

Conceptualizing a Differentiated Europe

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List of Abbreviations

AC	Arctic Council
BEAC	Barents Euro Arctic Council
CBSS	Council of the Baltic Sea States
COREPER	Committee of Permanent Representatives (Comité des représentants permanents)
CFSP	Common Foreign and Security Policy
CSDP	Common Security and Defence Policy
CT	Constitutional Treaty
E3	France, Germany, United Kingdom
E3/EU	France, Germany, UK and the High Representative for the Common Foreign and Security Policy (CFSP)
EAM	Extended Associated Membership
ECB	European Central Bank
ECJ	European Court of Justice
EEA	European Economic Area
EEA+	European Economic Area plus
EFTA	European Free Trade Association
EMP	Euro-Mediterranean Partnership
EMU	Economic and Monetary Union
EnCo	Enhanced Cooperation
ENP	European Neighbourhood Policy
ENPI	European Neighbourhood Policy Instrument
ESDP	European Security and Defence Policy
EP	European Parliament
ERM II	European Exchange Rate Mechanism II
EU	European Union
EU 27	European Union with 27 member states
EU 27+	European Union with 27 and more member states
FYROM	Former Yugoslav Republic of Macedonia
G6	Unofficial group of the interior ministers of the six biggest EU member states
GAERC	General Affairs and External Relations Council
JHA	Justice and Home Affairs
LT	Lisbon Treaty
MEP	Member of European Parliament
MS	Member state(s)

NATO	North Atlantic Treaty Organisation
NCM	Nordic Council of Ministers
PCAs	Partnership and Co-operation Agreements
SAP	Stabilisation and Association Process
TEC	Treaty establishing the European Community
TEC-N	Treaty establishing the European Community, Nice Version
TEU-N	Treaty on European Union, Nice Version
TEU-L	Treaty on European Union, Lisbon Version
TFEU	Treaty on the Functioning of the European Union
UMed	Union for the Mediterranean
UK	United Kingdom
NCBs	National Central Banks
PSC	Political and Security Committee
TAIEX	Technical Assistance Information Exchange Unit

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Key Points

- The European Union (EU) requires more different speeds, if an EU 27+ wants to remain effective. The increasing economic, financial, social and geopolitical heterogeneity among EU countries, diverging political objectives and expectations concerning the future path of integration, and the need to respond to the pressure from third countries aiming to join the European club, while enlargement fatigue is widespread, call for a higher degree of differentiated integration. The central question is not whether there will be a differentiated Europe, but how it will or rather how it should look like.
- The future path of differentiation will not be dominated by one single model. We are rather likely to witness the application of many and diverse forms of flexible integration. One can conceptually distinguish between the following six: (1) *creation of a new supranational Union*; (2) *cooperation via established instruments and procedures*; (3) *intergovernmental cooperation outside the EU*; (4) *differentiation through opt-outs*; (5) *affiliation beneath full membership*; (6) *negative differentiation through withdrawal*.
- The creation of a new supranational Union – with an autonomous institutional structure and an independent set of legal norms – is neither advisable nor realistic. It is undesirable because the establishment of such a new entity can lead to a division of Europe into two opposing camps. It is unrealistic because (i) the EU is far from reaching a point at which diverging national positions concerning the future of Europe can only be resolved through the establishment of a new Union, and because (ii) even in the most integration-friendly substantial countries there is currently hardly any readiness to jump into the deep and to further pool national competences in the framework of a new Union.
- If politically feasible and legally possible, differentiation should be organized inside the Union. Flexible cooperation within the EU framework (i) respects and benefits from the Union's single institutional framework, (ii) preserves the supranational powers and composition of the Commission, the European Parliament and the European courts, (iii) limits the anarchic and uncontrolled use of flexibility, (iv) guarantees a high level of calculability due to the existence of clear-cut rules concerning the inception, the functioning and the widening of differentiated cooperation, (v) is characterized by a high degree of openness, (vi) ensures a high level of democratic legitimacy through the involvement of the European Parliament and national parliaments, (vii) enables the continuous development of the EU's *acquis* in line with the requirements of the EU Treaties, and most importantly (viii) reduces the overall risk of a confrontational split between the "outs" and the "ins".

- Differentiated cooperation inside the EU framework should not follow a single master plan with a predefined idea of Europe's *finalité*. Applying the instruments of differentiation to create some sort of a federally organized “United States of Europe” (Verhofstadt) might create suspicions and fears among Eurosceptics and within the new and smaller member states, and in return limit the chances that the instruments of differentiation are constructively employed in practice.
- Differentiated cooperation within the EU should follow the concept of *functional-pragmatic differentiation*, which adheres to a functional case-by-case approach aiming to overcome specific blockades. In the years ahead greater use should be made of the various instruments of differentiated integration laid down in the EU Treaties, in order to reduce the widespread scepticism concerning further differentiation and to limit the necessity for extra-EU cooperation. It will be particularly important that EU institutions and member states become familiar with the limits and potentials of the differentiation instrument of *enhanced cooperation*.
- Closer cooperation outside the EU bears a number of potential risks. However, in some cases it might be better to make a step forward outside the Union instead of waiting indefinitely for a small step inside the EU. Cooperation outside the EU should follow the concept of an *Intergovernmental Avantgarde*, which is open to all member states and aims to integrate the legal norms adopted and the cooperation initiated outside the EU into the Union at the soonest possible moment. The recent case of the Treaty of Prüm proved that the chances to incorporate a legal and political *acquis* into the EU framework are higher, if the participating states keep the “outs” constantly informed and if key EU states actively promote a quick incorporation.
- One should not demonize the allocation of opt-outs to a small number of member states for various reasons: (i) The granting of opt-outs might be the only way to overcome the opposition of certain EU members towards a further deepening. (ii) Even a radical instrument such as an opt-out can result in integrationist dynamics throughout the Union, as the widespread use of the opt-in by the UK and Ireland in the area of Justice and Home Affairs or the possibility of a removal of certain opt-outs in Denmark have shown. (iii) The allocation of opt-outs preserves the EU's single institutional framework and does not lead to the creation of new bodies outside the EU. (iv) The institutional and political affiliation of the opt-out countries limits the danger of a divide between the “outs” and the rest of the Union.
- Concepts aiming to affiliate neighbouring European countries beneath the level of full membership – *Association Plus, Partial Membership, Limited Membership* – should not exclude the perspective of joining the EU club. The possibility of joining the Union should in principle remain open to all European countries, even if the prospect of membership in many cases might still be very distant or even indefinite. An attempt to once and for all define the borders of Europe would be politically

unwise. However, at the same time, the EU should avoid any enlargement automatism and for some time neither directly nor indirectly grant any further accession offers.

- The voluntary withdrawal of less integration friendly countries can enable a further deepening of EU integration. However, this form of “negative differentiation” can weaken or even destabilize the EU, if (i) the number of countries exiting the Union is large, (ii) the withdrawing states have played a significant role in a certain policy area, and (iii) if the EU and the withdrawing state(s) fail to constructively redefine their relationship. In order to continue to benefit from the advantages of the internal market and from a functioning inter-institutional structure, the withdrawing state(s) could decide to join the European Economic Area (EEA). Alternatively, a withdrawing state could also become a “partial” member of the EU in one or more policy areas, in case both sides consider this to be in their interest.
- The application of very diverse forms of differentiation inside and outside the EU framework will require the elaboration of a “narrative of differentiated Integration” and the setting up of an “informal differentiation board”. The “narrative of differentiated integration” is required in order to explain to the wider European public in a comprehensible fashion the purpose and reasoning behind flexible integration. The “informal differentiation board”, including the Commission and elected representatives of the states participating in the various differentiation projects, will be required to coordinate the activities of the various differentiation projects inside and outside the EU framework. The board should not be limited to an exclusive circle of countries forming some sort of a *directoire*, but rather represent a rotating mixture of EU members including small and big, new and old, northern and southern, eastern and western, euro and non-euro countries.

Conceptualizing a Differentiated Europe

Janis A. Emmanouilidis*

More than ever before, the European Union (EU) requires various speeds. The growing diversity of interests and the increasing economic, financial, social and geopolitical heterogeneity among EU countries, diverging political objectives and expectations concerning the future path of integration in an EU 27+, and the need to respond to the pressure from third countries aiming to join the European club, while enlargement fatigue is widespread, call for a higher degree of differentiated integration.¹

Differentiation is no magic potion and it should not be an end in itself. Nevertheless, a more differentiated Europe will be a necessity, if the EU 27+ wants to remain effective. Citizens expect the EU to provide state-like services in areas as diverse as justice and home affairs, foreign, security, defence, tax, environmental, economic or social policy. However, not all member states or potential EU countries can or may wish to provide such services on the European level at the same time and with the same intensity. As was the case in the past with the common currency, the Schengen accords, social policy, or more recently with the Treaty of Prüm, intensified cooperation among a smaller group of countries or the fact that the EU's *acquis* does not apply equally in all participating states can help to overcome a situation of stalemate and improve the way in which the European Union functions. In addition, differentiated integration can also limit tensions between the members of a more heterogeneous EU. The countries wishing to further deepen cooperation are allowed to do so and those who are not willing or able to further integrate are relieved from the pressure of the more integrationist member states.

The EU 27 is already today characterized by different levels of cooperation and integration. Some members have introduced the euro others not, some attempt to develop the Union as an Area of Freedom, Security and Justice

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¹ The present paper does not distinguish between the terms *differentiated integration*, *differentiation*, *flexible integration*, *flexibility*, *differentiated cooperation* or *flexible cooperation* but rather makes use of them as synonyms.

others not, most EU countries take fully part in European Security and Defence Policy (ESDP) or in the Schengen area others not. These examples show that the EU has already entered the path of differentiation. But the degree of flexibility is likely to further increase in the future. The central question is not whether there will be a differentiated Europe, but how it will or rather how it should look like.

The debates about *directorates*, *triumvirates*, *pioneer* and *avantgarde groups* or *centres of gravity* have been to a large extent characterized by threats and by semantic and conceptual misunderstandings, which overshadow the fact that differentiation provides a key strategic opportunity in a bigger and more heterogeneous EU. Differentiation has been repeatedly misused as a threat aiming to put pressure on states not willing to cooperate. Occasionally, this might have led to some short-term effects, but all in all it has rather harmed the concept of differentiation. Simply equating differentiation with a closed core Europe – in which a small group of countries determines the nature and fate of integration – misses the point that flexible forms of cooperation and integration provide opportunities to jointly solve problems, even if the support and participation of all EU member states or of all (potential) candidate countries is not (yet) forthcoming.

Bringing the whole notion of differentiation into disrepute makes it difficult to utilize its formative potential to the full. There is thus a necessity to dedramatise the debate and to open it up for rational arguments. For this purpose, three things need to be done:

- First, to conceptually distinguish between the different possible forms of differentiation in an attempt to bring more analytical clarity into the debate.
- Second, to critically analyse and evaluate the major implications and consequences of the diverse forms of flexible integration.
- And third, to sketch the main conclusions concerning the future path towards a more differentiated Europe.

Six forms of differentiation

There is no one single model but rather a whole set of diverging forms of flexible integration. One can distinguish between the following six principal forms:² (1)

² In order to avoid misunderstandings the present paper does not rely on previously defined concepts of differentiated integration. It rather conceptually develops a new set of diverse forms and subforms of differentiation. It does so on the grounds of the observation that concepts such as *Europe à la carte*, *variable geometry*, *core Europe* or *abgestufte Integration* mean different things to different people, which in return tends to create confusion rather than analytical clarity.

creation of a new supranational Union; (2) differentiation via established instruments and procedures; (3) intergovernmental cooperation outside the EU; (4) differentiation through opt-outs; (5) affiliation beneath full membership; (6) negative differentiation through withdrawal.

The following analysis of the six principal forms of differentiation starts with a short description of their key characteristics (for an overview see Table 1 on p. 62-63 followed by an examination of their major political, economic, and institutional consequences and implications (for an overview see Table 2 on p. 64-65. The paper ends with a list of ten major conclusions drawn from the previous findings.

1 Creation of a new supranational Union

1.1 Description of key characteristics

A group of countries creates a new Union aiming to achieve a higher level of supranational cooperation. The participating states hold that they cannot further deepen integration within the framework of the existing European Union due to contradictory and irreconcilable attitudes towards the future of European integration. The creation of a new Union would be the ultimate response to the fact that the diverging views about the future progress of integration can no longer be reconciled amongst all member states of the “old EU”.³ The new Union would most likely be characterized by a high degree of openness as every EU country is invited to participate, provided that it is willing and ready to accept the obligations and requirements deriving from membership in the new supranational Union. Right from its inception, the new Union aims at a higher level of supranational cooperation, which includes the immediate transfer of competences and thus the pooling of sovereignty beyond the current level inside the “old EU”. In the long-term perspective, the new entity seeks to deepen integration and to foster progress towards the development of a federally organized political Union. The legal basis of the new Union is laid down in a separate treaty or constitution worked out, approved, ratified and implemented solely by the participating member states. Since the creation of a new Union would require a massive political effort on behalf of the participating countries, one can expect that the legal basis of the new entity would be far more ambitious than e.g., the Constitutional Treaty of 2003/04, which in the final analysis was a hard-fought compromise between integrationists and

³ See also Janis A. Emmanouilidis, *Withdrawal or Creation of a New Union – A Way Out of the EU’s Constitutional Dilemma?*, Spotlight Europe 2007/02, Guetersloh/Munich, June 2007, here p. 4.

intergovernmentalists, between those who want a far more integrated Europe and those who oppose the creation of some sort of a political union.

1.2 Key consequences and implications

The creation of a new supranational Union would lead to a series of key political and institutional consequences and implications:

- *No direct role of existing EU institutions:* The institutions of the “old EU” – (European) Council, European Commission, European Parliament (EP), and European courts (Court of Justice, Court of First Instance) – would play no direct executive, legislative or judicative role within the new Union. However, as long as the countries of the new Union remain members of the “old Union” they would have to adhere to the principle of loyalty laid down in the EU Treaties (Art. 10 TEC-N; Art. 3a Lisbon Treaty (LT), Art. 4 TEU-L) and thus respect the supremacy of the EU’s *acquis* and not undermine the functioning of the “old Union”. Insofar, the EU institutions – and here especially the European Court of Justice (ECJ) – would have the ability to at least indirectly control the member states participating in the new entity.
- *Creation of new supranational institutions:* The establishment of a new supranational Union would entail the creation of novel institutions. The fact that the new entity aims at a higher level of supranational cooperation would make it necessary to establish an institutional architecture, which guarantees the functioning and legitimacy of the new Union. A lending of the organs of the “old EU” to the new Union (Organausleihe) would be politically unwelcome from the perspective of both the “ins” and the “outs” and legally impossible, since institutions cannot operate on the basis of two separate sets of primary law. At the same time, it will not be enough to establish a coordinative secretariat or a ministerial committee limiting cooperation to government-to-government relations. The new supranational Union will rather require a powerful executive, a strong parliamentary dimension securing democratic legitimacy, and a separate judicative for settling legal disputes within the new Union.
- *Most “old EU” members join the new Union:* One can assume that the vast majority of the members of the “old Union” will be very keen to enter the new entity and that no group of states will deny them their right to join the new club. Most countries will aspire to enter the new Union in order to be able to co-determine the future of European integration and to prevent what European political elites fear most: the establishment of a small leadership circle from which they are excluded against their will. On the other side, one

can take for granted that no small group of states would actively deny the wish of other countries to join the new Union. It seems far more likely that every country of the “old Union” will in principle be invited to participate. In other words, membership in the new entity will not be denied, as long as the countries in question accept all the obligations and fulfil all the requirements deriving from membership in the new Union. As most countries will exert pressure to join the new club and as nobody will actively deny them their wish, one can expect that the new Union will in the end include a vast majority of the members of the “old EU”.

- *Weakening of “old EU” and danger of a new dividing line:* The establishment of a new supranational Union, with an independent set of legal norms and an independent institutional structure, will most likely weaken the role of the “old EU” and lead to an unbalanced rivalry between the “old” and the “new” Union. In theory one could think of a construction in which a number of states integrate more strongly in the framework of a new Union without challenging the existing EU. The current Treaties already include concrete provisions for such forms of cooperation.⁴ The most prominent example is Article 306⁵ of the EC-Treaty (TEC-N) according to which the provisions of the Treaty shall not preclude the existence or completion of regional unions between Belgium and Luxembourg, or between Belgium, Luxembourg and the Netherlands, to the extent that the objectives of these regional unions are not attained by application of the Treaties. Other examples are the codified intention of Finland and Sweden to intensify Northern cooperation, which was explicitly mentioned in their Accession Treaty⁶, or the possibility for member states to develop closer cooperation in the framework of NATO, “provided that such cooperation does not run counter to or impede” the provisions laid down in the Treaties

⁴ Ideas to include a general clause allowing and regulating such forms of cooperation were discussed, but did not find their way into the Constitutional Treaty/Lisbon Treaty. In 2002 the Commission’s Penelope document called for a general clause “allowing closer cooperation between Member States working towards objectives that cannot be reached by applying the Constitution, on condition that the co-operation in question respects the Constitution”, see European Commission, Feasibility Study – Contribution to a Preliminary Draft Constitution of the European Union, Brussels 2002, here p. XIV-XV. See also Eric Philippart, A New Mechanism of Enhanced Cooperation for the Enlarged European Union, Research and European Issues N° 22, Notre Europe, March 2003; here p. 10.

⁵ Art. 306 of the *Treaty establishing the European Community* (TEC) was integrated into the new *Treaty on the Functioning of the European Union* (TFEU) as Art. 350.

⁶ See declaration N° 28 annexed to the Accession Treaty of Austria, Finland and Sweden. One should note that accession treaties have the legal status of primary law.

(Art. 17.4 TEU-N⁷). These examples portray that closer forms of cooperation, which allow a fertile coexistence between the EU and a new Union, are possible, at least from a theoretical and legal point of view. However, from the perspective of *Realpolitik* it seems rather likely that the “old” and the “new” Union will become rivalries. The members of the new Union would most likely concentrate their political energies on the development of their newly founded entity. In return, the “old EU” would become a subordinate and marginalized political body. In this case the “old EU” would not be able to function as a kind of bracket between the two entities. The idea that the “old EU” could ally the more integration-friendly European states and those less willing or able to further integrate in some sort of a “stability community” (Stabilitätsgemeinschaft) would not materialize. On the contrary, chances are high that the rivalry between the two Unions could even lead to a division of Europe into two opposing camps – on the one hand the members of the new Union, and on the other the excluded states, which seek their political fate in other (geo-)political constellations. In the end, chances are high that one might witness the gradual marginalisation or even dissolution of the “old EU”.

2 Differentiation via established instruments and procedures

2.1 Description of key characteristics

Some member states raise their level of cooperation inside the framework of the EU, by applying either general instruments of differentiation (*enhanced cooperation*⁸) or predetermined procedures for specific policy areas (e.g., Economic and Monetary Union (EMU), *permanent structured cooperation*⁹, *constructive abstention*), which are laid down in the Union’s primary law (see

⁷ The contents of Art. 17 of the Nice *Treaty on European Union* (TEU-N) was integrated into the new Lisbon *Treaty on European Union* (TEU-L) as Art. 42, although its wording was updated. Art. 42 states that the EU’s Common Security and Defence Policy (CSDP) “shall respect the obligations of certain Member States, which see their common defence realised in the North Atlantic Treaty Organisation (NATO), under the North Atlantic Treaty and be compatible with the common security and defence policy established within that framework.”

⁸ See Janis A. Emmanouilidis, *Der Weg zu einer neuen Integrationslogik – Elemente flexibler Integration in der Europäischen Verfassung*, in Werner Weidenfeld (ed.), *Die Europäische Verfassung in der Analyse*, Guetersloh, 2005, pp. 149-182, here pp. 150-162; *Enhanced Cooperation: From Theory to Practice*, in *The Treaty of Lisbon: Implementing the Institutional Innovations*, Joint Study of CEPS, EGDMONT and EPC, November 2007, pp. 97-119.

⁹ See Art. 42.6 and Art. 46 TEU-L, Art. 28 A and 28 E LT; Art. I-41.6 and Art. III-312 Constitutional Treaty (CT).

Box 1). Differentiation via established instruments and procedures is characterized by a high degree of openness, as participation must be open to every member state at every time. However, the definition of participation criteria, which all EU countries have to consensually agree on, or the fixation of a minimum number of participants (*enhanced cooperation*¹⁰) may limit or predetermine the number of participating states. However, the convergence criteria in EMU and the criteria established for *permanent structured cooperation*¹¹ exemplify that the member states tend to define criteria, which (gradually) allow the participation of the majority of EU countries willing to cooperate.

Box 1: Treaty Instruments of Differentiation

Enhanced cooperation is a general instrument of differentiation originally introduced into the Amsterdam Treaty and then modified by the Treaty of Nice and the Constitutional Treaty/Lisbon Treaty. Enhanced cooperation is a last resort mechanism, which can be initiated when the Council “has established that the objectives of such cooperation cannot be retained within a reasonable period by the Union as a whole” (Art. 20 TEU-L, Art. 10 LT; similar wording in Art. 43a TEU-N). Enhanced cooperation allows a minimum number of states (Nice: 8; Lisbon: 9) to cooperate more closely on the basis of a clear set of preconditions, rules and procedures concerning the authorization, the operation and the widening of cooperation (see also Table 3, pp. 70).

Permanent structured cooperation is a novel instrument of differentiation in the field of Common Security and Defence Policy (CSDP) developed in the framework of the European Convention (2002/03) and originally laid down in the Constitutional Treaty (2003/04) and later integrated into the Lisbon Treaty (2007). Permanent structured cooperation allows those member states “whose military capabilities fulfil higher criteria and which have made more binding commitments to one another with a view to the most demanding missions” to establish closer forms of cooperation within the framework of the EU. Permanent structured cooperation is thought as an instrument to further integrate, limit duplications and develop the military forces of the participating EU countries. The non-participating states do not take part in voting, but can join permanent structured cooperation at a later stage, if they fulfil the necessary preconditions. The participation criteria for permanent structured cooperation were laid down in a separate protocol.¹² The initiation of permanent

¹⁰ The Nice Treaties have set the minimum number of participants in *enhanced cooperation* at eight, the Lisbon Treaty at nine member states. The Constitutional Treaty had originally set the minimum number at one third of member states.

¹¹ The participation criteria for *permanent structured cooperation* were laid down in a separate protocol annexed originally to the Constitutional Treaty (Protocol 23) and later integrated into the Lisbon Treaty (“Protocol on Permanent Structured Cooperation Established by Art. 42 of the Treaty on European Union” (Protocol 10)). The criteria include: (i) the development of defence capacities through the development of national contributions and participation, where appropriate, in multinational forces; (ii) participation in the main European equipment programmes, and in the activity of the European Defence Agency; (iii) capacity to supply by 2010 at the latest, either at national level or as component of multinational force groups, targeted combat units for the missions planned, structured at a tactical level as a battle group capable of carrying out military missions within a period of 5 to 30 days.

¹² For an analysis of *permanent structured cooperation* see: Sven Biscop, *Permanent Structured Cooperation and the Future of ESDP*, Egmont Paper 20, Brussels, 2008; Gerrard Quille, *The Lisbon Treaty and its implications for CFSP/ESDP*, Directorate-General for External Policies of the Union, European Parliament, February 2008; Foreign Policy – Many Opportunities and a Few Unknowns, in *The Treaty of Lisbon:*

structured cooperation will require a qualified majority vote within the Council, which is likely to occur after the Lisbon Treaty has entered into force.

Constructive abstention allows every EU country to abstain from voting in the field of Common Foreign and Security Policy (CFSP) in the Council. The member state in question is not required to implement the decision though it accepts that the decision adopted by the other member states is binding for the EU as a whole. Although constructive abstention was already introduced in the Amsterdam Treaty, it has not played a decisive role in practice. In case of its application, its effects would be “limited” by the circumstance that EU states, which have constructively abstained from voting, are not excluded from subsequent votes.

In the context of differentiation via established instruments and procedures one can distinguish between two different sub-forms, which mainly differ with respect to their final objective:

- (i) **Differentiation aimed at creation of federal union:** This sub-form is guided by the idea that the employment of instruments and procedures of differentiation laid down in the EU Treaties should lead to the creation of a federal union. The most prominent recent example is that of the former Belgian Prime Minister Guy Verhofstadt, who advocates the creation of a federal political union – a “United States of Europe” comprising the countries of the Eurozone.¹³ The “United States of Europe” would constitute the political core surrounded by the remaining member states, which form some sort of an “Organisation of European States”.
- (ii) **Functional-pragmatic differentiation:** This sub-form follows a functional case-by-case approach without a pre-defined final outcome. In other words, differentiation within the EU framework is not guided by an explicit master plan, but rather aims to overcome specific blockades of certain member states, which are either not willing or not able to engage in a higher level of cooperation (e.g., harmonisation of corporate tax base or the extension of European citizenship rights via *enhanced cooperation*¹⁴; *permanent structured cooperation* in the field of security and defence).

2.2 Key consequences and implications

Differentiation on the grounds of established procedures and instruments leads to the following key consequences and implications:

Implementing the Institutional Innovations, Joint Study of CEPS, EGMONT and EPC, November 2007, pp. 121-141.

¹³ See Guy Verhofstadt, *Die Vereinigten Staaten von Europa*, Eupen, 2006; see especially pp. 83-86. When Verhofstadt speaks of the Eurozone he also includes the member states, which aim to introduce the euro in the near future (see p. 84).

¹⁴ For a list of potential areas for *enhanced cooperation* see: Commissariat Général du Plan (ed.), *Rapport de l'atelier sur les coopérations renforcées dans l'Union Européenne*, La documentation française, Paris, 2003; *Enhanced Cooperation: From Theory to Practice*, in *The Treaty of Lisbon: Implementing the Institutional Innovations*, pp. 97-119, here especially pp. 106-113.

- *Preservation of the EU's single institutional framework:* Differentiation based on instruments and procedures defined within the Union treaty framework does not undermine the role and functions of EU institutions. The European Commission, the European Parliament or the European courts are not deprived of their rights and obligations. Moreover, differentiated cooperation inside the EU does not lead to the creation of new institutions or bodies beyond the Union's institutional architecture. However, the coordination of cooperation might in some cases bring about the establishment of new sub-institutions similar for example to the Eurogroup.
- *Cooperation on the basis of clear-cut rules guarantees calculability:* Differentiated cooperation organized within the EU framework follows a clear set of rules, thereby limiting the anarchic use of flexibility. This is true with respect to both general instruments of differentiation and procedures specifically designed for certain (sub-)policy areas. In the case for example of *enhanced cooperation*, the Treaties include predefined rules regulating quite specifically the inception, the authorisation, the functioning and the widening of cooperation (see overview on pp. 70).¹⁵ The same applies to procedures defined for specific policy areas (*permanent structured cooperation*, EMU, *constructive abstention*). One may argue that the preconditions laid down in the Treaties are too tight and thus inhibit the use of e.g., *enhanced cooperation*.¹⁶ However, the existence of clear-cut rules ensures (i) the direct or indirect affiliation of the “outs”, the “pre-ins” and supranational institutions, (ii) forestalls an uncontrolled and over-excessive use of flexible forms of cooperation, (iii) and guarantees the cohesion of European politics, as potential conflicts between asymmetrical and regular European decisions and legislative acts are solved by specific rules. Overall, the existence of clear-cut rules makes differentiated cooperation more of a calculable venture.
- *Preservation of the supranational character of the Commission, the EP and the Courts:* Differentiation established within the Treaties' framework respects the supranational character of the European Commission, the European Parliament and the European courts. There is no distinction made between Commissioners, Parliamentarians or judges coming from a participating member state (“ins”) or from a country not (yet) taking part in differentiated cooperation (“pre-ins”; “outs”). In other words, every member

¹⁵ See also Emmanouilidis, *Der Weg zu einer neuen Integrationslogik*, pp. 150-162.

¹⁶ See Claus Giering and Josef Janning, *Flexibilität als Katalysator der Finalität? Die Gestaltungskraft der “Verstärkten Zusammenarbeit” nach Nizza*, *integration 2* 2001, pp.146-155.

of the Commission or the EP and all judges of the European courts enjoy the same rights, irrespective of whether their country of origin participates in a certain form of differentiated cooperation or not. The fact that there is no distinction between the “ins” and the “outs” in the Commission is particularly important in the case of *enhanced cooperation*, where the Brussels authority plays a particularly important role. The Commission functions as a guardian in all phases of *enhanced cooperation*. In most cases – with the notable exception of CFSP – it is the Commission which (i) has to check whether a certain *enhanced cooperation* fulfils the strict preconditions set by the Treaties, (ii) has to submit a proposal to establish *enhanced cooperation*, (iii) has the right of initiative also in the framework of *enhanced cooperation*, and (iv) can independently take the decision to allow the admission of further states to an *enhanced cooperation* in progress. In general, the unmodified composition of the Commission, the EP and the courts underlines that differentiated cooperation inside the EU is firmly integrated into the single institutional framework of the Union.

- *Distinction between representatives of “ins” and “outs” in the Council:* Concerning the Council and its sub-structures there is a distinction made between the representatives of the “ins” and the “outs”: The “outs” take part in the deliberations, but enjoy no voting rights (*enhanced cooperation, permanent structured cooperation*), or abstain from voting (*constructive abstention* in CFSP).
- *Involvement of the “outs” reduces the risk of a confrontational split:* The unmodified composition of and decision-making procedures in the Commission, the EP and the European courts, as well as the participation of the non-participating states in the deliberations within the Council and its substructures, ensures the constant attachment of the “outs”. The fact that the non-participating states have a say, when a decision to commence a certain form of differentiated cooperation is taken within the Council (e.g., by qualified majority in most cases of *enhanced cooperation*, with the exception of the area of CFSP, and in the case of *permanent structured cooperation*)¹⁷, the fact that there is no distinction between the “outs” and

¹⁷ In general, the decision to authorise *enhanced cooperation* requires a specific decision of the Council. However, there is a noteworthy exception to this rule: The Lisbon Treaty includes a form of “automatism” in the fields of “judicial cooperation in criminal matters” and “police cooperation” and concerning the establishment of a “European Public Prosecutor’s Office”. In these fields the authorisation to proceed with *enhanced cooperation* is granted automatically on the grounds of a clearly defined procedure, which makes the inception of *enhanced cooperation* easier (“judicial cooperation in criminal matters”: Art. 82, 83 TFEU, Art. 69 A, 69 B LT; “police cooperation”: Art. 87 TFEU, Art. 69 F LT; “European Public Prosecutor’s Office”: Art. 86 TFEU, Art. 69 E LT). In the case of a

the “ins” in the Commission, the EP and the courts, and the fact that the “outs” are associated to the operative phase of differentiated cooperation (by *inter alia* taking part in Council deliberations) has numerous advantages: (i) it facilitates a possible late participation of the “outs” – as the smooth accession of Greece, Slovenia, Cyprus and Malta to the Eurozone has proven; (ii) it provides the “outs” with a certain form of control via their representation in supranational authorities (Commission, EP, European courts) and in the Council; and (iii) it provides the “outs” the ability to influence the overall strategic orientation and developments inside the affected policy area.¹⁸ The advantages of a constant involvement of the non-participating states substantially reduce the risk of a confrontational rupture between the “ins” and the “outs”.

On the other hand, the notion that the representatives of the “outs” could try to undermine the development of a certain form of differentiated cooperation seems exaggerated. The representatives of the “outs” in the Council could exacerbate deliberations in the Council, but they could not avert a decision as they are not allowed to vote. Moreover, experience has proven that MEPs and Commissioners do not act solely as representatives of their country of origin, but that they feel responsible to the EU as a whole. It is thus difficult to systematically instrumentalise MEPs or Commissioners for genuine national purposes, if flexible cooperation among a limited number of member states aims to further the objectives of the Union within the framework of the EU.

deadlock, the authorisation to initiate *enhanced cooperation* “shall be deemed to be granted” to the member states willing to cooperate. The Lisbon Treaty goes beyond the Constitutional Treaty, which did not include such an automatism in the field of “police cooperation” and concerning the establishment of a European Public Prosecutor’s office. In contrast to the Constitutional Treaty, which had spoken of a minimum number of at least one third of member states (Art. III-270 and III-271 CT), the Lisbon Treaty defines the minimum number at nine member states. This specification is in line with the general provisions for *enhanced cooperation*, which now also refer to nine member states instead of a minimum number of one third of member states as originally laid down in the Constitutional Treaty (Art. 20 TEU-L, Art. 10 LT).

¹⁸ The example of CFSP supports the general observation that member states are particularly cautious not to undermine the ability of the “outs” to co-determine the strategic development within a policy field. The rather limited scope of differentiation within CFSP stems from the widespread awareness, that the success of the EU’s foreign, security and defence policy requires a high level of internal cohesion and unity. The limited effects of *constructive abstention*, the fact that the application of *enhanced cooperation* is restricted (Nice) and that its inception requires a unanimous decision within the Council, and the fact that the major innovation introduced by the Lisbon Treaty in the field of Common Security and Defence Policy (CSDP) – *permanent structured cooperation* – “merely” focuses on the improvement of military capabilities, guarantee that the strategic orientation of CFSP/CSDP requires the unanimous support of all member states.

- *(In-)Ability to reform legislative procedures:* The instruments, procedures and rules laid down in the EU's primary law also apply to the operation of differentiated cooperation. This means that decisions, which are taken in the Council for example within the framework of *enhanced cooperation*, must be taken by unanimity, if the Treaties stipulate that the adoption of acts in the respective policy field or specific case requires a unanimous decision. The same applies to the European Parliament or the European courts: The legislative powers of the EP or the judicative powers of the courts inside *enhanced cooperation* are the same as their powers in the respective policy area. Now, the Lisbon Treaty includes a very significant innovation: The EU's new primary law – taking up the provisions of the Constitutional Treaty (Art. III-422 CT) – offers the possibility to reform the decision-making procedure via a *special passerelle clause* for *enhanced cooperation*. The Lisbon Treaty (Art. 333 TFEU; Art. 280H LT) specifies that where a provision of the Treaties, which may be applied in the context of *enhanced cooperation*, stipulates that the Council shall act unanimously or adopt a legislative act under a special legislative procedure (e.g., by unanimity or without co-decision rights of the EP), the Council acting unanimously with the votes of the participating states may adopt a decision stipulating that it will act by qualified majority or pass acts under the ordinary legislative procedure, i.e. qualified majority in the Council and co-decision rights of the EP. The special passerelle clause allows the improvement of the decision-making procedures without a formal treaty amendment – an important innovation in case the member states participating in *enhanced cooperation* aspire to optimize the procedures by introducing qualified majority and by enhancing the powers of the EP. Noteworthy, such procedural improvements become part of the *acquis* of *enhanced cooperation*, which is then binding also for participants joining cooperation at a later stage. One should however note, that the special passerelle clause does not apply to decisions having military or defence implications.

3 Intergovernmental cooperation outside the EU

3.1 Description of key characteristics

A group of member states intensifies cooperation on the basis of intergovernmental mechanisms and procedures outside the EU framework. Cooperation is limited to relations between the governments of the participating countries and includes no (immediate) transfer of sovereignty rights to any

supranational authority. The member states participating in intergovernmental cooperation outside the EU must adhere to the principle of loyalty (Art. 4 TEU-L; Art. 3a Treaty of Lisbon (LT); Art. 10 TEC-N¹⁹) and thus respect the supremacy of the EU's *acquis* and not undermine the functioning of the Union. Closer cooperation among a group of member states would not be possible in areas in which the EU has exclusive competences.²⁰

In the framework of intergovernmental cooperation outside the EU one can distinguish between three separate sub-forms:

- (i) ***Intergovernmental Avantgarde***: The participating countries hold that further progress in a specific (sub-)policy field is only politically possible or legally feasible²¹, if a group of member states takes the lead by cooperating outside the EU framework. Collaboration between the countries of an *Intergovernmental Avantgarde* functions as kind of a “laboratory” and there is a clear goal to integrate intergovernmental cooperation into the Union at the soonest possible moment (examples: Treaty of Prüm²², Schengen-Model). The participating countries work out a treaty, convention or agreement laying down the objectives as well as the organisational and

¹⁹ Art. 4 TEU-L (Art. 3a LT) states the following: “The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union’s tasks and refrain from any measure which could jeopardise the attainment of the Union’s objectives.” The wording in the Lisbon Treaty is almost identical with the wording of the Nice EC-Treaty (Art. 10 TEC-N).

²⁰ Taking up the provisions of the Constitutional Treaty the Lisbon Treaty lists the following areas in which the Union has exclusive competences (Art. 3 TFEU, Art. 2 B LT): (a) customs union; (b) the establishing of the competition rules necessary for the functioning of the internal market; (c) monetary policy for the member states whose currency is the euro; (d) the conservation of marine biological resources under the common fisheries policy; (e) common commercial policy.

²¹ The initiation of closer cooperation among a smaller group of member states might in some cases not be possible within the EU framework due to legal restrictions. Concerning the instrument of *enhanced cooperation* this would be the case (i) if cooperation is initiated in areas not covered by the EU Treaties, (ii) if the number of participating states is smaller than the minimum number required by the Treaties, or (iii) if the authorisation of cooperation cannot be granted since there is no sufficient qualified majority in the Council. The latter could especially be the case in the field of CFSP, as the initiation of *enhanced cooperation* in this policy area requires a unanimous decision within the Council.

²² The Treaty of Prüm for example states that the participating parties seek “to have the provisions of this convention brought into the legal framework of the European Union” (Preamble). In Article 1.4 of the Basic Principles of the Convention the envisaged procedure is spelled out more concretely: “Within three years at the most following entry into force of this convention, on the basis of an assessment of experience of its implementation, an initiative shall be submitted, in consultation with or on a proposal from the European Commission, in compliance with the provisions of the [EU/EC-Treaties], with the aim of incorporating the provisions of this Convention into the legal framework of the European Union.” During the German EU Presidency in the first half of 2007 the EU Justice and Interior Ministers decided to integrate the provisions laid down in the Treaty of Prüm into the legal framework of the EU.

legal details of cooperation. The number of participating states is largely determined by functional imperatives, but participation is in principle open to every EU member state able and willing to join. The late participation of other countries is encouraged by the fact that the treaty or agreement includes a provision that every EU state is eligible for participation.²³

Box 2: Treaty of Prüm

The Treaty of Prüm was initiated by Germany and signed in Prüm, Germany, on May 27, 2005. The seven original signatories of the Treaty were Austria, Belgium, Germany, France, Luxemburg, Spain and the Netherlands. At a later stage Bulgaria, Finland, Greece, Italy, Portugal, Romania, Slovakia, Slovenia and Sweden had officially expressed their aspiration to join or had joined the Treaty. The objective of the Treaty is the “further development of European cooperation, to play a pioneering role in establishing the highest possible standard of cooperation especially by means of exchange of information, particularly in combating terrorism, cross-border crime and illegal migration, while leaving participation in such cooperation open to all other Member States of the European Union” (Preamble of the Treaty of Prüm).

- (ii) **Europe of Nations:** The participating countries assume that further progress in the respective (sub-)policy area can neither be achieved within the framework of the EU nor on the basis of supranational instruments and procedures. Cooperation in the context of a *Europe of Nations* is not guided by the wish to transfer national competences to a higher supranational authority at any stage. Cooperation is rather set up to be permanent and there is no clearly stated wish to integrate this cooperation into the EU at a later stage. The establishment of such a form of intergovernmental cooperation is characterized by a rather low degree of openness, as the participating states highly value the efficiency of a small group.
- (iii) **Loose Coalitions:** This sub-form foresees that intergovernmental cooperation is established to fulfil a single task or purpose (e.g., Contact Group for the Balkans, E3/EU concerning Iran (France, Germany, United Kingdom, High Representative), G6 or Salzburg-Group in the field of Justice and Home Affairs). *Loose Coalitions* are characterized by a very low level of institutionalization (*ad hoc* cooperation without a specific legal agreement) and by a very limited number of participating states (closed circle).

3.2 Key consequences and implications

Intergovernmental cooperation outside the EU framework leads to a number of general and sub-model specific consequences and implications:

²³ Such a provision is e.g., included in Schengen II: “Any Member State of the European Communities may become a Party to this Convention. Accession shall be the subject of an agreement between that State and the Contracting Parties” (Art. 140.1).

- *Exclusion of EU institutions:* The existing institutions have no direct executive, legislative or judicative role within the framework of any form of intergovernmental differentiation. As a result, the Commission is deprived of its role as guardian of the Treaties and initiator of legislation, the European Parliament is deprived of its control functions and its legislative co-decision rights, and the European Court of Justice is deprived of its direct supervisory authorities, although the Court has the powers to control whether the participating states adhere to the principle of loyalty and whether the cooperation exercised outside the Union respects the EU Treaties. Moreover, the “ins” may inform the “outs” about their activities by “using” the appropriate EU institutions. The countries participating in intergovernmental cooperation can even associate the Union with their extra-EU activities, for example by granting the Commission an observer status or by associating the EU High Representative to specific foreign policy efforts (e.g., E3/EU on Iran). The exchange of information and the association of the “outs” mainly depend on the willingness of the “ins” to keep their EU partners informed. One can expect that the countries of an *Intergovernmental Avantgarde*, which seek to integrate their cooperation into the EU and therefore will eventually require the assent of the “outs” to do so, will be more inclined to keep their partners constantly informed and willing to closely associate them with their activities than in the case of a *Europe of Nations*, which is not that clearly subordinate in its relationship with the EU. Moreover, experience has shown that the countries, which form *Loose Coalitions* to accomplish a certain task or purpose, are also very much keen to nurture their relationship with their EU partner countries in order to avoid a split or in order to secure their support (e.g., E3/EU) or in order to infiltrate their ideas and agenda into the Union (e.g., G6, Salzburg-Group). Thus, the participants of *Loose Coalitions* are in most cases very eager to keep the “outs” constantly informed and/or at least indirectly involved.
- *Establishment of new institutions:* Differentiated intergovernmental cooperation outside the EU would in the case of a *Europe of Nations* or of an *Intergovernmental Avantgarde* lead to the creation of new coordinative and/or executive bodies outside the institutional framework of the EU. Institutionalization may vary from the establishment of a mere coordinative secretariat to the creation of an executive committee (e.g., Schengen) or a ministerial committee (e.g., Prüm) authorised to take decisions. On the contrary, *Loose Coalitions* are characterized by a very low level of

institutionalisation, thus precluding the creation of new powerful extra-EU bodies or institutions.

- *Lack of democratic legitimacy not only on the European but also on the national level:* The fact that cooperation takes place outside the EU framework and thus beyond the control of the EP, as well as the fact that cooperation is limited to relations between governments, reduces direct democratic legitimacy and parliamentary scrutiny. Neither the EP nor national parliaments or representatives of civil society play a role when *intergovernmental cooperation* is established and operated outside the EU. If cooperation is based on a treaty between the “ins”, national parliaments have in most cases merely the right to reject or to adopt the treaty in the context of ratification.²⁴ In general, experience has shown that governments aim to limit national parliamentary control in order to sustain their freedom of executive action. The role of national parliaments is restricted to ex-post control, without an ability to decisively form the content of the treaty or written agreement worked out by the participating governments. For equivalent regulations developed in the framework of the Union, (some) national parliaments are able to exert (strong) influence on their governments and the EP is able to exert the powers attributed to it by the EU Treaties. In the running of *intergovernmental cooperation*, decisions are taken, which are not subject to parliamentary supervision on neither the European nor the national level, if those decisions are adopted as administrative acts. As a counter measure one could clarify during ratification, which functions the executive bodies have, which decision they are allowed to take, and how national supervision can be made effective.²⁵ The obvious alternative would be to integrate *intergovernmental cooperation* into the EU, in order to secure democratic legitimacy by *inter alia* getting the EP and/or national parliaments actively involved.
- *Adoption of procedures and legal norms outside the EU can decrease trust and obstruct cooperation inside the Union:* The participating states apply *intergovernmental cooperation* in the framework of a *Europe of Nations* or an *Intergovernmental Avantgarde* to set-up independent rules and procedures and adopt policy measures, which could have not been adopted in the framework of the EU. The participating states adopt the rules and

²⁴ Concerning the case of the Treaty of Prüm see: Daniel Kietz and Andreas Maurer, From Schengen to Prüm, SWP Comments 15, May 2006; here in particular p. 4; Paul Luif, The Treaty of Prüm: A Replay of Schengen?, paper presented at the 10th biennial conference of the European Union Studies Association, 17-19 May 2007, Montreal, Canada.

²⁵ See Kietz and Maurer, From Schengen to Prüm, p. 4.

procedures for cooperation and pass a legal *acquis* in an independent decision-making process excluding EU institutions and non-participating countries. This practice might have the following effects:

- i. Intergovernmental cooperation outside the EU can lead to the adoption of a set of legal norms, which conflicts with existing or planned Union law. This incompatibility can particularly arise, when cooperation outside the EU is initiated in fields, which are (partially) covered also by the EC/EU-Treaties, as for example in the case of the Treaty of Prüm in the area of freedom, security and justice.
 - ii. The non-participating countries and the EU institutions have to accept the decisions taken outside the Union as a *fait accompli*, in case the rules, procedures and legislative acts, which were originally adopted outside the Union, are eventually incorporated into the EU framework.²⁶ As a consequence, the “outs” plus the EP and the Commission are confronted with a set of legal norms that was enacted outside the EU’s legal framework and thus without their participation (e.g., Schengen Agreement, Treaty of Prüm).
 - iii. Cooperation outside the Union’s treaty framework might obstruct further integration, if the issues covered are strongly disputed between the member states. Cooperation among a group of EU countries outside the Union can cause distrust between the “outs” and the “ins”, if the former feel discriminated by the latter. Such a climate of distrust might not only hamper further cooperation in the specific policy field, but even result in negative spill-overs impeding further cooperation and integration not only in the specific sector but possibly even beyond.
- *Problematic integration of legal acquis into the EU:* There is no “guarantee” that the legal norms adopted outside the EU can be easily integrated into the Union’s *acquis*, even if an *Intergovernmental Avantgarde* clearly aspires to do so. The integration of a set of legal acts into the Union requires a respective decision of the member states’ governments in the Council. In case the policy area in question is subject to unanimity, the veto of one member state could suffice to block such a decision. In case not all EU countries are ready to support the integration of new legal norms into the Union’s framework or if not all are willing and able to apply the new *acquis*, one could employ the instrument of *enhanced cooperation*. However, this

²⁶ In view of the Treaty of Prüm see Thierry Balzacq, *The Treaty of Prüm and the Principle of Loyalty* (Art. 10 TEC), Centre for European Policy Studies (CEPS), Brussels, January 2006, here especially p. 2.

alternative would also have to overcome numerous critical hurdles: (i) the inception of *enhanced cooperation* requires a minimum number of participants: in the case of the Nice Treaties eight, in the case of the Lisbon Treaty nine member states; (ii) the authorisation of *enhanced cooperation* requires a Council decision taken by qualified majority, in the field of CFSP even a unanimous decision; and (iii) in most cases with the exception of CFSP the Commission must actively support the establishment of *enhanced cooperation*. The Commission must have concluded that the incorporation of a new *acquis* fulfils the many and strict pre-conditions set by the Union's Treaties and must be ready to submit to the Council a proposal to establish *enhanced cooperation*. But even if all the above hurdles are cleared and the instrument of *enhanced cooperation* is applied, the integrated *acquis* would “merely” bind the participating states and not the Union as a whole. Neither the non-participating countries nor the future member states would have to implement the *acquis* adopted in the framework of an *enhanced cooperation*.²⁷ Finally, the case of the Treaty of Prüm demonstrated that the successful integration of a set of legal norms into the EU framework requires the active support of key EU states. The German government had been very eager to integrate the Prüm *acquis* into the Union's legal framework and used its EU Presidency in the first half of 2007 to successfully accomplish this objective.

- *Long-lasting cooperation outside EU weakens the Union*: Long-lasting cooperation in sensible policy areas outside the EU that engages only a limited number of member states and excludes the “outs” against their will has the potential to fundamentally weaken the Union. If *intergovernmental cooperation* of that kind is not “quickly” integrated into the EU framework, the danger of political and legal ruptures between the “outs” and the “ins” and/or between the participating states and the Commission or the European Parliament increases over time. As a consequence, enduring cooperation outside the EU can in many instances complicate cooperation or even avert overall progress between the member states in the respective policy area, trigger legal fragmentation and even lead to negative spill-overs into other policy areas. These dangers related to intergovernmental

²⁷ The Nice EU-Treaty states that acts and decisions adopted in the framework of *enhanced cooperation* “shall be binding only on those Member States which participate in such cooperation and, as appropriate, shall be directly applicable only in those States” (Art. 44.1 TEU-N). The new Lisbon EU-Treaty takes up the substance of Nice: “Acts adopted in the framework of enhanced cooperation shall bind only participating member states. They shall not be regarded as part of the *acquis* which has to be accepted by candidate States for accession to the Union” (Art. 20.4 TEU-L; Art. 10 LT).

cooperation do not apply to *Loose Coalitions* which are (more or less) actively supported by the “outs” (Contact Group, E3/EU).

4 Differentiation through opt-outs

4.1 Description of key characteristics

The opposition of certain member states towards a further deepening of integration in a new (sub-)policy field is overcome by the allocation of an opt-out. The opt-out initiative comes from the country wishing to be excluded from a deepening of cooperation in a certain (sub-)policy area. The principle decision to grant an opt-out requires the assent of all EU member states. The basic legal and institutional rules and procedures regulating an opt-out must be agreed unanimously and laid down in the EU's primary law (e.g., through a protocol). The opt-out country might be granted an opt-in. In this case, the opt-out country has the right to join in and implement a certain measure or legislative act, although it was adopted in a (sub-)policy area from which the respective country has been excluded.

Box 3: Opt-out Cases

Denmark/UK in EMU: The UK secured an opt-out from having to introduce the euro in the Maastricht Treaty, while Denmark did so later following the Treaty's initial rejection in a referendum in 1992. In addition, it is worth noting that Sweden, while not formally having negotiated an opt-out on this matter, has not joined the European Exchange Rate Mechanism (ERM II) and thus deliberately fails to fulfil the criteria for introducing the euro.

Denmark/Ireland/UK concerning JHA and the Area of Freedom, Security and Justice

(1) Immigration, asylum and civil law legislation: According to the Nice Treaties **Ireland** and the **UK** are not taking part in measures on the grounds of the provisions on “Visas, asylum, immigration and other policies related to free movement of persons” (Title IV, TEC-N) and are not bound by them. Due to their opt-out they do not take part in respective votes in these areas. Ireland and the UK have however the right to opt-in: If the UK or if Ireland wishes to take part in the adoption and implementation of a proposed measure, they have to inform the President of the Council within a period of three months starting from the submission to the Council of the proposal or initiative. They are also entitled to agree to the measure at any time after its adoption by the Council. In a separate declaration Ireland has expressed its wish to take part as far as possible in measures adopted under Title IV, insofar as they allow the common travel area with the United Kingdom to be maintained, which allows the freedom of movement between Ireland and the UK. In the framework of the Lisbon Reform Treaty it was agreed that the current UK and Irish opt-outs from immigration, asylum and civil law were extended to cover policing and judicial co-operation in criminal matters. Denmark is also not taking part in the adoption of measures under Title IV and is not bound in any way by them. However, if the proposed measure builds upon the Schengen acquis under the provisions of Title IV, then **Denmark** has six months after the Council decision to decide whether or not it will implement the measure in its national legislation. In the Lisbon Reform Treaty the Danish opt-out is extended to the whole of the Title covering the Area of Freedom, Security and Justice, thus now including also police cooperation and judicial cooperation in criminal matters.

(2) Ireland/UK concerning Schengen: Ireland and the UK did not sign the original Schengen Convention of 1990. After the transfer of the Schengen rules into EC/EU law in the framework of the Amsterdam Treaty, the UK and Ireland reserved themselves an opt-out. As one effect, Ireland and the UK have not lifted border controls with other EU member states. Despite their opt-out, Ireland and the United Kingdom have the right to opt-in to the application of selected parts of the Schengen body of law. However, this is no absolute right: Ireland and the UK can take part in some or all of the arrangements under the Schengen acquis only after a unanimous vote in the Council by the member states fully participating in that acquis (i.e. the “Schengen States”).

Denmark in the defence field of ESDP: Denmark has an opt-out concerning the military part of the EU's European Security and Defence Policy (ESDP). As a consequence Denmark cannot contribute to military EU crisis management operations neither financially nor in terms of military assets. Further, Denmark cannot take part in the elaboration and implementation of any decisions or actions of the Union which have defence implications.

UK/Poland concerning the Charter of Fundamental Rights: During the Intergovernmental Conference which led to the Lisbon Treaty the UK and Poland obtained a special position in respect to the applicability of the Charter of Fundamental Rights. Concerning both the UK and Poland, a special Protocol annexed to the Treaties (Protocol No 30) states that “the Charter does not extend the ability of the Court of Justice of the European Union, or any court or tribunal of Poland or the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms” (Article 1). In addition, the protocol states that “to the extent that a provision of the Charter refers to national laws and practices, it shall only apply to Poland or the United Kingdom to the extent that the rights or principles that it contains are recognised in the law and practices of Poland or the United Kingdom” (Article 2). In an additional national declaration Poland has laid down that the Charter “does not affect in any way the right of Member States to legislate in the sphere of public morality, family law, as well as the protection of human dignity and respect for human physical and moral integrity” (Declaration 51).

4.2 Key consequences and implications

The granting of an opt-out has a number of key implications:

- *Preservation of the EU's single institutional framework:* The granting of a limited number of opt-outs does not undermine the role of EU institutions. The (European) Council, the European Commission, the European Parliament (EP) and the European courts continue to exercise their executive, legislative or judicative functions. Furthermore, the allocation of opt-outs does not lead to the creation of new institutions outside the EU framework. The potential establishment of new sub-structures or bodies inside the Union (such as the Eurogroup or the ECB's Executive Board and Governing Council²⁸), in which the "outs" do not participate, does not burden the Union's institutional coherence but is rather necessary as the operation of closer cooperation requires the establishment of new (sub-)structures. Finally, the opt-out countries can be institutionally linked to the policy-making process even within specifically created sub-structures (e.g., participation of non-Eurozone countries in the General Council of the European System of Central Banks).
- *Opt-outs do not prevent but rather allow a further development of the EU's (single) acquis:* The allocation of opt-outs does not prevent the further development of the EU's legal *acquis*. On the contrary: The attribution of opt-outs is the necessary political prerequisite for deepening cooperation within the respective policy field, as the opt-out country would have not accepted an amendment of the EU's primary law if it had not been granted an exemption. As a consequence, certain parts of the *acquis* do not apply to the countries, which have been granted an opt-out. For all the other current and future member states the *acquis* adopted in the respective (sub-)policy field is legally binding. The fact that the *acquis* applies also to future member states is a major difference of opt-outs compared to the instrument of *enhanced cooperation*, since acts and decisions adopted in the framework of the latter do not form part of the EU's overall *acquis* and

²⁸ The national banks of the countries not participating in the Eurozone are not represented in the *Executive Board* or in the *Governing Council*. The European Central Bank's (ECB) *Executive Board* consists of the President, Vice-President and four other members. All members are appointed by common accord of the Heads of State or Government of the euro area countries. The *Governing Council* is the main decision-making body of the ECB. It consists of the six members of the *Executive Board*, plus the governors of the national central banks (NCBs) from all euro area countries – the non-participating countries are thus not involved in the *Governing Council*. All EU countries are however represented in the *General Council*, which comprises the President and Vice-President of the ECB, plus the governors of the national central banks of all EU member states irrespective of whether they have or have not introduced the euro.

are only binding for the participating states (Art. 44.1 TEU-N; Art. 20.4 TFEU). In other words, the new member states must respect and implement the totally accumulated EU law, even if some older Union countries have successfully negotiated an opt-out from certain parts of the *acquis*.

- *Limited danger of a fundamental divide between “ins” and “outs”*: The legal and institutional affiliation of the opt-out countries on the basis of clear-cut rules keeps the respective countries “involved” and thus limits the risk of a deep split between the “ins” and the “outs” for a number of reasons: (i) The opt-out countries are able to influence the developments within the respective policy field. They take part in the day-to-day decision-shaping process within the Council, the EP and the Commission and changes to the EU’s primary law require their assent. (ii) The strong affiliation of the opt-outs simplifies the full integration of the “outs” at a later stage. (iii) The ability to opt-in allows the opt-out country to adopt legislative acts, even if it has decided to be excluded from the respective policy area.
- *Opt-outs promote à la carte Europe but also integrationist dynamics*: The granting of opt-outs is a perfect example of a *Europe à la carte*²⁹: The opt-out countries choose in which fields of cooperation they do not want to participate and are at the same time granted the right to opt-in. This form of “cherry-picking” makes the EU more complicated, less transparent, in some cases even less coherent and less solidary. However, political practice suggests that even a radical instrument such as an opt-out can result in integrationist dynamics. A number of cases backs this argument:³⁰ The fact that the UK and Ireland have adopted legislation in spite of their opt-out in the field of Justice and Home Affairs has fostered the gradual realisation of

²⁹ The expression *Europe à la carte* was first used by Ralf Dahrendorf in 1973. The concept is based on the idea that the member states are not obliged to stick to a certain menu but are rather free to choose from it. See Ralf Dahrendorf, *Plädoyer für die Europäische Union*, Munich/Zurich, 1973.

³⁰ Poland concerning the Charter of Fundamental Rights might become another case. Before its defeat in the last elections the then government under Prime Minister Jaroslaw Kaczynski had decided to join the British protocol limiting the Charter’s scope of application. Immediately after the October 2007 elections the newly elected Polish Prime Minister Donald Tusk announced that his government would support the Charter’s full application in Poland. However, the Tusk government had to rethink its original stance when it became clear that the Kaczynski’s Law and Justice Party would otherwise not support the ratification of the new Lisbon Treaty. The Tusk government therefore had to reverse on its own promise and keep Poland signed up to the British protocol. However, chances still persist that the limited application of the Charter in Poland might eventually be scrapped. For further details see Paweł Świeboda, *Poland’s second return to Europe?*, ECFR Policy Brief no. 2, December 2007, p. 4.

the area of freedom, security and justice throughout the European Union.³¹ Furthermore, a recent example illustrates that opt-outs must not be eternal, but can be overcome, when national perceptions, the composition of government or European or global parameters change. The Danish Prime Minister Anders Fogh Rasmussen announced in November 2007 that his government plans to hold a referendum on scrapping one or more of the country's four EU opt-outs.³² Denmark could thus eventually join policy areas from which the country had fiercely struggled to be excluded since the early 1990s.

5 Affiliation beneath full membership

5.1 Description of key characteristics

Differentiated integration need not be limited to EU member states. The wish of neighbouring countries to intensify cooperation with or even to join the EU combined with a widespread enlargement fatigue inside the Union increase the pressure to develop innovative ways affiliating countries beneath the level of a full and unlimited EU membership.³³ Despite the already very dense net of relations (see Box 4), many neighbouring countries are not satisfied with the current level of association or the pace of further EU enlargement. As a result, the EU faces a double challenge: On the one hand, the Union needs to provide the neighbouring countries with a more attractive offer in order to make sure that EU conditionality continues to be effective. On the other, it needs to acknowledge the widespread doubts about further rounds of widening.

The heated debates surrounding the proposal to offer Turkey a “Privileged Partnership” (see Box 5) or the highly disputed initiative of French President

³¹ See Daniel Thym, *Ungleichzeitigkeit und europäisches Verfassungsrecht*, Baden-Baden 2004, p. 389; Steve Peers, *British and Irish opt-outs from EU Justice and Home Affairs (JHA) law*, EU Reform Treaty Analysis no. 4, October 2007.

³² Danish Prime Minister Anders Fogh Rasmussen has been quoted as follows: “It is no secret that the government has been convinced all the time that the EU opt-outs are a hindrance for Denmark. We now say that the time has come to let the people take a stand on it.” See *Danish government wants second referendum on euro*, euobserver, 22 November 2007.

³³ For an overview of different concepts and ideas about how to associate partner countries beneath the level of full membership see: Canan Atilgan and Deborah Klein, *EU-Integrationsmodelle unterhalb der Mitgliedschaft*, Arbeitspapier der Konrad-Adenauer-Stiftung, Nr. 158/2006, May 2006; Andreas Maurer, *Alternativen Denken! Die Mitgliedschaftspolitik der Europäischen Union vor dem Hintergrund der Beziehungen zur Türkei*, SWP-Aktuell 36, July 2007; Johannes Varwick and Jana Windwehr, *Norwegen und Schweiz als Modellfälle differenzierter Integration?*, *Aus Politik und Zeitgeschichte (APuZ)*, 43/2007, pp. 15-20.

Nicolas Sarkozy to establish a “Union for the Mediterranean”³⁴ (see Box 4) indicate the relevance of the issue. Beyond such concrete initiatives, one can in more abstract terms differ between three main concepts involving very diverse levels of association and integration: (i) *Association Plus*, (ii) *Partial Membership*, and (iii) *Limited Membership*.

³⁴ French President Nicolas Sarkozy proposed the establishment of a *Union for the Mediterranean* (originally called *Mediterranean Union*) including all countries bordering the Mediterranean Sea. Sarkozy originally called on the Mediterranean people to “do the same thing, with the same goal and the same method” as the European Union, although the *Union for the Mediterranean (UMed)* would be a looser grouping than the EU. The French President invited all Mediterranean and eventually also all EU leaders to a summit in France on July 13/14, 2008 in order to lay the foundations of the *UMed*. Although the details of the initiative were not clear for some time and substantially modified over time, the idea to found a *Union for the Mediterranean* provoked mixed reactions both among EU countries and among states on the southern Mediterranean rim.

Box 4: Existing Forms of Association

The European Neighbourhood Policy (ENP) was introduced in 2003/04.³⁵ ENP aspires to avert the emergence of new dividing lines between the enlarged EU and its eastern and southern neighbours. The ENP includes six eastern European neighbours (Armenia, Azerbaijan, Belarus, Georgia, Moldova, Ukraine) and 10 southern neighbours (Algeria, Egypt, Israel, Jordan, Lebanon, Libya, Morocco, Palestinian Authority, Syria, Tunisia). The ENP aims to go beyond existing relationships by offering a deeper political relationship and economic integration. The ENP remains distinct from the process of enlargement, although it does not prejudge how the relationship between the EU and its European neighbours may develop. The ENP applies elements from both the accession and association toolbox. Inspired by the instrument of Accession Partnerships, the central element of the ENP are the tailor-made bilateral ENP Action Plans agreed between the EU and each partner setting out an agenda of political and economic reforms by means of short and medium-term priorities (3-5 years). These priorities cover political dialogue and reform, economic and social cooperation and development, trade-related issues and market and regulatory reform, cooperation in justice and home affairs, specific sectors (such as transport, energy, information society, environment, research and development) and a human dimension (people-to-people contacts, civil society, education, public health). The incentives on offer, in return for progress on relevant reforms, are greater integration into European programmes and networks, increased assistance and enhanced market access. The implementation of the mutual commitments and objectives contained in the Action Plans is regularly monitored through sub-committees with each country, dealing with the relevant sectors or issues. The implementation of the reforms is supported through various forms of EC-funded financial and technical assistance including instruments, which have proven successful in supporting reforms in Central, Eastern, and South-Eastern Europe.³⁶

The **European Economic Area (EEA)**, which came into being on January 1, 1994, is the most developed framework for relations between the EU and non-EU countries. The non-EU EEA countries include three members of the European Free Trade Association (EFTA), Iceland, Liechtenstein and Norway, which have adopted the essential parts of the EC *acquis communautaire* related to the internal market. The EFTA-country Switzerland did not become member of the EEA after a respective referendum in December 1992 had failed. The EEA Agreement obliges the three EFTA countries to implement the EU's *acquis* into national legislation. The EEA allows the three EFTA countries to participate in the internal market without becoming EU members as it is based on the same "four freedoms" as the EC/EU: the free movement of goods, persons, services, and capital. The EFTA countries participating in the EEA enjoy free trade with the European Union, contribute to the EU budget and participate in the Union's cohesion policy. However, cooperation in the EEA is not limited to issues related to the "four freedoms" of the internal market, but covers also issues related to research and technological development, information services, the environment, education, social policy, consumer protection, small and medium-sized enterprises, tourism, the audio-visual sector and civil protection. Noteworthy, the three non-EU-EFTA countries do not take part in the Common Agricultural Policy, tax harmonisation or in the EU's external trade relations.

The **Euro-Mediterranean Partnership (EMP)**, also known as the **Barcelona Process**, was launched in 1995 and constitutes the framework for the EU's relationships with its southern

³⁵ See European Commission, *Wider Europe-Neighbourhood: A New Framework for Relations with our Eastern and Southern Neighbours*, Brussels, 11.3.2003, COM(2003) 104 final; European Commission, *European Neighbourhood Policy Strategy Paper*, Brussels, 12.05.2004, COM(2004) 373 final.

³⁶ For more on the European Neighbourhood Policy see: Marise Cremona and Christophe Hillion, *L'Union fait la force? Potential and Limitations of the European Neighbourhood Policy as an Integrated EU Foreign and Security Policy*, EUI Working Paper LAW, No. 2006/39; Michael Emerson, Gergana Noutcheva and Nicu Popescu, *European Neighbourhood Policy Two Years on: Time indeed for an 'ENP plus'*, CEPS Policy Brief No 126, March 2007; Barbara Lippert, "Die EU-Nachbarschaftspolitik in der Diskussion – Konzepte, Reformvorschläge und nationale Positionen", Friedrich Ebert Stiftung, *Internationale Politikanalyse*, July 2007; Barbara Lippert, *Die Europäische Nachbarschaftspolitik: viele Vorbehalte – einige Fortschritte – unsichere Perspektiven*, *Internationale Politikfeldanalyse*, März 2008; Johannes Varwick and Kai-Olaf Lang (eds.), *European Neighbourhood Policy: Challenges for the EU-Policy Towards the New Neighbours*, Opladen & Farmington Hills, 2007.

Mediterranean neighbours. Its purpose is to strengthen the links between the Union and the partner countries, whilst encouraging closer ties among the Mediterranean countries themselves. The objective of the Partnership is to promote peace and stability in the region by establishing a political dialogue that respects the partners' shared values, such as democracy and the rule of law. The Barcelona Process aims to promote the prevention and resolution of conflicts, to increase prosperity, particularly through the creation of a free-trade area, and to develop cooperation. In this context, the Euro-Mediterranean Partnership brings together the EU member states and the Mediterranean countries under a large-scale programme with three strands: a political and security strand, an economic and financial strand and a social and cultural strand. Strengthening cooperation in the fields of justice, migration and social inclusion is also an important element of the Barcelona Process. The Partnership is put into effect both bilaterally and regionally. The bilateral arrangements are tailored to the individual partner country, an important aspect being the Euro-Mediterranean Association Agreements (see below). The Barcelona Process might be enhanced through the establishment of the **Union for the Mediterranean (UMed)**, which was originally proposed by the French President Nicolas Sarkozy. The "Barcelona Process: Union for the Mediterranean" will encompass all EU member states and the European Commission together with the remaining members and observers of the Barcelona Process (Albania, Algeria, Egypt, Israel, Jordan, Lebanon, Libya, Mauritania, Morocco, Palestinian Authority, Syria, Tunisia and Turkey), and the other Mediterranean coastal states (Croatia, Bosnia and Herzegovina, Montenegro and Monaco). Following its launch in July 2008 the "Barcelona Process: Union for the Mediterranean" is planned to concentrate on more concrete and visible regional and sub-regional projects.³⁷ It will be co-chaired by the EU and the Mediterranean partner countries. The Heads of State and Government will hold biennial summits. Foreign affairs ministerial meeting will take place between summits to review progress in the implementation of the summit conclusions and prepare the next summit meetings.³⁸

Euro-Mediterranean Association Agreements: The EU and nine Mediterranean partners (Algeria, Egypt, Israel, Jordan, Lebanon, Morocco, Palestinian Authority, Syria and Tunisia) have concluded bilateral Association Agreements. The provisions of the Euro-Mediterranean Association Agreements vary from one Mediterranean partner to the other. However, they have certain aspects in common: political dialogue; respect for human rights and democracy; establishment of WTO-compatible free trade; provisions relating to intellectual property, services, public procurement, competition rules, state aids and monopolies; economic cooperation in a wide range of sectors; cooperation relating to social affairs and migration (including re-admission of illegal immigrants); cultural cooperation. For the implementation of Association Agreements two common institutions are in place: the Association Council (ministerial) and the Association Committee (senior official level).

The **Stabilisation and Association Process (SAP)** launched at the Zagreb Summit in November 2000 is the EU's policy towards the countries of the Western Balkans. The countries concerned are Albania, Bosnia-Herzegovina, Croatia, the Former Yugoslav Republic of Macedonia (FYROM), Montenegro, Serbia, Kosovo. These countries are recognised as (potential) candidates for Union membership. The SAP is intended to ensure peace and stability in the region by providing support for the strengthening of democracy and the rule of law and the development of a market economy. It places great stress on developing regional cooperation e.g., by a free trade area and political dialogue. The purpose of the SAP is to establish special relations between the countries concerned and the EU in exchange for reforms with a view to EU accession, which will involve aligning their legislation more closely with that of the Union. The SAP is based on a progressive partnership, in which the EU offers a mixture of trade concessions (Autonomous Trade Measures), economic and financial assistance (CARDS Programme) and contractual relationships (Stabilisation and Association Agreements). Each country moves forward on the basis of the fulfilment of its commitments in the framework of the SAP. Annual Progress Reports assess the readiness of the Western Balkan countries to move closer to the EU. The SAP was strengthened at the Thessaloniki Summit in 2003 by taking over elements of the accession process. The most far-reaching of these

³⁷ For a list of concrete projects see Barcelona Process: Union for the Mediterranean, Communication from the Commission to the European Parliament and the Council, COM(2008) 319 (Final), 20.5.2008.

³⁸ On the Union for the Mediterranean see Rosa Balfour and Dorothee Schmid, A Union for the Mediterranean, disunity for the EU?, EPC Policy Brief, February 2008; Michael Emerson, Making sense of Sarkozy's Union for the Mediterranean, CEPS Policy Brief No. 155, March 2008; Daniela Schwarzer and Isabelle Werenfels, Formelkompromiss ums Mittelmeer, SWP-Aktuell 24, April 2008.

new instruments are the European Partnerships, inspired by the Accession Partnerships. The first set of European Partnerships was approved in 2004. By identifying short and medium-term priorities, which the countries need to address, the European Partnerships aspire to help the Western Balkans countries with their reforms and preparations for future membership. The countries that acquire candidate country status (currently Croatia and FYROM) continue to benefit from certain aspects of the Stabilisation and Association process although they are engaged in the process of accession.

The **Partnership and Co-operation Agreements (PCAs)** formalise the bilateral relations between the EU and individual partner countries in Eastern Europe and Central Asia. PCAs are now in force with nine partner countries: Armenia, Azerbaijan, Georgia, Kazakhstan, Kyrgyz Republic, Moldova, Russian Federation, Ukraine, and Uzbekistan. The PCAs with Belarus, Tajikistan and Turkmenistan have been signed but have not entered into force. PCAs are legal frameworks, setting out the political, economic and trade relationship between the EU and its partner countries. Each PCA is a ten-year bilateral treaty signed and ratified by the EU and the individual state.

The **Black Sea Synergy** is a cross-border cooperation programme initiated in early 2007 that involves local authorities in the countries around the Black Sea and supports the activities of civil society organisations. The countries participating in the initiative include the three EU countries Bulgaria, Greece and Romania, and seven non-EU countries Armenia, Azerbaijan, Georgia, Moldova, Russia, Turkey and Ukraine. The primary task of Black Sea Synergy is the development of cooperation within the Black Sea region and also between the region as a whole and the EU. The Black Sea Synergy specifically aims to stimulate democratic and economic reforms, to support stability and promote development, to focus on practical projects in areas of common concern, to respond to opportunities and challenges through coordinated action in a regional framework, and to develop a climate more conducive to the solution of conflicts in the region. Black Sea Synergy includes concrete initiatives in areas such as transport, energy, the environment, maritime management, fisheries, migration, and the fight against organised crime, the information society and cultural cooperation.

The **Northern Dimension** policy is a common project of its Partners, the EU, Iceland, Norway and Russia. The USA and Canada are observers to the Northern Dimension. The Northern Dimension supports the existing multilateral co-operation within the Northern regional councils (Council of the Baltic Sea States (CBSS), Barents Euro Arctic Council (BEAC), Arctic Council (AC), Nordic Council of Ministers (NCM)) and aims to maximize their synergies as well as those of all other Northern Dimension participants and actors. The Northern Dimension focuses on the following key areas of cooperation: economic cooperation; freedom, security and justice; research, education and culture; environment, nuclear safety and natural resources; social welfare and health. Northern Dimension ministerial meetings are held every two years and provide guidance and monitoring to Northern Dimension implementation. Senior officials meetings are held whenever necessary and at least every alternate year between ministerial meetings. Partners, observers and participants are invited to both ministerial and senior officials meetings. A steering group at expert level, which is composed of representatives of the EU, Iceland, Norway and Russia, normally meets three times a year to provide continuity between the high level meetings.

In May 2008 the Polish and Swedish governments proposed the initiation of an **Eastern Partnership**, which is to complement the Barcelona Process: Union for the Mediterranean, Northern Dimension and Black Sea Synergy. The European Council has asked the Commission to present to the Council in Spring 2009 a proposal for modalities of the Eastern Partnership. The new initiative, which is to be embedded into the ENP, aims to improve ties with Armenia, Azerbaijan, Belarus, Georgia, Moldova and Ukraine. The original Polish-Swedish proposal stresses multilateral cooperation in fields like migration, visa-free travel and the environment. Projects could also extend to Russia³⁹

³⁹ For an analysis of the “Eastern Partnership” see Agnieszka K. Cianciara, ‘Eastern Partnership’ – opening a new chapter of Polish Eastern policy and the European Neighbourhood Policy?, Analyses and Opinions No. 4, The Institute of Public Affairs, Warsaw, June 2008.

(i) **Association Plus:** Third countries do not join the European Union but are associated with the EU as closely as possible beneath the level of *de jure* or *de facto* membership. In practice the intensity in which the neighbouring countries are associated to the Union can vary significantly. It can include a privileged access to the internal market (EEA, bilateral agreements with Switzerland⁴⁰), the establishment of a customs union (Turkey), the adoption of “deep free trade agreements”⁴¹, a strategic dialogue on political and security-political issues, the ability to support CFSP positions and to participate in ESDP/CSDP operations, a privileged visa regime or even free access to the Schengen area (Iceland, Norway, Switzerland), intercultural and people-to-people exchanges, or financial and technical assistance (e.g., ENPI, TAIEX, twinning). The association can be based on both bilateral (e.g., ENP Action Plans, Association and Stabilization Agreements, Privileged Partnership, Most Favoured Neighbour status) and/or multilateral arrangements (e.g., “Barcelona Process: Union for the Mediterranean”, Black Sea Synergy, European Commonwealth, Pan-European Confederation, European Area, EEA).⁴² However intense and diverse the relationship between the EU and an associated country, one key feature characterizes all variants of an *Association Plus*: The partner countries do not participate in the internal process of EU decision-making, which remains the sole privilege of the Union and its members. In other words, the EU’s core institutions remain closed for associated countries. The formulation of the Union’s *acquis politique* and the adoption of legal acts are exclusively reserved to EU institutions and member states.

⁴⁰ See Marius Vahl and Nina Grolimund, *Integration without Membership: Switzerland’s Bilateral Agreements with the European Union*, Centre for European Policy Studies (CEPS), Brussels, 2006.

⁴¹ *Deep free trade* can e.g., include – in addition to free trade in goods and farm products – harmonisation or mutual recognition of technical standards, convergence on EU rules for free trade in services, adoption of EU rules on competition policy, corporate governance and internal market regulation, or some environmental standards. See Michael Emerson *et al*, *The Prospect of Deep Free Trade between the EU and Ukraine*, Centre for European Policy Studies (CEPS), Institut für Weltwirtschaft (IfW), International Centre for Policy Studies (ICPS), Brussels, 2006.

⁴² See Janis A. Emmanouilidis, *Alternatives between Full Membership and Non-membership – Fata Morgana or Silver Bullet?*, paper prepared for the conference “The EU and its Neighbours: In Search of New Forms of Partnership”, Athens, July 2008; download under: www.emmanouilidis.eu

Box 5: Variants of Association Plus

European Economic Area plus (EEA+): The European Parliament and here especially Elmar Brok, Member of the European Parliament (EPP/CDU), have proposed the creation of an *European Economic Area plus (EEA+)*.⁴³ Within the EEA+ the partner countries could – similar to the EEA – gradually adopt 40-60 per cent of the EU's *acquis*. Fields of close cooperation could – according to Brok – include the internal market, environmental protection or border control. The EEA+ does not exclude an eventual full membership in the EU.

ENP plus: Michael Emerson, Gergana Noutcheva and Nicu Popescu have spelled out details of an *ENP plus* – a term originally introduced by the German EU presidency.⁴⁴ *ENP plus* should include the basic provisions of the European Neighbourhood Policy (ENP) plus (i) an advanced association model for the able and willing partner states, (ii) a strengthening of regional-multilateral schemes, (iii) an upgrading of some of the standard measures being deployed, (iv) an “ENP light” package for states/entities with difficult political regimes.

Privileged Partnership: Probably the most prominent idea is the proposal to engage Turkey in a *Privileged Partnership* as an alternative to EU membership. This idea was originally proposed and developed by political circles surrounding the German CDU/CSU.⁴⁵ A *Privileged Partnership* would be phased in and eventually surpass the status of special relations. In more concrete terms, a *Privileged Partnership* could also include membership in the European Economic Area (EEA), provide particular forms of intensive political dialogue, and extend the non-EU country's involvement in CFSP/ESDP and/or in JHA.

European Commonwealth: The idea to establish a European Commonwealth aims to close the gap between EU enlargement and neighbourhood policy by tying the EU and its eastern and southern neighbouring countries (ENP countries and possibly also Russia) closer together in a multilateral forum. Cooperation should be based on shared values and include the area of freedom, security and justice, foreign and security policy, and cooperation in the fields of education, science and culture. Cooperation in the European Commonwealth should however exclude a participation in EMU, not allow any participation in EU decision-making organs, and exclude the free movement of persons.⁴⁶

Pan-European Confederation (gesamteuropäische Aufgabenkonföderation):⁴⁷ Taking up a proposal advocated by the former President of the European Parliament Klaus Hänsch in the early 1990s, Barbara Lippert advocates the creation of a Pan-European Confederation (gesamteuropäische Aufgabenkonföderation) including the EU – represented collectively – and a number of countries of the former Soviet Union⁴⁸; at a later stage possibly also Russia and the EFTA

⁴³ See Elmar Brok, Glaubwürdigkeit statt “Alles oder Nichts” – bei der Erweiterung stößt die EU an ihre Grenzen, in *Union in Europa*, 5/2006, pp. 4-5; European Parliament, European Parliament resolution of 15 November 2007 on strengthening the European Neighbourhood Policy, A6-TA(2007)0538, 15 November 2007, here especially point 31.

⁴⁴ See Emerson, Noutcheva and Popescu, *European Neighbourhood Policy Two Year on*.

⁴⁵ For the most detailed description of the idea see Johann zu Gutenberg, *Die Beziehungen zwischen der Türkei und der EU – eine “Privilegierte Partnerschaft”*, Aktuelle Analysen Nr. 33, Hanns-Seidel-Stiftung, Munich, 2004; see also *Privilegierte Partnerschaft: Die europäische Perspektive für die Türkei*, Beschluss der Präsidien der CDU und der CSU, 7.3.2004.

⁴⁶ See Andreas-Renatus Hartmann, *Für ein europäisches Commonwealth*, *Frankfurter Allgemeine Zeitung*, 7.5.2008, p. 10; Ognyan Minchev, *Towards a European Commonwealth of Nations – A Strategic Response to the EU ‘Enlargement Fatigue’*, Institute for Regional and International Studies (IRIS), 2005; John Palmer, *Toward a European Commonwealth – Beyond Enlargement*, *International Herald Tribune*, 23.6.2006; Ioannins Varvitsiotis, *Let's build on neighbourhood policy with an EU-backed “Commonwealth”*, *Europe's World*, Summer 2006.

⁴⁷ See Barbara Lippert, *Assoziierung plus gesamteuropäische Aufgabenkonföderation: Plädoyer für eine selbstbewusste EU-Nachbarschaftspolitik*, *integration* 2/2006, pp. 149-157.

⁴⁸ The group of former Soviet countries would include the following six states: Armenia, Azerbaijan, Belarus, Georgia, Moldova and Ukraine.

countries. The participating eastern neighbours should have concluded and successfully implemented a new type of “modernization and stabilization partnership” with the EU. The Confederation should provide a multilateral forum for functional cooperation allowing both sides to adopt joint decisions on the basis of joint decision-making mechanisms and “light” institutions. However, the neighbouring countries participating in the Confederation would not participate in the EU’s decision-making process. The establishment of a Confederation does not aim to create a new, third status in between EU membership and neighbourhood and is not primarily thought of as a transit arrangement on the way to EU membership. The Confederation should rather be a functional community on its own right. Similar to the CSCE process in the 1970s, the Confederation’s institutional structure, tasks, procedures, rules and norms of cooperation should not be predetermined but rather developed jointly in the course of the process. Cooperation within the Confederation should encompass three dimensions: (i) political and humanitarian dimension (rule of law, democracy and human rights; education, culture and science); (ii) economic dimension (economic area; monetary and macro-economic area; economic infrastructure/trans-European networks); (iii) security dimension (justice and home affairs; external and security policies; bundling of regional processes).

EU-Black Sea Union: In response to the French proposal to establish a “Union for the Mediterranean” the Socialist Group in the European Parliament proposed a similar initiative in the east of the EU. In more concrete terms, Hannes Swoboda, Austrian MEP and Vice-President of the EP and the Socialist Group, claimed that, “the Union for the Mediterranean must be accompanied by an EU-Black Sea Union” comprising the EU and Moldova, Turkey, Ukraine, the southern Caucasus (Georgia and Azerbaijan) and Central Asian countries.⁴⁹

European Area (alternative labels: *European Partnership Area* or *Euro-Sphere*): Dimitar Bechev and Kalypso Nicolaidis propose the creation of a separate political and economic entity including all countries addressed by the European Neighbourhood Policy (ENP). The *European Area* would be a multilateral body resembling the *Euro-Mediterranean Partnership* but with a broader geographical scope. The *European Area* would entail a radical decentring of special relationships away from the EU-oriented notion of neighbourhood and institutional management carried out in Brussels. As such it would be partially freed from the logic of convergence, although economic functional integration within the *European Area* would likely reflect the EU’s *acquis*. As a polity in its own right, the *European Area* would have its own council of ministers (with a secretariat), sectoral minister’s fora, expert bodies and a parliamentary assembly.⁵⁰

Most Favoured Neighbour (MFN): The MFN status developed by Emel G. Oktay distinguishes more explicitly between the EU’s eastern European neighbours and its southern partners as neighbours such as Ukraine, Moldova, and Belarus are granted a special status. The MFN status suggests that the EU treats its eastern European neighbours “normally” as a European state in the geographical sense and thus recognizes their legitimate right to apply for membership.⁵¹

(ii) **Partial Membership:** In the framework of a *Partial Membership* the affiliated countries are not merely associated but rather integrated in one or more specific EU policy areas without however becoming full members of the European Union. Sectoral integration can relate to political (e.g., CFSP/CSDP, Schengen⁵², visa regime) and/or economic aspects (e.g.,

⁴⁹ See PSE News, The Union for the Mediterranean must be accompanied by a EU-Black Sea Union, 27.3.2008

(<http://www.socialistgroup.eu/gpes/newsdetail.do?id=77270&lg=en>).

⁵⁰ See Dimitar Bechev and Kalypso Nicolaidis, Integration without Accession: The EU’s Special Relationship with the Countries in its Neighbourhood, Report to the European Parliament, October 2007; pp. 35-36.

⁵¹ See Emel G. Oktay, “Today’s Neighbours, Tomorrow’s Partners: Managing the Neighbourhood on Post-Enlargement Europe, Clingendael European Papers No. 3, The Hague, December 2007, here pp. 33-37.

⁵² It is important to note, that the case of Iceland, Norway and Switzerland in the framework of the Schengen zone does not qualify as an example of a *Partial Membership*. This has to do with the fact, that the non-EU Schengen states have few options to participate in

internal market, energy and climate policy, euro) (see Box 6). It can involve policy areas, which include all EU members or areas, which are subject to a high level of differentiation. “Partial” members become *de facto* members in the respective field and as such fulfil similar obligations and enjoy similar rights as any other EU country. Accordingly, “partial” members would be obliged to contribute to the policy-relevant budget and at the same time enjoy partial access to the Union’s core institutions. Over time, *Partial Membership* could be extended to other policy areas and would not exclude the possibility of an eventual full membership in the EU.

Box 6: Proposals of Partial Membership⁵³

Gradual Integration: The concept of *Gradual Integration (Abgestufte Integration)* developed by Cemal Karakas advocates a gradual and sectoral integration of Turkey into various EU policy areas, which can eventually lead to a full-fledged EU membership. The advancement to higher levels of integration is linked to progressive reforms and would be accompanied by a right of co-decision (albeit without voting rights) in the relevant policy fields. Karakas mentions three successive levels of integration: (i) education, culture, research, infrastructure and environment; (ii) progressive extension of the customs union towards a common market; (iii) participation in EMU, closer cooperation in the fields of JHA and ESDP.⁵⁴

Security Partnership: Charles Grant proposes the establishment of *Security Partnerships* in the area of CFSP. According to this proposal, the EU and the *security partner* agree that, on certain foreign policy subjects, they have shared common interests. On the basis of this agreement, the *security partner* helps to shape EU policies. Institutionally, the *security partner* should (i) send a small team of diplomats to be based in the Council, (ii) be asked to join in when relevant subjects are discussed within the EU, (iii) send a senior diplomat to the Political and Security Committee (PSC) and its foreign minister to the meetings of the General Affairs and External Relations Council (GAERC), when the agenda includes a topic covered by the *Security Partnership*, (iv) attend relevant working groups and committees, and (v) participate in ESDP operations not only through sending troops or other personnel but also by taking part in the management of operations. However, not being member of the EU, the *security partner* would – according to Grant – have to

shaping the evolution of the Schengen rules. Their role is effectively reduced to agreeing with whatever is presented before them or withdrawing from the Schengen agreement.

⁵³ The concept of an **Extended Associated Membership (EAM)** developed by Wolfgang Quaisser and Steve Wood does not qualify as a variant of *Partial Membership* as the *EAM* explicitly excludes an eventual EU membership. The concept of *Partial Membership* – as defined in this paper – does not exclude the eventual full EU accession of “partial” members. At the same time, the EAM goes beyond an *Association Plus* as it opens up the EU’s core institutions for “associated members”. The basic element of the EAM, which builds on the concept of a Privileged Partnership, is the complete participation of the “associated members” in the European Economic Area (EEA) (including a customs union). However, the EAM extends the scope and the institutional setting of the EEA (see Box 7). In concrete terms, the EAM (i) includes participation of EAM countries in EU council meetings albeit excluding voting rights, (ii) adds a special council for the area of ESDP, and (iii) foresees the creation of a special senate of the European Court of Justice to decide on treaty transgressions and other legal matters. See Wolfgang Quaisser and Steve Wood, *EU Member Turkey? Preconditions, Consequences and Integration Alternatives*, forst Arbeitspapier Nr. 25, October 2004, here pp. 50-55.

⁵⁴ See Cemal Karakas, *Für eine Abgestufte Integration – Zur Debatte um den EU-Beitritt der Türkei*, HSFK Standpunkte, Nr. 4/2005; Cemal Karakas, *A Compromise Solution for Turkey’s EU Ambitions*, *Europe’s World*, Summer 2007, download under www.europeworld.org

leave the room when the Union takes a decision. After the EU has decided on a common policy, the *security partner* would have the right to sign up to it – or not.⁵⁵

Junior Membership: The idea of a *Junior Membership* proposed by Franz-Lothar Altmann advocates a status in between the Stabilization and Association Agreements and full membership. *Junior members* (i) should have the right to co-determine EU policies, but should not be attributed co-decision rights, (ii) should have no right to appoint a Commissioner, (iii) should participate in the EU's structural and regional development programmes, (iv) should in order to become a *junior member* not be obliged to immediately fulfil all accession conditions e.g., in the fields of environment, regional development or competition. The concept of *Junior Membership* does not exclude an eventual full EU membership, but stipulates a phasing-in process at the end of which *junior members* can but must not become full members.⁵⁶

(iii) **Limited Membership:** The legal status of the acceding state is that of a full-fledged member of the European Union albeit subject to certain limitations. The new EU country does not enjoy all benefits of membership as it is excluded from certain (key) policy areas (e.g., Schengen, ESDP/CSDP, “four freedoms”, euro) or is not obliged to apply certain legal norms. The latter could for example include a “*differentiated acquis*” adopted for example in the framework of *enhanced cooperation*, which binds only the EU members participating in this particular cooperation.⁵⁷ In the past, the EU and the acceding countries agreed that new members must from day one of their accession respect the Union's *acquis* and fulfil all obligations deriving from EU membership. In other words, European law was valid right from the beginning although its application was in certain cases temporarily delayed, due to either derogations laid down in the accession treaty (e.g., transition period concerning the free access of labour markets) or due to the fact that the new EU countries were not (yet) able to fulfil certain pre-defined participation criteria or obligations (e.g., late introduction of the euro, no immediate abolition of border controls). The concept of *limited membership* deviates from this rule as new member states are more permanently excluded from one or more (sub-)policy areas or parts of the EU's *acquis*, if both parties – the Union and the acceding country – agree to the respective exemption in the course of membership negotiations. Beyond such selective exceptions, the new member states would enjoy all legal rights and obligations deriving from EU membership.

⁵⁵ See Charles Grant, *Europe's blurred boundaries: Rethinking enlargement and neighbourhood policy*, Centre for European Reform (CER), October 2006; here especially pp. 66-72.

⁵⁶ See Franz-Lothar Altmann, *EU und westlicher Balkan – Von Dayton nach Brüssel: ein allzu langer Weg?*, SWP-Studie S 1, January 2005, here p. 25.

⁵⁷ The new Lisbon Treaty takes up the original provision of the Constitutional Treaty, which explicitly states that acts adopted in the framework of *enhanced cooperation* “shall not be regarded as part of the *acquis* which has to be accepted by candidate States for accession to the Union” (Art. 20.4 TEU-L, Art. 10 LT; originally Art. I-44.4 CT).

5.2 Key consequences and implications

The different concepts of an affiliation beneath full membership would bring about a number of core institutional and political ramifications:

- *Different levels of conditionality*: The concepts of *Association Plus*, *Partial Membership* or *Limited Membership* offer different levels of EU conditionality. What all three concepts have in common is that they provide the EU with less incentives compared to the classical enlargement paradigm. The clear prospect of an unconditional, full-fledged membership is still the most attractive offer the EU can make and thus the most effective means to impose its own conditions on a neighbouring country wishing to join the club. The three concepts provide the Union with different levels of conditionality depending on what the EU is able to offer to a partner country. The ability to impose certain conditions on a third country is most distinct in the case of a *Limited Membership* and less so in the case of a *Partial Membership* and even lesser in the case of an *Association Plus*. In the latter case, the level of conditionality depends on what concrete “carrots” the EU is able to offer (i.e. financial and technical assistance, privileged market access etc.), and to what extent the Union allows the partner country to somehow influence the EU’s decision-shaping process, even if the EU’s core institutions remain closed.
- *Association Plus no alternative but step towards membership*: Viewed from the perspective of neighbouring states wishing to join the EU, any form of *Association Plus* will sooner or later run out of steam. For European countries aspiring and eligible to join the EU the option of an *Association Plus* cannot be an alternative to full membership. Whatever the EU is able and willing to offer in terms of financial and technical assistance or in terms of political and/or economic exclusivity, no type of affiliation can substitute the ultimate membership perspective. For countries wishing to join the club an *Association Plus* can only be attractive if it is conceived and perceived as an intermediate step towards (full) EU membership. For this reason, concepts like a *Privileged Partnership* or an *Extended Associated Membership*, which explicitly exclude the perspective of an eventual EU membership,⁵⁸ are unattractive and politically unacceptable from the perspective of a (potential) candidate country.
- *Association Plus attractive for states not willing or unable to fully join the EU*: The concept of an *Association Plus* can be an attractive long-term

⁵⁸ See: Guttenberg, *Die Beziehungen zwischen der Türkei und der EU*, pp. 5-6; Quaisser and Wood, *EU Member Turkey?*, p. 51.

alternative for countries which aspire to establish strong links with the EU but are not willing (e.g., Norway, Switzerland or Russia) or ineligible (i.e. non-European countries) to fully join the Union. For such countries an *Association Plus* can be an interesting alternative to EU accession as it provides key benefits of EU membership without the necessity to join the club. The case of countries like Iceland, Liechtenstein and Norway in the framework of the European Economic Area (EEA) (see Box 4) or of Iceland, Norway and Switzerland concerning the Schengen area exemplify that third countries may want to be closely associated to the Union, even if this means that they are mere recipients of EC/EU legislation.⁵⁹ In other words, third countries might be ready to be excluded from the Union's internal decision-making process, if this is the price they have to pay in order to have access to a space and market of more than 500 million people. However, neighbouring countries will only be ready to accept the limits of association, if they consider this to be in their own interest.

- *Co-decision rights make Limited and Partial Membership attractive:* From the perspective of a country aspiring to join the EU, the concepts of a *Limited* or *Partial Membership* offer one great advantage: Contrary to an *Association Plus*, “limited” or “partial” EU members take part in or at least have the ability to (strongly) influence the Union's decision-making process. They are not degraded to mere recipients of EC/EU legislation, but are able to actively and directly co-determine the EU's political and legal *acquis* from within the Union's institutional architecture. “Partial” or “limited” members are thus attributed a substantive dimension of EU membership, which was hitherto reserved to full EU members.
- *Limited Membership can alleviate EU accession:* The exclusion from parts of the *acquis* can alleviate and speed up the accession of new member states. Such exemptions can (i) make it politically easier for certain countries to join the Union by removing national obstacles on the road to EU membership (e.g., potential opt-out of Switzerland concerning ESDP/CSDP or tax harmonisation), (ii) allow a more rapid integration of states which otherwise would not (yet) fulfil all the prerequisites for joining the Union, (iii) reduce certain reservations in the “old” member states towards the accession of a certain country to the EU by e.g., restricting the acceding country's access to the EU labour market or to structural or

⁵⁹ The Norwegian Prime Minister Jens Stoltenberg described the fact that non-EU members of the EEA have no representation in EU institutions as a “fax democracy”, with Norway waiting for the latest legislation to be faxed from the Commission. See Ivar Ekman, In Norway, EU pros and cons (the cons still win), International Herald Tribune, 27.10.2005.

agricultural funds. The current Turkish case leads in this direction: The EU's Negotiating Framework for Turkey includes the possibility to negotiate long-term derogations. It explicitly mentions "permanent safeguard clauses i.e. clauses which are permanently available as a basis for safeguard measures" in areas such as the free movement of persons, structural policies or agriculture.⁶⁰

- *More complicated and less transparent institutional structure:* The introduction of a *Limited Membership*, a *Partial Membership* or an *Association Plus* would undoubtedly make the EU's institutional structure and decision-making processes more complicated and less transparent. But what would the institutional implications be, and how could the institutional design look like in more concrete terms?
 - (i) In the case of *Limited Membership* the new EU country would be fully and equally represented in all EU institutions. However, in the affected (sub-)policy fields "limited" members might not enjoy the same rights as the EU countries which are not subject to any membership limitations (e.g., no participation in the Eurogroup; no voting rights in certain forms of *enhanced cooperation*).
 - (ii) In the case of *Partial Membership* representatives of "partial" members would take part in the ordinary meetings of the relevant EU institutions and bodies. In more concrete terms, the participation of "partial" members in the main EU organs – (European) Council, European Parliament, Commission – could be organized as follows:

(European) Council: Representatives of the "partial" members take part in European Council summits and in the relevant meetings of the various formations of the Council and its substructures (working groups and committees, COREPER, PSC etc.) – when decisions relevant to the respective policy area(s) are deliberated. The representatives of the "partial" members would have a right to at least express their point of views. Beyond this undeniable right to express a national position, one would have to clarify, whether the "partial" members have no voting rights, some sort of veto or suspensive veto, or even equal voting rights when decisions in the respective (sub-)policy field are taken. The participation rights of the "partial"

⁶⁰ See Negotiating Framework, 3 October 2005, here paragraph 12, 4th indent. For a detailed analysis of the legal consequences of the negotiating framework see Christophe Hillion, *Negotiating Turkey's Membership to the European Union: Can the Member States Do As They Please?*, *European Constitutional Law Review*, 3 2007, pp. 269-284.

members must not be uniform, but could rather vary from policy area to policy area.

European Parliament: Parliamentarians of the “partial” members participate in the deliberations of the European Parliament, when issues related to the specific (sub-)policy area are debated and relevant decisions are taken. Commensurate to full EU members, the number of parliamentarians would be determined in a degressively proportional relation to the population size of the “partial” member. The representatives of “partial” members could either be seconded national parliamentarians or “European parliamentarians” elected in a separate election. Again, one would have to clarify, whether the representatives of the “partial” members would be limited to an active observer status, which would assign them the right to express an opinion, but exclude the right to participate in a vote, or whether they would enjoy similar or even equal rights as “ordinary members” of the European Parliament.⁶¹

European Commission: Based on the institutional logic of the European Union, one could argue that it is not obligatory that the “partial” members are represented in the Commission. Two arguments justify this position: (i) The Commission is a supranational organ called to be “completely independent” and to “promote the general interest of the Union” and not the interest of any particular member state(s). Commissioners should not first and foremost be national representatives, but rather members of a supranational college, who “shall neither seek nor take instructions from any Government”. (ii) Following the coming into force of the Lisbon Treaty and as from November 1, 2014, the number of Commissioners will be smaller than the number of member states. As a consequence, even full EU members will not always have the right to nominate one of their nationals to become member of the European Commission. The “partial” members will thus not be the only ones, who are not “represented” in the Brussels college.

⁶¹ The European Parliament, the Council and the Commission have experience with the observer status in the framework of the EU enlargement process. Once an Accession Treaty is signed, the acceding country sends observers to the Committee of Permanent Representatives (COREPER), the working groups of the Council, the Ministerial Councils, the European Council, the working groups of the European Commission, the European Parliament, the Committee of the Regions and the European Economic and Social Committee. An active observer has no right to vote but the opportunity to express its point of view in the EU decision-making process.

Concerning participation in the EU's bureaucratic structures, "partial" members could be represented in the relevant administrative services of the Commission (i.e. the relevant Directorates-General), the General Secretariat of the Council, the administration of the European Parliament, the new "European External Action Service", or in all relevant EU agencies.

The institutional details of a *Partial Membership* would have to be codified in writing. Two options seem feasible: (1) The EU and the "partial" member conclude, sign and ratify a bilateral agreement/treaty laying down the specific institutional details of their partnership. (2) The terms of *Partial Membership* – including the overall institutional set-up – are generally defined and legally codified in the EU Treaties. The latter would require a revision of the Union's primary law on the grounds of the ordinary revision procedure.⁶²

- (iii) In the case of *Association Plus* the affiliated non-EU countries would not enjoy rights similar to that of full-fledged, "limited" or "partial" Union members. The institutional arrangements associating the partner countries to the EU are limited to bilateral and multilateral meetings (e.g., Partnership/Association Council, Partnership/Association Committee, Joint Parliamentary Committee, EMP summits). However, the associated countries can get indirectly or directly affiliated to the EU's decision-shaping process. The degree of cooperation can be as close as to involve joint mechanisms of decision-making as for example in the case of the European Economic Area (EEA), where the EU and the three non-EU members of the EEA jointly decide on how EC legislation is integrated into the EEA Agreement (see Box 7). However, even in this case the actual legal *acquis* is not subject to joint decision-making as decisions are adopted autonomously within the EU and without the involvement of non-EU EEA countries. The fact that non-EU countries are excluded from EU institutions and not able to really influence the Union's policies and legislative output was one reason why several EFTA members such as Austria, Finland and Sweden in the early 1990s

⁶² The revision of the EU Treaties could specify the new neighbourhood article inserted into the Lisbon Treaty. According to this article the Union "shall develop a special relationship with neighbouring countries, aiming to establish an area of prosperity and good neighbourliness, founded on the values of the Union and characterised by close and peaceful relations based on cooperation" (Article 8 TEU-L).

rather preferred to seek full membership in the EU instead of joining the more limited EEA agreement.⁶³

Box 7: EEA Institutional Set-up

The European Economic Area (EEA) provides the most developed institutional framework for relations between the EU and non-EU countries. The decision-making process in the EEA Agreement is characterised by a two-pillar structure. Substantive decisions relating to the EEA Agreement and its operation are a joint venture with the EU and in the hands of common bodies. The *EEA Council* is responsible for giving political impetus and guidance for the implementation and development of the EEA Agreement (similarly to the European Council). It meets twice a year and is attended by the Ministers for Foreign Affairs from the EEA EFTA States, the current and forthcoming EU presidencies, as well as the Commissioner for External Relations and the High Representative for the EU's Common Foreign and Security Policy. The *EEA Joint Committee* is responsible for the ongoing management of the EEA Agreement. It is the forum in which views are exchanged and decisions are taken by consensus to incorporate Community legislation in areas covered by the EEA into the EEA Agreement. The incorporated legislation subsequently is implemented and becomes part of the national legislation of the EEA EFTA states. The *Joint Committee* generally meets once a month and is made up of ambassadors of the EEA EFTA States, representatives from the European Commission and EU member states. Four subcommittees assist the *Joint Committee* (on the free movement of goods; free movement of capital and services including company law; free movement of persons; and horizontal and flanking policies). Numerous expert and working groups report to these subcommittees. Other joint institutions include the *Joint Parliamentary Committee* and *Consultative Committee*, which have a consultative character. On the side of the EFTA countries (not including Switzerland!) the following institutions regulate the activities of the EFTA members in respect to their obligations in the European Economic Area: the *EFTA Standing Committee* is the forum in which the EEA EFTA States consult one another and arrive at a common position before meeting with the EU side in the *EEA Joint Committee*; the *EFTA Surveillance Authority* performs the European Commission's role as "guardian of the treaties" for the EEA EFTA countries; the EFTA Court performs the European Court of Justice's role for the EEA EFTA countries.

- *Imposed second-class membership or citizenship*: The introduction of *Limited* or *Partial Membership* would lead to new sub-forms of membership and citizenship. "Limited" or "partial" members would not enjoy the same rights and privileges as older EU countries and their citizens. One could argue that such forms of second-class membership or citizenship are nothing new. Some of the older EU members such as Denmark and the UK concerning the euro, Denmark, Ireland and the UK concerning Schengen, Denmark in the defence field of ESDP/CSDP or the UK and Poland concerning the Charter of Fundamental Rights are also not (fully) taking-part in one or more (sub-)policy areas. However, there are two important differences between both cases: First, Denmark, Ireland, Poland or the UK had themselves decided to restrict their membership status. Second, they had been able to co-determine the specific conditions of their partial exemption as they were already in the strong position of a full-fledged member of the EC/EU. In contrast, the future acceding countries would in most cases become "limited" or "partial" members not on their own will, but rather due to the pressure from the older member states. The new

⁶³ See Bechev and Nicolaidis, *Integration without Accession*, p. 21.

members would have to accept the limitations to their membership, if they want to gain (partial/limited) accession to the club.

- *Potential rupture between new and old member states:* The notion of being a second-class member can lead to severe tensions between old and new EU countries, if over time the latter feel discriminated by the former. The notion of being discriminated can fuel anti-EU sentiments in the new member states and put pressure on the ruling political class to improve their countries' membership status in the EU. Therefore, "limited" members could compel fellow EU members to remove the remaining membership limitations, "partial" members could try to extend their membership status to other areas or to the EU as a whole. The ability of the "discriminated" new EU countries to exert pressure on the older member states will depend on their power position within the Union. The more integrated the new member states are, the more able they would be to exert pressure. In case both sides clash, the resulting rupture between old and new EU members could negatively affect the EU's internal and external ability to act and even impede the structural development of the European Union.

6 Negative differentiation through withdrawal

6.1 Description of key characteristics

The withdrawal option originates from the idea that the state(s), which are either not prepared or not able to support a further deepening of integration, leave the European Union. According to this logic, the remaining EU members would be able to intensify cooperation among themselves only after the country/countries opposing more integration has/have left the Union. In this case, the withdrawing state(s) and the remaining EU members would have to conclude an agreement setting out the legal, institutional and political arrangements guiding any withdrawal.

The current Nice Treaties do not include provisions providing for a withdrawal from the European Union. However, from a legal perspective a retreat from the EU could be administered on the basis of the general rules governing international law and in particular the "Vienna Convention on the Law of Treaties" (Art. 54, 62).⁶⁴ In contrast to the current EC/EU Treaties, the new

⁶⁴ Article 62 of the Vienna Convention on the Law of Treaties could be invoked by a state claiming a radical change in the circumstances that originally caused it to join the EC/EU, leading to a drastic modification of the existing obligations. According to Article 54 of the Vienna Convention the withdrawal of a party may take place "at any time by consent of all the parties."

Lisbon Treaty (Art. 50 TEU-L; Art. 49 A) includes a withdrawal clause, which for the first time opens up the way towards such a form of “negative differentiation” by explicitly stipulating the possibility of a voluntary withdrawal.⁶⁵ According to the new provisions, which were taken over from the Constitutional Treaty (Art. I-60), every member state can withdraw from the Union “in accordance with its own constitutional requirements.” After the country in question has notified its intention to withdraw to the European Council, the two sides – the withdrawing state and the EU – will negotiate and conclude an agreement “setting out the arrangements of its withdrawal, taking into account of the framework for its future relationship with the Union.”⁶⁶

6.2 Key consequences and implications

Differentiation as an effect of a withdrawal from the EU would lead to a number of potential political and institutional consequences and implications:

- *Unaffected institutional operability despite limited institutional adaptations:* The withdrawal of one or more countries from the Union would not affect the operability of EU institutions. In concrete terms, the European Treaties would cease to apply to the withdrawn state(s) and the national representatives of the respective state(s) would have to give up their seats in EU institutions. The latter would require a number of manageable institutional adaptations, *inter alia* a new assignment of tasks within the Commission, a replacement of administrative personnel within EU institutions and agencies or a new agreement on the voting quotas for a qualified majority in the Council – in case the triple majority voting procedure is still in place.
- *Redefinition of relationship in order to avoid rupture:* The European Union and the withdrawing country or countries will have to define a novel framework for their future relationship. If both sides are not able to shape a constructive and institutionally regulated basis for their future relations, this could lead to a deep and enduring political rift between the countries of the EU and the withdrawn state(s).
- *EU withdrawal possible only on a voluntary basis:* No member state can be forced to give up its EU membership. No matter what the legal basis may

⁶⁵ See Janis A. Emmanouilidis and Claus Giering, In Vielfalt geeint – Elemente der Differenzierung im Verfassungsentwurf, *Integration* 4/03, pp. 454-467, here p. 465.

⁶⁶ It is noteworthy that on the part of the EU the Council will be the institution responsible for concluding such an agreement and that the Council will act by a qualified majority and not unanimously. As a consequence, no single EU member or no small fraction of member states can block the withdrawal of a country from the Union if the latter has autonomously decided to leave the Union.

be (Vienna Convention or withdrawal clause), a withdrawal from the EU can only be negotiated on a voluntary basis. Demanding from a state to exit the Union is thus pointless if the country concerned does not deem withdrawal from the EU to be a sensible thing to do.

- *Potential weakening of the EU:* The voluntary withdrawal of one or of a couple of member states can (substantially) weaken the European Union, if the retreating country plays a significant role in key policy areas of the Union. This would for example be the case, if the United Kingdom should decide to exit the EU. A withdrawal of the UK would constitute a severe setback for the efforts undertaken in the area of security and defence (ESDP/CSDP), and thus for the relevance of the EU in a multi-polar world. With regard to Economic and Monetary Union, the withdrawal of one of the members of the Eurozone could place a considerable and incalculable strain on the stability of the common European currency.
- *Danger of European antagonism:* The collective withdrawal of a larger number of states could lead to the creation of rival camps in the heart of Europe. The risk of a new European antagonism would be particularly high, if the former EU members decide to establish their own grouping in order to compensate the political and economic costs associated with the withdrawal from the EU within a new collective framework. This prospect could be avoided, if the states exiting the EU remain closely affiliated to the Union even after their withdrawal.
- *Potential renaissance of EEA and EFTA or partial membership:* The withdrawing state(s) could decide to join the European Economic Area in order to continue to benefit from the advantages of the internal market. Future relations between the EU and its former member(s) could in this case be regulated via the existing institutional structures linking the EU and the European Free Trade Association (EFTA) (see Box 7). The participation of former EU states in the EEA could lead to a renaissance of EFTA as its political and economic weight would increase due to the accession of new members. In return, EFTA might become more attractive for countries aspiring but not yet able to join the European Union. Alternatively, the withdrawing states could remain closely associated to the European Union by becoming “partial” members in one or more specific EU policy areas (e.g. CFSP/CSDP, Eurozone).

Ten Conclusions

The future path of differentiation will not be dominated by one single model. In practice we are rather likely to witness the application of many and diverse types of flexible integration. But which path(s) towards a more differentiated Europe should be followed? Which forms of differentiated integration should be avoided and which preferred? The following conclusions are drawn from the findings of this paper and sketch some answers to these questions.

Conclusion 1: The creation of a new Union, which brings together a group of countries aiming to achieve a higher level of supranational cooperation, is neither advisable nor realistic.

The creation of a new supranational Union – with an independent institutional structure and an independent set of primary law – entails the risk of creating new dividing lines in Europe. The members of the new Union would most likely concentrate their political energies on the development of their newly founded entity. In return, the “old EU” would gradually become marginalized. In this case the idea that the “old EU” could function as a kind of a bracket between the two entities and ally the more integration-friendly European states and those less willing or able to further integrate in some sort of a “stability community” would not materialize. On the contrary, the rivalry between the Unions might even lead to a division of Europe into two opposing camps – on the one hand the members of the new Union, and on the other the excluded states, which seek their political fate in other (geo-)political constellations.

The creation of a new Union is not only undesirable, it seems also unrealistic – at least from today’s perspective – for two main reasons: (i) The EU is not and has not been in a crisis big enough to generate the political energy required for the creation of a new Union. The EU has not reached the point at which diverging national positions concerning the future of Europe can only be resolved through the establishment of a new Union. Even in the most recent crisis following the double “No” in France and in the Netherlands to the Constitutional Treaty in 2005 the member states sought to find a solution within and not beyond the framework of the EU. (ii) Even in the most integration-friendly countries there is hardly any readiness to give up or rather to further pool substantial national competences on the grounds of a common vision of Europe’s *finalité*. On the contrary, it seems more likely that one would also in a new Union witness a clash of diverging interests and diverging perspectives concerning the future of integration. One cannot assume that the potential members of a new Union would be willing or able to agree on a common grand

vision of Europe – especially as one can presume that the number of potential members will be rather high as most members of the “old Union” will be keen to join the exclusive club of a new Union. As long as the current EU has not arrived at a political dead end, and as long as the potential participants of the new Union are themselves not ready to jump into the deep end and create some sort of a political union, the political, economic and administrative costs associated to the creation of a new Union would not equal the benefits.

Conclusion 2: Differentiated integration should preferably be organized within the EU framework, as cooperation organized outside the Union’s Treaties bears a number of potential risks.

Differentiated integration creates numerous opportunities. However, it bears also a number of potential risks. Flexible cooperation among a smaller number of member states can (i) lead to the creation of parallel institutional structures, which can weaken the EU’s supranational institutional architecture, (ii) exacerbate the problem of coordination between different policy areas and damage the overall coherence of the Union, (iii) lead to a fragmentation of legislation within and outside the EU framework, (iv) decrease the level of transparency and democratic accountability, and (v) in the worst case even carry the seed of creating new dividing lines in Europe. These risks are particularly high, if cooperation is implemented without clear procedures and norms and without the involvement of supranational institutions – which is the case, if differentiated cooperation is organized outside the EU.

If politically feasible and legally possible, differentiation should thus be organized inside the Union. Closer cooperation within the EU (i) respects and benefits from the Union’s single institutional framework, (ii) preserves the supranational powers and composition of the European Commission, the European Parliament and the European courts, (iii) limits the anarchic and uncontrolled use of flexibility, (iv) guarantees a high level of calculability due to the existence of clear-cut rules concerning the inception, the functioning and the widening of differentiated cooperation, (v) is characterized by a high degree of openness as participation is open to every member state at every time, (vi) guarantees a high level of democratic legitimacy through the involvement of the European Parliament and national parliaments, (vii) enables the continuous development of the EU’s *acquis* in line with the requirements of the EU Treaties, and most importantly (viii) reduces the overall risk of a confrontational split between the “outs” and the “ins”.

Conclusion 3: Differentiated cooperation within the EU framework should not follow a single master plan with a predefined idea of Europe's finalité. Ideas which are wrongly or rightly perceived as calls for a European core impede differentiation and do a disservice to the future development of integration.

The idea of applying the instruments of differentiation to create some sort of a "United States of Europe" (Verhofstadt) is unrealistic and counterproductive. It is unrealistic, because the wider public and increasingly also parts of the elites even in the most integration friendly countries are not (yet) willing to surrender substantial national competences in order to develop some sort of a federally organized political union. It is counterproductive, because the idea to create a "United States of Europe" via instruments and procedures of differentiation raises negative suspicions. Eurosceptics get the impression that differentiation is another way towards something they want to avoid – a devil in disguise leading to the creation of a federal union. Many of the EU's smaller and new countries (mis)perceive such proposals as an attempt to create a closed core Europe and fear that they could be excluded from such an elitist club. Independent of whether such suspicions or fears are justified or not, they raise distrust between EU countries and in return limit the chances that the instruments of differentiation are constructively employed in practice. Promising projects are prematurely buried in a climate of mistrust and the potentials of greater differentiation are not exploited.

Conclusion 4: Differentiation within the Treaty framework should follow the concept of functional-pragmatic differentiation based on flexibility instruments and procedures laid down in the EU Treaties.

The concept of *functional-pragmatic differentiation* does not adhere to a predefined master plan, but rather follows a case-by-case approach while aiming to overcome specific blockades of certain member states, which are either not willing or not able to engage in a higher level of cooperation. In the years ahead, greater use should be made of the various instruments of differentiated integration laid down in the EU Treaties, in order to reduce the widespread scepticism concerning further differentiation and to limit the necessity for extra-EU cooperation. It will be particularly important that EU institutions and member states become familiar with the instrument of *enhanced cooperation*, which has up till now never been triggered as such, although it was introduced more than ten years ago into the Amsterdam Treaty.⁶⁷ *Enhanced*

⁶⁷ The first case where *enhanced cooperation* was seriously considered concerned the minimum taxation of energy products. It has also been envisaged to enact the Statute for

cooperation should be applied in practice in order (i) to prove whether or not the strict conditions laid down in the EU Treaties can be met, (ii) to ascertain how well the current legal and institutional provisions work and where further improvements are needed, and (iii) to test the applicability of the new *special passerelle clause*, which in theory allows the improvement of the decision-making procedures within *enhanced cooperation*. The instrument of *enhanced cooperation* should initially be applied and tested in the context of smaller cases, most probably in the realm of policy areas still subject to unanimity in the Council. However, the individual initiatives should be part of a bigger picture explaining to citizens what differentiated cooperation is all about (see also Conclusion 10).

Conclusion 5: In some cases closer cooperation might have to be organized outside the EU framework in order to make a step forward instead of waiting indefinitely for a small step inside the Union.

If closer collaboration between a group of countries is politically and legally feasible only outside the EU, cooperation outside the Treaties should follow the concept of an *Intergovernmental Avantgarde*, which is open to all member states and aims to integrate the legal norms adopted and the cooperation initiated outside the EU into the Union at the soonest possible moment. However, the integration of a legal *acquis* into the EU can prove to be difficult. This is particularly the case, (i) if the legal norms conflict with existing or planned law in policy areas which are (partially) covered by the EC/EU-Treaties, (ii) if cooperation outside the EU covers issues which are strongly disputed between the member states, (iii) if EU institutions are not associated with or at least continuously informed about the activities outside the Union, and (iv) if the “outs” are as a matter of principle not willing to accept a set of legal norms that was enacted without their participation. Dividing lines and a decrease of trust between the “ins” and the “outs” and between the “ins” and the EU’s supranational institutions can not only hinder the integration of legal norms in the EU framework, it can also lead to negative spill-overs in other policy fields and hamper the overall integration process. The recent case of the Treaty of Prüm has shown that the chances to successfully incorporate a legal or political *acquis* into the EU framework are higher, if the participating states keep the “outs” constantly informed, and if key member states – in the Prüm case Germany – very actively promote the integration of a set of legal norms

a European Company, and later the European arrest warrant. The European Commission had also contemplated the use of *enhanced cooperation* to establish a common consolidated basis for taxation on company profits. See “Enhanced Cooperation: From Theory to Practice”, p. 106.

originally defined outside the Union into the EU. Cooperation outside the Union should not follow the model of a *Europe of Nations*, because long-lasting cooperation that escapes the EU and engages only a limited number of governments has the potential to fundamentally weaken the Union, as the danger of severe political and legal ruptures between the “ins” and the “outs” increases over time.

Conclusion 6: One should not demonize the limited allocation of opt-outs, which allow a further deepening of integration despite the staunch opposition from one or from a limited number of member states.

The granting of opt-outs is a perfect example of a *Europe à la carte*, which makes the EU more complicated, less transparent, and in some cases even less coherent and less solidary. However, the allocation of opt-outs is not entirely negative for a couple of reasons: (i) The granting of opt-outs might be the only way to overcome the opposition of certain EU members towards a further deepening. (ii) Even a radical instrument such as an opt-out can result in integrationist dynamics throughout the Union as the widespread use of the opt-in by the UK and Ireland in the area of Justice and Home Affairs or the potential removal of the Danish opt-outs have shown. (iii) The allocation of opt-outs preserves the Union’s single institutional framework and does not lead to the creation of new bodies outside the EU framework. (iv) The legal *acquis* adopted also applies to future member states, which is a major difference compared to the instrument of *enhanced cooperation*, since acts and decisions adopted in the framework of the latter do not form part of the EU’s overall *acquis* and are only binding for the participating states. (v) The institutional and political affiliation of the opt-out countries limits the danger of a divide between the opt-out countries and the other member states. Due to the above reasons one should not demonize the allocation of opt-outs as long as the number of exceptions granted to a small number of states remain limited.

Conclusion 7: Concepts aiming to affiliate neighbouring countries beneath the level of a full membership should not exclude the perspective of joining the EU club. An attempt to once and for all define the borders of Europe would be politically unwise, even if the prospect of membership in many cases might still be very distant or indefinite.

The wish of many neighbouring countries to join the club or at least to intensify cooperation with the EU and the widespread enlargement fatigue inside the Union increase the pressure to develop innovative ways affiliating partner

countries beneath the level of a full and unlimited EU membership. However, such concepts can only be successful and effective, if the perspective of joining the European club is not excluded. Concepts denying the membership carrot, like the one of a *Privileged Partnership* or an *Extended Associated Membership*, are in most cases doomed to fail, because they are unattractive for European countries, which aim to ultimately join the EU. Moreover, concepts denying the ultimate membership perspective are counterproductive for two reasons: (i) Excluding the prospect of EU membership provokes negative reactions in the partner countries and thus actually limits the potentials to constructively tie neighbouring countries closer to the Union below the level of full membership. (ii) A denial of the membership perspective substantially limits the Union's ability to impose conditionality. Without the long-term perspective of further enlargement the European Union is less in a position to effectively influence the overall political orientation and the transformation process of its neighbouring countries. For most states in the geographic vicinity of the Union the prospect of EU membership provides an important impetus for the initiation or continuation of the political, economic and social transformation process towards democracy and market economy. In sum, the possibility of joining the EU should in principle remain open to all European countries, even if the prospect of membership in many cases might still be very distant or even indefinite. Or to put it more bluntly: An attempt to once and for all define the borders of Europe would be politically unwise. However, it would be equally unwise to disregard the enlargement fatigue in many EU member states.⁶⁸ As a consequence, the Union should avoid any enlargement automatism and for some time neither directly nor indirectly grant any further accession offers beyond the countries, which have already the status of a candidate country (Croatia, Turkey and FYROM) or of a potential candidate country (Albania, Bosnia and Herzegovina, Montenegro and Serbia including Kosovo).⁶⁹ In many member states further offers would unnecessarily exacerbate popular dissatisfaction with the EU's enlargement and neighbourhood policies.

⁶⁸ According to Eurobarometer almost one in every two Europeans is in favour of further enlargement of the European Union (49%). However, in nine EU countries the percentage of citizens not supporting a further enlargement is below 50 per cent. Among them the four most populous EU member states: Italy (48%), the UK (41%), Germany (34%), and France (32%). It is also worth noting that support for further enlargement is far stronger in the 12 states that joined the European Union in the last enlargement round 2004/07 (68%) than in the old EU 15 countries (43%), i.e. 25 percentage points higher. See *Eurobarometer 67*, November 2007, here p. 188-190.

⁶⁹ See Janis A. Emmanouilidis, Boleslaw Wozniak and Paweł Świeboda, *European Union Enlargement*, demosEUROPA – Centre for European Strategy, Warsaw, December 2006; Janis A. Emmanouilidis and Ruby Gropas, *Combining Pragmatism and Vision – The Future of EU Enlargement*, Think Global – Act European: The Contribution of European Think Tanks to the French, Czech and Swedish Trio Presidencies of the European Union, Paris 2008, pp. 308-313.

Conclusion 8: Limited Membership can alleviate EU accession, but makes sense only as an intermediate step. In order to avoid a potential blockage, “partial” members should not have the ability to block EU reforms.

Conceptually one can differ between three forms of affiliation beneath full membership: *Limited Membership*, *Partial Membership* and *Association Plus*. The concept of a *Limited Membership*, which allows certain states to join the Union albeit subject to some long-term limitations in certain (sub-)policy areas, can alleviate and speed up the accession of new member states. The concept of a *Partial Membership* offers a *de facto* membership status in a certain policy field without the respective country joining the EU as a whole. The concept of an *Association Plus*, which aims at the closest possible affiliation beneath the level of membership, is characterized by the fact that the associated countries do not participate in the process of EU decision-making. In contrast, “limited” or “partial” EU members would have the right to fully or at least partially take part in the Union’s decision-making process. However, both a *Limited* and a *Partial Membership* would lead to new sub-forms of membership and citizenship. The imposition of second-class membership can over time lead to a rupture between the old and the new members, if the latter feel discriminated by the former. The notion of being discriminated can fuel anti-EU sentiments in the new members and in return put pressure on the ruling political class to improve their country’s membership status in the EU. This could lead to severe tensions between both sides, which might not only negatively affect the EU’s ability to act in certain policy areas, but also structurally impede the Union’s further development. In an attempt to compel fellow EU partners to remove the remaining membership limitations, “limited” members would be in a strong position to block the overall development of the EU. As a consequence, the concept of a *Limited Membership* politically makes sense only, if it is conceived and construed as an intermediate step on the way towards a full-fledged unlimited membership. Exemptions from certain (sub-)policy areas or from parts of the *acquis* should not be eternal. The accession treaty should include predefined mechanisms and procedures allowing for an abatement of membership limitations. The eradication of membership restrictions should be subject to a decision taken by the member states’ governments based on a qualified majority vote in the Council and not by consensus. No single EU member or small number of states should be able to veto the gradual inclusion of a new member state in all policy areas. In order to extend their membership status to other areas or to the Union as a whole, “partial” members could attempt to put pressure on the EU and its member states to reach this objective. In this case, “partial” members could be tempted and would actually have the power to paralyze the sectoral (sub-)policy

area which they have joined. However, in order to avoid a potential blockade of the Union's overall development, *Partial Membership* should exclude the right to participate in treaty revision procedures on an equal footing. "Partial" members should not be able to block EU reforms in the framework of a Convention or an Intergovernmental Conference or through the application of the passerelle clauses.

Conclusion 9: The voluntary withdrawal of less integration friendly countries can enable a further deepening of EU integration. However, this form of "negative differentiation" can also weaken the EU and even lead to a new European antagonism, if both sides fail to redefine their relationship.

The voluntary withdrawal of one or more countries from the Union can enable a further deepening of EU integration, if countries not aspiring to deepen cooperation decide to leave the Union. However, if the EU and the withdrawing state(s) fail to constructively redefine their relationship, one might witness a deep and enduring political rift between both sides possibly even leading to a new European antagonism. Moreover, the departure of one or more countries from the Union can weaken or even destabilize the EU, if the number of countries exiting the Union is large and if the withdrawing states have played a significant role in a certain policy field (e.g., UK in ESDP/CSDP). In order to continue to profit from the advantages of the internal market and to benefit from a functioning inter-institutional structure, the withdrawing state(s) could decide to join the European Economic Area (EEA) as members of the European Free Trade Association (EFTA). The accession of former EU states could lead to a renaissance of EFTA/EEA, which in return would become more attractive for countries aspiring but not yet able to join the EU. Alternatively, a withdrawing state could become a "partial" member of the Union in order to continue to participate in one or more EU policy areas. This alternative might be especially in the interest of the EU, in case the exiting country has played and should continue to play a significant role in the respective policy field (e.g., UK in ESDP/CSDP).

Conclusion 10: A more differentiated Europe will require the elaboration of a comprehensible "narrative of differentiated Integration" and the setting up of an "informal differentiation board".

The need for more differentiation in an EU 27+ and the application of very diverse forms of differentiation inside and outside the EU framework will lead to a twofold challenge: (1) The complexity of a Europe of different speeds will

require the elaboration of a “narrative of differentiated integration” portraying and explaining to European citizens the objectives and the overall logic of differentiation. The EU and its member states need to explain to the wider European public in a comprehensible fashion the purpose and reasoning behind flexible integration. However, it would not be wise to base such a narrative on a particular vision of Europe’s political *finalité*, as this might create suspicions and therefore actually limit the potentials of flexible cooperation. The “narrative of differentiated integration” should rather rely on the definition of one or more European projects, the implementation of which requires the use of more flexible forms of cooperation. (2) The management and supervision of a highly differentiated Europe will at some stage necessitate the setting-up of an “informal differentiation board” to coordinate the activities of the various differentiation projects inside and outside the EU framework. Such a coordinative body could function as kind of an institutional umbrella providing the opportunity to informally exchange information, experiences and views, to link the various differentiation projects and to provide impetus for further cooperation. The “informal differentiation board” should in particular include the European Commission as the central guardian of the Treaties and representatives of the member states participating in the individual differentiation projects. Similar to the Eurogroup, the latter could be selected by the states participating in the respective projects. The board would not be limited to an exclusive circle of countries forming some sort of a *directoire*, but rather represent a rotating mixture of EU members including small and big, new and old, northern and southern, eastern and western, euro and non-euro countries.

Table 1: Key Characteristics of the Six Forms of Differentiated Integration (I)

Form	New supranational Union	Cooperation via established procedures and instruments		Intergovernmental cooperation outside the EU		
		Creation of a Federal Union	Functional-pragmatic differentiation	Europe of Nations	Intergovernmental Avantgarde	Loose Coalitions
Key characteristics	<ul style="list-style-type: none"> group of member states (MS) creates new Union objective: higher level of supranational cooperation leading to a federal political union separate treaty/ constitution immediate transfer of competences high degree of openness 	<ul style="list-style-type: none"> inside EU use of general instruments of differentiation or predetermined procedures for specific policy areas participation must be open to every MS at every time (but: participation criteria or minimum number of states) 		<ul style="list-style-type: none"> (originally) outside EU limited to intergovernmental relations no (immediate) transfer of sovereignty rights cooperation adheres to principle of loyalty: supremacy of EU <i>acquis</i>; not undermine functioning of EU cooperation not possible in areas in which EU has exclusive competences 		
		<ul style="list-style-type: none"> differentiation aims at creation of a federal union – a “United States of Europe” 	<ul style="list-style-type: none"> functional case-by-case approach to overcome specific blockades no pre-defined final outcome 	<ul style="list-style-type: none"> no wish to transfer competences to higher supranational authority no motivation to integrate cooperation into EU rather low degree of openness 	<ul style="list-style-type: none"> Avantgarde takes lead integration of cooperation into EU as soon as possible independent treaty or agreement participation in principle open to every MS 	<ul style="list-style-type: none"> single task or purpose oriented very low level of institutionalization closed circle

Table 2: Key Characteristics of the Six Forms of Differentiated Integration (II)

Form	Differentiation through opt-outs	Affiliation beneath full membership			Negative differentiation through withdrawal
		Association Plus	Partial Membership	Limited Membership	
Key characteristics	<ul style="list-style-type: none"> • allocation of opt-out(s) • initiative from opt-out country • principle decision to grant opt-out requires assent of all MS • legal and institutional rules and procedures laid down in EU Treaties 	<ul style="list-style-type: none"> • closest possible affiliation beneath membership • no participation in EU decision-taking process • core EU institutions remain closed • divergent forms and levels of affiliation 	<ul style="list-style-type: none"> • <i>de facto</i> membership in certain policy areas (sectoral integration) • full-fledged political, legal and institutional participation in respective policy area • no exclusion of membership perspective 	<ul style="list-style-type: none"> • membership subject to certain limitations • exclusion from certain policy areas or no application of certain parts of <i>acquis</i> • “Limited” members enjoy all rights and obligations 	<ul style="list-style-type: none"> • EU countries pursue higher level of cooperation after voluntary withdrawal of state(s) • withdrawing state concludes agreement with EU • EU Treaties cease to apply to withdrawn country

Table 3: Key Consequences of the Six Forms of Differentiated Integration (I)

Form	New supranational Union	Cooperation via established procedures and instruments		Intergovernmental cooperation outside the EU		
		Creation of Federal Union	Functional-pragmatic differentiation	Europe of Nations	Intergovernmental Avantgarde	Loose Coalitions
Key consequences	<ul style="list-style-type: none"> no direct role of existing EU institutions creation of new supranational institutions most “old EU” members join new Union no fertile coexistence, but rather disruptive rivalry between “old EU” and new Union weakening of “old EU” and danger of a new dividing line 	<ul style="list-style-type: none"> preservation of EU’s single institutional framework clear cut rules guarantee calculability preservation of supranational character of European Commission, EP and Courts involvement of “outs” reduces risk of confrontational split (in-)ability to reform legislative procedures 		<ul style="list-style-type: none"> exclusion of EU institutions lack of democratic legitimacy even on national level insufficient judicial control 		
		<ul style="list-style-type: none"> predefined idea of Europe’s <i>finalité</i> limits practical potentials of differentiation 	<ul style="list-style-type: none"> practical experience with instruments of differentiated integration 	<ul style="list-style-type: none"> new coordinative institutions long-lasting cooperation weakens EU 	<ul style="list-style-type: none"> new institutions authorised to take decisions possible alignment of EU institutions and “outs” problematic integration of legal <i>acquis</i> into EU danger of permanent fragmentation 	<ul style="list-style-type: none"> “outs” confronted with legal <i>fait accompli</i> legal norms might conflict with existing or planned EU law <ul style="list-style-type: none"> potential decrease of trust between “ins” + “outs”

Table 4: Key Consequences of the Six Forms of Differentiated Integration (II)

Form	Differentiation through opt-outs	Affiliation beneath full membership			Negative differentiation through withdrawal
		Association Plus	Partial Membership	Limited Membership	
Key consequences	<ul style="list-style-type: none"> • preservation of EU's single institutional framework • opt-outs do not prevent but rather allow further development of EU's <i>acquis</i> • limited danger of a fundamental divide between "ins" and "outs" • opt-outs promote <i>à la carte</i> Europe but also integrationist dynamics 	<ul style="list-style-type: none"> • less conditionality than full-fledged unlimited EU membership • more complicated and less transparent institutional EU structure • status and powers of existing EU institutions not undermined 			<ul style="list-style-type: none"> • unaffected institutional operability and limited institutional adaptations • redefinition of relationship in order to avoid rupture • potential weakening of EU • danger of European antagonism • potential renaissance of EEA and EFTA • possibility of <i>Partial Membership</i>
		<ul style="list-style-type: none"> • recipients of EC/EU legislation • no alternative but step towards membership • attractive for states not willing or unable to join EU • joint bilateral and multilateral institutional structures possible (e.g., EEA two pillar structure) 	<ul style="list-style-type: none"> • imposed second-class membership/citizenship • potential rupture between new and old MS 	<ul style="list-style-type: none"> • participation in decision-making process in respective policy area • no ability to block EU reforms 	

Table 5: Enhanced Cooperation – Legal Provisions of Nice & Lisbon

Legal basis	
Nice	Lisbon
<ul style="list-style-type: none"> • 16 articles with 23 paragraphs at four spots in the Treaties (Art. 43, 43a, 43b, 44, 44a, 45 TEC-N (basic provisions); Art. 27a-e TEU-N (CFSP); Art. 11, 11a TEC-N; Art. 40, 40a, 40b TEU-N (specific provisions for the first and third pillar)) 	<ul style="list-style-type: none"> • 10 articles with 18 paragraphs at two spots (Art. 20 TEU-L, Art. 10 LT (general provisions); Art. 326-334 TFEU, Art. 280 A - 280 I LT (detailed provisions))
Requirements	
Nice	Lisbon
<ul style="list-style-type: none"> • EnCo may be undertaken only at a last resort, when objectives of such cooperation cannot be attained within a reasonable period by applying relevant provisions of Treaties (Art. 43a TEU-N) • Participation of at least 8 Member States (MS) (Amsterdam: majority of member states) (Art. 43 (g) TEU-N) • Enhanced Cooperation (EnCo) must remain within limits of powers of Union or of Community and does not concern areas which fall within exclusive Community competence (Art. 43 (d) TEU-N) • EnCo must be aimed at furthering objectives of Union and of Community, at protecting and serving their interests and at reinforcing their process of integration (Art. 43 (a) TEU-N) • EnCo must respect Treaties and EU single institutional framework (Art. 43 (b) TEU-N) • EnCo must respect <i>acquis communautaire</i> and measures adopted under other provisions of Treaties (Art. 43 (c) TEU-N) • EnCo must not undermine internal market or the economic and social cohesion (Art. 43 (e) TEU-N) • EnCo must not constitute barrier to or discrimination in trade between MS and must not distort competition between them (Art. 43 (f) TEU-N) • EnCo must respect competences, rights and obligations of non-participating MS (Art. 43 (h) TEU-N) • EnCo must not affect provisions of the Protocol integrating the Schengen <i>acquis</i> into the framework of the EU (Art. 43 (i) TEU-N) 	<ul style="list-style-type: none"> • EnCo shall be adopted as a last resort, when objectives of such cooperation cannot be attained within a reasonable period by EU as a whole (Art. 20.2 TEU-L, Art. 10.2 LT) • Minimum number of participating MS: 9 (Art. 20.2 TEU-L, Art. 10.2 LT) (Constitutional Treaty: one third) • MS may establish EnCo between themselves within the framework of the EU's non-exclusive competences (Art. 20.2 TEU-L, Art. 10.2. LT) → in any other case EnCo is permitted • EnCo must aim to further the objectives of the Union, protect its interests and reinforce its integration process (Art. 20.1 TEU-L, Art. 10.1 LT) • EnCo shall be open at any time to all MS (Art. 20.1 TEU-L) • EnCo shall not undermine the internal market or economic, social and territorial cohesions and it shall not constitute a barrier to or discrimination in trade between MS, nor shall it distort competition between them (Art. 326 TFEU, Art. 280 A LT) • EnCo shall respect competences, rights and obligations of non-participating MS (Art. 327 TFEU, Art. 280 B LT)

Specific provisions

Nice

- Additional requirements for inception of EnCo in CFSP (Art. 27a TEU-N) and the area of JHA (Art. 40.1 TEU-N)
- EnCo in CFSP shall merely relate to the implementation of a joint action or a common position (Art. 27b TEU-N)
- EnCo shall not relate to matters having military or defence implications (Art. 27b TEU-N)

Lisbon

- No specific provisions for areas of JHA and CFSP (exception: procedure for submitting a request, see below)
- EnCo is applicable to entire area of CFSP/CSDP
- “Automatism” concerning authorisation of EnCo concerning “judicial cooperation in criminal matters” (Art. 82, 83 TFEU; Art. 69 A, 69 B LT), “police cooperation” (Art. 87 TFEU, Art. 69 F LT) and the establishment of a “European Public Prosecutor’s Office” (Art. 86 TFEU, Art. 69 E LT) (Constitutional Treaty: no “automatism” for “police cooperation” and “European Public Prosecutor’s Office”!)

Procedure for submitting a request

Nice

- Separate procedures for all three pillars
- Pillar 1 (EC): MS which intend to establish EnCo submit request to the Commission → Commission submits proposal to Council or denies request while informing the concerned MS about reasons for denial; EP is consulted; when EnCo relates to an area covered by procedure referred to in Art. 251 TEC-N, the assent of the EP is required (Art. 11.1 TEC-N)
- Pillar 2 (CFSP): MS intending to establish EnCo address request to Council. Commission gives opinion; EP is informed (Art. 27c TEU-N)
- Pillar 3 (police and judicial cooperation): MS which intend to establish EnCo submit request to Commission → Commission submits proposal to Council or denies request while informing concerned MS about reasons for denial; in case of denial the concerned MS may submit an initiative to Council designed to obtain authorisation for EnCo; EP is consulted (Art. 40a TEU-N)

Lisbon

- Lisbon Treaty reduces number of procedures for submitting a request
- Procedure except CFSP: MS wishing to establish EnCo address a request to Commission specifying the scope and objectives of EnCo → Commission submits a proposal to Council or denies a proposal while informing MS concerned of reasons for doing so (Art. 329.1 TFEU, Art. 280 D.1 LT)
- Procedure in CFSP: request of MS wishing to establish EnCo are addressed to Council; it shall also be forwarded to High Representative and to Commission: both shall give an opinion (Art. 329.2 TFEU, Art. 280 D.2 LT)

Authorisation procedure

Nice	Lisbon
<ul style="list-style-type: none"> • Compared to Amsterdam no veto right in Pillars One and Three • Authorisation requires a qualified majority in the Council (Art. 11.2 TEC-N) • Constriction: A member of Council may request that matter be referred to European Council; after matter has been raised before European Council, Council may decide by qualified majority (Art. 11.2 TEC-N) • Exception: Authorisation of EnCo can be blocked in area of CFSP in case a member state declares that it opposes adoption of a decision for important and stated reasons of national policy → <i>de facto</i> unanimity (Art. 27c in conjunction with 23.2 TEU-N) 	<ul style="list-style-type: none"> • Authorisation to proceed with EnCo generally granted by Council with qualified majority; EP must give consent (Art. 329.1 TFEU, Art. 280 D.1 LT) • Area of CFSP: authorisation requires unanimous decision of Council; EP merely informed (Art. 329.2 TFEU, Art. 280 D.2 LT) • Provision that a MS may request that a matter be referred to European Council was deleted • „Automatism“ concerning “judicial cooperation in criminal matters” (Art. 82, 83 TFEU, Art. 69A, 69B LT), “police cooperation” (Art. 87 TFEU, Art. 69 F LT) and the establishment of a “European Public Prosecutor’s Office” (Art. 86 TFEU, Art. 69 E LT)

Degree of openness

Nice	Lisbon
<ul style="list-style-type: none"> • EnCo open to all MS • Commission and MS participating in EnCo shall ensure that as many MS as possible are encouraged to take part (Art. 43b TEU-N) • Pillar One: MS wishing to participate in EnCo notifies its intention to Council and Commission; Commission gives an opinion to Council within three months; within four months Commission takes a decision (Art. 11a TEC-N) • Pillar Two: MS wishing to participate in EnCo notifies its intention to Council and informs Commission → Commission gives an opinion within three months; within four months Council takes a decision on request by qualified majority (Art. 27e TEU-N) • Pillar Three (police and judicial cooperation): MS wishing to participate notifies its intention to Council and Commission; Commission gives an opinion within three months; Council takes a decision on the request within four months acting by a qualified majority (Art. 40b TEU-N) 	<ul style="list-style-type: none"> • EnCo open at any time to all MS (Art. 20.1 TEU-L, Art. 10.1 LT) • When EnCo is established, it is open to all MS subject to compliance with any conditions of participation laid down by the authorising decision (Art. 328 TFEU, Art. 280 C LT) • EnCo shall be open to all MS at any other time, subject to compliance with the acts already adopted within that framework, in addition to original participation conditions (Art. 328.1 TFEU, Art. 280 C.1 LT) • Commission and participating MS shall promote participation by as many MS as possible (Art. 328.1 TFEU, Art. 280 C.1 LT) • Procedure for late participation (except CFSP): MS wishing to participate in EnCo in progress notifies intention to Council and Commission → Commission confirms participation of MS concerned within four months; if Commission considers that conditions of participation have not been fulfilled, it indicates arrangements to be adopted to fulfil those conditions and sets deadline for re-examining request; if Commission after a re-examination considers that conditions have still not been met, MS concerned may refer matter to Council, which then decides on request (Art. 329.1 TFEU, Art. 280 D.1 LT) • Procedure CFSP: MS wishing to participate in EnCo in progress notifies intention to Council, High Representative and Commission →

	Council confirms participation of MS concerned, after consulting High Representative, on basis of unanimity with votes of participating MS; if Council considers that conditions of participation have not been fulfilled, it indicates arrangements to be adopted and sets deadline for re-examining request (Art. 329.2 TFEU, Art. 280 D.2 LT)
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Decision-making and application of adopted acts and decisions

Nice	Lisbon
<ul style="list-style-type: none"> For the adoption of acts and decisions necessary for implementation of EnCo the relevant treaty provisions (TEU/TEC) apply (Art. 44.1 TEU-N) → e.g., unanimity even inside EnCo, if area concerned is subject to unanimity Only MS participating in EnCo take part in adoption of decisions (Art. 44.1 TEU-N) All MS take part in deliberations (Art. 44.1 TEU-N) Acts and decisions adopted in EnCo do not form part of <i>acquis</i> → such acts and decisions are only binding for participating states (Art. 44.1 TEU-N) 	<ul style="list-style-type: none"> MS participating in EnCo may make use of EU's institutions and apply relevant provisions of Treaties (Art. 20.1 TEU-L; Art. 10.1 LT) → within EnCo same rules and procedures apply, which are laid down in Treaties for respective area Only MS participating in EnCo have right to vote when decisions are adopted (Art. 20.3 TEU-L, Art. 10.3 LT; Art. 330 TFEU, Art. 280 E LT) All MS may participate in deliberations (Art. 20.3. TEU-L, Art. 10.3 LT; Art. 330 TFEU, Art. 280 E LT) Special passerelle allows introduction of more efficient procedures: Council may decide unanimously with votes of participating MS that decisions taken within EnCo may be adopted by qualified majority and according to ordinary legislative procedure (Art. 333.1/2 TFEU, Art. 280 H.1/2 LT). Passerelle does not apply to decisions having military or defence implications (Art. 333.3 TFEU, Art. 280 H.3 LT). Acts adopted in the framework of EnCo bind only the participating MS; Lisbon Treaty explicitly states that these acts must not be accepted by acceding states (Art. 20.4 TEU-L, Art. 10.4 LT)

Financing

Nice	Lisbon
<ul style="list-style-type: none"> Expenditure resulting from implementation of EnCo, other than administrative costs entailed for the institutions, are borne by the participating MS (Art. 44a TEU-N) 	<ul style="list-style-type: none"> No changes compared to Nice (Art. 332 TFEU, Art- 280 G LT)

Distinction between „Pre-Ins“ and „Outs“

Nice	Lisbon
Not foreseen	Not foreseen

Inclusion of non-EU countries

Nice	Lisbon
Not foreseen	Not foreseen

ELIAMEP Policy Papers

PP02.01, Philippos Savvides, “Cyprus at the Gate of the European Union: Scenarios, Challenges and Prospects”, 2002

PP02.02, Stavridis Stelios, “The Barcelona Process after Valencia and Seville: What Priorities for the 2003 Greek Presidency?”, 2002

PP03.03, Thanos Dokos, “NATO's Mediterranean Dialogue: Prospects and Policy Recommendations”, 2003

PP03.04, Constantine Michalopoulos, “A Strategy for Trade Integration in South East Europe: Accomplishments and Future Challenges”, 2003

PP05.05, Ian Lesser, “Security and Strategy in the Eastern Mediterranean”, 2005

PP05.06, Anna Triandafyllidou, “Migration Policy in Greece”, 2005

PP06.07, Loukas Tsoukalis (ed.), “Higher Education in Greece”, 2006

PP07.08, Nikos Koutsiaras (research team: Anna Vallianatou and Elli Siapkidou), “The European Constitution After (a Period of) Reflection” (in Greek), 2007

PP07.09, Thanos Dokos (ed.), “Greek National Security Policy in the 21st Century”, 2007

About ELIAMEP

ELIAMEP is an independent, non-profit and policy-oriented research and training institute. ELIAMEP neither expresses, nor represents, any specific political party view. It is only devoted to the right of free and well-documented discourse.

ELIAMEP can trace its origins to informal meetings in the mid-1980s among academics, diplomats, military officials and journalists. That group's goal was to introduce an independent and scholarly approach to policy options regarding European integration, transatlantic relations as well as the Mediterranean, South-eastern Europe, the Black Sea and other regions of particular interest to Greece. In April 1988 these meetings were institutionalized and became the Hellenic Foundation for Defence and Foreign Policy (Greek acronym, ELIAMEP).

Since its official establishment, ELIAMEP has experienced significant growth and has attracted the attention of scholars, government officials and corporate entities in Greece and abroad. As developments in the wider region moved rapidly, the focus of the institute was enlarged to include more policy-relevant research projects assisting post-communist democracies in the creation of a civil society, providing training and networking services and acting as a contact point to public and private sector bodies on politico-economic and security matters, as well as on European affairs. This was reflected in the 1993 amendment of ELIAMEP's statutes to include a change of name (without abandoning its original acronym), which would illustrate the Foundation's wider scope of concerns and activities: Hellenic Foundation for European and Foreign Policy. The message is clear: in the context of the EU and shared sovereignties, a distinction needs to be drawn between European policy and traditional foreign policy.

Over the years, ELIAMEP expanded its activities to include topics such as migration, human rights, civic participation and social inclusion, climate change and its impact on human security; good governance and security sector reform, and energy security, with a view to having a greater impact on the public through the dissemination of information and of policy proposals, the organisation of training and conflict management seminars and international conferences, the publication of books, journals and monographs. ELIAMEP is frequently visited by journalists from various parts of the world requesting the Foundation's help for information, analysis and interviews. It is now generally recognised as one of the leading think-tanks in the region.

