Differentiation in the European Integration Process

The path to harmonisation is flexible and open-ended

“As from time to time it is worth reminding ourselves why 27 European nation states have come together voluntarily to form the partnership that is the European Union.” (Ley Berry 2009)

“[T]his voluntary joining together of sovereign nations, which is aimed at increasing their economic and political potential, can be seen to be the most compelling European idea since the Enlightenment.” (Zervakis 2006, 205)
This paper establishes the difference between process and outcome differentiation, claiming that the former seems to have become reality in the European integration process. Concerning the outcome, the author claims that thus far the Union is legally defined by its actors to be a harmonisation project, serving the interests of EU citizens by means of an economic and increasingly political Union of European countries. With that conceptual background, different embodiments of differentiation as flexibility instruments with their respective strengths, weaknesses, risks and possibilities are analysed, emphasising the distinction between differentiation within and outside the Union framework and the respective policy areas in which differentiation is applied as the decisive analytical factors. The author comes to the conclusion that differentiation on a temporary basis within the Union framework is the most integration-friendly way of differentiation. However, permanent closer cooperations inside as well as outside the Union framework will not entirely vanish from the cooperation habits of the member states. A crucial feature in this connection is the perception of the European integration process as being open-ended.

A crucial task will be to communicate process differentiation to the citizens of the EU as well as to external actors interacting with the Union. The aim has to be that differentiation is perceived as a normal and natural feature of the European integration project and not as a weakness or shortcoming. To achieve this, the member states and the European Commission have to take steps to allow enhanced cooperation to become a practiced and effective integration tool of the same value as traditional integration means. Additionally, the notion of an “EU of Projects in a multi-way integration process” could contribute to solving the dilemma between increased complexity and the difficult relationship between the EU and its citizens.

Keywords: differentiation, European integration process, open-endedness, internal vs. external policies, EU of Projects

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1 Introduction

The inclusion of differentiation has been a highly controversial issue in the debate about the future path of the European integration process. Against the background of a certain ‘integration density’, the political character of recent integration projects as well as EU enlargement, the tendency to debate differentiation seems the prevailing new aspect of European integration or, even more, seems to increase in relevance. This debate is also linked to a major challenge that the EU faces in times of financial, economic and constitutional crisis, which is the increasing tendency towards a greater re-nationalisation of politics or the shifting focus towards national material interests. This is accompanied by increasing euroscepticism on the part of European citizens, which raises the questions of the relevance and validity of European solidarity, especially in the relationship between ‘old’ and ‘new’ member states (compare, for example, Tcherneva 2009). It seems to become more and more of a problem that “[w]e compete for what we can get out of the European Union, rather than on what we can achieve collectively through it” (Ley Berry 2009). The financial and economic crisis has aggravated the rifts “between east and west, rich and poor, new and old” and has put “[t]he sense of solidarity within Europe […] under strain” (Miliband 2009), one example being the discussion about the appropriate means to handle the crisis (Runner 2009).

For all these reasons, there is a need to give increased attention to flexible integration mechanisms and to establish new concepts, with the goal of adjusting the picture of flexible integration means and to clarify their added value for the European integration process. In contrast to the predominant literature on differentiation, the relevant concepts applied in this paper are the distinction between process and outcome differentiation, followed by the analysis of four different embodiments of differentiation within and outside the EU framework according to their effects on the integration process. Additionally, the

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1 This Master thesis is based on a discussion paper the author wrote for Stiftung Wissenschaft und Politik (SWP), Berlin when she was an intern with SWP from 3 November 2008 to 30 January 2009.

2 For example, signs that richer member states intend to try and buy their way out of the crisis, an option not open to central and eastern countries, have alarmed the newer member states and raised the fear of economic nationalism and increasing rifts between euro-in- and outsiders (Mahony, 2009d).
relevance of the respective policy areas when applying flexible integration means is outlined. The conclusive part of the paper is twofold. It firstly recommends stressing the open-endedness of the European integration process and, secondly, it focuses on the effect of differentiation on the relationship between the EU and its citizens, bringing forward the concept of an “EU of Projects in a multi-way integration process” as a possible approach to tackle this problematic relationship.
2 Process vs. Outcome
Differentiation

The overall ideal of the European Union, which is to achieve and preserve homogenous integration of its member states in order “to continue the process of creating an ever closer union among the peoples of Europe”\(^3\), still seems to be the unanimously pursued goal of the member states and the institutions of the EU, as it has been written into the treaties and repeatedly interpreted by the European Court of Justice (ECJ)\(^4\). The core idea of the European project is, therewith, positive integration through harmonisation of national legislation (Thym 2006, 647) as the 27 European countries agree that “across the board, more objectives are likely to be achieved by pooling sovereignty than by preserving it intact” (Ley Berry 2009). However, there appears to be increasing acknowledgement that the norm of absolute homogeneity in the *process*\(^5\) (and not so much in the *outcome*) of integration has to be, at least partly, abandoned against the background of substantial deepening and geographical widening. This conclusion can firstly be drawn from academic debates demanding the renunciation of the “illusion of absolute convergence” (Winkler 2009, 283) in the European integration process and the acknowledgement that “differentiation has come to stay”, meaning that it has become “a norm rather than an exception” in the European project (for many: Marcussen 2008, 2; Dyson & Marcussen 2009, 3, 8, 25 f.; Emmanouilidis 2008, 13; Zervakis 2006, 206). Secondly, the notion of ‘juste retour’\(^6\) has generally been discredited today and political actors acknowledge that different inputs can, or rather will, generate different outputs for different countries. Thirdly, flexible approaches to harmonisation already exist in the form of various

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\(^3\) Preamble and Art. 1 (2) of the Treaty on European Union, since Maastricht Treaty.

\(^4\) The most prominent examples are the ruling of the ECJ in *Van Gend & Loos* (1963) and *Costa/E.N.E.L* (1964) about the principle of supremacy of EC Law, by that establishing the principle of homogeneity of EC Law (compare Thym 2006, 637).

\(^5\) In this study *process* is not to be understood as ordinary, every-day policy-making but rather as the way policy issues are addressed or handled on a higher, more abstract level. For example, the European Monetary Union is handled with the help of an opt-out integration process instead of an all-countries-encompassing strategy, as the latter is not feasible.

\(^6\) This concept stands for the idea that each country – mainly in terms of money – gets out of the European enterprise what it puts into it.
flexibility instruments, causing a kind of ‘patchwork’ integration process. Tools for states to have varying participation options in different policy areas, such as transition periods, opt-outs/opt-ins or enhanced cooperation, allow for a large amount of differentiation in the implementation stage, but without abandoning the overarching ideal of harmonisation. Those tools reflect EU regulation that takes into account the diversity of member states. Fourthly, more and more raised voices demand an end to the repeated misuse of differentiation as a threat aiming only to put pressure on states unwilling to cooperate, and instead to view it as a strategic opportunity in a bigger and more heterogeneous EU (for many: Emmanouilidis 2008, 13). Fifthly, differentiation is increasingly regarded as supporting the integration process of the whole Union. In this sense, a non-simultaneous partial harmonisation brings about a ‘more common’ status as the continuation of 27 different national legislations. For example, the harmonisation of a uniform assessment base for corporate taxation in, lets say, 20 member states abolishes differences, if not totally then at least in part. Furthermore, this does not lead to new distortions of competition that have not already existed before (Thym 2006, 647). In this regard, the paradox of the dynamic or flexible interpretation of European legislation as a necessity for the preservation of the Union’s unity is solved.

Against this background, the general logic of the European integration process does not seem to have changed, as forms of flexibility have always been a part of the process. Nevertheless, three more specific aspects should be considered: Firstly, due to the increasing diversity of interests and the growing complexity of the decision-making process in the EU, which is magnified by enlargement, there could be a demand for even more process differentiation than already exists today. Additionally, European citizens demand state-like activities from the EU in areas ranging from justice and home affairs, foreign, security and defence policy to environmental, economic and social policy, which not all member states can achieve at the same time and with the same intensity. Secondly, and connected to the first, there has to be a discussion on the appropriate means and, therefore, embodiment of differentiation in regard to its effects on the integration process. Thirdly, one could expect a higher demand for the clarification of differentiation as being ‘normal’ in the integration process towards Europe’s citizens and external actors the EU interacts with.

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Emmanouilidis demonstrates this by preferably using the term ‘pre-ins’ instead of ‘outs’ for countries not (yet) participating in, for example, enhanced cooperation. Therewith he emphasises the desired temporary character of differentiation, which in the end should lead to harmonisation including all member states (2008, 20).
As stated, the focus of the demands for differentiation seems to be on the integration *process*. However, considering the different conceptions concerning the future of the European integration process that member states allegedly have today, one could also identify a call for flexibility concerning the *outcome* (or *end*) of European integration.⁸ Those calls are, however, mainly interpretations by political science scholars and thereby only implicitly taken from the political process and are never explicitly mentioned by political actors, as this would contradict the treaties and, with them, the overall ideal on which the EU is founded.

In short, the call for and implementation of *process differentiation* appears to have become reality in the integration process, whereas *outcome differentiation* is at best implicitly involved in those calls, or only inherent in the academic debate. In general, the primacy of the goal of concerted European integration remains.

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**Note on Terminology**

In the following ‘differentiation’ is to be understood as ‘process differentiation’. If ‘outcome differentiation’ is meant, this is explicitly stated.

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⁸ Those conceptions move along a continuum with the goal of a United States of Europe on the one extreme and a loose economic union without any political competences on the other.
3 Factors, Questions, Limitations

Concerning the concept of differentiation itself, one has to acknowledge that there is no ‘one size fits all’ approach to differentiation. Many often fall into the trap of perceiving differentiation as one single strategy in contrast to a homogeneous approach in the integration process. But differentiation can be applied in very different ways and it is a widely shared opinion that differentiation does not always mean the same in those contexts. For example, flexibility may apply to the European project’s participants, objectives, pace, or any combination of these (Zervakis 2006, 206). It can even comprise non-EU member states, as happened with the European Space Agency and the Bologna Process (ibid., 208). In this study however, the most decisive factors are the distinction between differentiation within and outside the Union framework and the respective policy area in which differentiation is applied, concerning EU member states only.

In the respective contexts, differentiation is implemented differently and can therefore have a range of effects on the integration process which can be completely opposite, having either uniting or rather disruptive effects on the European integration process. The task therefore is to analyse the different embodiments of differentiation according to their risks and possibilities in terms of the integration process and ascertain their effect on the cohesion of the Union.

- When is the cohesion of the Union seriously in danger?
- Where does fragmentation begin and what does it mean?
- Which embodiment of differentiation is the least community-averse and the most integration-friendly and therefore the most compatible with the ideal of a homogeneous integration end?

Decisive questions

In order to be able to evaluate the different embodiments of differentiation, the concept of ‘integration-friendliness’ (interview Martin Marcussen) has to be clarified. Its applied meaning here is fourfold:
With this information in the background, several issue areas are to be analysed:
- What are the general risks and possibilities linked to the application of differentiation?
- What are the different embodiments of differentiation and what are their strengths, weaknesses, opportunities and threats?
- Which legal aspects are relevant in the application of differentiation?\(^9\)
- Which political aspects have to be considered?
- What effects are to be expected for the relationship between the Union and its citizens?

Concerning the limitations of this study, it firstly has to be kept in mind that this study does not include potential future member states of the EU or aspirants for the accession process in general into the differentiation debate, which encompasses concepts like ‘association plus’, ‘membership minus’ or ‘privileged partnership’.\(^{10}\)

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\(^9\) This point generally refers only to enhanced cooperation, as this is codified primary law laid out in treaties articles.

\(^{10}\) For a discussion of various forms of affiliation beneath full membership compare Emmanouilidis 2008, 34 ff.
Secondly, although touching upon it when analysing the relationship between the EU and its citizens, the study does not intend to give a broad analysis of the ‘democratic deficit of the EU’ debate. This does not mean that the issue of the democratic credentials of the EU is unimportant here since this topic should certainly be kept at the back of the researcher’s mind while conducting the study. However, it is definitely not possible to do justice to such a huge topic here and the author therefore refers the reader to the impressive amount of literature that already exists on this topic.

Thirdly, the EU’s role as a normative power in international politics is touched upon but cannot be elaborated thoroughly as this would go beyond the scope of this study, *inter alia* because of the huge amount of existing literature on this topic.¹¹

Further methodological limitations will be discussed in the following section.

4 Theory and Methods

4.1 Theory

Having outlined the analytical path of this study, the theories and methods being applied to achieve new analytical conclusions have to be described. First of all, this study is designed to be theory-informed rather than theory-driven. More precisely, the primary aim is not to generate a new theory, but rather, based on a firm theoretical and empirical basis, to generate new knowledge and conclusions about the issue under study. Along with this, nevertheless, goes a critique of established theories that take a harmonious integration process for granted. Many theories dealing with the European integration process focus more on the search for a ‘general equilibrium’ in the relations and policies of the respective actors. In contrast to this, theories are needed that take account of the diverse nature of the actors in the European integration process and the increasing complexity of policy-making. They have to accept and position the notion of process differentiation in their reasoning instead of simply “fighting” the concept as a danger to the integration process. Concrete, this could mean for example theories concerned with diversity management taking into account different ‘skills’ and opportunities of actors, leading to the notion of possible plus-sum games through the exploitation of such resources. One could also resort to economic theory that depicts diversity as a resource for innovation. Another theory strand could consider new institutional developments that take account of a differentiated integration process (interview Martin Marcussen).

Touching upon issues like norms, identity and leadership as well as power relations between states, the study has to resort to a range of existing theories and cannot be based on a single theory strand. Having the nation state in the EU as the focus of analysis points to one of the main international relations and European integration theory strands, which are accounts of rational choice and liberal intergovernmentalism focusing on individualistic and materialistic
state actor behaviour (Schimmelfenning 2004, 76 ff.; Moravcsik 2003, 239 f., 243).12 Also, the identification of strong unanimity and, therefore, national sovereignty aspirations in the traditional second pillar of the EU – here external policy area – points to the importance of state and material power as having decisive effects on differentiation efforts in that area (Schimmelfenning 2004, 83). Equally, the notion of leadership represents a manifestation of the continuing importance of material power relations in the context of a project like the EU. Here the study is influenced by Moravcsik’s notion of the “relative power of nation-states” and their “asymmetrical interdependence” (2003, 247).

On the other hand, however, analysing differentiation in the European integration process touches upon the basic question of what the EU is or rather what common aspirations for the EU’s identity might be, thus putting the emphasis on the importance of the discourse between actors on different levels.13 This inclusion of the importance of discourses together with the related discussion about norms, values and identity relevant in an integration project emphasise the role of another main integration theory, social constructivism.14 This theory has as an underlying predication that the world is socially constructed, which means that human agents do not exist independently of their social environment and its collectively shared system of meanings (Jørgensen & Phillips 2002, 5; Risse 2004, 160). It also includes the notion that a given EU citizen may have multiple sets of values and ambitions, which are reflected on the regional, national and/or European level (Bailes 2009, 815). In addition, analysing the effects of differentiation on the relationship between the EU and its citizens concretises the constructivist influence on this paper. This is particularly the case when raising the question of the relevance and validity of European solidarity, especially against the background of the tendency towards greater renationalisation of politics and

12 Andrew Moravcsik (1998, 18) describes the general argument of liberal intergovernmentalism that “EU integration can best be understood as a series of rational choices made by national leaders.” Furthermore, Schimmelfenning (2004, 80) replicates Moravcsik saying “state governments call the tune in European integration. They pursue diverse interests generated at the national, domestic level; they engage in hard intergovernmental bargaining; and they are in control of the integration process.”
13 Those include local, regional, national and European, while the focus in this paper is on the discourse on the European level.
14 Compare Checkel (2003, 351, 353), who sees social constructivism as exploring “the ways group norms, ideas, and even cultures shape, and sometimes change, the identities and interests of political actors.” Social learning and norm diffusion are key aspects to explain actor behaviour in the European integration process.
15 Alyson Bailes relates these multiple sets of values and ambitions to the security behaviour of the respective state. It is claimed here that this notion can be understood more generally as referring to any policy area.
increasing euroscepticism on the part of European citizens. Finally, demanding a change of the integration logic also on the part of the EU institutions, the study takes into account the importance of institutions and institutional change linked to the notion of institutional and actor ‘learning’ (Checkel 2003, 352 ff.).

Especially concerning social constructivism, the study offers some theoretical contributions. It presents the notion of an EU of Projects as a possible way of reconciling the dilemma between increasing process differentiation in European integration and improving the relation between the EU and its citizens. Connected to this, the study will try to sketch out the concept of a multi-way integration process that takes into account the necessity and factual existence of process differentiation in the European integration project. Additionally, since empirical work on the respective policy area relevant for differentiation efforts is not very developed, the study can provide new inputs for this so-far underdeveloped analytical field. Finally, the clarification of terminology and the establishment of the distinction between process and outcome differentiation in an open-ended integration project like the EU can be defined as small but valuable theoretical contributions.

### Note on Terminology
This study establishes its own set of terminology on differentiated integration means. It partly resorts to existing terms but, given the huge variety and inaccuracy of most definitions, terms are adjusted in order to bring about as much clarity as possible.

4.2.1 A Normative Constructive Approach

Given the issue under study, the methodological approach is of a normative qualitative nature, as this paper deals with issues like shared or distinct beliefs and values between various players that surround political actions (Seale et al 2004, 3). In the sense of a qualitative study, the way to “prove” or make an academic contribution to a problem or issue is to find a way to understand and explain the reasons for and the dynamics of a phenomenon, in this case, the development, impact and relevance of the concept of differentiated integration in the European integration process. John W. Creswell brings the intended result of a qualitative study to the point:

The final written report or presentation [of the qualitative study] includes the voices of participants, the reflexivity of the researcher, and a complex description and interpretation of the problem, and it extends the literature or signals a call for action. (2007, 37)
The assessment of qualitative research is achieved using the criteria of validity and reliability. Flick writes in this context that “[t]he validity of a study is assessed with reference to the object under study” and that “[t]he central criteria depend on whether findings are grounded in empirical material, […] whether the methods are appropriately selected and applied, as well as [on] the relevance of findings and the reflexivity of proceedings” (2006, 15). In that sense, the means to assure the validity and reliability of this study are presented in the following.

Along the lines of the methodological path taken by Christian Fernández (2005), this study follows a ‘normative constructive approach’ meaning to strike a balance between idealism and realism, to be visionary and realistic at the same time and to combine critique with means to change things for the better (Fernández 2005, 18, 41 ff.). In other words, the thesis intends to provide plausible or workable solutions by giving realistic, normative recommendations about a specific problem. In concrete terms, the study describes and analyses in a normative-constructive way the path of the European integration process in harmonisation and differentiation terms and ends up with recommendations on the further development of the European integration process. Departing from the acknowledgement that process differentiation is inherent in the integration process, the researcher recommends that for a successful – integration-friendly, non-disruptive – European integration process a change in the overall integration logic concerning the communication of the necessity of differentiated integration towards the citizens of the EU as well as towards external actors is essential. Together with the advice concerning the appropriate embodiment of differentiation this demonstrates the norm-shaping or -constructing approach of the study.

By choosing the outlined approach, the author departs from conventional approaches or clichés concerning the academic handling of differentiation in the European integration process. Many recent works on differentiation have either focussed on the discussion about the necessity or the danger of a ‘hard core’ of countries driving the integration process forward, or on the effect of new instruments like ‘permanent structured cooperation’17, which would be implemented

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16 Flick also discusses ‘objectivity’ as a third criterion in empirical research (2006, 375 ff.). As stated also further below in this paper, the concept of objectivity is not seen as an appropriate criterion as a qualitative and social constructivist informed study like this is based on the notion of a heterogeneous reality that does not go together with the concept of objectivity.

17 A recommendable work on this issue is the EGMONT institute paper on “Permanent structured cooperation and the future of ESDP” by Sven Biscop (2008).
with the Lisbon Treaty. Those concepts are not irrelevant in the differentiation debate, but they have to be imbedded in a broader or substantial rather than a purely procedural context (interview Alyson Bailes). Whereas this study also deals with procedural issues when presenting and evaluating four different embodiments of differentiation, the originality and rationale of the study is nevertheless its substantial analysis, embedding the procedural debate in the broader context of the debate surrounding how the European enterprise should work, the importance of the respective policy area as well as the claim for a perception change in the debate on differentiation.

The aim of such a constructive study is to bring the existing closer to the desirable (Fernández 2005, 44). A normative approach is necessary in this study as it touches upon the idea and content of European integration, which is an emotionally charged concept that does not have a ‘neutral’, objective or common meaning to everyone. To discuss the development of the European integration process is to talk about norms, values and subjective expectations, which necessarily includes talking about what should or should not be (Fernández 2005, 10).

Although the study is not primarily designed to develop new theory, it nevertheless intends to make theoretical contributions concerning the understanding of the European integration process. Methodologically, this means the application of an approach that emanates from initial theories and ideas as well as new concepts established by the researcher. These will be used and developed to analyse and explore the issue under study with the help of qualitative text analysis, discourse analysis and expert interviews (operationalisation). The result is new contributions to the theoretical understanding of the European integration process in a normative constructive way as described above (interpretation, explanation).
Moving from theory to data and back again suggests a deductive approach. Furthermore, establishing the concept of a distinction between process and outcome differentiation in the integration process before analysing data in form of various embodiments of differentiation and the relevance of the respective policy area is characteristic of deductive logic (Babbie et al. 2007, 9).

As the researcher provides new normative constructions by evaluating the contrasting embodiments of differentiation and by claiming a necessary change in the integration logic in the relationship between the EU and its citizens and the EU and external actors, the limitation of a social constructively informed study mirroring “just one representation of the world among many other possible representations” (Jørgensen & Phillips 2002, 22) must be emphasised. This ‘one representation’ is unavoidably influenced by personal and to a certain extent, also political considerations of the researcher. In other words, the researcher explicitly distances herself from the interpretation of understanding her findings as ‘absolute truth’. However, although a researcher potentially skates on thin ice when providing normative conclusions, the issue under study would lose its value when avoiding that path. Given the thorough theoretical, methodological and empirical background of the study, the author is confident to be able to provide useful contributions to the academic

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18 Based on the circular, grounded theory approach developed by Flick (2006, 98-100).
debate on differentiation in the European integration process also precisely because normative conclusions are provided.

4.2.2 Qualitative Text Analysis

Of huge importance – not least for the sake of the validity of the approach taken – is a thorough qualitative text analysis by resorting to the huge amount of existing literature on differentiation in the European integration process, conducting systematic analysis of terminological, legal and political matters. As Klaus Krippendorff puts it:


Flick describes the information from existing literature as “context knowledge” that is indispensable for such a study (2006, 58 f.). With the help of this type of empirical background the study explores four embodiments of differentiation and the relevance of the respective policy areas in which differentiation is taking place. Having a thorough knowledge of established academic work on differentiation is indispensable to further develop this issue area academically. This is a necessary feature in order to be able to label the research project ‘scientific’, which means it has to “be based on previous investigations, must take account of results in this area and build on them, and distinguish itself from previous investigations on the chosen topic” (Titscher et al 2000, 12).

This method is also the prerequisite for the other two approaches applied in this study, expert interviews and discourse analysis. Without a thorough background from the existing literature on the issue at hand it is not possible to ask sophisticated questions during an expert interview (Rapley 2004, 17) or to understand the implications of political and academic discourses influencing the topic. Additionally, it is not possible to sketch out whether the knowledge obtained, for example during expert interviews, is new if a thorough presentation of existing knowledge is missing (Kvale 1996, 95).
4.2.3 Discourse Analysis

Discourse analysis\(^{19}\) is a very important method to be applied in this work, which means the constant observance and analysis of current political developments and discussions of political actors primarily on the European level that very often imply, although mostly not explicitly, notions of a differentiated integration process. One example is the reaction Nicolas Sarkozy triggered with his idea to create an ‘economic government’ of the eurozone with himself as ‘leader’, as analysed in part 7.5 in this paper. This approach is especially important in theoretical terms as it provides opportunities to “detect” social constructivist influences on actor behaviour.\(^{20}\) Also – departing somewhat from the established definition of discourse analysis outlined below – the explicit discourse on the application of differentiated integration means must be followed. The most apparent case concerns the request to apply enhanced cooperation for the first time ever (on divorce law, see below). This discourse provides an ideal ground to analyse in a social constructive context how knowledge is created through social interaction in which “common truths” – on the course of European integration – are created and brought into competition with each other (Jørgensen & Phillips 2002, 5).

The underlying definition of ‘discourse’ “is the general idea that language is structured according to different patterns that people’s utterances follow when they take part in different domains of social life”, one familiar example being ‘political discourse’. “‘Discourse analysis’ is the analysis of these patterns.” (Jørgensen & Phillips 2002, 1) In this sense, the social constructivist discourse surrounding the issue of differentiated integration is to be analysed in the sense of “a particular way of talking about and understanding the world (or an aspect of the world)” (ibid., emphasis in the original). In this connection it is also necessary to point to the quality of discourse analysis as critical, at least in the way it is applied here. ‘Critical’ research in this sense means “to investigate and analyse power relations in society and to formulate normative perspectives from which a critique of such relations can be made with an eye on the

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\(^{19}\) There is no single label or definition for the method of discourse analysis (Jørgensen & Phillips 2002, 23, note 1). This paragraph outlines the ‘form’ of discourse analysis applied in this study, while drawing back to the huge amount of literature existing on this research method, by that resorting to the multiperspectival approach in the sense of Jørgensen and Phillips (2002, 4), meaning to define “one’s own package” of discourse analysis.

\(^{20}\) Compare Risse (2004, 164) who describes ”[t]he emphasis on communicative and discursive practices” as a “characteristic feature of social constructivist approaches”.

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possibilities for social change” (Jørgensen & Phillips 2002, 2, own emphasis). This critical quality of discourse analysis is very important for this study as it adds another theoretical component that the study is shaped and informed by. These are rational choice and liberal intergovernmentalism theory. It therefore completes the theoretical picture linked to the method of discourse analysis\(^{21}\), which is often described as being accompanied by the concepts of ‘power’ and ‘ideology’ (Jørgensen & Phillips 2002, 3), combining rational and constructivist notions.

The focus of this study is the discourse on differentiated integration means in the European integration process on the European political level. In other words, the discourse mainly occurring between political state actors, which is, of course, also influenced by discourses going on on other levels – nationally, regionally etc. A second discourse analysis level is that of academic experts, which goes together with the qualitative text analysis approach but which must be distinguished from the expert interview approach, as the latter does not concern the use of language or the implicit influence on the discourse regarding differentiation in academic work. Rather, the expert interviews are conducted on specific questions and issues related to the topic of the study and are therefore not to be viewed as part of a discourse in the sense as it is applied here. The political and academic discourse is most prevalent in the context of the established distinction between process and outcome differentiation. Whereas process differentiation seems to be perceived as a reality on both the political and academic level, the existence of, or call for, outcome differentiation is to be defined as interpretations by political science scholars only and as such solely taken implicitly from the political process and never explicitly mentioned by political actors, as this would contradict the treaties and with them the overall ideal on which the EU is founded.

4.2.4 Expert Interviews

In order to gain a more thorough insight into particular matters, expert interviews with scholars working on differentiation in the European integration process were conducted. The interviews are to be understood as a supporting or complementary method or a means to

\(^{21}\) Jørgensen and Phillips (2002, 3 f.) emphasise the importance of viewing the methodological and theoretical study as a harmonious whole when applying discourse analysis (notion of the “complete package”). Steinar Kvale points to the importance of theoretical clarity connected to qualitative research in general (1996, 10 f.).
get new input for the debate on differentiation in the European integration process. Two experts have been chosen on the grounds of their academic interest and work on differentiation. The first interview, with Martin Marcussen from the University of Copenhagen, had the newly established concepts of the researcher (process vs. outcome differentiation) and the possible theoretical research contribution of the study in focus. The second interview, with Alyson Bailes from the University of Iceland, was centred on the role of the respective policy area in connection with differentiated integration means. Both interviews had, in a sense, the purpose of testing new concepts and new knowledge established by the researcher. Additionally, the second interview in particular but also to some extent the first, had explorative lineaments in the sense that new ideas and concepts for the study were detected (compare Kvale 1996, 97 f. on explorative and hypothesis testing interviews). The two topic areas were chosen as they represent the most important original research contributions of this study and given their newness, they increasingly need to be discussed regarding their implications for the study of the European integration process. A lot of useful and elaborate material could be gained from these interviews, facilitated by the fact that both interviewees are well established in academia.

The overall aim of the interviewer was to encourage the interviewees to give “thick descriptions” or “elaborated and detailed answers” (Rapley 2004, 15, emphasis in the original) on the chosen topic area, which reveals the quality of the interviews as semi-structured. Sending an outline of the topic including questions and small informative paragraphs a few days in advance facilitated this. For the actual conducting of the interview it was very important for the researcher not to be too fixed on the prepared outline, in the sense that she should “not strictly delimit the talk to [her] predetermined agenda” (Rapley 2004, 18). It was rather more a means to trigger the discussion, which led to a smooth flow of information. The outline was nevertheless important to keep the interviewee on track, providing some kind of a guideline to prevent deviations. In general, when conducting the interview the researcher was led by Rapley’s advice:

[I]nterviewers don’t need to worry excessively about whether their questions and gestures are ‘too leading’ or ‘not empathetic enough’; they should just get on with interacting with that specific person (2004, 16, 20, emphasis in the original).

Kvale (1996, 124) describes this type of interview as having “a sequence of themes to be covered, as well as suggested questions”, whereas an openness to change is an essential characteristic. Rapley uses the term “qualitative” interviews (2004, 15).
The method of interviewing applied in this study is based on the idea of “the active interview” laid out by Holstein and Gubrium (2004). ‘Active’ in this sense means to understand the interview as a form of interactive and interpretive activity between interviewer and interviewee, in contrast to the frequently stated opinion that researchers should keep their involvement to the minimum by trying to be little more than a “fly on the wall” during the interview (Holstein & Gubrium 2004, 140 f.). Accordingly, the interviewee should not only be seen as a “vessel of knowledge” (Holstein & Gubrium 2004, 144 f.), who will only provide valid answers if the researcher is neutral and unbiased and with that remains as passive as possible in the production of knowledge process. Therefore, in contrast to the positivist idea of the existence of an ‘objective reality’ and in line with a social constructivist stance, the approach presented here neglects the existence of ‘pure’ or entirely objective knowledge that has to be extracted from the respondent in as uncontaminated a method as possible. The aim rather is to trigger a discussion on the topic at hand instead of conducting a strict question-and-answer game, as the latter would not do justice to a complex and normatively loaded topic such as differentiation.

23 Steinar Kvale describes this with the metaphor of “the interviewer as a minor” who tries to “seek nuggets of essential meaning […] waiting in the subject’s interior to be uncovered, uncontaminated by the miner” in contrast to the metaphor of “the interviewer as a traveller” that involves a conversational approach in order to construct new knowledge (1996, 3 ff.).
5 Open-endedness: *Purpose* instead of *Outcome*

It has to be mentioned again that even if from a political science perspective it is often claimed that ‘homogenous integration’ is *de facto* no longer existent because of the various forms of differentiation already inherent in the European integration process and accelerated through the process of enlargement, the political ideal or norm of a unified community converging towards the open-end of a homogenous integrative status is still existent. In this regard, the emphasis is on the open-endedness of the EU project (for many: Emmanouilidis 2008, 10, 19; Thym 2006, 640; Bailes 2009a, 8; Bailes 2009b, 2). This makes all speculations about the EU becoming a federal state or, the opposite, only a loose economic alliance of states redundant. Many scholars at least implicitly argue in favour of outcome differentiation when denying that the integration process is intended to move towards a ‘harmonious whole’. But by rejecting the idea of the integration goal as a ‘common destiny’ for the member states of the Union, they themselves fall into the trap of trying to define the end-state of the Union, be it explicitly by proposing a ‘EU à la carte’ due to increased differentiation or implicitly by simply denying the intention of the Union as a harmonisation project. Instead of debating the ‘outcome’, the ‘intention’ or the ‘purpose’ that the Union has been created for should be emphasised. This is to benefit the European people through an economic and increasingly political Union. According to the treaties, the means by which to fulfil this purpose is via the increasing harmonisation of the policies of EU member states, even though with various possibilities for process differentiation. This consensus has not been abandoned yet. If those means turn out to be no longer appropriate to fulfil the Union’s purpose, decision-makers are expected to adapt European regulation respectively.

When observing the policy areas concerned which differentiation has already been applied to or about which there is a debate regarding its necessity, one can ascertain that the whole range of policy areas is affected by this development, be it financial, monetary or social policy, justice and home affairs, environment and climate policies or common foreign and security policy. The integration process also already contains a quite large amount of differentiation, be it various opt-outs concerning for example the Schengen agreement and EMU or
transition periods concerning new member states to the Union. A more recent form of flexibility has been the rather inflationary usage of extraordinary meetings of just a group of countries to address specific issues, for example a meeting in Berlin of six member states on 22 February 2009 to prepare for the G20 summit in London or a mini-summit of nine central and eastern European countries on 1 March 2009 to debate the economic crisis (Mahony 2009c). In addition, there is a quite constant debate about further process differentiation, for example in security and defence or the recent French proposal for an ‘economic government’ of the eurozone. Given this large range of application for differentiation tools, the general risks and possibilities connected to them have to be addressed.
6 General Risks and Possibilities

An overall concern pertinent to all forms of differentiation is the dissolution of integration efforts and/or the prevention of further integration, in short, the tearing apart of the Union.\(^\text{24}\) This is especially prevalent in terms of outcome differentiation but also to process differentiation because of the very nature of the concept. Differentiation is to be defined as the departure from the general principle of homogeneity of the EU which says that all member states participate similarly and realise the same matters at the same time (Müller-Graff 2007, 129, 131; Zervakis 2006, 206). Against the background of the above definition this is a legitimate concern. That is the reason why every proponent of the concept of differentiation emphasises the necessity of maintenance to a *binding integration core* – at least in the single market, competition and trade policy – for all member states as a basic condition for ’healthy’ differentiation (compare, for example, Cromme 2007, 827).

### Note on Terminology

The ‘binding integration core’ is not to be confused with the concept of a ‘core Europe’ or ‘core EU’. In this paper the latter is labelled ‘avant-garde EU’ or ‘centre of gravity’ in order to use ‘core’ only in one context so as to avoid creating confusion.

Additionally, many criticise the increased complexity and lack of transparency due to the application of differentiation in an already complicated endeavour like the European integration process, endangering the overall coherence and consistency of the Union (for many: Zervakis 2006, 207). This would only intensify the lack of democratic credentials of the European Union by deepening the rift between elites and citizens, consequently strengthening the bureaucratic and undemocratic nature of the Union.

The possibilities linked to differentiation embrace first and foremost the overcoming of blockades and/or lack of political will to move the integration process forward. The concept is also understood

\(^\text{24}\) Joschka Fischer, for example, in his speech at Humboldt University named the danger of the loss of European identity, of internal coherence and with that the danger of the internal erosion of the EU (2000, 27 f.).
as a means to prevent a ‘dilution of integration’ (wider but weaker) as a consequence of enlargement (Zervakis 2006, 210). Furthermore, differentiation can increase the EU’s effectiveness, efficiency and capability of policy-making and contribute to the endeavour to keep a Europe of 30+ governable. This is just a general point, usually connected to differentiation efforts. More concrete risks and possibilities vary according to the different embodiments of differentiation and will be illustrated in the following chapters.
7 Embodiments of Differentiation: Inside vs. Outside the Union Framework

The most important distinction has to be drawn between differentiation inside and outside the Union framework, distinguishing between institutional (or formal) and political (or informal) differentiation.\(^25\) The inside-outside distinction can be understood as an umbrella concept for several embodiments of differentiation, such as an EU of different speeds, avant-garde Europe, opt-out policy and politics of alliances.

The inside-outside distinction can in some cases be blurred to the extent that, besides the formal treaty texts, the so-called “living constitution of the EU” (Marcussen 2008, 11) has to be kept in mind. According to this concept, procedures and structures as they are described in legal texts may not correspond to every-day decision-making practices that tend to be informal, multi-level and elusive in character (ibid.). Whenever detected, this aspect will be highlighted.

The existence of institutional tools for differentiation in the treaties mirrors the fact that the member states – often called ‘Masters of the treaties’ – have translated the necessity for process differentiation into treaty articles. The most apparent was the introduction of ‘enhanced cooperation’ into the Treaty of Amsterdam, whose regulation has been reformed through the Treaty of Nice. The most important change was that originally the Council had to decide unanimously in order to authorise enhanced cooperation. According to Nice, only qualified majority voting (QMV) is necessary to allow enhanced cooperation (Art. 11 (2) TEC in both cases). The Lisbon Treaty introduced a distinction by policy area: According to Art. 329 (1) TFEU\(^26\), the Council decides with QMV if enhanced cooperation is authorised “in one of the areas covered by the Treaties, with the exception of fields of exclusive competence and the common foreign and security policy”. Authorisation to proceed with enhanced cooperation in the area of Common Foreign and Security Policy (CFSP) shall be granted

\(^25\) For an overview see Appendix 1: Differentiation inside and outside the European Union framework.

\(^26\) “TFEU” stands for the Treaty on the Functioning of the European Union, consolidated version as amended by the Treaty of Lisbon.
by a decision of the Council acting unanimously (Art. 329 (2) TFEU). Additionally, in contrast to Nice, where eight member states were the minimum threshold for enhanced cooperation (Art. 43 (g) TEU), Lisbon sets nine countries as the minimum (Art. 20 (2) TEU-L\(^{27}\)).

The treaties contain some more features of flexibility in the area of Common Foreign and Security Policy. One example is the so-called instrument of ‘constructive abstention’, which is laid out in Art. 31 TEU-L. This provision constitutes that abstentions by a member state, accompanied by a formal declaration, do not mean that the member state in question is obliged to apply the decision but must accept that it commits the Union. The member state must then refrain from any action that might conflict with Union action based on that decision. In other words, the abstaining member state allows the other states to move ahead on a CFSP issue.

Another example is ‘permanent structured cooperation’ in the area of Common Security and Defence Policy (CSDP) according to Art. 42 (6) and 46 TEU-L, as well as to Protocol 10 on Permanent Structured Cooperation of the Treaty on European Union. This is an instrument for member states “whose military capabilities fulfil higher criteria and which have made more binding commitments to one another in this area with a view to the most demanding missions” to establish closer forms of cooperation within the framework of the EU (Art. 42 (6) TEU-L).\(^{28}\)

Given these provisions, one would expect that it is logical for the actors in the integration process to use the EU’s own tools to implement the necessary process differentiation. However, the most general legal differentiation instrument, enhanced cooperation, has never been used! Obviously there is great hesitance towards using this legal tool to steer the EU’s own integration development. Many scholars dealing with differentiation heavily criticise this non-usage of enhanced cooperation (for many: Emmanouilidis 2008, 10). Their argument is that differentiation outside the Union framework – or “extra-EU cooperation” as Emmanouilidis puts it – is often imperfect, unbound and arbitrary, which potentially leads to suboptimal results and could even harm the EU. In contrast, flexible cooperation within the Union framework provides a remarkable number of advantages:

\(^{27}\) “TEU-L” stands for the consolidated version of the Treaty on European Union as amended by the Treaty of Lisbon.

\(^{28}\) For an overview on enhanced cooperation, constructive abstention and permanent structured cooperation compare Emmanouilidis 2008, 18 f.
Advantages of flexible cooperation within the Union framework

Political or informal differentiation approaches are closer to classical alliance policy between countries and therefore harder to keep under control. This could consequently harm the community method. A very important point is, furthermore, the problem of double structures that creates inefficiency and waste of resources. Differentiation outside the Union framework is nevertheless taking place and is sometimes even a necessary condition for successful differentiated policy making. More can be read on this issue below in paragraph 7.4 ‘Outside: politics of alliances’.

7.1 **Inside: Different Speeds – Same Degree of Integration for all Member States**

One way of establishing differentiation within the Union framework is the creation of changing leading coalitions or ‘islands of differentiated integration’ (Weidenfeld et al 2006, 12), which could work as a catalyst for more integration in the respective policy area. This is to be understood as a group of countries integrating further within the respective policy area and therewith paving the way for other more reluctant countries. Crucial in this context is the idea of providing a learning environment or process for these hesitant countries through

- These tools respect and benefit from the Union’s single institutional framework.
- They preserve the supranational powers and composition of the Commission, the EP and the ECJ and
- they limit the anarchic and uncontrolled use of flexibility, therewith guaranteeing a high level of calculability due to the existence of clear rules concerning the initiation, functioning and scope of differentiated cooperation.
- Through its high degree of openness and the involvement of the EP and national parliaments this form of cooperation ensures a high level of democratic legitimacy.
- It enables the continuous development of the EU’s acquis in line with the requirements of the treaties and in that sense also reduces the overall risk of a confrontational split between the in- and outsiders of such a cooperation. (Emmanouilidis 2008, 9, 19-23)
which they will be encouraged to follow the leading countries and thus catch up in terms of the integration process.

Such a form of differentiation has also been referred to as ‘hubs and spokes’, which would lead to the creation of an ‘open space of gravity’ (Weidenfeld et al 2006, 13) consisting of the sum of all cooperation projects. It is crucial that those projects remain open to all member states, but in order to ensure success, certain conditions for participation have to be established. The result can be labelled a temporary EU of different speeds.

### Note on Terminology

In order to bring as much clarity as possible into “the Babylonian terminology chaos” (Müller-Graff 2007, 129) surrounding the concept of differentiation, it is important not to confuse ‘Europe’ and ‘EU’ when introducing the names of the single differentiation embodiments. The difference shall be illustrated by the following example: A ‘Europe of different speeds’ includes potential future EU member states and aspirants for the accession process in general. This potentially includes concepts like ‘association plus’, ‘membership minus’ or ‘privileged partnership’. On the other hand, an ‘EU of different speeds’ only refers to the member states of the EU, the current EU-27.

The former concept is linked to the broad issue area of enlargement and therefore adds another layer of differentiation to the picture. In order not to confuse the inside-outside Union framework distinction established here, the focus is on ‘EU’ rather than on ‘Europe’.

The same applies for example to the terms ‘avant-garde EU/Europe’ and ‘two-class EU/Europe’. The commonly used term ‘Europe à la carte’ does not really make sense in this regard as it is intended to mean the ability to pick and choose from EU and not European policy areas.

The first example of non-simultaneous integration was established in the Maastricht Treaty with the agreement to allow different speeds when implementing the European Monetary Union (EMU) (Thym 2006, 639). A more recent example illustrating that an EU of different speeds is increasingly perceived as real is the current strive of many countries to adopt the euro as soon as possible. This policy is widely perceived as a reaction to the financial crisis and a means to enter the ‘safe haven’ of the euro zone. Another interpretation would be that the countries are reacting to the Lisbon crisis, which has been accompanied by speculations about countries, which tend to bloc all
remaining member states, that could be called upon to let the others move forward. More precisely, they anticipate that the EU of different speeds is up and coming or already existent and the euro group will be the best integrated, most advanced, in short, ‘speediest’ part of the EU. Therefore, they channel their efforts to belong to this group in order not to be left behind.

7.1.1 Institutionalisation: Enhanced Cooperation

As has already been touched upon above, it seems crucial to explore and practice the legal instruments of differentiation, which could provide the basis for community-friendly process differentiation. This is especially evident in the case of enhanced cooperation, which scholars often describe as ‘the central tool of differentiation’ and which provides the legal means for changing leading coalitions in the EU integration process. These are laid out in Title IV “Provisions on Enhanced Cooperation” in the Treaty on European Union and Part Six, Title III in the Treaty on the Functioning of the European Union. According to those provisions, member states can establish enhanced cooperation “between themselves within the framework of the Union’s non-exclusive competences” excluding common foreign and security policy and “may make use of its [the Union’s] institutions”. In addition to this, “enhanced cooperation shall aim to further the objectives of the Union, protect its interests and reinforce its integration process” by remaining open “at any time to all Member States”. The conditions for the implementation of enhanced cooperation are that the Council decides that “the objectives of such cooperation cannot be attained within a reasonable period by the Union as a whole” and that at least nine member states participate. Additionally, “such cooperation shall not undermine the internal market or economic, social and territorial cohesion” of the Union and is not allowed if it leads to a “barrier to or discrimination in trade between Member States” or if it distorts competition within the Union. Finally, the acts adopted within the framework of enhanced cooperation “shall bind only participating Member States” and they

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29 Especially in the case of Ireland after the negative referendum in June 2008.
30 Art. 20 TEU-L, Art. 27a – 27e, 40b, 43 – 45 TEU (Nice).
31 Art. 326 – 334 TFEU, Art. 11, 11a TEC (Nice).
32 Art. 326 TFEU.
33 Art. 20 (1) TEU-L, Art. 328 TFEU.
34 Art. 20 (2) TEU-L.
35 Art. 326 TFEU.
“shall not be regarded as part of the acquis which has to be accepted by candidate States for accession to the Union.”

No one knows yet if these primary law provisions work in practice. Ten countries were making an attempt on divorce legislation but the Commission is still very hesitant to allow such a move. In July 2008 Austria, Bulgaria, France (since January 2009), Greece, Hungary, Italy, Luxembourg, Romania, Slovenia and Spain have decided to formally request the European Commission to launch the enhanced cooperation mechanism after the 27-nation bloc has been unable for over two years to introduce pan-European rules in order to clarify which law should apply in cases where a married couple in which the husband and wife come from different countries wants to get divorced. Sweden blocked an EU-wide agreement fearing that EU harmonisation in the area could threaten its liberal family law. Under the debated rules, if a mixed nationality couple decides to divorce, spouses would be allowed to choose the competent court and the law to apply to their case. Should they fail to agree, the couple would be automatically referred to a court in their place of residence (Goldirova 2008). The ten member states argue that, at present, it is too easy for husbands or wives in international marriages to take action in courts where they feel they will get the best divorce settlement - a form of ‘litigation shopping’. The draft legislation, introduced by the Commission in 2006, known as Rome III, would combat this by harmonising the rules courts use to determine which national law should apply in cases where the husband and wife have different nationalities, live in different member states, or live outside of their home member state. As the draft legislation has stalled in the Council of Ministers there would be no other way forward for the willing member states than to apply enhanced cooperation (Brunsden 2008).

Jacques Barrot, Commissioner for Justice, Freedom and Security, must weigh up the opportunities and the potential risks of using this unexplored and untried mechanism for the first time. The Commission has been examining the possibility of enhanced co-operation since July 2008, but has yet to deliver its verdict, which is expected before the end of the current Commission’s mandate, scheduled for November 2009. Mr Barrot has been rather critical on the process stating that he feels a political “critical mass” seems to be lacking for the case to succeed (Brunsden 2009a/b). He grounds this estimation basically on the fact that other countries – Finland, Germany, Ireland, the Netherlands, Poland, Portugal and the UK – are opposed to applying enhanced cooperation to divorce law.

The application of flexibility can complicate the picture in many ways. For example, there are concerns that complex legal tangles

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36 Art. 20 (4) TEU-L.
could result in cases where one partner comes from a country participating in Rome III and the other does not (Brunsden 2008). Therefore many possible situations and repercussions of such a move have to be considered by the Commission when drafting its proposal for the Council. Furthermore, the Commission and some member states fear that a precedent will be set that could lead to the fragmentation of the Union. If Rome III is adopted and is seen to improve the legal environment, then member states will be less reluctant to resort to enhanced co-operation in future (ibid., Brunsden 2009a). While the former concern about the consideration of repercussions through the application of enhanced cooperation is thoroughly legitimate and demands utmost prudence in the process, the reaction to the latter must surely be that the whole point of writing a procedure into the treaty is that there is the political will to use it. Otherwise, it has to be defined as mere lip service, acknowledging that the procedure is necessary but with the tacit understanding that it will never find its way into practice. It is beyond doubt that the application of a procedure like enhanced cooperation has to be developed very carefully because of the complications it can cause and because of the effects on basic understandings of the European integration process. This, however, cannot mean the refusal to ever use this procedure in the real world and keeping it only as a paper tiger.

It is not only the Commission that is quite hesitant towards the application of enhanced cooperation. Also, the member states have so far very seldom resorted to the possibility of introducing enhanced cooperation. An explanation could be that member states are afraid of applying flexible instruments because even if they cannot be forced to follow others who go ahead in certain areas they might experience an identity or value crisis. They fear ending up in a situation of peer pressure to follow other countries even if they would not under different circumstances.

Another explanation can be derived from a situation observed by Jolyon Howorth. He claims that a problem frequently encountered both in European integration in general and in the area of CFSP/ESDP in particular is that member states, having decided for a variety of external constraining reasons that it was necessary to set up a ‘centralizing’ institution, immediately became nervous of their own temerity and began trying to keep the new body under their own firm control (Howorth et al 2007, 71). The same seems to hold true for the instrument of enhanced cooperation. Member states first agree that they need the tool and write it into the treaties, but once confronted with its actual existence and even upcoming application, they shy away in the fear of losing control, being left behind or outside the process in any policy area by setting a precedence.

One crucial point yet to be explored is whether the legal provisions are perhaps too tight for enhanced cooperation to be a workable
instrument (Zervakis 2006, 207 f.). This has to be debated against the background of necessary caution in applying differentiation because of its potential disruptive effects. The authorisation procedure for enhanced cooperation has to follow a strict legal and political procedure:

- First of all, the Commission submits a draft proposal to the Council after member states have addressed a request to the Commission about their wish to initiate enhanced cooperation.
- The Council then needs to vote by QMV in favour of allowing enhanced co-operation to go ahead (unanimously in the case of common foreign and security policy) after it has received consent from the EP.
- At least nine member states then have to agree to participate.
- All of these participating countries then have to vote on the legislation by unanimity for it to enter into force.
- During this time, any member state can demand that the process be suspended and discussed by EU leaders at the next European Council.
- Even if all legal requirements are fulfilled, the Commission, the EP or the Council can still refuse their permit on political grounds.

Authorisation procedure for enhanced cooperation

Some would argue that such tight rules should not be seen as a ‘straight jacket’ to enhanced cooperation as they are necessary in order to adhere to Art. 20 (2) TEU-L which states that “[t]he decision authorising enhanced cooperation shall be adopted by the Council as a last resort”. Furthermore, from a legal perspective, these rules should not be considered as being too tight as they would not impose a stricter set of rules on enhanced cooperation than on concerted action by all member states (Thym 2006, 645 f.). The only exception is the nine member states threshold, which some consider necessary in order to avoid exclusive cooperation by the big or founding member states and to prevent a fragmentation of the Union into too many small groups (ibid., 645). In sum, having a legal as well as a political barrier that must be passed in order to initiate enhanced cooperation is an essential safeguard in order to guarantee differentiation without disruption (Thym 2006, 648 f.).

Another argument that refutes the opinions on the legal provisions as too tight is the reference to the effet utile rule, which has been established by the ECJ. According to this interpretation norm a European treaty provision or law must always have a meaningful field of application in practice. In other words, a provision can never be interpreted in such a way that it has no legal effect. Additionally, the
integration-friendly rulings of the ECJ in past decades suggest a favourable approach towards enhanced cooperation (Kurpas et al 2006, 5).

In conclusion, it is only the necessity to have nine member states in order to initiate enhanced cooperation that might prevent the certainly useful application of flexibility in areas where only a smaller number of countries would wish to go further. Especially the accession of economically and partly politically rather different countries to the EU-15 has lead to an even more diverse Union, so that rather smaller groups of countries with similar policy interests can be expected. On the other hand, a bigger number of member states makes the achievement of a certain threshold quite possible than a smaller number, so that nine might be a good choice in order to keep the balance between flexible process differentiation and the ideal of outcome harmonisation. In order to find out if an amount of nine countries is practical or if it has to be adjusted in response to the countries’ demands, the tool enhanced cooperation has to be explored in practice.

Lastly, one unintended but possible development through the application of enhanced cooperation should be illustrated. A core aspect of enhanced cooperation is that it must remain open for all member states at any time (Art. 20 TEU-L) in order to guarantee its quality as a means to a temporary EU of different speeds against the background of the harmonisation purpose of the integration process. However, the application of enhanced cooperation in certain policy areas can inevitably lead to the permanent exclusion of some member states and with that to differentiated integration on a permanent basis. This would be the case for example in the enhanced cooperation case on divorce policy. Malta, which does not even have divorce in its legal system, would never join this area of cooperation. Also Sweden, the UK and Ireland have demonstrated their absolute opposition to the application of foreign divorce law on their territory, which is an essential element of the draft legislation. Consequently, enhanced cooperation in such cases would lose its ability to function as a ‘demonstration project’ for other countries to follow later. Legally it would remain a project of enhanced cooperation aiming towards the participation of as many member states as possible (Art. 328 TFEU). But de facto it would mean differentiation on a permanent basis and with that, coming close to an avant-garde EU in that specific policy area. Such a situation can well be imagined in other policy areas, for example foreign and defence policy or even taxation, where national traditions and particularities could lead to permanent differentiation.
7.2 Inside: Avant-Garde EU – Regional Integration within Regional Integration

One form of differentiation that has been, and still is, visible in the differentiation debate, but is mostly rejected because of its likely disruptive effects, regards an avant-garde EU (other terminology includes triumvirate or centre of gravity)\(^{37}\). The zenith of this debate\(^{38}\) is found in the famous speech of former German Vice-Chancellor and foreign minister Joschka Fischer at Humboldt University in Berlin on 12 May 2000 entitled “From Confederacy to Federation: Thoughts on the Finality of European Integration”. He stated that the instrument to master the two big tasks of the EU – Eastern enlargement and political integration – is a strong Franco-German alliance which should form the avant-garde or a ‘centre of gravity’ for the Union until the completion of Robert Schuman’s idea of a European Federation has been achieved. This avant-garde should constitute the driving force toward the completion of political integration (Fischer 2000, 11, 20 f., 29). According to some, however, during the last five years – especially due to the big enlargement round – the ‘Franco-German engine’ is no longer but a new centre of gravity has yet to come up (Vucheva 2009; EurActiv 2009). Even more, Alyson Bailes sees “the most tricky divisions of prima facie interest and of derived policies […] between the largest states such as France and Germany and Britain” and this “may be the simplest answer as to why we have not seen any stable ‘hard core’ phenomenon emerging in 21st century Europe so far and may never see it” (Bailes 2009b, 4).

The main difference to the EU of different speeds in conceptual terms is that an avant-garde EU establishes differences on a permanent basis. Whereas in an EU of different speeds, the overall ends of integration remain the same for all countries, in an avant-garde EU this is abandoned since it is accepted that a group of countries, a centre of gravity, forms the permanent head of the integration process. This could be labelled ‘regional integration within regional integration’ as permanent blocs of member states would be established. Another difference is that the concept of an avant-garde EU assumes generally that the same countries form the permanent leading group (usually the big states, France, Germany, UK, sometimes Italy), whereas in an EU of different speeds changing

\(^{37}\) One example constitutes the often-claimed German-French-British avant-garde on EU security and defence as well as on economic matters (Laumen, Maurer 2006, 19).

\(^{38}\) In the debate the applied term is usually ‘core Europe’ (see for example the Schäluble-Lamers paper from 1994), but for stated reasons of terminological clarity ‘avant-garde EU’ is preferred here.
leading coalitions with different countries can and will emerge, according to the policy area concerned.

From a scholarly perspective, the concepts referring to an avant-garde EU are generally described as unrealistic and counterproductive to the integration process, not least because of their hegemonic attributes. Firstly, they are unrealistic, as a predominant majority of countries would like to belong to the avant-garde, which would contradict the very character of such a group. Furthermore, potential avant-garde countries would be forced to actively refuse the wish of the remaining countries to participate, which no respected country would be happy to do (Weidenfeld et al 2006, 13). Secondly, they are counterproductive, as an atmosphere of mistrust between the ‘ins’ and the ‘outs’, which would lead to the permanent establishment of a two-class EU, would be created, having rather disruptive effects on the integration process. Consequently, potential benefits from differentiation projects would not be achieved, as differentiation would be perceived as a threat rather than an opportunity.

The main obstacle to an avant-garde EU is that it goes hand in hand with the concept of periphery. This has especially been criticised in the context of integrating new member states, which might be willing to join the avant-garde group but may be unable to do so for many years to come. In contrast the UK, for example, might be able but unwilling to join the centre of gravity (Zielonka 2000, 153). Another crucial point is how the excluded countries materially perceive the centre and the periphery, namely the centre as “affluent and stable” in contrast to the periphery as “impoverished and unstable” with a deep dividing line between the two areas. Therefore, especially the new member states of the enlargement rounds of 2004 and 2007 suspect the proponents of an avant-garde EU of deliberately trying to keep the less developed Eastern European countries outside a more prosperous EU (Zielonka 2000, 153. f.). Václav Havel, former President of the Czech Republic, brings the point to bear:

“The idea that there could forever be two Europes – a democratic, stable and prosperous Europe engaged in integration, and a less democratic, less stable and less prosperous Europe – is, in my opinion, totally mistaken. It resembles a belief that one half of a room could be heated and the other half kept unheated at the same time. There is only one Europe, despite its diversity.” (quote taken from Zielonka 2000, 155)
7.3 Inside: Opt-out Policy

Maybe the most used embodiment of differentiation is the granting of opt-outs to certain countries on certain issues. Opt-outs are included in the EU framework in form of protocols to the Treaty on the European Union and therefore belong to the primary law of the EU. While remaining inside the treaty framework, granting opt-outs is a differentiation policy allowing countries to remain outside deepening cooperation in certain (sub-)policy areas in contrast to flexibility mechanisms under which countries can go further.

Generally, every differentiation policy can be defined as either countries going further or lagging behind. In order to establish the difference, it is necessary to use the binding core common to all member states as the reference point. In the case of an opt-out it is based on parts of this core that countries decide to stay outside, meaning they are (willingly) left behind. In the case of enhanced cooperation or politics of alliances for example, countries go beyond the binding core (see Figure 2).

Figure 2: The binding core

Opt-out policy is often welcomed as a very successful tool for adherence to the concerns of countries on single issues and to overcome overall blockades of integration efforts by allowing certain countries to stay out (Corbett 2008). Opt-out policy makes sense, since it constitutes a learning process for the countries that are not yet ready whilst preserving the EU’s single institutional framework, as this form of differentiation does not lead to the creation of new

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39 For an overview of “Opt-out policy in practice” see Appendix 2.
41 He states in the context of opt-out policy: “In the EU, the give-and-take cooperation of all member countries is fundamental to the continued success of the EU.”
institutions outside the Union. Additionally, opt-out policy has a positive democratic effect as it respects a national majority without allowing this group, which is a minority at the European level, to prevent the European majority moving forward on a policy issue (Thym 2006, 642). Finally, in contrast to enhanced cooperation, this constitutes a well-tried mechanism, which does not seem to hurt the integration process. Further, some claim that opt-out policy can result in new integrationist dynamics, as demonstrated for example by the use of opt-ins by the UK and Ireland in the area of Justice and Home Affairs (Emmanouilidis 2008, 10, 32). A major difference to enhanced cooperation is the fact that the differentiated respective acquis, under which certain countries enjoy an opt-out, also applies to future member states. This means that new member states must respect and implement the totally accumulated EU law, even if some older Union members have successfully negotiated an opt-out from certain parts of the acquis (Emmanouilidis 2008, 32 f.).

Critics perceive opt-outs as a rather pick-and-chose approach, meaning countries simply chose which policy issues whether they wish to integrate or coordinate further with other countries or if they prefer to keep the national framework. In the German debate, it has been referred to as the danger of the EU becoming a ‘Gemischtwarenladen’ (general merchandise store). Despite the quality of opt-outs being a policy of ‘cherry-picking’ or ‘EU à la carte’, which potentially makes the EU less transparent and in some cases even less coherent and less solidary, some claim that the positive integrationist dynamics spurred by opt-out policy result in more benefits than harm (Emmanouilidis 2008, 33).

A crucial point of opt-out policy is the timeframe, or rather, which timeframe is perceived. On the one hand, opt-outs are perceived as a temporary ‘stepping out of the line’ by certain countries in order to give them time to be ready to opt in. This idea would belong to the notion of an EU of different speeds but with the same integration ends. It comes closer to an EU à la carte if the opt-outs are established and perceived as long-term exceptions without the implicit expectation of the countries to opt in at some point. The proponents of the concept usually perceive the former timeframe whereas opponents refer to the risk of permanently fragmenting the Union through the granting of opt-outs.

Whilst there is no legal date of expiry for opt-outs, some documents explicitly mention the possibility to opt in if the countries wish to do so. Additionally, the review of opt-outs is sometimes

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42 This applies to the UK and Ireland concerning the change from unanimous to qualified majority voting in the sector of Police and Judicial Co-operation in Criminal Matters. Furthermore, Denmark has the possibility to change its complete Justice and
added, as is the case for the Irish Police and Judicial Co-operation in Criminal Matters (PJC) opt-out, to be revised three years after the Lisbon Treaty enters into force. Finally, naming the respective countries as either ‘out’ or ‘pre-in’\textsuperscript{43} clearly hints to the perception of an opt-out policy’s character. Currently, the Danish debate on the abandonment of one, several or all of its opt-outs, supports the “pre-in” or “temporarily out” characterisation.\textsuperscript{44}

In connection with granting opt-outs, the grounds upon which those opt-outs were (or are) granted should be kept in mind. In many cases, the respective governments are in favour of furthering the integration process, but the people as a majority are opposed to this. This is true for the Danish government who ‘had to’ demand the opt-outs of the Edinburgh Agreement in order to guarantee the Danish people’s acceptance of the Maastricht Treaty in 1993 after the treaty had been rejected in the first referendum. The current Irish case on the Lisbon Treaty is another example. In a constructivist sense, this could be a hint of differing “amounts” of identification on the part of the elites and the people. Alison Bailes illustrates this quite well when stating:

> “When proposed EU advances are struck down in popular referendums, it usually means that the elites have got carried away by an emerging club spirit while the peoples’ real needs either remain unreconciled, or would have pointed in another direction.” (2009, 12)

\vspace{10pt}

Note on Terminology
Opt-outs with an indefinite timeframe could technically also be considered as policies of an avant-garde EU instead of an EU à la carte. The decisive difference between the two concepts is that the avant-garde implies the deliberate definition of ‘avant-garde’ by those member states that intend to belong to this centre group. In other words, they ‘force’ the other states in the periphery, whereas in the case of an opt-out or EU à la carte, the countries that remain outside chose to do so. In other words, they enable other member states to broaden the common binding core getting an individual exception for this policy area in return (see also Figure 2 for clarification).

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\textsuperscript{43}See footnote 7.
\textsuperscript{44}For example, on enquiry from the Irish, the Danes reported rather negative experiences from the opt-out on certain aspects of defence policy, because they feel the Danish decision to opt-out from EU defence in 1992 was to their ultimate disadvantage (Mahony 2009a).
7.4 *Outside*: Politics of Alliances

**Note on Terminology**
When stepping outside the Union framework one would expect the notion of ‘intergovernmental cooperation’ to come up. However, this term is ambiguous. On the one hand, it is to be understood as the traditional form of international cooperation between countries in the sense of classical alliance politics. On the other, it is a defined term for a certain decision-making method of the EU mainly referring to Common Foreign, Security and Defence Policy according to which the European Council – that is, the state governments – acts unanimously to the exclusion of supranational bodies. Despite the exclusion of the latter, cooperation still takes place within the Union framework, as Foreign, Security and Defence policy form the traditional 2nd pillar of the Union. In order not to confuse the terminology, this part, referring to coordination outside the Union framework, is headlined ‘politics of alliances’.

Classical alliance politics mean that a group of countries intensifies cooperation on the basis of intergovernmental mechanisms and procedures outside the EU framework. This means that cooperation is limited to the relations between governments of the participating countries and therefore does not include the transfer of sovereignty rights to any supranational authority. However, according to Art. 4 (3) TEU-L member states participating in such alliance policies must adhere to the principle of loyalty and not undermine the functioning of the Union. Additionally, this form of closer cooperation is not possible in areas where the EU has exclusive competences (Emmanouilidis 2008, 24).

Alliances between member states outside the Union framework are likely to occur if legal restrictions prevent the usage of intra-EU differentiation tools. Concerning the instrument of enhanced cooperation this would 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, or if the authorisation of cooperation cannot be granted since there is no sufficient qualified majority in the Council. The latter could especially be the case in the field of CFSP, as the initiation of enhanced cooperation in this policy area requires a unanimous decision within the Council (Emmanouilidis 2008, 24, footnote 21). Apart from legal hindrances, political hurdles also potentially cause member states to resort to alliance policy. This can be expected especially on issues belonging to the so-called *domaine réservés*, comprising usually foreign policy,
security and defence, but in some countries also social policy issues. Those are usually policy areas, which a country understands as being of crucial importance to its self-conception as a sovereign and independent state.

A group of countries is also expected to resort to politics of alliances on grounds of capability. Put differently, they decide to move on – if not possible within the framework, maybe on the grounds of legal hindrances as described above – outside of the framework because other member states do not possess the appropriate resources or capabilities to participate in the cooperation. The point to be emphasised is that it is not always solely dependent on political will, but also on material capabilities if further integration within the Union is to work out. This can particularly be expected in high cost-intensive areas such as defence policy.45

As has already been touched upon above, closer cooperation outside the EU bears a number of potential risks. It means the exclusion of EU institutions as 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. The inclusion of outsiders entirely depends on the political willingness of participating member states to associate them. Other implications are:

- The establishment of new institutions outside the framework, which could lead to double structures.
- The lack of democratic legitimacy on the European and the national level due to decreased influence of the EP and national parliaments.
- The decrease of trust and the obstruction of cooperation inside the Union through the adoption of procedures and legal norms outside the EU, which could potentially lead to conflicts with existing or planned Union law. Furthermore, non-participating member states and the EU institutions have to accept the decisions taken outside the Union as fait accompli if they are eventually incorporated into the Union framework.
- The potential problematic integration of the external legal acquis into the EU, as for example in the divorce law case. (Emmanouilidis 2008, 26 ff.)

45 Compare Bailes (2009, 10) naming defence expenditure and the basic underlying military traditions and readiness to reform as the crucial factors.
Nevertheless, in some cases politics of alliance might be a useful tool in order to, as Emmanouilidis puts it, “make a step forward outside the Union instead of waiting indefinitely for a small step inside the EU” (2008, 10, 24 f.). In order to minimise the risks such a form of cooperation poses to the community method, he suggests to follow only temporary alliance politics, which should be open to all member states with the aim of integrating the legal norms adopted and the cooperation initiated outside the Union into the framework as fast as possible, following the example of the Treaty of Prüm or the Schengen Agreement. In short, this form of cooperation should, similar to a EU of different speeds inside the EU framework, work as a kind of “laboratory” (Emmanouilidis 2008, 10, 24 f.46), providing a ground for the later accession of all member states and incorporation into the acquis of the EU.

The risk that once initiated politics of alliances remain outside the EU without being embedded into the legal framework is even more prevalent than in the above situation. This illustrates the possibility that enhanced cooperation could remain a permanent form of differentiation without the prospect of encompassing all member states at some near point. Apart from the legal hindrances this is especially due to the fact of various still existing forms of domaine réservées, which are usually quite immune to being opened up for supranational cooperation. Additionally, in contrast to enhanced cooperation, no legal, intra-EU order exists, which demands the inclusion of all member states as soon as possible.

7.5 Outside to make Inside possible – a Recent Example

Alongside all pleas for more differentiation in the integration process, one must not forget that the necessity for more differentiation essentially originates from the need for intensified community action in many EU policy areas. A very recent example is the overall acknowledged need for intensified and improved action in the economic and monetary policy area, which has become apparent due to the global financial crisis. The notion of differentiation comes into the picture when determining that more community action does not

46 The successful implementation of the Treaty of Prüm into the Union framework, which was an extra-Union cooperation initially, would prove that the chances to incorporate a legal and political acquis into the EU framework are higher if the participating states keep the ‘outs’ constantly informed and if initially participating EU states actively promote a quick incorporation.
always mean more concerted action by all 27. To build further on the above example, stronger concerted action in the economic and monetary area makes more sense among the countries of the euro zone. This should not mean the absolute exclusion of the others, which is guaranteed, for example, through the representation of all states in the Ecofin Council, which remains the decision-taking body where all countries have their say. But meetings of euro zone representatives, even heads of states and government, are nevertheless a useful tool in order to tackle problems that demand more cooperation.

In this respect, one could wonder why the French proposal on an ‘economic government’ of the euro group (compare Strassel 2009 for more information) has been met with such harsh criticism if it makes sense to have more cooperation in this area. The problem here was the approach chosen by the French in order to get their proposal passed. They applied yet another means of differentiation, conceptually linked to the concept of an avant-garde EU – the application of active leadership. President Sarkozy proposed in a speech in the EP on 21 October 2008 (Agence Europe 2008) regular meetings of the heads of states and government of the euro group by establishing a new, formal forum in order to better coordinate responses to the global financial crisis. This would serve as a unified economic government of the euro zone led by President Sarkozy himself beyond the Presidency of his country. There was no other way that this was perceived as an attempt to undermine the following Czech Presidency in particular and drawing a line between big/important/skilful and small/new/inexperienced EU member states in general. This proposal sparked a heated debate about alleged French attempts to categorise countries according to their ability to lead the EU appropriately, in doing so “sending the message of a hierarchy of important and less important countries” (Neuman 2008). In short, the approach chosen by the French sparked suspicions about the establishment of an avant-garde or upper class EU with the French on top and especially with ‘newer’ and smaller member states being less important and therefore left behind. Although the French proposal of more concerted action among the euro zone countries might have in its substance been the correct answer to the crisis, the approach chosen to implement this by establishing a formal forum to the blunt exclusion of others led to the outright refusal of the proposed plan, even by

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47 This idea has been supported by Spain (Phillips 2009).
48 President Sarkozy seemed to see himself presiding over this hypothetical group until 2010 in a bid to offer a stronger command than that which could be offered by the successive six-month EU presidencies of the euro sceptic and struggling Czech government and the Swedes, who remain outside the euro zone. Then, in 2010, Spain would be able to take over from President Sarkozy, combining the two roles of EU and euro zone president (EurActiv.com 2008).
countries that would have been included in the new forum, most notably Germany.

This example shows that despite all the advantages linked to differentiation within the Union, in some cases it is inevitable that stepping out of the framework must be allowed. Its most useful application is if outside, or informal, differentiation is used to make concerted action possible within the Union, as preparatory work for concerted action. Inside, or formal, differentiation in this context is sometimes not feasible as it contains the momentum of an avant-garde EU, or raises suspicions about a country aspiring leadership. The lesson to learn is, consequently, that in certain contexts differentiation strategies can only be successful if adopted informally, that is outside the Union framework. This can be illustrated by another example where informality was applied and therefore good results could be achieved.

The common position of the European Council on 16/17 October 2008 in preparation for the World Finance summit in Washington on 15 November 2008 was based on an action plan designed by the finance ministers of the euro group with significant influence from a non-euro country (Great Britain) and was adopted by the 11 remaining member states (Dyson & Marcussen 2009, 22). This means that concerted action of the EU-27 was preceded by action of only a group of member states but was nevertheless accepted by all 27. How was this possible?

The euro group has the character of a loose, informal cooperation forum in which the finance ministers of the euro group meet regularly in order to coordinate their action concerning the euro ahead of Ecofin meetings. The euro countries plus the UK saw it as a necessity to react quickly and decidedly to the current crisis situation and therefore decided to meet outside the formal Ecofin framework in order to flesh out an action plan for the whole EU. That their approach was successful was significantly determined by the factor informality. It allowed not only the inclusion of the non-euro country UK into the group, but most crucially was its quality that the remaining non-euro countries accepted the exclusiveness of the meeting of the group. The formal floor remains Ecofin where all 27 member states have their say. If formality had been transferred to the group meeting, the excluded countries would not have accepted this move, although content-wise the outcome can expected to be the same as in the informal meeting. Additionally, one could apply Emmanouilidis’

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49 Protocol No 14 on the Euro Group of the Treaty on the European Union (consolidated version Lisbon Treaty), Art. 1: The Ministers of the Member States whose currency is the euro shall meet informally. Such meetings shall take place, when necessary, to discuss questions related to the specific responsibilities they share with regard to the single currency.
concept of intergovernmental cooperation outside the Union framework in the form of *Loose Coalitions*, according to which intergovernmental cooperation is established to fulfil a single task or purpose (Emmanouilidis 2008, 25 f.). The meeting between euro countries plus the UK can be interpreted as such an *ad hoc* cooperation. In sum, the necessity of quick and rapid action in response to the crisis situation made a group of member states cooperate more deeply to the exclusion of the others. For this to be accepted by all 27 member states and eventually to allow concerted action by the whole EU, the condition of informality of the group had to be fulfilled. In conclusion, the informal Ecofin-euro-Council formation could be interpreted as a *de facto* institutionalisation without actual formalisation in the sense of the “living constitution of the EU” (Marcussen 2008).

This nice picture of applying flexibility outside the Union framework with the consent of all players has to be confronted with a number of potential flaws. First of all, countries have the possibility to reject or obstruct group formations within the Union framework. Naturally, they do not have this means if some countries chose to cooperate more closely outside the framework, precisely for the fact that it happens outside the framework – a location where every sovereign country can pursue politics of alliances as much as it wants. Therefore, differentiation outside the Union framework is unbound and not a matter to be decided by other EU countries. Secondly, the prior make-up of a policy proposal – like the action plan in response to the financial crisis – by a group of member states can potentially put the excluded countries under pressure to accept the proposal for at least two reasons. Firstly, there is the time-aspect which is related to the political context of the proposal. In times of crises it is important to react quickly. Secondly, if the countries consider rejecting the proposal – be it on the grounds that they have been excluded from the deliberations or because they reject the content – they are under pressure to present an alternative plan. This again leads – especially for the smaller countries – to the problem of having the appropriate capacity to present an own proposal as quickly as possible.

Nevertheless, the non-bureaucratic approach taken by the euro countries plus the UK can be viewed as a precedence of a new kind of policy making, especially in areas where rapid political reaction is crucial. Therefore, this behaviour is likely to be more common in the future.
8 The Role of the Respective Policy Area

After having thoroughly elaborated on different embodiments of differentiation, the respective policy areas in which those embodiments are applied have to be analysed. The policy area is a crucial factor in determining if the chosen differentiation approach has unifying rather than disruptive effects on the European integration project. Peter-Christian Müller-Graff proposes the thesis that a differentiation measure has a unifying integration tendency the more it serves the functioning of the single market and/or the less it runs counter to specific national political interests (2007, 134). It has to be added to the latter point that integrationist leaps of countries against their specific national interests do nevertheless take place. This could be explained by a process of national trade-off considerations between economic and political and/or strategic objectives. One example is that the new member states are willing to implement sometimes painful economic and structural reforms as they receive political and strategic shelter in the EU solidarity community in return. Another could be that countries are afraid of being left behind in the integration process and are therefore willing to make compromises to the detriment of specific national interests.

Returning to the former point, the main reason for choosing the single market as the reference point is the economic principle of comparative advantages. This means that in the context of the integration process, economic interconnectedness through a common market generates needs for intensified cooperation in policy areas close to the single market (Müller-Graff 2007, 134). Accordingly, a classification of policy areas into those necessary for, not essential to but feasibly for and, rather remote from the functioning of the single market can be suggested (based on ibid., 134-137)\textsuperscript{50}.

\textsuperscript{50} In the German original those three concepts are named “binnenmarktzwingende”, “binnenmarktplausible” and “binnenmarktferne Fälle”.
<table>
<thead>
<tr>
<th>Necessary policy areas</th>
<th>Feasible policy areas</th>
<th>Remote policy areas</th>
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<tbody>
<tr>
<td><strong>Free movement of people</strong></td>
<td><strong>Monetary Union</strong></td>
<td><strong>Common Foreign and Security Policy</strong></td>
</tr>
<tr>
<td>Schengen agreement + security aspects: aviation security, passport/visa system</td>
<td>monetary law is a crucial component of national sovereignty, therefore potential for dissociation tendencies</td>
<td>Iraq mission as example for disunity; competing differentiating alliances could have a unifying shock effect leading to more concerted foreign policy cooperation, e.g. as a rebound effect for the pro-war-group after a failed joint adventure (“Iraq syndrome”) (Bailes 2009, 9); but also continued disruptive effects possible</td>
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<tr>
<td><strong>The Treaty of Prüm</strong></td>
<td><strong>Police and Judicial Cooperation in Criminal Matters</strong></td>
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<td>regulation of the exchange of DNA data between EU countries to fight crime</td>
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<td><strong>External perception of the single market concept</strong></td>
<td><strong>Energy cooperation</strong></td>
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<td>effect on other European/non-EU countries, ‘force of attraction’ on EFTA countries, “autonomous follow-up“</td>
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<td><strong>Social policy</strong></td>
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The classification in this table illustrates that, concerning the single market, the assumption holds that harmonisation of national regulations is the agreed aim of the actors as this is necessary a condition for a single market to function, for example to deter ‘free riding’ (Dyson & Marcussen 2009, 4). In other words, it is justified to say that in connection to the single market unitary integration is the pursued goal as it ensures the very success of the policy. However, this cannot be said about external policy areas of the EU, like foreign,
security and defence policy. Therefore, it is necessary to draw a distinction between internal and external EU policies.

The creation and further development of the single market has let to a huge amount of harmonisation, standardisation and regulation of national policies, for example, to allow equal market access for people and goods with the four freedoms, to protect individual freedoms and rights with a common labour legislation, or to create a single bloc vis-à-vis outsiders, for instance in WTO negotiations. What is not standardised or unified is either a case of subsidiarity, justified through ‘legitimate variation’, for example because of deep-rooted national traditions, or there are gains to be made from being diverse (Bailes 2008) through burden sharing, comparative advantages, specialisation and division of labour. Whereas a huge amount of harmonisation can thus be identified in internal policy areas of the EU, one has to ascertain very strong diversities between the member states in external policies. However, this is not to neglect the fact that consistency in some basic principles and signs of a common European external action outlook together with set forms of action exist, as it is often crucial to show a ‘common front’ to have a collective impact in world politics. For example, there is an increasing awareness of new and common non-military threats in the post-Cold War era (Bailes 2009, 11). More concrete, common positions or actions are usually adapted in order to have an influence on ‘global governance’ to pursue – if reachable – common European interests, for example in form of having a strong voice vis-à-vis other actors in international organisations. Common action is also pursued where only indirect European interests are identifiable, for example the policy of ‘helping for the sake of helping’ or ‘helping for the improvement of the international system’, such as in the area of

51 The most apparent example is that Norway, Iceland and Liechtenstein have only joined the single market sphere of the EU through the EEA agreement. Consequently, they have only accepted to pursue economic harmonisation. However, the opinions about the level of harmonisation in policy areas beyond the single market vary also greatly between EU member states.
52 This distinction constitutes the two ‘extreme’ cases: the single market on the harmonisation end and foreign policy/security/defence policy on the diversity end. It has to be left to further research to also include policy areas that are halfway between those two. One example is the area of internal security, for example the Schengen system or the Treaty of Prüm, which combines foreign policy and single market issues. Another example is energy policy, which has significant external qualities, for example relations to Russia, and internal aspects, for example a single market for energy.
53 This comprises common legal positions of EU countries, for example on arms control issues, the death penalty, UN membership or development aid.
54 However, although Europeans seem to be less distinctive in the kinds of threats they perceive, they nevertheless differ more dramatically in the level of their agreement over how to handle those challenges (Bailes 2009, 11).
development aid and poverty reduction in developing countries (“do-gooding missions” (Bailes 2009, 5)). ‘Indirect’ interests in this sense mean that the necessity of the concerted action could be hard to explain to European citizens (Bailes 2008). Without neglecting the factual existence of common external action of the EU, as just described, nevertheless, one cannot deny the predominance of diverging national interests when it comes to foreign policy making of the countries of the European Union. This is institutionalised by the necessity of consensus in the decision-making process of this area of highly politically sensitive issues. This rule has an effective meaning as external actors would play on divisions within the EU when, let’s say, five EU members get overruled by QMV (interview Alyson Bailes).

The following tables (drawn from Bailes 2008 and Bailes 2009, 8-11) give an overview of the factors causing the differences between EU countries concerning external policy-making.
All these drivers for difference help to explain why much of the EU’s foreign, security and defence output still comes from nation-states and therefore, is not ‘supranationalised’ (Bailes 2009, 11 f.) on the European level. This leads in its conclusion to the existence of a pre-eminent disunity between EU member states concerning external policy actions.

Having outlined the existence of fundamental differences between EU member states when it comes to external policy-making, the

Examples for different threat perceptions: “Opinion polls regularly show higher German than Spanish levels of concern about Russia and energy dependence – which do not contradict but rather explain Germany’s preference for handling Moscow with kid gloves. The British worry more than the Nordics about terrorism and nuclear rivalry, and Italians more than the British about the Mafia, while Nordics are more exposed to and concerned about the environment, and so on.” (Bailes 2009, 9)
respective effects of that on European integration have to be analysed. Externally, diverging national interests are

(a) helpful if going further in the same direction
(b) neutral if outside the EU range of competence or ambition, or
(c) harmful if cutting across existing or emergent common policies.

One can ascertain that category (b) is steadily shrinking, implying that in the area of foreign policy the EU is more and more forced to take joint positions if it does not want to be perceived as a weak player in the international area, a good example being the Iraq War of 2003. Hence, there is more pressure to reach a consensus in this area, as unanimity will remain the rule in the traditional second pillar because it is not feasible to overrule countries in such a highly sensitive policy field. Consequently, the EU has to move into new areas of common policies besides the single market, and this does not only comprise classical foreign policy issues, but also related areas like environmental or energy policy. With initiatives like the European Security Strategy (ESS) and the Weapons of Mass Destruction Strategy the EU has already reacted to this development (Bailes 2008).

As unanimity is the prevailing norm in the area of foreign, security and defence policy, diversity and with it differentiation appears to have rather harmful effects on the European integration process, for example, in form of a ‘broken common front’ or inconsistent behaviour on principled issues. The limited effects of constructive abstention, the fact that the application of enhanced cooperation in CFSP requires a unanimous decision within the Council, and the fact that the major innovation introduced by the Lisbon Treaty in the field of Common Security and Defence Policy (CSDP) – permanent structured cooperation – “merely” focuses on the improvement of military capabilities, guarantee that the strategic orientation of CFSP/CSDP requires the unanimous support of all member states. This demonstrates the rather limited scope of differentiation within CFSP mirroring the widespread awareness that the success of the EU’s foreign, security and defence policy requires a high level of internal cohesion and unity (Emmanouilidis 2008, 22). The expected effect is that countries relocate policy issues outside the Union

56 Furthermore, the interconnectedness of internal and external policy areas has to be kept in mind, for example security being related to energy, climate change and development policy to environmental and economic policy. Additionally, single policy areas can unite internal and external policy aspects within them, for example the interconnectedness of internal and external security governance.

57 However, diversity can of course also have useful implications in external policy-making, for example through different strengths or specialisations of countries (niche roles) if this is coordinated in form of a harmonious interplay of diversities, especially also towards other actors.
framework in order to ‘escape’ the unanimity rule (politics of alliances). The problem in this connection is that different views concerning external policies can be perceived as rather diametrically opposed than in the area of internal policies. Again the Iraq war is an example, countries were either ‘in favour of’ or ‘opposed to’ joining the war. In other words, a middle course or a compromise is usually harder to find than in internal policies.

The reason for the EU being a weak actor if it does not speak externally with one voice is that the Union’s influence is dependent on perceptions from other countries. A good example is an extract from last year’s global trends review of the US National Intelligence Council (NIC):

This year's [2008] report, Global Trends 2025: A World Transformed, foresees the EU in 2025 as likely having completed its institutional reforms and consolidated itself as a political entity, but infighting between member states with competing domestic interests and a European public alienated by a perceived democratic deficit will leave it a "hobbled giant", with massive economic heft but little genuine international power. (Phillips 2008)

Against this background, it seems feasible to assume that the pressure for the EU to speak to the rest of the world with a single voice will become more and more intense. Some even call the refusal to make collective EU choices in the world of 2025 “tantamount to an abdication of sovereignty” (Howorth et al 2007, 22.). In this context, enlargement, complexity and ‘the logic of diversity’ must be perceived as the main obstacles to this necessity to create a unified and integrated EU. The sharp normative disagreements among the citizens of Europe regarding the desirability of such an integrated EU complicate the picture even more. This prevailing diversity leads to the fact that it is increasingly easy for other actors to play on the internal divisions within the EU (Hill & Smith 2005, 406; for an example see Fox & Godement 2009 on EU-China relations).

In the light of this situation, one possible remedy would be to extend the aquis of the Union by broadening the scope of CFSP so that it is less possible for countries to ‘escape’ the common framework. However, as outlined above, strict EU regulation is only accepted in non-sensitive areas where countries can agree easily, for example the condemnation of capital punishment or torture. Equalisation in other areas is not possible or even sensible, because of prevailing differences between the actors (interview Alyson Bailes). In the light of this, it is necessary to change the integration logic of the European integration process concerning the EU’s external and therewith global role. As it is increasingly impossible for the EU to speak with one voice, although it is more and more forced to do so in order to be influential, the whole logic has to be changed. In other words, the EU has to change the perception that non-concerted action is synonymous with weakness. More precisely, first of all, the EU
itself has to accept the fact that it cannot be united on every issue at all times. If it is then able to transport this message to the outside that flexibility and diversity are necessary and natural features of the EU on its way to a more and more concerted foreign policy capability, then it is not going to be perceived as a weak actor. It is firstly about defining itself and its role internally, then framing the outside role accordingly. The overall end of more and more concerted foreign policy action should prevail; it is again rather about process than outcome differentiation. In order to succeed in this, the initial effort is the responsibility of every single EU country to cope with the specialities linked to foreign policy. Being a core issue of national sovereignty and an area that is potentially compromise-averse, outright disagreements, diametrical oppositions and even mutual accusations of pursuing the wrong policies can and will occur. Naturally, such situations do not help to strengthen the Union’s role abroad, no matter how acknowledged a differentiated integration process is. It is therefore in the hands of the member states, if not to find compromises, at least avoid politically ‘attacking’ one another and always striving for at least acceptance or respect for other countries’ policy approaches for the sake of a ‘good picture’ of the Union abroad. This strive for compromise and mutual respect at home paired with an understanding of the European integration process as being differentiated in its process dimensions abroad, could help to solve the dilemma of having to speak with one single voice in a Union with increasingly diverse interests.

In general, it is crucial for the Union to emphasise more the advantages than the disadvantages of differentiation. Additionally, European actors should praise individual countries more for their individual inputs and it should be more about recognising what the EU achieves instead of what it does not achieve. The Union’s reaction to the war in Georgia in August 2008, its climate change agenda, or its reaction to the recent economic developments are all examples where no grave misguidance or malpractice by the Union is apparent. In simple words, things do go right in EU policy-making and it should be communicated more strongly towards the Union’s own people and external actors. (interview Alyson Bailes)
9 The Relationship between the Union and its Citizens in a Differentiated Integration Process

Diversity is no obstacle to European integration and therefore there is no need to demonise it. Deriving from the Union’s motto ‘Unity in Diversity’, divergence is a normal state of affairs in the European Union. Even more, diversity – or pluralism – is a prerequisite of modernity as only highly diversified societies are able to succeed in the conditions of modern competition. The problem facing a supranational integration project like the EU that defines itself as a ‘Union of the citizens’ is that cultural identity and democracy require transparency, simplicity and a sense of belonging to a defined community (Zielonka 2000, 161). This is definitely hard to acquire in a highly diversified environment like the European Union with its potentially 27+ member states.

This problem has been touched upon by Emmanouilidis in his most recent work on differentiation where he suggests the elaboration of a “narrative of differentiated integration” is necessary in order to “explain to the wider European public in a comprehensible fashion the purpose and reasoning behind flexible integration”. In order to achieve the required overview and transparency of flexibility in the interaction process, which is needed in order to succeed in this endeavour, Emmanouilidis further proposes the setting up of an “informal differentiation board”, including the Commission and elected representatives of the states participating in the various differentiation projects, who should coordinate the activities of the various differentiation projects inside and outside the EU framework (Emmanouilidis 2008, 11, 60 f.).

Given today’s already often-lamented communication deficit between the Union and its citizens\(^5\), a huge effort is necessary in order to succeed in explaining a differentiated integration process to the people. One “window of explanation opportunity” could be that

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\(^5\) For many: Laumen, Maurer (2006, 27) talk about the duty of the member states to change their communicative approach towards their citizens on EU matters. They especially lament the “EU-schizophrenia” of many member states, which means ‘to agree in Brussels, but fighting it at home’ (in the German original: “in Brüssel mitstimmen, zu Hause dagegen anschreien”).
the narrative should focus on the democratic potential of differentiated integration means\textsuperscript{59} and the fact that better results can be expected for the people through the application of various forms of differentiation. As already stated, in connection to the EU’s citizens and external actors, process differentiation should be communicated as a natural feature of the integration process and not as a weakness of the Union. One could argue that such an approach does not make the EU’s citizens understand the political procedure. This is correct! However, given the high complexity of an institutional and decision-making entity like the EU complicated by flexibility mechanisms, legitimate doubts can be raised on whether this is an achievable aim, despite how desirable and helpful it would be. For this reason, the communication of the possibility to achieve better results through differentiation is an approach focusing on output legitimacy\textsuperscript{60}. This is not to neglect that there is also still a lot to do on the side of input legitimacy, through a broader involvement of the EP and national parliaments in the decision-making and –taking process of the EU for example. As Heinrich August Winkler puts it, as member states are still the Masters of the Treaties, their national parliaments have to take on more European responsibility. If they succeed to be heard before crucial decisions are taken – for example on the granting of candidate status to an aspirant country or on the inception of accession negotiations – they can prevent such decisions being taken behind closed doors to later be presented to the public as fait accompli (Winkler 2009, 290). Such measures are necessary in order to enhance citizens’ trust in the Union’s institutions and, therewith, also the acceptance of a differentiated integration process.

Another viewpoint concerning the communication problem between the EU and its citizens is possible. One could argue that large parts of the EU’s citizens think already that differentiation is a good thing but the problem is that the EU is perceived as an enemy of diversity (interview Alyson Bailes). The question then is not how to make the people like differentiation, but how to make them understand that the EU supports diversity and honours the individual countries for their individual input. On the other hand, there are areas, predominantly in the external sphere, where citizens want more uniformity, for example, from a tax point of view when moving from one country to another or concerning protection abroad from

\textsuperscript{59} Compare the above paragraph on opt-out policy.

\textsuperscript{60} The dilemma between policy efficiency and legitimacy through people’s involvement, thoroughly outlined by Dahl (1994), can be seen as connected to the situation described here. Dahl writes: “[T]he two that compose the dilemma under discussion here are the ability of the citizens to exercise democratic control over the decisions of the polity versus the capacity of the system to respond satisfactorily to the collective preferences of its citizens.” (1994, 28)
whichever EU embassy. In this sense, the crucial point concerning the relationship between the EU and its citizens concerning differentiation in the external policy area is that the EU is not honouring diversity enough where the citizens want it and the EU does not harmonise policies where citizens would like to see it.

To conclude, concerning the messages the Union should send in order to correct the picture concerning process differentiation and outcome harmonisation in the European integration process, the following simple information should get through:

Necessary message towards the outside world:

We can be a Union despite being diverse!

Necessary message towards European citizens:

We can be diverse despite being a Union!

9.1 An ”EU of Projects” in a ”Multi-way Integration Process”

The notion of an “EU of Projects” can be considered as a possible way of reconciling the dilemma between increasing process differentiation in the European integration process and improving the relationship between the EU and its citizens. It has to be understood as being embedded in a “multi-way integration process” that takes into account the necessity and factual existence of process differentiation in the European integration project. In times of a “triple crisis” as outlined above – financial, economic and constitutional – new lines of reasoning for the necessity of a European integration project have to be communicated to the people in order to secure necessary popular support. The experience of war was a sufficient legitimation basis at the beginning of the integration process – the peace community argument – but is no longer today, especially for the younger generation (Laumen, Maurer 2006, 28). In other words, people have to be given the opportunity to identify with the European process to ensure the legitimacy of the European project. One means to this is a stronger focus on the approach of an “EU of Projects”.

Projects are a good means to get closer to the people. It is argued that people can more easily identify with concrete political projects than with treaty reform. This has become more prevalent due to recent cumulative treaty reform attempts in form of the failed Constitutional Treaty and the current difficulties with the ratification of the Lisbon Treaty, leading to ‘treaty fatigue’ among the citizens. Two
conclusions have to be drawn from this current status. Firstly, institutional reform is needed although people have difficulties identifying with this process. Even more, up-to-date treaties are a prerequisite in order for the EU to be able to initiate and successfully accomplish projects. Secondly, no obvious big project seems to be in the air today despite the triple crisis Europe is faced with. It is doubtful that new issues like democracy enhancement in the EU or climate change challenges are big enough to create huge momentum like the projects of a European single market and a common European currency were able to do. An undoubted big event or project was the big enlargement round of 2004, and the Lisbon Treaty can argued to be the logical institutional consequence of this project. The problem is, however, that enlargement has already happened without the new treaty being in force. Therefore the link is not that strong. Furthermore, for the EU-15 enlargement is something that does not happen at home, rather “abroad” and is therefore not directly perceived as an added value, sometimes even as a burden.

One also has to state that the EU has already a very good record on actually established projects. There is a lot the 27 member states have agreed on despite lingering veto rights. However, a “permissive consensus” in the European integration process no longer exists today. Rather, the EU’s citizens increasingly seem to have strong opinions about the cost-benefit-evaluation of European integration, which turns out to be increasingly negative (Laumen, Maurer 2006, 24). Politicians become hesitant European actors because of the peoples’ discontent and ‘fatigue’ with the EU; increased national rhetoric leads to enforced renationalisation tendencies on the citizen as well as on the elite level. National politicians become less willing to transfer competencies to the EU, as they see no point in further integration given the peoples’ dissatisfaction with and lack of trust in European integration. This again leads to people steering their focus even less on the European level, creating a vicious circle towards more and more inward-looking European countries, damaging the legitimacy of the European integration project.

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61 This model is taken from Lindberg and Scheingold (1997) who analysed the attitude of EU citizens during the 40ies and 60ies and who found out that people’s attitude have hardly determined or influenced the development of the European integration process. In other words, they gave plenty of rope to the actors of the integration policy. This ‘tacit agreement’ to the course of the integration process was possible as no overt controversies were available at that time and therefore the political elite communicated no opposition to the process. Consequently, a growing majority of the EU’s citizens were convinced about the desirability and profitableness of European integration. This ‘permissive consensus’ was also supported by economic progress and increasing prosperity as well as the security- and peace-enhancing effect of European integration (Laumen, Maurer 2006, 5).
This very bleak picture of the relationship between the elites and the citizens can be brightened up to a certain extent. First of all, institutional reform and projects for the good of Europe’s citizens have to be communicated as two sides of the same coin. When people primarily understand treaty reform in terms of costs, mainly in the form of greater transfer of sovereignty from the nation state to the European level, those costs have to be communicated as a necessary investment in order to receive the pay-off. Such pay-offs are the capability of the EU to implement policy projects to serve the interest of the EU’s citizens. Secondly, although events like the financial, economic and constitutional crisis of the EU enforce renationalisation tendencies for example in form of “economic nationalism” (Mahony 2009b), events can also trigger growing demand for common European problem solving mechanisms, for example, environmental and especially climate change challenges. In other words, there are definitely not only renationalisation tendencies in the relationship between the EU and its citizens. However, to ensure the necessary popular support for its projects the EU has to work on the communication of its capabilities. This does not only mean resorting to the advantages of common European policy making in terms of output (output legitimacy), but also finding ways to involve the people, making those affected feel able to affect the European integration process (input legitimacy).
10 Conclusion

As desirable as process differentiation on a temporary basis with the explicit aim of encompassing all member states as soon as possible might be, the likelihood of permanent closer cooperations inside, as well as outside the Union framework will remain. Therefore, it is tempting to assume that the European integration process is developing towards a fragmented Union, characterised by permanent avant-garde groups. But such an interpretation would again mean focusing on the intended outcome of the European integration project, which is not the path to follow. Rather, the character of the European integration process being open-ended should be kept in mind. Then the intention or purpose of the integration process moves into the centre of attention, which is to benefit the European people through an economic and increasingly political Union of European countries. Against this background, permanent closer cooperations between member states lose most of their threatening potential, which only becomes prevalent in the debate about the final outcome of the integration project. Therefore, as long as better results in an enlarged and increasingly diverse Union with 27+ member states can be achieved with the help of differentiation instruments, permanent closer cooperations in- or outside the Union framework should not be regarded as tremendously threatening the whole European project. Also, the success of temporarily enhanced cooperation or alliances policies in the sense that they lead to overall integration of all member states will keep the ideal of a harmonisation project alive. In order to achieve this, the reputation of process differentiation has to be adjusted in the sense that European citizens and external actors perceive it as a normal and natural feature of the integration project. To achieve this, the member states and the European Commission have to take steps to allow enhanced cooperation to become a practiced and effective integration tool of the same value as traditional integration means.
11 Recommendations for Further Research

Given the extensive scope of the issue under study it is definitely not possible to cover all interesting aspects linked to differentiation in the European integration process. Therefore this section outlines some of the research areas where the author sees a need for further academic effort.

One area that should be elaborated on more thoroughly is the notion that overall-integration ideas are only valid or sustainable for an EU ‘in fair-weather conditions’. Put differently, one could argue that there is a fundamental weakness of European integration and cooperation ideals in times of unexpected events and crises. This topic has gained relevance particularly due to the outbreak of the financial and economic crises in autumn 2008. One could analyse the amount and type of differentiated means in the European integration process along a continuum routine vs. crisis. A hypothesis would be that European actors are more prone to act in harmony in routine situation and when the policy issue at hand is characterised by positive conjunctures, whereas in times of crisis and unintended or extreme situations more differentiated behaviour could be expected. One could then conclude that harmonious approaches developed in political ‘fair weather conditions’ are not sustainable in times of crises. Moreover, one could analyse inasmuch political statements emphasising the importance of unity especially in times of crisis can be declared as mere lip service or if accordant action is taken to keep the European unity. Finally, one could discuss whether certain crises situations simply go beyond the means or capacity of the European Union to handle them appropriately. In terms of the financial and economic crisis one could maintain that the amounts of money that are needed to support a leading retail bank are beyond the means of the EU. The political crisis that would be created by such a failure is too great a threat for a national politician to survive (European Voice, 2008). Appropriate case studies might include the 2003 Iraq war and the financial and economic crisis, which started at the end of 2008. As this crisis situation is still very new and ongoing, research concerning the crisis and its effect on the European integration process should be conducted with some temporal distance.

Given the period of institutional and political change the EU finds itself in at the moment – constitutional reform, enlargement, financial
and economic crisis – the author feels that further research on the notion of an ‘EU of Projects’ is needed. Again here it seems worth waiting until the Union has gotten itself into calmer waters again. Also the further development of the area of environmental policy in general, and climate change in particular, in light of the upcoming decision on a post-Kyoto framework in December 2009 in Copenhagen, is expected to deliver new material for an assessment if environmental policies could perform a new big project of the European Union its people can better identify with.
This study departs from the normative assumption that differentiation understood in process terms is a normal state of affairs in the European integration process. This is increasingly true due to the cumulative amount of policy areas that are handled on the European level, the increasing amount of member states of the Union as well as due to the challenges the EU faces nowadays in terms of financial, economic, and constitutional crises. By establishing the difference between process and outcome differentiation, the author emphasises the need for understanding the project of the EU as open-ended, therewith marking the discussions about the end-state of the Union as redundant and leading to nowhere in the endeavour to understand and analyse the European integration process. The focus of this thesis is therefore on the analysis of process differentiation in the European integration project. Outcome differentiation is not in focus as the overall ideal of the EU, which is to achieve and preserve a homogenous integration of the member states of the European Union, is still the unanimously pursued goal of the member states and the institutions of the EU.

Having a normative constructive approach as the theoretical basement of this study, the author evaluates four different embodiments of differentiation means in- and outside the Union framework according to their usefulness and integration-friendliness in the integration process. Those comprise the concepts of different speeds, avant-garde EU, opt-out policy and politics of alliances. The author outlines the possibilities and strengths as well as the risks and weaknesses of those differentiation means. A further primary aim is to achieve as much terminological clarity as possible concerning the different embodiments, as the debate on differentiation has been characterised by a rather inflationary usage and interpretation of terms and concepts. In conclusion, differentiated integration inside the Union framework as a temporary flexibility mechanism with the explicit aim to include all member states as soon as possible is evaluated as the most community-friendly flexibility approach. However, the author acknowledges that permanent differentiation inside as well as outside the Union framework has, does, and will take place, mainly in the area of foreign, security and defence policy due to persisting major differences concerning political interests of the member states.
Subsequently, the importance of the respective policy area in which differentiation means are applied is outlined. The respective policy area is a crucial factor in determining if the chosen differentiation approach has unifying or rather disruptive effects on the European integration project. The author draws a distinction between internal and external EU policies, analysing the single market and the area of foreign, security and defence policies according to the implications of differentiation in those areas. The author sees these two policy areas as rather ‘extreme’ cases because concerning the single market the assumption holds that the goal of harmonisation of national regulations is the agreed aim of the actors, as this is the necessary condition for a single market to function. In contrast, the area of foreign, security and defence policy is characterised by strong diversities between the member states and therefore flexibility means are used very frequently. Those diversities are explained by referring to factors such as history, geography and general governance system.

The problem concerning differentiation in EU external policy making is that the EU’s success on the international stage is dependent on how it is perceived by other players. Not speaking with one voice in international politics is generally perceived as a weakness of the Union. Therefore, as unanimity is the prevailing norm in the area of external policy-making, diversity, and with it differentiation, appear to have rather harmful effects on the European integration process. Given the increasing amount of external policy issues the EU is faced with, one can come to the conclusion that the pressure for the EU to speak to the rest of the world with a single voice will become more and more intense. This causes the dilemma for the EU of being under increasing pressure to speak to the rest of the world with one voice, while at the same time being confronted with the increasing diversity of external policy interests within the Union leading to rather differentiated policy approaches instead of a harmonised approach comprising all member states.

In a next step, the thesis expounds the problem of the relationship between the Union and its citizens in a differentiated integration process. Given the rather distant relationship between the Union and its people, differentiation can be expected to add another layer of complexity and therefore to deepen the rift. The author recommends working on the communication deficit by focussing on output legitimacy, which is to emphasise the democratic potential of differentiated integration means and the fact that better results can be expected for the people through the application of various forms of differentiation. Furthermore, it is crucial for the EU to strike a balance between harmonisation and diversity according to the peoples’ wishes. In other words, the Union should on the one hand support and acknowledge diversity as something good and useful where people
would like to see it and, on the other, it should promote harmonisation where people feel that it is still lacking.

The author puts forward the concept of an “EU of Projects” in a “multi-way integration process” as a means to tackle the dilemma between increasing process differentiation in the European integration project and the necessity to improve the relationship between the EU and its citizens. The underlying idea is to use concrete policy projects — past examples comprise the single market and the European Monetary Union — in order to enhance the capability of the citizens to identify with the European project, which would in turn help to ease the legitimacy crisis of the EU. Another effect would be to ‘cure’ the treaty fatigue of the EU’s citizens, making the people understand that institutional reform and concrete policy projects are two sides of the same coin, and therefore necessarily have to go together. It has to be left to further research which concrete policy areas could potentially provide a new ‘grand project’ that is capable of creating the necessary identification momentum between the Union and its citizens. However, it can already be established today that such a project has to be imbedded in a “multi-way integration process” that takes into account the necessity and factual existence of process differentiation in the European integration project.

Generally, in addition to the normative conclusions concerning the most appropriate differentiation embodiment, the author claims that the integration logic of the EU has to be adjusted in order to solve the dilemma between the actual existence and increased necessity of process differentiation in the integration project on the one hand and the need for more concerted European action on the international stage as well as the rather distant relationship between the Union and its citizens on the other. In short, differentiation has to be communicated as inherent, necessary and normal in the European endeavour instead of a problem or a weakness.
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Alyson J.K. Bailes, Visiting Professor, Department of Political Science, University of Iceland, 15 April 2009 in Reykjavik, Iceland.
14 Appendix

Appendix 1

Differentiation Inside and Outside the European Union Framework
### Appendix 1: Differentiation inside and outside the European Union framework

<table>
<thead>
<tr>
<th>EU framework</th>
<th>Inside Institutional/formal differentiation</th>
<th>Outside Political/informal differentiation</th>
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<tr>
<td>Embodiment</td>
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<td>里面样式</td>
<td>Different speeds</td>
<td>Politics of alliances</td>
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<td></td>
<td>• Remain open to all member states</td>
<td>• A group of countries intensifies cooperation on the basis of intergovernmental mechanisms outside the EU framework</td>
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<td></td>
<td>• Conditions for participation</td>
<td>• Limitations: Art. 4 (3) TEU-L and areas of exclusive EU competence</td>
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<td></td>
<td>• Institutionalisation: enhanced cooperation</td>
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<td>• Means of last resort</td>
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<tr>
<td>Key features</td>
<td><strong>Institutional/formal differentiation</strong></td>
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<tr>
<td></td>
<td>• Strong Franco-German alliance (Fischer speech 2000)</td>
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<td></td>
<td>• Avant-garde as driving force for completion of political integration</td>
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<td>• Notion of leadership</td>
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<td><strong>Opt-out policy</strong></td>
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<td></td>
<td>• Mostly used form of differentiation</td>
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<td></td>
<td>• Allows countries to remain outside deepened cooperation in (sub-)policy areas</td>
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<td></td>
<td>• Differentiated acquis also applies to future member states</td>
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<td><strong>Embodiment</strong></td>
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<td>• Changing leading coalitions</td>
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<td>• Learning environment for hesitant countries</td>
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<td>• Ensured binding core</td>
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<td><strong>Strengths</strong></td>
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<td>• Changing leading coalitions</td>
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<td><strong>Possibilities</strong></td>
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<td></td>
<td>• Potential driving force for more political integration for a number of countries</td>
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<td></td>
<td><strong>Weaknesses</strong></td>
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<td></td>
<td>• Enhanced cooperation never been used so far</td>
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<td></td>
<td>• Countries hesitant because of the fear of peer pressure</td>
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<td>• Legal provisions are perhaps too tight (nine countries threshold)</td>
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<td></td>
<td>• Potentially leads to permanent exclusion of some member states</td>
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<td></td>
<td>• Establishes differences on a permanent basis</td>
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<td>• Usually the same countries form permanent leading group</td>
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<td></td>
<td>• Creates mistrust, two-class EU</td>
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<td>• Linked to concept of periphery</td>
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<td><strong>Risks</strong></td>
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<td>• Potential disruptive effects on integration process</td>
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<td></td>
<td>• Exclusion of EU institutions, could harm community method</td>
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<td>• Inclusion of outsiders depends on political willingness of insiders</td>
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<td>• Problem of double structures, inefficiency, waste of resources</td>
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<td></td>
<td>• Lack of democratic legitimacy on European and national level</td>
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<td>• Decrease of trust &amp; obstruction of EU cooperation</td>
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<td>• Potential problematic inclusion of external acquis into EU</td>
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<td>Examples</td>
<td>• EMU</td>
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<td>• Treaty of Prüm</td>
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<td>• Potentially divorce law</td>
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<td>• Franco-German axis</td>
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<td>• Schengen (IE, GB)</td>
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<td>• EMU (GB, DK, (SE))</td>
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<td>• ESDP (DK)</td>
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<td>• JHA/PJC (DK, GB, IE)</td>
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<td>• Charter of Fundamental Rights (GB, PL)</td>
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<td><strong>Examples</strong></td>
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<td>• Especially foreign, security and defence policy</td>
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<td></td>
<td>• Potentially social policy issues</td>
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Appendix 2

Opt-out Policy in Practice

Current and potential future opt-outs concern the Schengen Agreement, the Economic and Monetary Union, European Security and Defence Policy, Justice and Home Affairs, European citizenship, the Charter of Fundamental Rights and Police and Judicial Co-operation in Criminal Matters. The respective countries affected are the Republic of Ireland, the United Kingdom, Denmark and Poland.

Ireland and the United Kingdom have opt-outs from the implementation of the Schengen acquis. The UK furthermore secured an opt-out from having to introduce the euro in the initial Maastricht Treaty negotiations while Denmark did so later after a failed referendum on the Maastricht Treaty. Following a negative referendum on euro adoption in 2003, Sweden only has a de facto opt-out on the euro, as it did not formally negotiate an opt-out on this matter. The country did not join the European Exchange Rate Mechanism II (ERM II) and so deliberately failed to fulfil the criteria for introducing the euro. The Commission and the European Central Bank tacitly accept the Swedish derogation.

Denmark negotiated a whole package of opt-outs following the negative referendum on the Maastricht Treaty in 1992. In order to secure the acceptance of the Danish people in a second referendum, in 1993 four opt-outs had been established in the so-called Edinburgh Agreement concerning – already stated – EMU, European Security and Defence Policy (ESDP), Police and Judicial Co-operation in Criminal Matters. Ireland only joined the UK in adopting this opt-out to keep the Ireland–United Kingdom Common Travel Area in effect.

Denmark is not obliged to participate in the third phase of the European Exchange Rate Mechanism, i.e. to replace the Danish krone with the euro.

Denmark does not participate in the European Union's foreign policy where defence is concerned and does not contribute troops to missions conducted under the auspices of the European Union.

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Co-operation in Criminal Matters (PJC) or Justice and Home Affairs (JHA)\textsuperscript{65} and the citizenship of the European Union\textsuperscript{66}.

After the coming into force of the Treaty of Lisbon two additional opt-outs will emerge. The first concerns the Charter of Fundamental Rights of the European Union\textsuperscript{67} from which Poland and the United Kingdom have opted out. This means that the European Court of Justice will not be able to rule on issues related to the Charter if they are brought to courts in Poland or the UK.\textsuperscript{68} The second regards Police and Judicial Co-operation in Criminal Matters in which Ireland and the UK have opted out of the change from unanimous decisions to qualified majority voting. However, both states will be able to opt-in on these voting issues on a case-by-case basis.

Former opt-outs are comprised of the British opt-out from the Social Protocol, negotiated by John Major in 1991. However, Tony Blair abolished this opt-out immediately after coming to power in 1997.

The debate about granting more opt-outs to Ireland, mainly concerning the Charter of Fundamental Rights and the Common Foreign and Security Policy, has recently emerged against the background of the negative referendum on the Lisbon Treaty.

\textsuperscript{65} The JHA opt-out exempts Denmark from certain areas of home affairs. Significant parts of these areas were transferred from the third European Union pillar to the first under the Amsterdam Treaty; Denmark's opt-outs from these areas were kept valid through additional protocols. Acts made under those powers are not binding on Denmark except for those relating to Schengen, which are instead conducted on an intergovernmental basis with Denmark.

\textsuperscript{66} The citizenship opt-out stated that European citizenship did not replace national citizenship; this opt-out was rendered meaningless when the Amsterdam Treaty adopted the same wording for all members.

\textsuperscript{67} The Charter is a part of the Lisbon Treaty.

\textsuperscript{68} Poland's then ruling party, Law and Justice, mainly noted concerns that it might force Poland to grant homosexual couples the same kind of benefits which heterosexual couples enjoy, while the UK was worried that the Charter might be used to alter British labour law, especially as it relates to allowing more strikes.