Differentiated Europe – Forms, Consequences and Conclusions

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Key Points

To be added

Differentiated Europe – Models, Consequences and Conclusions

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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 form third countries aiming to join the European club while enlargement fatigue is on the rise 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.

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 others not, most EU countries take part in European Security and Defence Policy 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 shall look like.

The debates about *directorates*, *triumvirates*, *pioneer* and *avantgarde groups* or *centres of gravity* are however 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 too often been 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. 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 candidate countries is not (yet) forthcoming. Moreover, differentiated integration can help limit tensions between the members of a more heterogeneous EU as those who wish to further deepen cooperation are allowed to do so, and those who are not

[1] The present paper makes use of the terms *differentiated integration, differentiation, flexible integration, flexibility, differentiated cooperation* or *flexible cooperation* as synonyms.

willing to further integrate are relieved from the pressure of the more integrationists member states.

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, one needs to do three things: First, to distinguish between the different forms of differentiation in an attempt to bring more analytical clarity into the debate.[2] 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 on the grounds of the findings of the two previous steps.

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: (1) *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) *differentiation through withdrawal.*

The following analysis of these six forms of differentiation starts with a short description of their key characteristics (for an overview see Table 1 on p. A 1) followed by an examination of their major political, economic, and institutional implications (for an overview see Table 2 on p. A 2). The paper ends with a list of ten major conclusions drawn form 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 EU 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 inside 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 aims to deepen integration and to foster progress

[2] In order to avoid misunderstandings the present paper does not rely on past concepts of differentiated integration. It does so on the grounds of the observation that concepts such as *Europe á la carte, variable geometry, core Europe* or *abgestufte Integration* mean different things to different people. In order to avoid misunderstandings this analysis rather develops a new set of diverse (sub-)forms of differentiation.

[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.

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

1.2 Key consequences

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), 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) 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 and legally impossible since those 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 strong and effective executive, a parliamentary dimension securing democratic legitimacy and a separate judicative for settling legal disputes within the new Union.
- *Most "old EU" members join new Union:* One can assume that the vast majority of the members of the "old Union" will be very keen to enter the new Union 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 Europe and to prevent what European political elites fear most: the establishment of a small leadership circle from which some European countries are excluded. 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 "old EU" members.

- *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 a 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 306 of the EC-Treaty (TEC-N)[5] 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 Treaty[6], or the possibility for member states to develop closer cooperation in the framework of WEU and NATO, "provided that such cooperation does not run counter to or impede" the provisions laid down in the Treaties (Art. 17.4 TEU-N[7]). 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 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 even 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, 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

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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. 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 observe that accession treaties have the legal status of primary law.

7 In the framework of the Lisbon Treaty 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.

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 (military) cooperation*[9], *constructive abstention*[10]), which are laid down in the Union's primary law. 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*[11]) may limit or predetermine the number of participating states. However, the convergence criteria in EMU and the criteria established for *permanent structured cooperation*[12] exemplify that the member states tend to define

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8 *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/Treaty of Lisbon. *Enhanced cooperation* can be described as 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 annexed overview on pp. A3-A5). 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 CEPS, EGMONT and EPC, November 2007, pp. 97-119.

9 *Structured permanent cooperation* is a novel instrument of differentiation in the field of European Security and Defence Policy (ESDP) 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) (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)). *Structured permanent 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. *Structured permanent 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 structured cooperation at a later stage if they fulfil the necessary preconditions. The participation criteria for *structured permanent cooperation* were laid down in separate protocol annexed to the Constitutional Treaty (Protocol 23) (see also footnote 12). The initiation of *structured permanent cooperation* still requires a qualified majority vote within the Council, which is likely to occur after the Lisbon Treaty has entered into force.

10 *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 role in practice and its effects are "limited" by the circumstance that EU states, which have constructively abstained from voting, are not excluded from subsequent votes.

11 The Nice Treaties have set the minimum number of participants at eight, the Lisbon Treaty at nine member states.

12 The participation criteria for *structured permanent cooperation* were laid down in 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. 28 A of the Treaty on European Union"). 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.

criteria, which in the end allow the participation of the majority of EU countries willing to cooperate.

In the context of this form of differentiation 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 political Union. The most prominent recent example is that of 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*; *constructive abstention*).

2.2 Key consequences

Differentiation on the grounds of established procedures and instruments leads to a number of key implications:

- *Preservation of the EU's single institutional framework:* Differentiation based on instruments and procedures within the EU 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. 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. A3 –A5).[15] The same applies to procedures defined for specific policy areas (*permanent structured cooperation*, EMU, *constructive abstention*). One

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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: "Enhanced Cooperation: From Theory to Practice", in *The Treaty of Lisbon*, pp. 106-113; Commissariat Génerl du Plan (ed.), *Rapport de l'atelier sur les coopérations renforcées dans l'Union Européene*, La documentation française, Paris, 2003.

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

may argue that the preconditions laid down in the Treaties are too tight and thus inhibit the use e.g., of *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 form 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 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 unmodified composition of the Commission, the EP and the courts underlines that differentiated cooperation inside the EU is integrated into the single institutional framework of the Union. If one would distinguish between representatives of the "outs" and representatives of the "ins" this would imply that Commissioners, European judges or MEPs are foremost national representatives responsible to their member state and not to the EU as a whole.
- *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 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 in the Council 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* (exception: area of CFSP) and in the case of *permanent structured cooperation*)[17], the fact that there is no distinction between the "outs" and the

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

17 In general, the decision to authorise *enhanced cooperation* requires a specific decision of the Council. However, there is a novel 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" as the authorisation to proceed with *enhanced cooperation* is granted automatically on the grounds of a clearly defined procedure (concerning "judicial cooperation in criminal matters": Art. 82, 83 TFEU, Art. 69 A, 69 B LT; concerning "police cooperation": Art. 87 TFEU, Art. 69 F LT; concerning the Public Prosecutor's Office: Art. 86 TFEU, Art. 69 E LT). This "automatism" makes the inception of *enhanced cooperation* easier. In the case of a 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

"ins" in the Commission[18], the EP and the courts, the fact that the "outs" have the right to initiate proceedings in the European courts, and the fact that the "outs" are associated to the operative phase of a 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 developments inside the affected policy area.[19] 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 argument that the involvement of the "outs" is unjustified from a democratic point of view or the notion that the representatives of the "outs" could try to undermine the development of a certain form of differentiated cooperation seem 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.

- *(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 within 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. The new Lisbon Treaty includes a very significant innovation. The EU's new primary – taking up the provisions of the Constitutional Treaty (Art. III-422 CT) – offers the possibility to further develop the decision-making procedure via a *special passerelle clause* for *enhanced cooperation*. The Lisbon Treaty (Art. 333 TFEU;

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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 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 cooperations,* and (iv) can independently take the decision to allow the admission of further states to an *enhanced cooperation* in progress.

[19] The example of CFSP supports the general assumption that the member states are particularly cautious not to undermine the ability of the "outs" to co-determine the overall development within a policy field. The rather limited scope of differentiation within CFSP derives from the 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 and its inception requires a unanimous decision of the Council, and the fact that the new instruments introduced by the Lisbon Treaty concerning ESDP (*permanent structured cooperation*, EU missions) merely focus on the improvement of military capabilities, guarantee that the strategic orientation of CFSP/ESDP is supported by all member states unanimously.

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. Such procedural improvements become part of the *acquis* of *enhanced cooperation*, which is binding also for participants joining cooperation at a later stage. One should 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-N[20]) 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.[21]

In the framework of this form of differentiation one can distinguish between three separate sub-forms:

(i) ***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 this form of intergovernmental cooperation is characterized by a rather low degree of openness, as the participating states highly value the efficiency and effectiveness of a small group.

[20] Art. 4 TEU-L (Art. 3a LT) states the following: "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 of Art. 10 TEC-N currently in force is almost identical with the wording in the Lisbon Treaty.

[21] 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.

(ii) ***Intergovernmental Avantgarde:*** The participating countries hold that further progress in a specific (sub-)policy field is only politically possible or legally feasible[22] 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 Prüm[23], Schengen-Model).[24] The participating countries work out a treaty, convention or agreement laying down the objectives as well as the organisational and 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.[25]

(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, EU-3 concerning Iran (France, Germany, United Kingdom), 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

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

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[22] 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 for example be the case if cooperation is initiated in areas not covered by the EU Treaties, if the number of participating states is smaller than the minimum number required by the Treaties or if the authorisation of cooperation cannot be granted since there is no sufficient majority in the Council. The latter especially the case in the field of CFSP, as the initiation of *enhanced cooperation* in this policy area requires a unanimous decision within the Council.

[23] 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" (quoted from the Preamble of the Treaty of Prüm).

[24] 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.

[25] 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. Experience has also 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., EU-3), or in order to infiltrate their ideas and agenda (e.g., G6, Salzburg-Group) into the Union.
- *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*, which involve a very limited number of governments are characterized by a very low level of institutionalisation, thus precluding the creation of new powerful bodies or institutions.
- *Lack of democratic legitimacy not only on the European but also on the national level:* The fact that cooperation is initiated 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. Neither the EP nor national parliaments or representatives of civil society play a role when intergovernmental cooperation is established and operated. 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.[26] 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/agreement worked out by the participating

[26] 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.

governments. For equivalent regulations developed in the framework of the EU, (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 Union Treaties. In the running of intergovernmental cooperation decisions might be 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.[27] The obvious alternative would be to quickly integrate this form of cooperation into the EU, in order to secure democratic legitimacy by getting the EP actively involved.

- *Adoption of legal norms outside the EU can decrease trust and obstruct cooperation inside the Union:* The participating states might (mis)use intergovernmental cooperation in the framework of a *Europe of Nations* or an *Intergovernmental Avantgarde* to adopt policy measures which cannot be adopted in the framework of the EU. The participating states adopt the rules, practices and procedures for cooperation without an involvement of the institutional and democratic structures of the Union or the other EU members. The Union's institutions and the non-participating EU countries are excluded from the decision-shaping and the decision-making process and possibly also from the adoption of legislative acts. 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* when the rules, procedures and legislative acts, which were originally adopted outside the Union are incorporated into the EU framework.[28] As a consequence, the non-participating states 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 policy area 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

[27] See Kietz and Maurer, "From Schengen to Prüm," p. 4.

[28] 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 p. 2.

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. If 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 choose to employ the instrument of *enhanced cooperation.* However, this 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 come to the conclusion 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 a proposal to establish *enhanced cooperation* to the Council. And 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, which means that neither the non-participating countries nor the future member states have to implement the *acquis* passed in the framework of an *enhanced cooperation*.[29] Finally, the case of the Treaty of Prüm was a perfect example 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 accomplish this objective.

- *Long-lasting cooperation outside EU weakens the Union:* Long-lasting cooperation in sensible policy areas that escapes the EU and engages only a limited number of EU member states has the potential to fundamentally weaken the Union. If intergovernmental cooperation is not rather "quickly" integrated into the EU framework, chances increase that one might witness political and legal ruptures between the "outs" and the "ins" and/or between the participating states and the Commission or the European Parliament. As a consequence, enduring cooperation outside the EU can avert the overall progress in the respective policy area, which would in the end not promote the integration process, but rather complicate cooperation between the member states and trigger fragmentation within the 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 (examples: Denmark/UK concerning the euro[30]; Denmark/Ireland/UK concerning the Area of

[29] The Nice Treaties states that acts and decisions taken 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 Treaties 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).

[30] 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 1992 referendum. It is worth noting that Sweden, while not formally having negotiated an opt-out on this matter, did not join the

Freedom, Security and Justice[31]; Ireland/UK concerning Schengen[32]; Denmark in the defence field of ESDP[33]; Ireland/UK concerning Police and Judicial Cooperation in the Lisbon Treaty[34], UK/Poland concerning the Charter of Fundamental Rights in the Lisbon Treaty[35]). 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 also be agreed unanimously and laid down in the EU's primary law (e.g., through a protocol). The opt-out country might be granted the right to opt-in. In this case the opt-out country has the right to join in and implement a certain measure or legislative act, which was adopted in a (sub-)policy area from which the respective country had been excluded.

4.2 Key consequences

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

European Exchange Rate Mechanism (ERM II) and thus deliberately failed to fulfil the criteria for introducing the euro.

31 **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 areas falling within the area of security, freedom and justice. 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 will also be 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 United Kingdom. **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.

32 Ireland and the UK are not members of the Schengen area and have opt-outs from the implementation of the Schengen *acquis*. However, Ireland and the United Kingdom have the right to opt-in to the application of selected parts of the Schengen body of law. This opt-in is not, however, an 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 participating Member States plus the representative of the government of the state concerned.

33 Denmark has an opt-out concerning the military part of the EU's European Security and Defence Policy (ESDP). The consequence of this opt-out is that 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.

34 In the framework of the Treaty of Lisbon Ireland and the UK have opted out from the change from unanimous decisions to qualified majority voting in the sector of "Police and Judicial Co-operation in Criminal Matters". In Ireland this decision will be reviewed three years after the Treaty enters into force.

35 The UK and Poland have asked for a special positioning 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 #7) 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 Sates 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).

- *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 Executive Board, Governing Council[36]), in which the "outs" do not participate, do not endanger the Union's institutional coherence but are rather necessary as the operation of closer cooperation require the establishment of new institutional bodies. Finally, the opt-out countries can be institutionally linked to the policy-making process even within the respective policy field (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 integration within the EU in the respective policy field. The opt-out country would have not accepted an amendment of the EU's primary law if they had not been granted an opt-out. 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 however 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 are only binding for the participating states (Art. 44.1 TEU-N; Art. 20.4 TFEU[37]). In other words, the new member states must in principle 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 strategic developments within the respective policy field as they still take part in the day-to-day decision-shaping process and as changes to the EU's primary law still require their assent; (ii) the strong affiliation of the opt-outs simplifies the potential full integration of the "outs" at a later stage; (iii) the ability to opt-in allows the opt-out country to adopt legislative

[36] The national banks of the countries not participating in the Eurozone are not involved 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 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.

[37] The new EU Treaties explicitly state 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).

acts even if it has in general terms decided to be excluded from the respective policy area (see also next bullet-point).

- *Opt-outs promote à la carte Europe but also integrationist dynamics:* The granting of opt-outs is a perfect example of *Europe à la carte*[38]: The opt-out countries choose in which fields of cooperation they do not want to participate and are anyhow granted the right to opt-in whenever they wish to do so. 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. Numerous cases support this argument: 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 supported the gradual realisation of the area of freedom, security and justice throughout the European Union.[39] Furthermore, two recent examples illustrate that opt-outs must not be eternal, but can be overcome when national perceptions, the composition of government or European or global parameters change. First, 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.[40] Denmark could thus eventually join policy areas from which the country had fiercely struggled to be excluded since the early 1990s. The second case is that of Poland and the Charter of Fundamental Rights. 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.[41] However, the Tusk government had to rethink its original stance when it became clear that the Kaczynski's Law and Justice Party would not support the ratification of the new Lisbon Treaty if the government gives up the British protocol. The new government therefore had to reverse on its own promise and keep Poland signed up to the text. However, Prime Minister Tusk has announced that he will make a political declaration that the new Polish government will accept the Charter 'in principle' and pledge to sign up to it as soon as possible.

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 to join the EU combined with a growing enlargement fatigue inside the Union has increased the need to develop innovative ways affiliating countries beneath the level of a full and unlimited EU

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38 The expression *Europe à la carte* was first used by Ralf Dahrendorf in 1973. The concept stems from 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

39 See Daniel Thym, *Ungleichzeitigkeit und europäisches Verfassungsrecht,* Baden-Baden 2004, p. 389.

40 See "Danish government wants second referendum on euro", *euobserver,* 22.11.2007. 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."

41 For further details see Paweł Swieboda, Poland's second return to Europe?, *ECFR Policy Brief* no. 2, December 2007, here p. 4.

membership. The heated debates surrounding the idea to offer Turkey a *Privileged Partnership,* the introduction of the *European Neighbourhood Policy (ENP)*[42], or the most recent initiative of French President Nicolas Sarkozy to establish a *Mediterranean Union*[43] indicate the relevance of the issue.[44] Besides such concrete initiatives and in more abstract terms, one can differ between three main concepts involving very diverse levels of association and integration:

(i) ***Association Plus:*** Third countries do not join the European Union but are associated to the EU as closely as possible beneath the level of membership. In practice the association of neighbouring countries with the Union can vary significantly. It can include a privileged access to the internal market, a strategic dialogue on political and security-political issues, a privileged visa regime or even free access to the Schengen area, intercultural exchanges, or financial and technical assistance.[45] However diverse the relationship between the EU and an

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[42] The *European Neighbourhood Policy (ENP)* was introduced in 2003/04. ENP aspires to avert the emergence of new dividing lines between the enlarged EU and its neighbours. 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 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 (3-5 years) priorities. 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 those 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 Europe and South-Eastern Europe.

[43] French President Nicolas Sarkozy has proposed the establishment of a *Mediterranean Union* including all countries bordering the Mediterranean Sea till 2008. Sarkozy called on the Mediterranean people to "do the same thing, with the same goal and the same method" as the European Union although the *Mediterranean Union* would be a looser grouping than the EU. The French President has invited all Mediterranean leaders to a summit in France to take place on July 14, 2008, in order to lay the foundations of a political, economic and cultural union founded on the principles of strict equality. Although the details of the initiative are not clear yet the idea to found a *Mediterranean Union* has already provoked mixed reactions both among EU countries and among states on the southern Mediterranean rime. See “France muddies waters with 'Mediterranean Union' idea,” *euobserver,* 25.10.2007.

[44] For an overview of different concepts and ideas related to the EU enlargement process 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.

[45] There is a whole range of proposals advocating the idea to extend the current forms of association. Probably the most prominent is the proposal to engage Turkey in a *Privileged Partnership* as an alternative to full EU membership. This idea was originally proposed and developed by political circles surrounding the German CDU/CSU. A *Privileged Partnership* would be phased in and eventually surpass the status of special relations. In more concrete terms, a *privilege 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 Justice and Home Affairs (JHA). For the most detailed description of the idea see Johann zu Gutenberg, *Die Beziehungen zwischen der Türkei und der EU – eine “Priviligierte Partnerschaft”,* Aktuelle Analysen Nr. 33, Hanns-Seidel-Stiftung, Munich, 2004. Wolfgang Quassier and Steve Wood advocate the idea of an *Extended Associated Membership (EAM)*. This concept builds on that of a *Priviledged Partnership* and includes a full participation in an “Extended European Economic Area.” However, Quassier and Wood exclude certain specific sectors including for example labour market access. At the same time, the EAM

associated country can be, one key feature characterizes all variants of an *Association Plus* and distinguishes it from other forms of affiliation: The partner countries do not participate in the process of EU decision-making, which remains the sole privilege of the Union and its members. In other words, the formulation of the Union's *acquis politique* and the adoption of legal acts are limited exclusively to the institutions and member states of the EU.

(ii) ***Partial Membership:*** Candidate countries do not become full EU members but are completely integrated in specific EU policy areas, which can relate to political and/or economic aspects (e.g., CFSP/ESDP, Schengen/visa regime, internal market).[46] Such sectoral integration would include a full-fledged participation in the respective policy field(s).[47] The "partial" member would in the respective field enjoy the same legal and institutional rights as any other EU member. *Partial Membership* would by no means exclude the possibility of an eventual full membership in the EU. On the contrary, participation in certain policy areas could bring a country aspiring to join the Union one step closer to the EU.

(iii) ***Limited Membership:*** The legal status of the acceding state is that of a full-fledged member of the European Union but 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., Economic and Monetary Union (EMU), Schengen, ESDP, "four freedoms"[48]) or is not obliged to apply certain legal norms. The latter could for example include an *acquis* adopted for example in the framework of *enhanced cooperations*.[49] In the past, the EU and the acceding countries have agreed that new members must from day one of their accession respect the Union's *acquis* and fulfil all obligations deriving from EU

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extends the institutional setting and the scope of the *European Economic Areas (EEA)* (see footnote 52): It adds a special council for the area of ESDP, it includes participation in EU Council meetings albeit excluding any voting rights, it creates a special senate of the European Court of Justice to decide on treaty transgressions and other legal matters, and also goes beyond the EEA concept as it also represents a customs union. Wolfgang Quassier and Steve Wood, *EU Member Turkey? Preconditions, Consequences and Integration Alternatives,* forost Arbeitspapier Nr. 25, October 2004, here pp. 50-55.

46 Different concepts developed in the past refer to the idea of a *Partial Membership.* The concept of *Abgestufte Integration* developed by Cemal Karakas advocates a gradual and sectoral integration of Turkey into various EU policy areas, which can eventually lead to full-fledged EU membership. See Cemal Karakas, "Für eine Abgestufte Intgration – Zur Debatte um den EU-Beitritt der Türkei", *HSFK Standpunkte,* Nr. 4/2005. Similarily, the idea of a *Junior Membership* proposed by Franz-Lothar Altmann advocates a status in between the Stabilization and Association Agreements and full membership. 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.

47 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 Schengen states, which are not EU members, have few options to participate in shaping the evolution of the Schengen rules. Their options are effectively reduced to agreeing with whatever is presented before them, or withdrawing from the Schengen agreement.

48 It is worth mentioning that the 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." The areas mentioned in the Negotiating Framework are the free movement of persons, structural policies or agriculture. See *Negotiating Framework*, 3 October 2005, here paragraph 12, 4th indent. Download available under: http://ec.europa.eu/enlargement/pdf/turkey/st20002_05_tr_framedoc_en.pdf For a detailed analysis of the legal consequences of the negotiating framework see also 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.

49 The new Lisbon Treaty includes 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).

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 a *limited partnership* deviates from this rule as new member states are (more) permanently excluded from one or more (sub-)policy areas if both parties – the EU and the acceding country – agree to the respective exemption in the course of membership negotiations.[50] In spite of such selective exceptions, the new member states would anyhow enjoy all legal rights and obligations deriving from EU membership.

5.2 Key consequences

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 an *Association Plus,* a *Partial Membership* or a *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 themselves 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 EU decision-making.
- *Association Plus no alternative but step towards membership:* For countries aspiring 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 membership perspective. For countries wishing to join the club an *Association Plus* can only be attractive if it is conceived as a step on the way towards full EU membership. For this reason, concepts like that of *Privileged Partnership* or an *Extended Associated Membership*, which explicitly exclude the perspective of an eventual EU membership,[51] are unattractive and in some cases even politically unacceptable from the perspective of a (potential) candidate country.
- *Association Plus highly attractive for states not willing to fully join the EU:* The concept of an *Association Plus* can be an attractive alternative for countries which aspire to establish strong links with the EU but are not (yet) willing 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,

[50] See Thym, *Ungleichzeitigkeit und europäisches Verfassungsrecht,* pp. 264-265.

[51] See Guttenberg, *Die Beziehungen zwischen der Türkei und der EU,* pp. 5-6, and Quaisser and Wood, *EU Member Turkey?,* here especially p. 51.

Liechtenstein and Norway in the framework of the *European Economic Area* (EEA)[52], 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 become mere recipients of EC/EU legislation.[53] In other words, third countries are ready to be excluded from the EU's internal decision-taking process, if this is the price they have to pay in order to have full access to a space and market of more than 500 million people.

- *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* and of a *Partial Membership* have one great advantage: Contrary to an *Association Plus* the "limited" or "partial" EU members take part in the Union's decision-taking process. The respective countries are not mere recipients of EC legislation, but are able to actively and directly co-determine the EU's *acquis* from within the Union's institutional structure.

- *More complicated and less transparent institutional structure:* Generally, the introduction of an *Association Plus*, a *Partial Membership* or a *Limited Membership* would make the EU's institutional structure more complicated and less transparent. However, these effects would not undermine the status and powers of EU institutions as the Commission, the (European) Council, the European Parliament or the European courts would not be deprived of any of their genuine rights. But what are the institutional implications in more concrete terms?

  (i) In the case of a *Limited Membership* the new EU country would be fully and equally represented in all EU institutions. However, in the affected (sub-)policy fields the "limited" members might not enjoy the same rights as the member states which are not subject to any membership limitations (e.g., Eurogroup).

  (ii) In the case of a *Partial Membership* the country participating in a certain policy field would take part in deliberations and in the decision-making process related to the respective area. The participation of "partial" members could be orchestrated in different ways: (a) The "full-fledged" members and the "partial" members meet in separate formations created and designed specifically for this reason. The joint meetings with the (European) Council, the European Parliament or the European Commission would allow an equal involvement of the "partial" members in the respective (sub-)policy fields. (b) Representatives of the "partial" members take part in the meetings of the

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[52] 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 latter include three countries 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 allows the three EFTA countries to participate in the internal market without becoming EU members. The EEA is based on the same "four freedoms" as the European Community: the free movement of goods, persons, services, and capital among the EEA countries. The EFTA countries participating in the EEA enjoy free trade with the European Union. 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.

[53] The former Norwegian Prime Minister Jens Stoltenberg described the fact that non-EU members of the EEA have no representation in EU institutions such as the European Parliament or European Commission situation as a "fax democracy", with Norway waiting for their latest legislation to be faxed from the Commission. See Ivar Ekman, "In Norway, EU pros and cons (the cons still win)", *International Herald Tribune*, October 2005.

(European) Council, the European Parliament, and the European Commission when issues related to the specific (sub-)policy area are deliberated and relevant decisions are taken. The "partial" members could also 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.

(iii) In the case of an *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 joint meetings. The associated country or countries do not take part in the Union's internal decision-taking process and are thus not represented in the EU's institutions. 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 even involve joint mechanisms of decision-making as for example in the case of the European Economic Area, where the EU and the three non-EU members of the EEA jointly decide on how EC legislation is integrated into the EEA Agreement.[54]

- *Limited Membership can alleviate EU accession:* The exclusion of new member states from certain (sub-)policy areas or specific privileges resulting from EU membership can in many respects alleviate and speed up the accession of new member states. The exemption from certain policy areas or the non-obligation to apply specific elements of the *acquis* can (i) make it politically easier for certain countries to join the EU by removing certain obstacles on the road to the EU (e.g., opt-out of Switzerland concerning ESDP), (ii) allow a more rapid integration of certain 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 (e.g., labour market accession of Turkey).

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[54] The 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 so-called *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, from the current and forthcoming EU presidencies, as well as by the Commissioner for External Relations and the High Representative for the EU's Common Foreign and Security Policy. The so-called *EEA Joint Committee* is responsible for the ongoing management of the EEA Agreement. It provides 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 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 of 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 a *Limited* or a *Partial Membership* would lead to new sub-forms of membership and citizenship as the "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 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 be excluded, and second, they had been able to 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 countries aspiring to join the EU 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 members would have to accept the limitations to their membership if they want to gain (partial) accession to the club.
- *Potential rupture between new and old member states:* The notion of being a second-class member can lead to a rupture between old and new EU countries if the latter feel discriminated by the former. The notion of being discriminated can fuel anti-EU sentiments in the new member states and in return put pressure on the ruling political elites to improve their countries' membership status in the EU – the "limited" members could compel fellow EU members to remove the remaining limitations, the "partial" members could try to extend their membership status to other areas or to the EU as a whole. The ability of the discriminated EU countries to exert pressure on the older member states will depend on their power position within the EU. 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 Union.

6 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 have left the Union. The withdrawing state(s) would have to conclude an agreement with the EU setting out the legal, institutional and political arrangements guiding its 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).[55] In contrast to the current EC/EU Treaties, the new Lisbon Treaty (Art. 50 TEU-L; Art. 49 A) includes a withdrawal clause, which for the first time explicitly stipulates the

[55] 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."

possibility of a voluntary withdrawal. According to the new provisions, which were taken over form 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."[56]

6.2 Key consequences

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

- *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. 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 be (Vienna Convention or withdrawal clause), a withdrawal from the EU can only be negotiated on a voluntary basis. Demanding from a state to withdraw 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 being made in the area of European Security and Defence Policy (ESDP), and thus for the relevance of the EU in a multi-polar world setting. 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

[56] It is noteworthy that on the part of the Union 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 country or no small fraction of states can block the withdrawal of a country from the Union if the latter has itself decided to leave the 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 (see next point).

- *Potential renaissance of EEA and EFTA:* 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)*. 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.

Ten Conclusions

Conclusion 1: The creation of a new Union 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 "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" would not materialize. On the contrary, the rivalry between the 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.

The creation of a new Union is not only undesirable, it is also unrealistic – at least from today's perspective – for two main reasons: (i) The EU is not and has not yet been in a crisis big enough to generate the political energy required for the creation of a new Union. The EU has by far 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. As long as the current EU has not reached a political dead end, the political, administrative and economic costs associated to the establishment of a new supranational Union would be considerably greater than the potential benefits of such a new entity. (ii) Even in the most integration-friendly countries there is currently hardly any readiness to give up or 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 rather be high as most member of the "old Union" will be keen to join the exclusive club of a new Union. 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. 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 coordination between different policy areas and thus damage the overall coherence of the EU, (iii) lead to a fragmentation of legislation, (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 potential risks are particularly high if cooperation is implemented without clear procedures and norms and without the involvement of supranational institutions. This is especially the case, if differentiated cooperation is organized outside the EU.

If politically feasible and legally possible, Differentiation should be organized inside the Union because closer cooperation within the EU (i) respects and benefits from the Union's single institutional framework, (ii) limits the anarchic use of flexibility, (iii) preserves the supranational powers and composition of the European Commission, the European Parliament and the European Courts, (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 level of openness as participation must be 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 to apply 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 even parts of the elites also in the most integration friendly countries are not (yet) willing to surrender or to pool 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 in many EU countries. Especially the Union's smaller and new countries (mis)perceive such proposals as an attempt to create a closed core and fear that they could be excluded from such an exclusive club. Independent of whether such fears are justified or not, they raise distrust between member states and in return decrease the chances that the instruments of differentiation are constructively employed in practice. Promising projects are prematurely buried in a climate of mistrust among member states and the potentials of greater differentiation are not exploited.

Conclusion 4: Differentiation within the Treaty framework should follow the concept of *functional-pragmatic differentiation.* The instruments of differentiation laid down in the Treaties and especially *enhanced cooperation* should be applied in practice

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 wide spread scepticism concerning further differentiation and to limit the necessity for extra-EU cooperation. It will be particularly important that EU institutions and the member states become familiar with the instrument of *enhanced cooperation*, which so far has never been triggered as such.[57] *Enhanced cooperation* should be applied in practice in order (i) to show that 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 *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 which are still subject to unanimity in the Council. However, the individual initiatives should be part of a bigger picture explaining to citizens what the cooperation is all about.

Conclusion 5: One should not demonize a Europe *à la carte*, as the limited granting of opt-outs allows a further deepening of integration despite the staunch opposition from one or from a limited number of member states.

At times the allocation of an opt-out might be the only way to overcome the opposition of certain EU members towards a further deepening. 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) 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 recent tendency to remove certain opt-outs in Denmark and Poland have proven. (ii) 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 framework. (iii) The legal *acquis* adopted also applies to future member states, which is a major difference to 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 are only binding for the participating states. (iv) The 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.

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[57] 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 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", in *The Treaty of Lisbon*, p. 106.

Conclusion 6: Despite numerous risks associated with cooperation outside the EU, it might in some cases be better to make a step forward outside the Union instead of waiting indefinitely for a small step inside 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 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 if (i) 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 negatively affect the overall integration process. The recent case of the Treaty of Prüm has shown that the chances to successfully incorporate a legal *acquis* into the EU framework are higher if key member states – in the Prüm case Germany – very actively promote the integration of a set of legal norms 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 limited governments might fundamentally weaken the Union as the danger of political and legal ruptures between the "ins" and the "outs" increase over time.

Conclusion 7: Concepts aiming to affiliate partner countries beneath the level of a full and unlimited 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 increased enlargement fatigue inside the Union make it necessary to develop flexible concepts aiming to affiliate 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 – i.e. *Privileged Partnership* or *Extended Associated Membership* – are doomed to fail if they are unattractive for countries, which aim to ultimately join the EU. Moreover, concepts denying the ultimate membership perspective are counterproductive in two ways: (i) Excluding the prospect of EU membership provokes negative reactions in the partner countries and thus in the end limits the chances to apply flexible forms of cooperation bellow 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 EU is not in a position to effectively influence the overall political orientation and the transformation process of the EU's neighbouring countries. For most countries 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 general terms, 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 in other words: 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 growing enlargement fatigue in many EU member states.[58] As a consequence the EU should at least in the near future not grant any further accession offers beyond the countries, which have already the status of a candidate country (Croatia, Turkey and Macedonia) or of a potential candidate country (Albania, Bosnia and Herzegovina, Montenegro and Serbia including Kosovo). In many EU countries further offers would unnecessarily exacerbate the popular dissatisfaction with the EU's enlargement policy.

Conclusion 8: The concept of a *Limited Membership* can alleviate EU accession but in the long-term perspective makes sense only as an intermediate step on the way towards a full-fledged unlimited membership. In order to avoid the danger of a blockage of the EU's overall development, "partial" members should not have the ability to block the reform of EU Treaties.

Conceptually one can differ between three forms of affiliation beneath full membership: *Limited Membership, Partial Membership, 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 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 take part in the Union's decision-taking process. However, both a *Limited* and a *Partial Membership* would lead to new sub-forms of membership and citizenship. The introduction of such imposed forms of second-class membership can in the course of 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 elites to improve their countries membership status in the EU. This could lead to a rift between both sides, which might not only negatively affect the EU's ability to act but also structurally impede the Union's further development. "Limited" members would be in a strong position to block the overall development of the EU if they should seek to compel fellow EU partners to remove the remaining membership limitations. As a consequence, the concept of a *Limited Membership* makes sense only as an intermediate step on the way towards a full-fledged unlimited membership. 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 by paralyzing the policy area which they have joined. The ability of "partial" members to structurally impede the Union's overall development could be severely restricted, if *Partial Membership* excludes the right to participate in treaty revision procedures on an equal footing. In this case, "partial" members would not be able to block reforms of the EU's primary law.

[58] 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.

Conclusion 9: The voluntary withdrawal of less integration friendly countries can enable a further deepening of EU integration. However, it 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 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. The departure of one or more countries from the Union can in particularly weaken the EU if the number of countries exiting the Union is high and if the withdrawn states have played a significant role in a certain policy field (e.g., UK in ESDP). The withdrawing state(s) could decide to join the *European Economic Area* in order to benefit from a functioning inter-institutional structure and in order to continue to benefit from the advantages of the internal market. The participation of former EU states in the *European Free Trade Association* could lead to a renaissance of ETFA, which in return would become more attractive for countries aspiring but not yet able to join the EU.

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 council".

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 European public the overall reasoning and objectives of flexible integration. (2) The effective management and supervision of a highly differentiated Europe will require adequate procedures, instruments and institutional settings in order to avoid a split between the various groupings and in order to secure the coherence between different initiatives in different policy areas. A special responsibility will lie with the states participating in all major initiatives inside and outside the EU framework and with the European Commission as the central guardian of the Treaties. In order to secure policy coherence the key actors involved in the different forms of differentiation should be brought together in an "informal differentiation council".

Table 1: Key Characteristics of the Six Forms of Differentiated Integration

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	• group of 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	• 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)		• (originally) outside EU • limited to intergovernmental relations • no (immediate) transfer of sovereignty rights • cooperation adheres to principle of loyalty: supremacy of EU acquis; not undermine functioning of EU • cooperation not possible in areas in which EU has exclusive competences		
		• differentiation aims at creation of a federal political union – a "United States of Europe"	• functional case-by-case approach to overcome specific blockades • no pre-defined final outcome	• no wish to transfer competences to higher supranational authority • no motivation to integrate cooperation into EU • rather low degree of openness	• Avantgarde takes lead • integration of cooperation into EU as soon as possible • independent treaty or agreement • participation in principle open to every MS	• single task or purpose oriented • very low level of institutionalization • closed circle

Form	Differentiation through opt-outs	Affiliation beneath full membership			Differentiation through withdrawal
		Association Plus	Partial Membership	Limited Membership	
Key characteristics	• 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	• eventual full-fledged membership not excluded • closest possible affiliation beneath membership • no participation in EU decision-taking process • divergent forms of affiliation	• membership in certain policy areas (sectoral integration) • full-fledged political, legal and institutional participation	• membership subject to certain limitations • exclusion from certain policy areas *or* no application of certain parts of *acquis* • "Limited" members enjoy all rights and obligations	• 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 2: Key Consequences of the Six Forms of Differentiated Integration

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	• no direct role of existing EU institutions • creation of new supranational institutions • no fertile coexistence, but rather disruptive rivalry between "old EU" and new Union • weakening of "old EU" and danger of a new dividing line	• 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 • predefined idea of Europe's *finalité* limits practical potentials of differentiation	• practical experience with instruments of differentiated integration	• exclusion of EU institutions • lack of democratic legitimacy even on national level • insufficient judicial control • "outs" confronted with legal *fait accompli* • legal norms might conflict with existing or planned EU law • potential decrease of trust between "ins" + "outs" • new coordinative institutions • long-lasting cooperation weakens EU	• new institutions authorised to take decisions • possible alignment of EU institutions and "outs" • problematic integration of legal acquis into EU • danger of permanent fragmentation	• no or very low level of institutionali-zation • alignment of EU and "outs"

Form	Differentiation through opt-outs	Affiliation beneath full membership			Differentiation through withdrawal
		Association Plus	Partial Membership	Limited Membership	
Key consequences	• preservation of EU's single institutional framework • opt-outs do not prevent but rather allow further development of EU's *acquis* • limited danger of a fundamental divide between "ins" and "outs" • opt-outs promote *à la carte* Europe but also integrationist dynamics	• less conditionality than full-fledged unlimited EU membership • more complicated and less transparent EU's structures • status and powers of existing EU institutions not undermined • recipients of EC/EU legislation • no alternative but step towards membership • attractive for states not willing to join EU • joint institutional structures (e.g., EEA two pillar structure)	• imposed second-class membership/citizenship • potential rupture between new and old MS • participation in decision-making process only in respective policy area • no ability to block EU reforms	• alleviation of EU membership • full/equal representation in EU institutions • Intermediate step towards "unlimited" membership	• 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

Table 3: Enhanced Cooperation – the Legal Provisions of Nice and Lisbon

	Nice Treaties	Lisbon Treaty
Legal basis	• 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))	• 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 (detailed provisions))
Requirements	• 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 *acquis communautaire* 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 *acquis* into the framework of the EU (Art. 43 (i) TEU-N)	• 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 (Constitutional Treaty: one third) (Art. 20.2 TEU-L, Art. 10.2 LT) • 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 objectives of 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	• 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)	• 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/ESDP • "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	• 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)	• CT reduces number of procedures for submitting a request • Procedure except CFSP: MS wishing to establish EnCo address a request to Commission, specifying 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	• 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 ➔ *de facto* unanimity (Art. 27c in conjunction with 23.2 TEU-N)	• 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 matter be referred to European Council 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	• 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)	• 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 al 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)
Decision-making and application of adopted acts and decisions	• 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 *acquis* ➔ such acts and decisions are only binding for participating states (Art. 44.1 TEU-N)	• 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 being 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	• The expenditure resulting form implementation of EnCo, other than administrative costs entailed for the institutions, are borne by the participating MS (Art. 44a TEU-N)	*No changes compared to Nice (Art. 332 TFEU, Art- 280 G LT)*
Differentiation between „Pre-Ins" and „Outs"	*Not foreseen*	*Not foreseen*
Inclusion of non-EU countries	*Not foreseen*	*Not foreseen*