem@wrr.nl.

WRR

THE NETHERLANDS SCIENTIFIC COUNCIL FOR GOVERNMENT POLICY