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Institutional Consequences of Differentiated Integration

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Key Points

- The increasing diversity of interests, the growing complexity of decision-making and diverging expectations concerning the future path of integration in an enlarged EU call for a higher degree of differentiated integration. The central question is not whether there will be a differentiated Europe but how it will or rather how it should look like.
- The debates about *directorates*, *triumvirates*, *pioneer* and *avantgarde groups* or *centres of gravity* are characterized by threats and by semantic and conceptual misunderstandings, which overshadow the fact that differentiation provides a key strategic opportunity. There is thus a necessity to dedramatise the debate and to open it up for rational arguments.
- There is no **one** model but rather a whole set of diverging forms of flexible integration. One can distinguish between the following six 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) differentiation through enlargement; (6) differentiation through withdrawal.
- The creation of a new supranational Union, with an independent institutional structure and an independent set of legal norms, entails the risk of creating new dividing lines in Europe. Such a new entity could lead to a disruptive rivalry and in the worst case even to a radical split between the new Union and the “old EU”, which in return would result in the gradual marginalisation or even dissolution of the latter.
- Differentiated cooperation within the EU should be preferred to initiatives outside the Union. Differentiation inside the EU respects the Union’s single institutional framework, limits the anarchic use of flexibility, preserves the supranational character of the Commission, the EP and the Courts, guarantees a high level of calculability, enables the continuous development of the *acquis* and reduces the overall risk of a confrontational split between the “outs” and the “ins”.
- Differentiated cooperation should not follow a single master plan with a predefined idea of Europe’s *finalité*. Using differentiation in order to create a “United States of Europe” (Verhofstadt) could limit the practical potentials of differentiation.
- Differentiated cooperation within the EU should follow the concept of *functional-pragmatic differentiation*. This concept does not adhere to a predefined master plan, but rather follows a functional case-by-case approach aiming to overcome specific blockades. Greater use should be made of the Treaties’ instruments of differentiation, as the real potentials of flexible integration will only be revealed in practice.

- One should not disrespect the potentials of differentiation through the granting of opt-outs. The widespread use of the opt-in by the UK and Ireland in the area of Justice and Home Affairs is proof that even a radical instrument such as an opt-out can result in integrationist dynamics throughout the Union.
- Despite numerous risks affiliated 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 clearly aims to integrate the legal norms adopted outside the Treaties into the EU at the soonest possible moment. However, the experience with the Treaty of Prüm shows that the integration of a legal *acquis* into the EU can prove to be difficult.
- Transitional periods or other forms of derogation or the temporary or indefinite exemption of new EU countries from certain policy fields as an effect of enlargement can alleviate and speed up the accession of new states and open up the prospect of a “limited EU membership”. However, the introduction of a second or third class membership can lead to a rupture between the old and the new member states, which might paralyze the EU from within and structurally impede the further development of the Union.
- The voluntary withdrawal of one or more countries from the EU can enable a further deepening of integration. However, the EU and the withdrawing state(s) must redefine their relationship if they want avoid a deep and enduring political rift. The withdrawing state(s) could decide to join the *European Economic Area* in order to continue to benefit from the advantages of the Common Market. The accession of former EU states could lead to a renaissance of ETFA, which in return would become more attractive for countries aspiring but not yet able to join the European Union.

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The increasing diversity of interests, the growing complexity of decision-making and diverging expectations concerning the future path of integration in an enlarged European Union (EU) call for a higher degree of differentiated integration. More than ever before Europe requires various speeds in order 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, and social policy. However, not all of the member states 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, or social policy, intensified cooperation among a smaller group of countries 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 (see overview annexed on p. A 1). But the degree of differentiation is likely to further increase in the future. The central question is not whether there will be a differentiated Europe but how it will or rather how it should look like.

The debates about *directorates*, *triumvirates*, *pioneer* and *avantgarde groups* or *centres of gravity* are characterized by threats and by semantic and conceptual misunderstandings, which overshadow the fact that differentiation provides a key strategic opportunity. 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 provide opportunities to cooperate even if the support and participation of all EU member states is not (yet) forthcoming.

Bringing the whole notion of differentiation into disrepute makes it difficult to utilize its formative potential to the full. There is thus a necessity to dedramatise the debate and to open it up for rational arguments. For this purpose, one has to critically analyse the major institutional and political implications of more flexible forms of integration. From this analysis one can then draw general conclusions.

Six forms of differentiation

There is no **one** model but rather a whole set of diverging forms of flexible integration. This paper explores the key implications of a more flexible EU while distinguishing between the following six forms of differentiated integration: (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) *differentiation through enlargement*; (6) *differentiation through withdrawal*.

The analysis of the six forms of differentiation starts with a short description of their key characteristics (for an overview see table 1 on p. A 2) followed by an examination of their major institutional and political implications (for an overview see table 2 on p. A 3). The paper ends with a list of eight major conclusions drawn from the findings of this analysis.

1 Creation of a new supranational Union

1.1 Description of key characteristics

A group of member states creates a new Union aiming to achieve a higher level of supranational cooperation. The participating countries hold that they cannot further deepen integration within the framework of the existing EU, due to contradictory and irreconcilable attitudes towards the future of Europe. The legal basis of this new entity is laid down in a separate treaty or constitution worked out solely by the participating member states. 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 EU. In the long-term perspective the new entity aims to foster progress towards the development of a federally organized political Union. The new Union is characterized by a high degree of openness: every EU country is invited to participate, provided that it is willing and ready to accept the obligations and requirements deriving from membership inside this new Union.

1.2 Key consequences

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

- *No direct role of existing EU institutions:* The institutions of the “old EU” – (European) Council, 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 EU organs to the new Union (Organausleihe) seems impossible. 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 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.
- *Weakening of the “old EU” and danger of a new dividing line:* The establishment of a new supranational Union with an independent institutional structure and an independent set of legal norms will most likely fundamentally weaken the role of the “old Union”. One might witness a radical marginalization of the “old EU” and in the worst case the creation of new dividing lines inside Europe.

In theory one could think of a construction in which a number of states integrate more strongly without challenging the existing EU. The current Treaties already include similar forms of cooperation. The most prominent example is Article 306

EC-Treaty (TEC), which states that 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 Treaty¹, 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 Title V (CFSP provisions) of the EU-Treaty (Art. 17.4 TEU-N).² These examples portray that closer forms of cooperation, which aim at a fertile coexistence between the EU and a new Union are possible, at least from a legal point of view.

However, from a political perspective it seems rather likely that the “old” and the “new” Union will become rivalries. The circumstance that the new Union was born out of a profound conceptual schism between the member states strengthens the argument that the “old EU” will become a subordinate political entity – at least from the perspective of the countries participating in the new entity, which will concentrate their political energies on the new Union. In the worst case, one will witness a disruptive rivalry and eventually even a split between both Unions, which in return would result in the gradual marginalisation or even dissolution of the “old EU”.

2 Differentiation via established instruments and procedures

2.1 Description of key characteristics

Member states willing and able to cooperate more closely raise their level of cooperation inside the framework of the EU. For this purpose they apply either general instruments of differentiation (enhanced cooperation³) or predetermined procedures for specific policy areas (e.g., EMU, JHA, permanent structured (military) cooperation, constructive abstention⁴), which are accepted by all member states and 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

¹ Declaration N° 28 annexed to the Accession Treaty of Austria, Finland and Sweden. One may observe in this respect that accession treaties have the legal status of primary law.

² 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. 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.

³ 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. Enhanced cooperation allows a minimum number of states to cooperate more closely on the basis of a clear set of preconditions, rules and procedures (see also annexed overview on pp. A 4-A 6).

⁴ Constructive abstention allows every EU country to abstain from voting in the field of Common Foreign and Security Policy 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. The effects of constructive abstention are “limited” by the circumstance that EU states, which have constructively abstained from voting, are not excluded from subsequent votes.

criteria, which all EU countries have to consensually agree on, or the fixation of a minimum number of participants (enhanced cooperation) may limit or predetermine the number of participating states. However, the convergence criteria in EMU and the criteria established for permanent structured cooperation⁵ exemplify that the member states tend to define criteria, which in the end allow the participation of the vast majority of EU countries willing to cooperate.

In the framework of this form of differentiation one can distinguish between two different sub-forms, which mainly differ with respect to their final objective:

- (i) *Creation of a federal Union*: This sub-form is guided by the idea that the employment of instruments and procedures of differentiation should lead to the creation of a federal political Union. The most prominent recent example is that of the 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.⁶ 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 is not guided by a 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; structured military cooperation; constructive abstention).

2.2 Key consequences

Differentiation on the grounds of established procedures and instruments would have the following 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 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 informal meetings of 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

⁵ Structured permanent cooperation is a novel instrument of differentiation in the field of European Security and Defence Policy (ESDP) laid down in the Constitutional Treaty. It 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 (Art. I-41.6; III-312 CT). The participation criteria for structured permanent cooperation were laid down in separate protocol annexed to the Constitutional Treaty (Protocol 23).

⁶ 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 (p. 84).

Treaties include predefined rules regulating quite specifically the inception, the authorisation, the functioning and the widening of cooperation (see overview on pp. A4 –A6).⁷ The same applies to procedures defined for specific policy areas (permanent structured cooperation, EMU, constructive abstention). One may argue that the numerous preconditions laid down in the Treaties are too tight and thus inhibit the use e.g., of enhanced cooperation.⁸ However, the existence of clear-cut rules ensures the direct or indirect affiliation of the “outs”, the “pre-ins” and supranational institutions and in the end makes differentiated cooperation a calculable venture. Potential conflicts between asymmetrical and regular European decisions and legislative acts are solved by specific rules guaranteeing the cohesion of European politics.

- *Preservation of the supranational character of the Commission, the EP and the Courts:* Differentiation established inside the Treaties’ framework respects the supranational character of the 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, the EP or the European courts enjoys the same rights, irrespective of whether their country 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. 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 and decision-making procedures of 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)⁹, the fact that there is no distinction between the “outs” and the “ins” in the Commission, the EP and

⁷ See also 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*, Gütersloh, 2005, pp. 149-182; here pp. 150-162.

⁸ Claus Giering and Josef Janning, “Flexibilität als Katalysator der Finalität? Die Gestaltungskraft der ‘Verstärkten Zusammenarbeit’ nach Nizza,” *integration 2* 2001, pp.146-155.

⁹ The decision to authorise enhanced cooperation requires a specific decision of the Council. However, there is a novel exception to this rule: The Constitutional Treaty includes a form of “automatism” in the field of judicial cooperation in criminal matters as the authorisation to proceed with enhanced cooperation is granted automatically on the grounds of a clearly defined procedure laid down in Art. III-270 and III-271 CT. Art. III-270 concerns the adoption of minimum rules to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters. Art. III-271 concerns the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension.

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 accession of Greece and Slovenia to the Eurozone has proven; (ii) it provides the “outs” with a certain form of control via supranational authorities and inside the Council; and (iii) it provides the “outs” the ability to influence the strategic developments inside the affected policy area.¹⁰ 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. Experience has proven that MEPs and Commissioner do not act solely as representatives of their own country, but that they feel responsible for 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 or the Constitutional Treaty stipulates that the adoption of European legislation in the respective policy field or specific case requires a unanimous decision. The same applies to the European Parliament: The legislative powers of the EP inside enhanced cooperation are the same as the powers of the Parliament in the respective policy area. The Constitutional Treaty offers the possibility to further develop the decision-making procedure via a *special passerelle clause* for enhanced cooperation: Article III-422 CT stipulates that where a provision of the Constitution, which may be applied in the context of enhanced cooperation, stipulates that the Council shall adopt European laws or framework laws 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 under the ordinary legislative procedure, i.e. qualified majority in the Council and co-decision rights of the EP. This provision does not apply to decisions having military or defence implications. The specific passerelle clause allows the improvement of legislative procedures – an important innovation in case the participating member states aspire to optimize the legislative procedures by introducing qualified majority and by enhancing the powers of the EP.

¹⁰ 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 Constitutional 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.

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 (Article 10 TEC-N¹¹) and thus respect the supremacy of the EU's *acquis* and not undermine the functioning of the Union. Cooperation would not be possible in areas in which the EU has exclusive competences.¹²

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 only be achieved outside the EU and not 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 set up to be permanent and there is no clear 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.
- (ii) *Intergovernmental Avantgarde*: The participating countries hold that further progress in a specific (sub-)policy field will only be possible if a group of member states takes the lead by cooperating outside the EU framework.¹³ There is a clear goal to integrate intergovernmental cooperation into the Union at the soonest possible moment (examples: Treaty of Prüm¹⁴, Schengen-Model).¹⁵ The

¹¹ Article 10 TEC-N states the following: "Member States shall take appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty [EC-Treaty], or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks. They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty."

¹² The Constitutional Treaty lists the following areas in which the Union has exclusive competences (Art. I.13 CT): (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.

¹³ One good example is the Treaty of Prüm in which the contracting parties have agreed to endeavour "without prejudice to the provisions of the Treaties [EC- and EU-Treaties], for the further development of European cooperation to play a pioneering role" (Preamble of the Prüm Treaty).

¹⁴ The Treaty of Prüm was initiated by Germany and signed in Prüm, Germany on May 27, 2005. The seven signatories of the Treaty are Belgium, Germany, Spain, France, Luxemburg, the Netherlands and Austria. Bulgaria, Finland, Greece, Italy, Portugal, Romania, Slovakia, Slovenia and Sweden have officially expressed their aspiration to join 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).

¹⁵ The Treaty of Prüm 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

participating countries work out a treaty 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.¹⁶

- (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 JHA). *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:

- *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 High Representative for the CFSP or the EU Foreign Minister to specific foreign policy efforts (e.g., EU-3). 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 require the assent of the “outs” to do so, will be more inclined to keep their partners informed about and 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 prepared 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.

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.”

¹⁶ 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).

- *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, which precludes the creation of new 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.¹⁷ Experience has shown that governments aim to limit national parliamentary control in order to sustain their freedom of action. The role of national parliaments is restricted to ex-post control, without an ability to form the content of the treaty/agreement worked out by the participating 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.¹⁸ 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 a legal norms outside the EU can decrease trust and obstruct cooperation inside the Union:* Intergovernmental cooperation in the framework of a *Europe of Nations* or an *Intergovernmental Avantgarde* is (mis)used 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 member states. The Union’s institutions and the non-participating EU countries are excluded from the decision-shaping and the decision-making process and from the eventual adoption of legislative acts. This practice might have the following effects: (i) Intergovernmental cooperation outside the EU can lead to the adoption of a legal *acquis* 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,

¹⁷ 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.

¹⁸ See *ibid.*

security and justice. (ii) In case the adopted rules, procedures and legislative acts are eventually incorporated into the EU framework, like for example in the case of Schengen or possibly in the case of the Treaty of Prüm, the non-participating states and the EP and the Commission would be confronted with a set of legal norms that were enacted outside the EU's legal framework and without their participation. The later-joining parties and the EU institutions would have to accept the decisions taken outside the Union as a *fait accompli*.¹⁹ (iii) If cooperation outside the Union's treaty framework covers issues, which are strongly disputed between the member states, there is a danger that this might impede EU-wide solutions. Taken all this together, cooperation outside the Union can decrease trust between the "outs" and the "ins" in sensible policy fields such as Justice and Home Affairs or foreign and security policy and thus obstruct cooperation within the Union in the specific policy field or even beyond (negative spill-overs).

- *Problematic integration of legal acquis into the EU:* There is no "guarantee" that the legal norms adopted outside the EU can be integrated into the Union's treaty framework, even if an *Intergovernmental Avantgarde* clearly aspires to do so. The integration of legal norms into the Union via for example the instrument of enhanced cooperation would have to overcome a number of critical hurdles: (i) the inception of enhanced cooperation requires a minimum number of participants (Nice Treaties: 8 member states; Constitutional Treaty: one third of the member states (EU-27: 9)); (ii) the authorisation of an enhanced cooperation in the first and third pillar requires a decision of the Council taken by qualified majority; (iii) the Commission must clarify whether the *acquis* is compatible with the numerous pre-conditions set by the Union's Treaties. The example of the Prüm Treaty indicates how difficult integration via enhanced cooperation may be: The number of participating states (initially seven) would not be sufficient and it is politically not easy to form a qualified majority in the Council authorising the inception of enhanced cooperation. But even if the legal norms can be integrated into the EU by means of enhanced cooperation, the integrated *acquis* would "merely" bind the participating states and not the Union as a whole.
- *Long-lasting cooperation outside EU weakens the Union:* Long-lasting cooperation in sensible policy areas that escapes the EU and engages only some of the member states has the potential to fundamentally weaken the Union. If intergovernmental cooperation is not "quickly" integrated into the treaty framework, this might create political and legal ruptures between the "outs" and the "ins" and/or between the participating states and the Commission or the European Parliament. 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.²⁰

¹⁹ 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.

²⁰ See Daniel Kietz and Andreas Maurer, "Folgen der Prümer Vertragsavantgarde: Fragmentierung und Entdemokratisierung der europäischen Justiz- und Innenpolitik," *Diskussionspapier der FG 1*, 2007/01, January 2007, SWP Berlin.

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; Denmark/Ireland/UK concerning Schengen; Denmark in the defence field of ESDP). 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., protocol).

4.2 Key consequences

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

- *Preservation of the EU's single institutional framework:* The granting of a limited number of opt-outs does not undermine the role of the existing institutions. The (European) Council, the European Parliament (EP) and the European courts continue to exercise their executive, legislative or judicative functions. Furthermore, the allocation of opt-outs does neither lead to the creation of new institutions outside the EU framework nor does the potential establishment of new sub-structures or bodies inside the Union (such as the informal Eurogroup or the ECB Executive Board and Governing Council²¹), in which the "outs" do not participate, endanger the Union's institutional coherence. Finally, the opt-outs can be institutionally linked to the policy-making process even within the respective policy field.
- *Opt-outs do not prevent 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 political prerequisite for deepening integration within the EU in the respective policy field. Certain parts of the *acquis* merely do not apply to the countries, which have been granted an opt-out. For all the other current and future member states the *acquis* adopted in the respective (sub-)policy field is legally binding. The fact that the *acquis* applies also for future member states is a major advantage 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 *acquis* and are only binding for the participating states (Art. 44.1 TEU-N; Art. I-44.4 CT²²). The new member states

²¹ 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 the 13 euro area countries. All 27 EU countries are represented in the *General Council*, which comprises the President and Vice-President of the ECB, plus the governors of the national central banks of the 27 EU member states. In other words, the *General Council* includes representatives from the 13 euro area countries and the 14 non-euro area countries. The other members of the ECB's Executive Board, the President of the EU Council and a member of the European Commission may attend the meetings of the General Council, but they do not have the right to vote.

²² The Constitutional Treaty 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. I-44.4 CT).

must thus respect and implement the *acquis*, even if some EU countries have obtained an opt-out.

- *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 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; (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 acts even if it has in general terms decided to be excluded from the respective policy area (see also next bullet-point); (iv) the opt-out countries can be closely affiliated to specific projects or missions within the respective policy-field even if they have been granted a general opt-out (e.g. Denmark’s participation in ESDP missions).
- *Opt-outs promote à la carte Europe but also integrationist dynamics*: The granting of opt-outs is a perfect example of an *à la carte* Europe, as the opt-out countries have the unilateral ability to opt-in whenever they decide to do so. The widespread use of the opt-in by the UK and Ireland in the area of Justice and Home Affairs in recent years suggests that even a radical instrument such as an opt-out can result in integrationist dynamics. The fact that the UK and Ireland have adopted legislation in spite of their opt-out has supported the gradual realisation of the area of freedom, security and justice throughout the European Union.²³

5 Differentiation through enlargement

5.1 Description of key characteristics

Different levels of integration between EU countries can be the result of the enlargement process. New member states – at least temporarily – do not enjoy all the benefits of membership in certain policy areas (examples: late introduction of the Euro, no immediate abolition of border controls, limited access to labour markets etc.). 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 membership. In other words, European law was valid right from the beginning, although its application was in certain cases temporarily delayed due to derogations (e.g., transitions periods concerning the free access of labour markets) or due to the fact that these countries were not (yet) able to fulfil the participation criteria (e.g., convergence criteria in EMU). Deviating from this rule, new member states could be excluded from one or more policy areas if both parties – the EU and the acceding country – agree to an exemption.²⁴ New EU countries would not take part in certain (sub-)policy areas (e.g., from Economic and Monetary Union (EMU), Schengen or ESDP) or would not be obliged to apply certain legal norms, which have been adopted for example in the framework of enhanced cooperations.

²³ See Daniel Thym, *Ungleichzeitigkeit und europäisches Verfassungsrecht*, Baden-Baden 2004, p. 389.

²⁴ See *ibid* pp. 264-265.

5.2 Key consequences

Differentiation through enlargement is characterized by a number of major institutional and political consequences:

- *No weakening of the EU's institutional structure*: Differentiation as a consequence of enlargement would not undermine the role of EU institutions. The Commission, the European Parliament or the European courts are in no respect deprived of their rights and obligations. Derogations or the temporary or indefinite exemption from a certain policy field or the non-obligation to apply a certain *acquis* would not lead to the creation of new institutions beyond the EU's institutional architecture. The new member states would enjoy all the rights and obligations deriving from EU membership and would thus be equally represented in the Union's institutions.
- *Alleviation of EU accession and prospect of a "limited EU membership"*: Differentiation through enlargement can in many respects alleviate and speed up the accession of new member states. The exemption from certain policy areas (e.g., ESDP, EMU) or the non-obligation to apply a certain *acquis* (i) can make it politically easier for certain countries to join the EU (e.g., opt-out of Switzerland concerning ESDP), (ii) might allow a more rapid integration of certain states, which otherwise would not (yet) fulfil all the prerequisites for joining the Union, (iii) could reduce certain reservations in the "old" member states towards the accession of a certain country to the EU (e.g., Turkey and labour market accession). The exemption from certain policy fields or the non-obligation to apply certain legal norms can open up the prospect of a "limited EU membership": The acceding states are legally speaking full-fledged members of the EU, but in practice however excluded from a number of (key) policy areas or from certain areas of differentiated cooperation.
- *Danger of rupture between new and old member states*: Differentiation resulting from EU enlargement can lead to a rupture between the old and the new member states, in case the latter feel discriminated by the former. The notion of being a second or third class EU member can negatively affect public opinion towards the Union and increase anti-EU populism in the new member states, and in the end even motivate the ruling political class to follow a policy of obstruction from within the EU's institutional structure. The rupture between the old and the new member states could negatively affect the EU's internal and external ability to act and impede the further structural development of the Union.

6 Differentiation through withdrawal

6.1 Description of key characteristics

The countries of the EU might pursue a higher level of cooperation after the voluntary withdrawal of one or more countries from the Union.²⁵ The member states remaining inside the Union are able to intensify their level of cooperation only after the countries opposing more integration have left the EU. The withdrawing state or states conclude an agreement with the EU setting out the legal, institutional and political arrangements guiding the withdrawal from the Union.

²⁵ The Constitutional Treaty includes a procedure for the voluntary withdrawal from the EU (Art. I-60 CT). This is the first time in EC/EU history that the member states have agreed on a specific procedure beyond the general provisions of international law.

6.2 Key consequences

Differentiation resulting from EU enlargement would lead to a number of 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 EU Treaties or the Constitutional Treaty 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 the EU institutions. The latter would require a number of institutional adaptations, *inter alia* a new assignment of task within the Commission, a replacement of certain positions inside the EP and in the courts and a new agreement on the voting quotas for a qualified majority in the Council – in case the triple majority procedure is still in place at the time.
- *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).
- *Potential weakening of the EU:* The voluntary withdrawal of one or of a couple of member states can (substantially) weaken the European Union, if (i) the number of states leaving the EU is relatively high, or (ii) if the retreating country has played a prominent role in one of the Union's key policy areas. The latter would be the case in the area of security and defence if for example the UK should decide to exit the EU. Should a larger number of countries decide to collectively withdraw from the EU there is even the prospect that these states might decide to establish a new collective entity.
- *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 Common 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)*.²⁶ 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. As a consequence, EFTA might become more attractive for countries aspiring but not yet able to join the European Union.

²⁶ The two pillar system between the EU and EFTA includes the following bodies: EEA Council, EEA Joint Committee, EEA Joint Parliamentary Committee, EEA Consultative Committee, EFTA Standing Committee, EFTA Surveillance Authority and the EFTA Court.

Conclusions

Conclusion 1: The enlarged EU will require a higher level of differentiated integration. However, the process of differentiation should be pursued cautiously. First and foremost one must avoid the risk of creating new dividing lines in Europe. This risk is particularly high if a group of member states decides to create a new supranational Union with an independent institutional structure and an independent set of legal norms. As this new entity would probably be the result of a profound conceptual schism between the member states concerning the future of Europe, one will witness a disruptive rivalry and in the worst case eventually even a radical split between both Unions, which in return could result in the gradual marginalisation or even dissolution of the “old EU”.

Conclusion 2: Differentiated cooperation within the EU framework should be preferred to initiatives outside the Union. Differentiation inside the Union (i) respects the EU’s single institutional framework, (ii) limits the anarchic use of flexibility, (iii) preserves the supranational character of the Commission, the EP and the 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, (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*. The idea to create a federal political union via instruments and procedures of differentiation will face numerous problems: First, a debate about the ultimate finality of the integration process would be counter-productive due to the deep conceptual schism among and partially even within EU member states. Consensus could not be reached, mutual distrust would further increase, and one would in the end witness paralysis instead of a new dynamic. Second, the wider public and even parts of the elites also in the most integration friendly countries are not (yet) willing to surrender substantial national competences in order to develop some sort of a “United States of Europe”. Third, one could not identify a specific group consisting of countries, which are all able and willing to deepen integration in the same policy fields at the same time. History has proven that the composition of the groups is not homogenous but rather varies from policy area to policy area (see annexed overview on p. A 1). Using differentiation in order to create a “United States of Europe” could in the end prove to be counter-productive, thereby decreasing the chances that the instruments of differentiation are constructively employed in practice.

Conclusion 4: When applying differentiation within the Treaty framework one should follow the concept of *functional-pragmatic differentiation*. This concept does not adhere to a predefined master plan, but rather follows a functional case-by-case approach 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 (e.g., harmonisation of the corporate tax base; military cooperation and EU missions). The application of this concept will be particularly important in those areas in which the

Treaties continue to stipulate unanimity in the Council. The real potentials of differentiation will be revealed only in practice. In the years ahead greater use should be made of the various instruments of differentiated integration offered within the Treaty framework in order to reduce the wide-spread scepticism concerning differentiation and to limit the necessity for extra-EU cooperation. It will be particularly important that the EU institutions and the member states become familiar with the instrument of enhanced cooperation. Although enhanced cooperation is no magic potion, it has the potential to achieve asymmetrical progress in specific situations.²⁷ Enhanced cooperation should initially be used in the context of smaller cases in the realm of different policy areas. Only then will it be possible to ascertain how well the current legal provisions concerning enhanced cooperation work in practice and where improvements are needed in order to increase the usefulness of this key instrument of differentiation.

Conclusion 5: One should not disrespect the potentials of differentiation through opt-outs. 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. The advantages of opt-outs have to do with the fact (i) that the EU's single institutional framework is not questioned, (ii) that the adopted *acquis* also applies to future member states, and (iii) that the affiliation of the opt-out countries limits the danger of a fundamental divide between the opt-out countries and the other member states. The granting of opt-outs is a perfect example of a *à la carte* Europe, as the opt-out countries have the unilateral ability to opt-in whenever they wish to do so. The widespread use of the opt-in by the UK and Ireland in the area of Justice and Home Affairs in recent years is proof that even a radical instrument such as an opt-out can result in integrationist dynamics throughout the Union.

Conclusion 6: Flexible integration creates numerous opportunities, however, it bears also a number of potential risks. Cooperation among a smaller group 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 within 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. But despite potential risks, 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. In this case one should, however, avoid the model of a *Europe of Nations*, because long-lasting cooperation that escapes the EU and engages only a limited number of member states has the potential to fundamentally weaken the Union. Cooperation outside the Treaties should rather follow the idea of an *Intergovernmental Avantgarde*, which clearly aims to integrate the legal norms adopted outside the Treaties into the EU at the soonest possible moment. However, the experience with the Prüm Treaty shows that the integration of a legal *acquis* into the EU can prove to be difficult – in some instances even impossible. 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

²⁷ See also Thym, p. 387.

cooperation outside the EU covers issues which are strongly disputed between the member states and the “outs” are not willing to accept a set of legal norms that was enacted without their participation, (iii) if EU institutions are not associated with or at least continuously informed about the activities outside the Union, (iv) if cooperation outside the Union has decreased trust between the “ins” and the “outs”, which will make it difficult or even impossible to find a qualified majority inside the Council in favour of an integration of the legal norms e.g., via the instrument of enhanced cooperation. Dividing lines between the “ins” and the “outs” and between the “ins” and the EU’s supranational institutions can not only hinder the overall progress in the respective policy field, but also lead to negative spill-overs in other policy fields.

Conclusion 7: Transitional periods or other forms of derogation or the temporary or indefinite exemption of new EU countries from certain policy fields as an effect of EU enlargement can alleviate and speed up the accession of new member states and open up the prospect of a “limited EU membership”, which legally entails a full-fledged membership but excludes the acceding countries from (key) policy areas. The introduction of a second or third class membership can, however, lead to a rupture between the old and the new member states, if the latter feel discriminated by the former. A deep rift between the new and the old member states could negatively affect the EU’s ability to act and structurally impede the Union’s further development.

Conclusion 8: The voluntary withdrawal of one or more countries from the Union can enable a further deepening of integration within the institutional and political framework of the EU. However, if the Union and the withdrawing state(s) fail to redefine their relationship one might witness a deep and enduring political rift between both sides. The departure of one or more countries from the Union can in particular 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. The withdrawing state(s) could decide to join the *European Economic Area* in order to continue to benefit from the advantages of the Common Market. The participation of former EU states in the *European Free Trade Association* could lead to a renaissance of ETFA, which in return might become more attractive for countries aspiring to join but not yet able to join the EU.

Differentiation
in Europe 2007

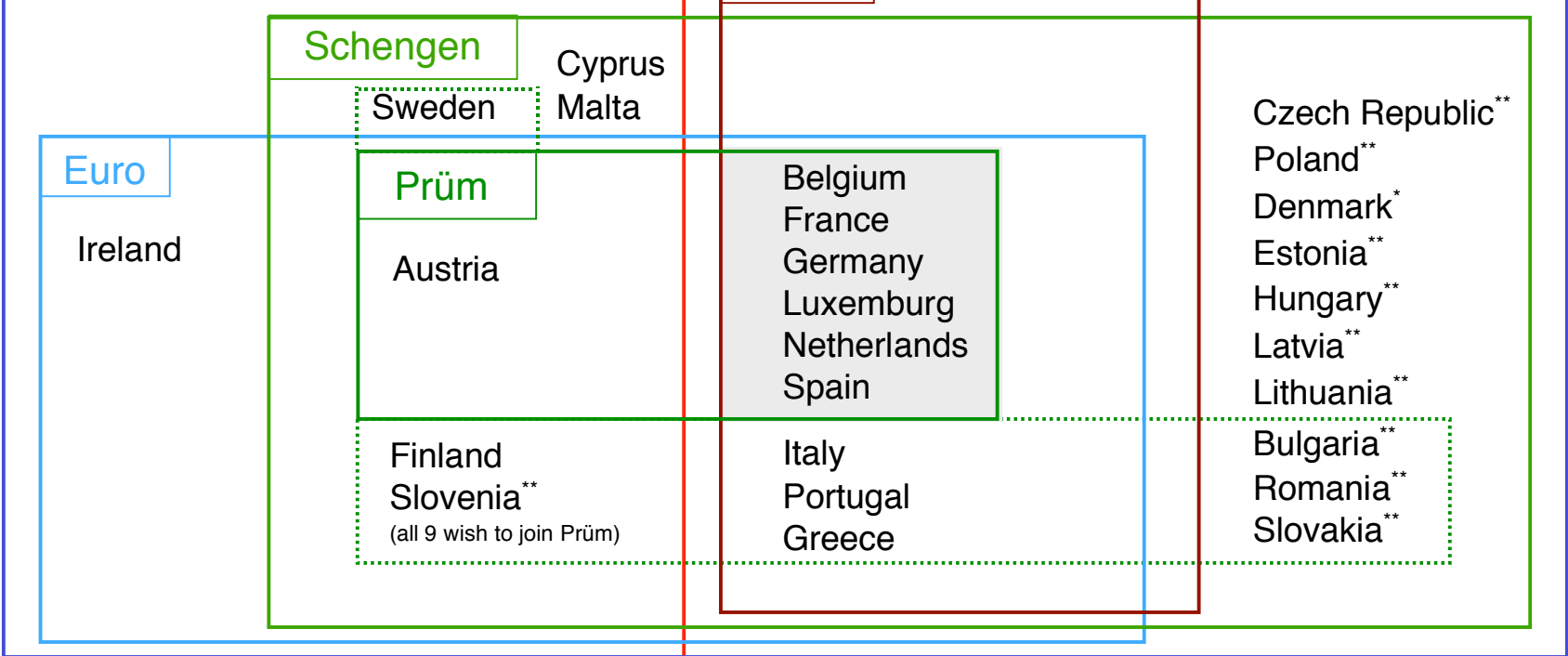
NATO

USA Canada

European Union

* opting-out for future Schengen-decisions
** border controls still in effect

WEU United Kingdom



Candidate Countries

Croatia (negotiation talks)
Macedonia

Turkey (negotiation talks)

Iceland / Norway
EFTA-States / Schengen associated
potential EU-candidates

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

Form	Differentiation through opt-outs	Differentiation through enlargement	Differentiation through withdrawal
Key characteristics	<ul style="list-style-type: none"> allocation of opt-out(s) initiative comes from opt-out country principle decision to grant opt-out requires assent of all MS basic legal and institutional rules and procedures laid down in EU’s primary law 	<ul style="list-style-type: none"> new MS – at least temporarily – do not enjoy all benefits of membership in certain policy areas differentiation via derogations (transition period), non-fulfilment of participation criteria, indefinite exclusion or non-application of a legal <i>acquis</i> 	<ul style="list-style-type: none"> EU countries pursue higher level of cooperation after voluntary withdrawal of state(s) withdrawing state concludes agreement with EU setting out legal, institutional + political arrangements guiding withdrawal EU Treaties/Constitutional Treaty cease to apply to withdrawn country

Table 2: Key institutional consequences

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

Form	Differentiation through opt-outs	Differentiation through enlargement	Differentiation through withdrawal
Key consequences	<ul style="list-style-type: none"> preservation of EU’s single institutional framework opt-outs do not prevent further development of EU’s <i>acquis</i> limited danger of a fundamental divide between “ins” and “outs” opt-outs promote <i>à la carte</i> Europe but also integrationist dynamics 	<ul style="list-style-type: none"> no weakening of the EU’s institutional structure alleviation of EU accession prospect of “limited EU membership” danger of rupture between new and old member states 	<ul style="list-style-type: none"> unaffected institutional operability and limited institutional adaptations redefinition of relationship in order to avoid rupture potential weakening of EU potential renaissance of EEA and EFTA

Table 3: Enhanced Cooperation – the legal provisions of Nice and of the Constitutional Treaty

	Nice	Constitutional Treaty
<i>Legal basis</i>	<ul style="list-style-type: none"> 16 articles with 23 paragraphs at four spots in the Treaties (Art. 43, 43a, 43b, 44, 44a, 45 TEC-N (basic provisions); Art. 27a-e TEU-N (CFSP); Art. 11, 11a TEC-N; Art. 40, 40a, 40b TEU-N (specific provisions for the first and third pillar)) 	<ul style="list-style-type: none"> 8 articles with 15 paragraphs at two spots (Art. I-44 CT (general provisions); Art. III-416 - III-423 CT (detailed provisions))
<i>Requirements</i>	<ul style="list-style-type: none"> Participation of at least 8 Member States (MS) (Amsterdam: majority of member states) (Art. 43 (g) TEU-N) Enhanced Cooperation (EnCo) must remain within the limits of the powers of the Union or of the Community and does not concern the areas which fall within the exclusive competence of the Community (Art. 43 (d) TEU-N) EnCo must be aimed at furthering the objectives of the Union and of the Community, at protecting and serving their interests and at reinforcing their process of integration (Art. 43 (a) TEU-N) EnCo must respect the Treaties and the single institutional framework of the Union (Art. 43 (b) TEU-N) EnCo must respect the <i>acquis communautaire</i> and the measures adopted under the other provisions of the Treaties (Art. 43 (c) TEU-N) EnCo must not undermine the internal market or the economic and social cohesion (Art. 43 (e) TEU-N) EnCo must not constitute a barrier to or discrimination in trade between the MS and must not distort competition between them (Art. 43 (f) TEU-N) EnCo must respect the competences, rights and obligations of non-participating MS (Art. 43 (h) TEU-N) EnCo must not affect the provisions of the Protocol integrating the Schengen <i>acquis</i> into the framework of the EU (Art. 43 (i) TEU-N) EnCo may be undertaken only at a last resort, when the objectives of such cooperation cannot be attained within a reasonable period by applying the relevant provisions of the Treaties (Art. 43a TEU-N) 	<ul style="list-style-type: none"> Minimum number of participating MS: one third of MS (→ EU-27: 9 MS) (Art. I-44.2 CT) MS may establish EnCo between themselves within the framework of the Union's non-exclusive competences (Art. I-44.1 CT) → in any other case EnCo is permitted EnCo must aim to further the objectives of the Union, protect its interests and reinforce its integration process (Art. I-44.1 CT) EnCo shall be open at any time to all MS (Art. I-44.1 CT) EnCo shall be adopted as a „last resort“, when the objectives of such cooperation cannot be attained within a reasonable period by the Union as a whole (Art. I-44.2 CT) 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 the MS, nor shall it distort competition between them (Art. III-416 CT) EnCo shall respect the competences, rights and obligations of the non-participating MS (Art. III-417 CT)
<i>Specific provisions</i>	<ul style="list-style-type: none"> Additional requirements for the inception of EnCo in the area of CFSP (Art. 27a TEU-N) and the area of JHA (Art. 40.1 TEU-N) EnCo in the 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) 	<ul style="list-style-type: none"> No specific provisions for the areas of JHA and CFSP (exception: procedure for submitting a request, see below) EnCo is applicable to the entire area of CFSP/ESDP “Automatism“ concerning the authorisation of EnCo in the framework of judicial cooperation concerning criminal matters (Art. III-270, III-271 CT)

<p><i>Procedure for submitting a request</i></p>	<ul style="list-style-type: none"> • Separate procedures for all three pillars • Pillar 1: MS which intend to establish EnCo submit a request to the Commission → Commission submits proposal to the Council or denies the request while informing the concerned MS about the reasons for its denial; EP is consulted; when EnCo relates to an area covered by the procedure referred to in Art. 251 TEC-N, the assent of the EP is required (Art. 11.1 TEC-N) • Pillar 2: MS which intend to establish EnCo address a request to the Council. The Commission shall give its opinion; EP is informed (Art. 27c TEU-N) • Pillar 3 (police and judicial cooperation): MS which intend to establish EnCo submit a request to the Commission → Commission submits proposal to the Council or denies the request while informing the concerned MS about the reasons for its denial; in case of a denial the concerned MS may submit an initiative to the Council designed to obtain authorisation for EnCo; the EP is consulted (Art. 40a TEU-N) 	<ul style="list-style-type: none"> • CT reduces the number of procedures for submitting a request • With the exception of CFSP the Commission is attributed key role • Procedure with the exception of CFSP: MS which wish to establish EnCo between themselves address a request to the Commission, specifying the scope and objectives of EnCo → Commission submits a proposal to the Council or denies a proposal while informing the MS concerned of the reasons for doing so (Art. III-419 CT) • Procedure in the area of CFSP: request of MS which wish to establish EnCo are addressed to the Council; it shall also be forwarded to the Union Minister for Foreign Affairs and to the Commission: both shall give an opinion (Art. III-419.2 CT)
<p><i>Authorisation procedure</i></p>	<ul style="list-style-type: none"> • Compared to Amsterdam no veto right in Pillars One and Three • Authorisation requires a qualified majority in the Council (Art. 11.2 TEC-N) • Constriction: A member of the Council may request that the matter be referred to the European Council; after the matter has been raised before the European Council, the Council may decide by qualified majority (Art. 11.2 TEC-N) • Exception: The authorisation of EnCo can be blocked in the area of CFSP in case a member state declares that it opposes the adoption of a decision for important and stated reasons of national policy → <i>de facto</i> unanimity (Art. 27c in conjunction with 23.2 TEU-N) 	<ul style="list-style-type: none"> • Authorisation to proceed with EnCo is generally granted by the Council with qualified majority; EP must give its consent (Art. III-419.1 CT) • Area of CFSP: authorisation requires unanimous decision of the Council; EP is merely informed • Provision that a MS may request that the matter be referred to the European Council deleted • „Automatism“ in the framework of judicial cooperation concerning criminal matters (Art. III-270, III-271 CT)
<p><i>Degree of openness</i></p>	<ul style="list-style-type: none"> • EnCo is 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 which wishes to participate in EnCo notifies its intention to the Council and the Commission; Commission gives an opinion to the Council within three months; within four months the Commission takes a decision (Art. 11a TEC-N) • Pillar Two: MS which wishes to participate in EnCo notifies its intention to the Council and informs the Commission → Commission gives an opinion within three months; within four months the Council shall take a decision on the request by qualified majority (Art. 27e TEU-N) • Pillar Three (police and judicial cooperation): MS which wishes to 	<ul style="list-style-type: none"> • Commission and participating MS shall promote participation by as many MS as possible (Art. III-418 CT) • When EnCo is established, it shall be open to all MS, subject to compliance with any conditions of participation laid down by the European authorising decision (Art. III-428 CT) • Procedure for late participation with the exception of CFSP: MS which wishes to participate in EnCo in progress notifies its intention to the Council and the Commission → Commission confirms the participation of the MS concerned within four months; if the Commission considers that the conditions of participation have not been fulfilled, it indicates the arrangements to be adopted to fulfil those conditions and sets a deadline for re-examining the request; if

	<p>participate notifies its intention to the Council and the 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)</p>	<p>the Commission after a re-examination considers that the conditions have still not been met, the MS concerned may refer the matter to the Council, which then decides on the request (Art. III-420.1 CT)</p> <ul style="list-style-type: none"> • Procedure in the area of CFSP: MS which wishes to participate in EnCo in progress notifies its intention to the Council, the Union Minister for Foreign Affairs and the Commission → Council confirms the participation of the MS concerned, after consulting the Union Minister for Foreign Affairs, on the basis of unanimity with the votes of the participating MS; if the Council considers that the conditions of participation have not been fulfilled, it indicates the arrangements to be adopted and sets a deadline for re-examining the request (Art. III-420.2 CT)
<i>Decision-making and application of adopted acts and decisions</i>	<ul style="list-style-type: none"> • For the adoption of acts and decisions necessary for the implementation of EnCo the relevant treaty provisions (TEU/TEC) shall apply (Art. 44.1 TEU-N) → e.g., unanimity even inside EnCo, if the area concerned is subject to unanimity • Only MS participating in EnCo take part in the adoption of decisions (Art. 44.1 TEU-N) • All MS take part in the deliberations (Art. 44.1 TEU-N) • Acts and decisions adopted in the framework of EnCo do not form part of the <i>acquis</i> → such acts and decisions are only binding for the participating states (Art. 44.1 TEU-N) 	<ul style="list-style-type: none"> • MS participating in EnCo may make use of the Union's institutions and apply the relevant provisions of the Constitution (Art. I-44.1 CT) → within EnCo the same rules and procedures apply, which are laid down in the Constitution for the respective area • Only the MS participating in EnCo have the right to vote when decisions are being adopted (Art. I-44.3 CT) • All MS may participate in the deliberations (Art. I-44.3 CT) • Passerelle allows introduction of more efficient procedures: the Council may decide unanimously with the votes of the participating MS that decisions taken within EnCo may be adopted by qualified majority and according to the ordinary legislative procedure (Art. III-422.2 CT). Passerelle does not apply to decisions having military or defence implications (Art. III-422.3 CT). • Acts adopted in the framework of EnCo bind only the participating MS; the Constitutional Treaty also explicitly states that these acts must not be accepted by candidate states (Art. I-44.4 CT)
<i>Financing</i>	<ul style="list-style-type: none"> • The expenditure resulting from implementation of EnCo, other than administrative costs entailed for the institutions, are borne by the participating MS (Art. 44a TEU-N) 	<i>No changes compared to Nice</i>
<i>Differentiation between „Pre-Ins“ and „Outs“</i>	<i>Not foreseen</i>	<i>Not foreseen</i>
<i>Inclusion of non-EU countries</i>	<i>Not foreseen</i>	<i>Not foreseen</i>