Towards a More Flexible European Union: Preparing for Enlargement with a New Integration Architecture

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1. Between enlargement and overstretch of the EU

According to Article 49 of the Treaty on European Union (TEU), any European state that respects the values of Article 2 TEU – above all, democracy and the rule of law – may apply for accession. Rather than a right to accession, this represents a right to a transparent political decision in light of these criteria.

With the Western Balkan, Ukraine and Moldova, new accession candidates are waiting on the doorstep of the EU (European Commission 2023). Their accession to the EU is advocated in politics for geopolitical reasons (European Council 2023b). Especially in the Central European and South-Eastern European (CE-SEE) countries, the prospect of accession has regularly led to an acceleration of the transformation processes, which makes it seem justified to describe the accession goal as an effective instrument of foreign policy for the EU.

To date, however, the EU has not been capable of further enlargement and there is a threat of an overstretch of the EU (Calliess 2023), which could lead in the long run to an erosion of the achievements of European integration. This is particularly the case because the EU has been in crisis mode for several years now (see Kirchhof, Kube and Schmidt 2017: 56, 60 ff.; Giegerich 2012; and, for a political perspective, the speeches of various European politicians in Pernice 2007), culminating in what has been called a "poly-crisis" (Juncker 2016). This started with the sovereign debt crisis in the euro area in 2010, continued with the migration and security crisis in 2016, and has even intensified with the Covid-19 pandemic and the ongoing war in Ukraine. This mode of the poly-crisis is still with us.

Nonetheless, a common and sustainable response to this poly-crisis has been hard to agree on[1], as there is no consensus on the right road to take ahead, either among the 27 EU member states or among European citizens. This is largely due to the fact that reforms in the euro area touch on sensitive domestic issues, such as the further Europeanisation of financial and budgetary policy, that have implications for social policy at the national level. And the challenges at stake are no less sensitive in the Schengen Area when it comes to reaching an agreement on a European asylum, refugee and immigration policy[2] or on challenges regarding internal security like terrorism or organised crime. In addition, external security – or, in concrete terms, the building of a genuine 'Defence Union' as a European pillar of NATO – touches at the heart of national sovereignty, as well. Finally, a consensus even seems to be hard to reach regarding the European internal market, which is subject to disruptive change triggered by digitalisation and the innovations associated with it (e.g. the platform economy, block chain and artificial intelligence) as well as by decarbonisation in the areas of energy and transport.

At the same time, previous enlargements have made the EU more heterogeneous in both cultural and political senses. This applies not only to economic and social conditions in the member states but also to their governance (see European Commission 2001). In Europe's multi-tier system of governance, the European level depends on the national governments, administrations and courts, which are respectively responsible for implementing, applying and enforcing Union law. Shortcomings in implementation, which have always been a problem in the EU, are on the increase. And the goal of uniform application of European law, achieved by virtue of its primacy, is coming up against the effective heterogeneity in the member states (see Calliess 2021a: 5).

Advocates of enlargement are therefore right to call for a prior reform of the EU to strengthen its capacity to act. In this respect, however, given the EU's state of heterogeneity, it will not be sufficient to switch from unanimity voting to qualified majority voting in some additional areas. Given these circumstances, it is important not to gloss over the problems but to develop constructive approaches to solving them in order to boost the EU's capacity to act and thereby guarantee its ability to successfully undergo additional enlargement.

For some time, there has been heated debate surrounding the future of the EU and the necessary reforms – including the question of whether changes to the EU Treaties are necessary, appropriate and realistic – in public, in the EU institutions, and in dialogue between the EU and its citizens (on the debate and proposals, see Calliess 2022). This debate was sparked by the European Commission's White Paper on the Future of Europe from March 2017, and it continued with the Conference on the Future of Europe, which ended with the presentation of its final report in May 2022, whose proposals include treaty changes. Support for reforms also comes from the European Parliament, which called for a convention to amend the Treaties in accordance with Article 48 TEU in a resolution on the follow-up to the conclusions of the conference of 4 May 2022 and then submitted proposals for treaty changes based on a concrete draft amendment that was adopted by a narrow majority on 22 November 2023. The European Council must now decide whether to open a Constitutional Convention. In its conclusions of 14–15 December 2023, it emphasises that it will address the issue of internal reforms at its next meetings with a view to adopting conclusions in summer 2024. Member states are still divided on this topic. Already in 2022, a group of 13 published a non-paper opposing treaty changes, whereas a group of six Western European states in turn published a non-paper supporting reforms, including treaty changes.

Nevertheless, there is still a proverbial 'elephant in the room', as all the proposals more or less avoid touching on the topic of differentiated integration, including approaches for a more flexible architecture for European integration (see Calliess 2019, 2021a, 2022). There was, however, a proposal on differentiated integration in the September 2023 report of the Franco-German Working Group on EU Institutional Reform (MEAE 2023: 33–36).

2. 'Coalitions of the willing and able' – Enlargement and flexibility

a) Flexibility by differentiation

There can be no doubt that European integration has been a successful project of peace, which started in 1951 with the European Steel and Coal Community (ECSC Treaty). It was in this spirit that the 1957 treaty establishing the European Economic Community (known as both the EEC Treaty and the Treaty of Rome) emphasised in its preamble the goal of an "ever closer union", in the course of which the integration of the national economies

1 A recent example of this was Hungary's veto of EU efforts to provide additional financial assistance to Ukraine.
2 As the negotiations regarding the EU Pact of Migration and Asylum, agreed on between the European Parliament and the Council in December 2023, have shown.

into a single market was to serve to secure peace and to subsequently motivate Europe's states and peoples to also pursue political integration. With the EEC Treaty and the 1985 White Paper on the completion of the internal market, including the limited 1986 reform treaty (the Single European Act), a European single market gradually came into being. Implementation of the single market brought in its wake the Europeanisation and partial harmonisation of flanking policies, resulting in the development of European environmental, health, consumer-protection and, in part, social policies. This made the EU more political and gradually led to an additional foundation of European integration. With the 1992 Maastricht Treaty (Article F TEU) and then even more explicitly with the Lisbon Treaty of 2009 (Article 2 TEU), the EU became a community of common values. Drawing lessons from the dictatorships of the 20th century, it guarantees, among other things, basic standards of human rights, democracy and the rule of law in the EU and its member states (Calliess 2010)[3].

Based on this common foundation, according to its (unofficial) motto[4], the EU is 'united in diversity'. Yet diversity is both the strength and the challenge of the EU. On the one hand, diversity goes hand in hand with the principle of subsidiarity (Article 5 TEU), which safeguards cultural plurality as well as federal competition in search of the best solution for political solutions. On the other hand, in the course of enlargement, the EU has become more and more heterogeneous in economic, cultural, social and political ways. Therefore, the diversity of the 27 member states increasingly results in interests that are sometimes so vastly different that it is no longer possible to reach a consensus on common action, be it with legislation or the reforms necessary to strengthen the EU's ability to act. Consequently, without reform and the member states' willingness to pool sovereignty in additional policy fields, there is a risk that the EU may fall into a state of "imperial overstretch" that could threaten its very existence, to use a phrase coined by the historian Paul Kennedy in his (strongly economically based) analysis of the rise and fall of great powers (Kennedy 1987: 536 ff.).

Against this backdrop, the time is ripe – again (see Stubb 2002) – to discuss options for a more flexible (and thereby simultaneously more dynamic) future architecture of the EU featuring 'coalitions' that are willing and able to pool the necessary competences and deliver 'European public goods' (see Calliess 2020, 2021b). The many faces and options of 'coalitions of the willing' and differentiation can be traced to discussions in academic and political circles reaching back to the 1980s, the term comprises various forms of a more differentiated and flexible EU, which can range from increased cooperation and differentiated integration to asymmetric integration, a Europe with different speeds or a Europe with a variable geometry.[5]

With the prospect of enlarging the EU to comprise 30 or more member states, the 'coalitions of the willing' approach is gaining fresh momentum (Schimmelpfennig and Tekin 2023: 94 ff.). Since the EU has already reached its limits when it comes to its capability to act, European actors should this time be in the position to design a more differentiated and thereby tailor-made architecture for European integration, with the aim being to hinder processes of disintegration. In this regard, 'coalitions of the willing' by differentiation could pave the way to reforms.

b) Differentiation approaches

The various approaches to differentiated integration can be associated with two main schools of thought, which essentially represent two different political views regarding the future of the EU: (1) the concept of a federal 'core Europe' and (2) the concept of a flexible 'Europe à la carte'. Although both concepts advocate differentiation between member states and the adoption of regulations of limited scope to prevent blockage and split-up, they pursue different long-term objectives (Stubb 1996, 2002).

(1) The concept of a federal "core Europe"

According to this concept, although the long-term aim is still an 'ever closer union' as enshrined in Art. 1 TEU, it will be achieved through differentiation 'on the way'. The temporary inabilities or political unwillingness of some member states will be compensated for by closer integration of the other member states. This will result in a multi-speed Europe featuring concentric circles around the federal core, which will enable some countries (pioneers) to advance while others will follow later.[6]

With regard to the objective of an 'ever closer union' pioneer groups are not allowed to aim at a static 'two-speed Europe' that would introduce parallel and separate 'orbits'. Instead, the Treaties envision a pioneer group leading by positive example. The pioneers are supposed to press ahead with deeper integration and inspire other member states to join in by showing them the benefits of membership.

3 For a sceptical view of this coupling, see Volkmann 2017: 56, 60 ff.
4 Proclaimed by the European Parliament on 4 May 2000 and later inserted into Article I-8 of the Constitutional Treaty of 2004.
5 For an overview, see Wessels and Wolters (2017) and Tekin (2020). For a legal perspective, see Thym (2004: 28 ff.), della Cananea (2019) and, using the example of the EMU, Piris (2011: 66 ff.).
6 See, for example, the Schäuble and Lamers proposal (Schäuble and Lamers 1994), Lamers et al. (1994) and Bozo (2008).

(2) The concept of a flexible 'Europe à la carte'
In contrast, this concept aims at a thoroughly new conception of the EU as a network of cooperating governments without the aim of an 'ever closer union' . This cooperation would not be framed by supranational EU institutions but be based on national rather than common interests. According to this concept, the EU would maintain a small number of common objectives and policies, but each member state would decide case by case on its participation (so called cherry picking) without being obliged to join in (see e.g. Dahrendorf 1979).

c) Differentiation tools from a legal perspective

From a legal perspective, differentiation in the EU can be achieved through various methods and tools. First of all, special provisions in EU secondary law, sometimes even explicitly mentioned in the Treaties (Article 114 (4–7) or Article 193 TFEU), might allow for differentiation in European legislation. These are stipulations referring to the internal market and its flanking policies, which are either explicitly only applicable in certain member states or which implicitly assign a special status to a member state, as they are substantively adapted to the particular situation in this member state. For example, Article 193 TFEU explicitly allows the member states to keep in place or introduce more stringent protective measures (so-called 'opting up') with regard to the environment than those adopted by the EU pursuant to Art. 192 TFEU.

More important is that the Treaties today offer a general tool for differentiation, namely, the procedure of enhanced cooperation (Article 20 TFU and Article 326–334 TFEU). In a situation in which the required unanimity or majority for a measure cannot be achieved in the Council, under certain conditions, this procedure enables a 'pioneer group', including at least nine member states, to move ahead by passing a new secondary law and to thereby deepen a policy field of the EU within the competences of the EU. The other member states are free to join the enhanced cooperation at any time. This method is designed to overcome paralysis, such as when a proposal is blocked by an individual country or a small group of countries. It has already been used in the fields of divorce law and patents, and it is approved for the field of a financial transaction tax.

The authorisation to initiate enhanced cooperation must be granted in accordance with Article 20 (2) TEU in conjunction with Article 329 (1) TFEU. According to this paragraph, a qualified majority of all member states in the Council and the consent of the European Parliament is sufficient. Unanimity is only required within the framework of the Common Foreign and Security Policy (CFSP) (see Art. 329 (2) TFEU). Once this is granted, the member states participating in enhanced cooperation must adopt new rules in accordance with the respective legal basis in the Treaty – which, in many cases of enhanced cooperation, would imply unanimity (e.g. in tax policy, Article 113 TFEU). In practice, this means that even within 'pioneer' groups of member states, decision-making may be hampered by the unanimity rule. More worryingly, one could imagine a situation in which a member state would enter into an enhanced cooperation with the sole purpose of blocking it from the inside – even though such behaviour would run counter to the principle of loyal cooperation enshrined in Article 4(3) TEU. In this regard, enhanced cooperation provides a strong tool to safeguard the EU's ability to act: In derogation of the legal basis of the respective policy (e.g. in tax policy, Article 113 TFEU), a specific passerelle clause for enhanced cooperation laid down in Article 333 TFEU enables the 'pioneer group' to switch its decision-making process from unanimity voting to qualified majority voting. Therefore, a coalition of the willing (e.g. in the field of tax policy) could decide by majority vote although the treaties in Article 113 TFEU call for unanimity in the Council.

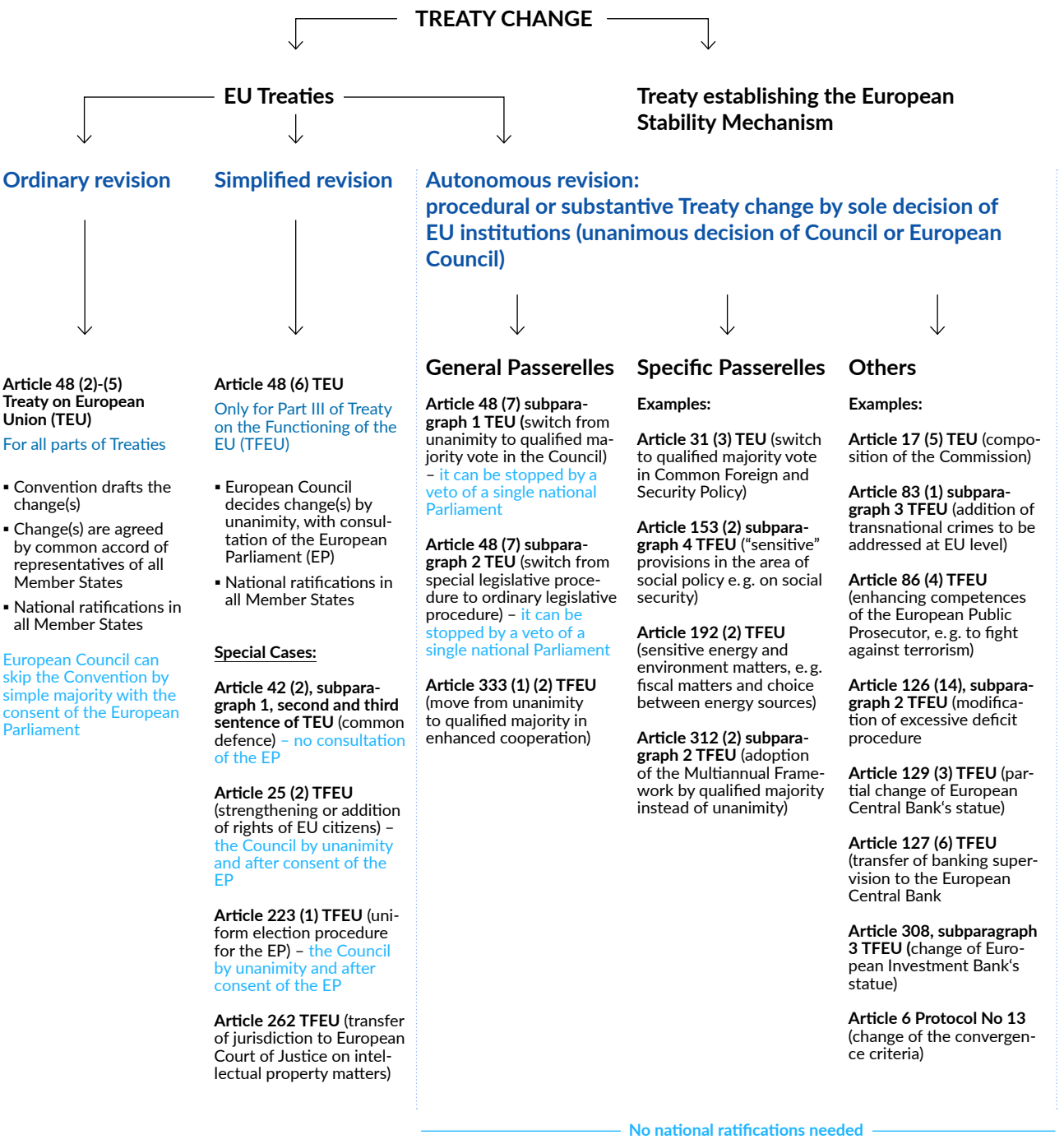
In the field of defence policy, the Treaties established a special provision in Article 46 TEU providing the grounds for establishing a Permanent Structured Cooperation (PESCO) (for more details, see Scheffel 2018). In December 2017, a Council decision formally established PESCO. It allows willing and able member states to jointly plan, develop and invest in shared projects as well as to enhance the operational readiness and contribution of their armed forces. The commitments undertaken by the participating member states are of a legally binding nature. Moreover, regarding the euro area, the creation of differentiated secondary law in the field of economic policy could be extended by Article 136 TFEU.[7]

Finally, by means of treaty change, differentiation can be accomplished through special provisions in the EU Treaties themselves (Art. 48 (1–5) TEU) or the protocols added to them (Art. 51 TEU). Moreover, in the context of enlargement, the accession treaties (Art. 49 TEU) allow for differentiation by transitional and/or special provisions regarding new member states.

Differentiation goes hand in hand with flexibility. In this regard, the simplified treaty-revision procedure as well as the flexibility mechanisms – particularly the so-called passerelle clauses provided by the Treaty of Lisbon (see below) – offer some untapped potential.

7 For more details on Art. 136 TEFU, see Häde in Calliess and Ruffert (2022), Art. 136, marginal number 1–21.

FIGURE 1: **Options for Treaty Change**



Source: Prof. Dr. Christian Calliess, FU Berlin, europarecht@fu-berlin.de

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By virtue of Article 48 (6) TEU, a simplified procedure for amending the Treaties was established to exist in parallel with the standard procedure. Although it is limited to policy fields of the Treaty on the Functioning of the EU, the new mechanism makes it possible to avoid having to organise a fully fledged convention to modify the Treaties. However, it still requires treaty amendments to be approved by all member states in accordance with their respective constitutional requirements.

Apart from that, the Lisbon Treaty introduced a number of flexibility mechanisms that make it possible to deviate from the legislative procedures initially foreseen in the Treaties – particularly in those areas where special

legislative procedures and unanimity were maintained – without having to go through the cumbersome process of full-on treaty reform. Generally referred to as passerelle clauses, these provisions enable 'autonomous adjustments' to the Treaties. By applying these clauses, it is possible either (a) to switch from unanimity voting to qualified majority voting in specified policy areas or (b) to move from the special legislative procedure to the ordinary legislative procedure in specified policy areas.

There are both a general passerelle clause (Article 48 (7) TEU) that is applicable to all European policies – except those in the field of defence or for decisions with military implications – as well as specific passerelle clauses that apply to defined European policy areas. These include: Article 81 (3) TFEU regarding judicial cooperation in civil matters; Article 153 (2) TFEU regarding social policy; Article 192 (2) TFEU regarding environmental policy; Article 312 (2) TFEU regarding the multiannual financial framework; the aforementioned Article 333 (2) TFEU regarding decisions on enhanced cooperation; and, last but not least, Article 31 (2 and 3) TEU regarding common foreign and security policy. The latter includes an interesting procedural way of exercising flexibility using the mechanism of constructive abstention (Article 31 (1) TEU[8]), which might even be a blueprint for the reform of other policy fields hampered by the need for unanimity: While all decisions relating to the EU's CFSP are generally adopted unanimously, in certain cases, a member state may decide to abstain from voting on a particular measure without blocking it, thereby enabling a decision.

Beyond these passerelle clauses, the Lisbon Treaty provides for other types of flexibility mechanisms that allow for technical adjustments to the Treaties without 'treaty change'. A good example can be found in the context of the Security Union, where the Treaty explicitly allows for broadening the tasks of the European Public Prosecutor's Office (Article 86 (4) TFEU) – a clause which, given the unanimous agreement of the European Council after obtaining the consent of the Parliament and consulting the Commission, could be used to expand its tasks beyond the area of the fight against fraud to include other serious crimes with a cross-border dimension, such as terrorism. Similarly, there are a number of provisions relating to the Economic and Monetary Union that allow for technical adjustments. These include the protocol on the excessive deficit procedure (Article 126 (14) TFEU), provisions concerning the convergence criteria, the statutes of the European Central Bank and of the European Investment Bank, and the tasks of the European Central Bank, which can be extended to banking supervision.

Nevertheless, all tools of differentiation and flexibility require unanimity among the member states in the European Council and, in many cases, the (implicit) consent of national parliaments. Therefore, a tool of differentiated integration resulting from international treaties between two or more member states outside the framework of the EU can become of interest. According to Article 6 of the Vienna Convention on the Law of Treaties, every state has the capacity to conclude treaties. Since EU member states remain sovereign states and are subject to international law, they can still independently conclude international treaties with other sovereign states, including other EU member states.

However, this competence is limited in certain ways by EU law. First, it is crucial to distinguish between the limits placed on member states concluding international treaties with non-EU countries and the limits placed on members states concluding international treaties with other EU member states. When it comes to the latter, the European Court of Justice (ECJ) has essentially defined the scope of member states in its Pringle judgement (CJEU 2012). The case concerned the compatibility of the Treaty on the European Stability Mechanism (ESM) with the EU Treaties. The Court clarified that, in areas where the EU Treaties do not provide for a single or specific competence of the Union, the member states are authorised to conclude international treaties among themselves, such as the one establishing the ESM (see ibid. paras 93 ff.).

Additionally, when concluding international treaties, the member states must adhere to the principle of sincere cooperation set out in Article 4 (3) TEU.[9] This also implies that the member states should primarily resort to the method of enhanced cooperation that is explicitly provided for in EU primary law and only conclude international treaties as a second option (Repasi 2013: 59 f.).

3. Three options for a more dynamic and flexible EU

Based on the two different basic approaches (see Section 2b) and taking the possible instruments for differentiation into account, three options for making the EU more dynamic and flexible via differentiated integration can be identified. All three options would facilitate both the reform of the current EU 27 regarding its ability to act as well as the accession of new member states by taking their individual capabilities and capacities into account.

8 For more details on Art. 31 TEU, see Cremer in Calliess and Ruffert (2022), Art. 31, marginal number 1–20.
9 For more details on Art. 4 (3) TEU, see Calliess/Kahl in Calliess and Ruffert (2022), Art. 4, marginal number 168.

OPTION 1

A new architecture for European integration – and integration of gradation

The first option could be to establish a new architecture for European integration that is based on the current Treaties and institutions but introduces differentiation by concentric circles (Calliess 2021a: 27–32). In keeping with the goal of achieving 'an ever closer union' (Art. 1 TEU), Option 1 is built around an inner circle ('Core Union') of EU member states that agree on deeper integration. This particularly applies to political integration, and those member states that are willing and able to would jointly create the European Political Union (Circle 1).

Membership in Circle 1 would be based on a reform of the Treaty of Lisbon, particularly in three major policy fields: (1) the necessary completion of the Economic and Monetary Union, which includes democratically and institutionally strengthening it and granting it real fiscal competence in a narrowly defined area; (2) creating a more resilient inner 'area of freedom, security and justice' (see European Parliament 2023) comprising sustainable border management and functioning migration policies as well as stronger cooperation and institutional integration in fighting terrorism, organised crime and cyber-attacks (i.e. the Security Union); and (3) establishing a Defence Union as a European pillar of NATO that would comprise common procurement, European battle groups, a European headquarters and security council, and a council formation of defence ministers (for concrete proposals, see Calliess 2023).

On this basis, the political Core Union would not only share the institutions but also the tasks and competences with the surrounding circles. Moreover, all inner supranational circles would share the basic core values and principles of Article 2 TEU, in particular democracy, the rule of law, and a common legal framework. They would also have to adhere to the European principles of subsidiarity, solidarity and coherence.

Those member states not willing or able to integrate any further by signing the new treaty would then share the single market with the Circle 1 member states. As a result, in addition to essentially constituting a supranational 'European Economic Union' (Circle 2) with them, they would simultaneously not hinder them from deeper integration.

A third circle could then be added to allow for a looser form of integration limited to the freedom of goods. Membership could be offered to countries that do not fulfil the criteria for full single market integration or do not wish to fully participate in it. This circle could be referred to as a supranational 'European Customs Union' (Circle 3), and countries within this circle would still be member states of the supranational EU.

In addition, ways of intergovernmental economic cooperation outside the three inner circles of the EU should be offered. These could range from a 'Multilateral Free Trade Area' (Circle 4) offering access to the EU single market – as currently represented by the European Economic Area (EEA) – to looser forms of cooperation in 'Bilateral Free Trade Agreements' (Circle 5). Moreover, the EU could establish development partnerships with economically underdeveloped countries that share a common interest or interests, such as in migration, security, energy and climate protection.

With regard to a supplementing intergovernmental political cooperation that ensures the rule of law, two organisations could play a role: the Council of Europe, with its institutions and conventions, and the European Political Community (EPC). The latter, made up of the 27 EU member states and several other European countries,[10] is a relatively new forum for political dialogue and cooperation between the EU and neighbouring countries to address issues of common interest (see EU23 2023 or Federal Government of Germany 2023). The roots of the EPC lie in the Conference on the Future of Europe held in May 2022, when French President Emmanual Macron, who also held the presidency of the Council of the European Union at the time, proposed the creation of this forum. In his words, the EPC was supposed to provide "a new space for political cooperation, security, cooperation on energy, transport, investment, infrastructure and the movement of people" (see EU23 2023). To date, three meetings have been held, the last in October 2023 (European Council 2023a). Thus, over the last two years, the EPC has become another political platform to consider when thinking about the EU's enlargement (as well as its neighbourhood policy).[11]

While such looser forms of political cooperation find their basis in very general common interests and are only sup-

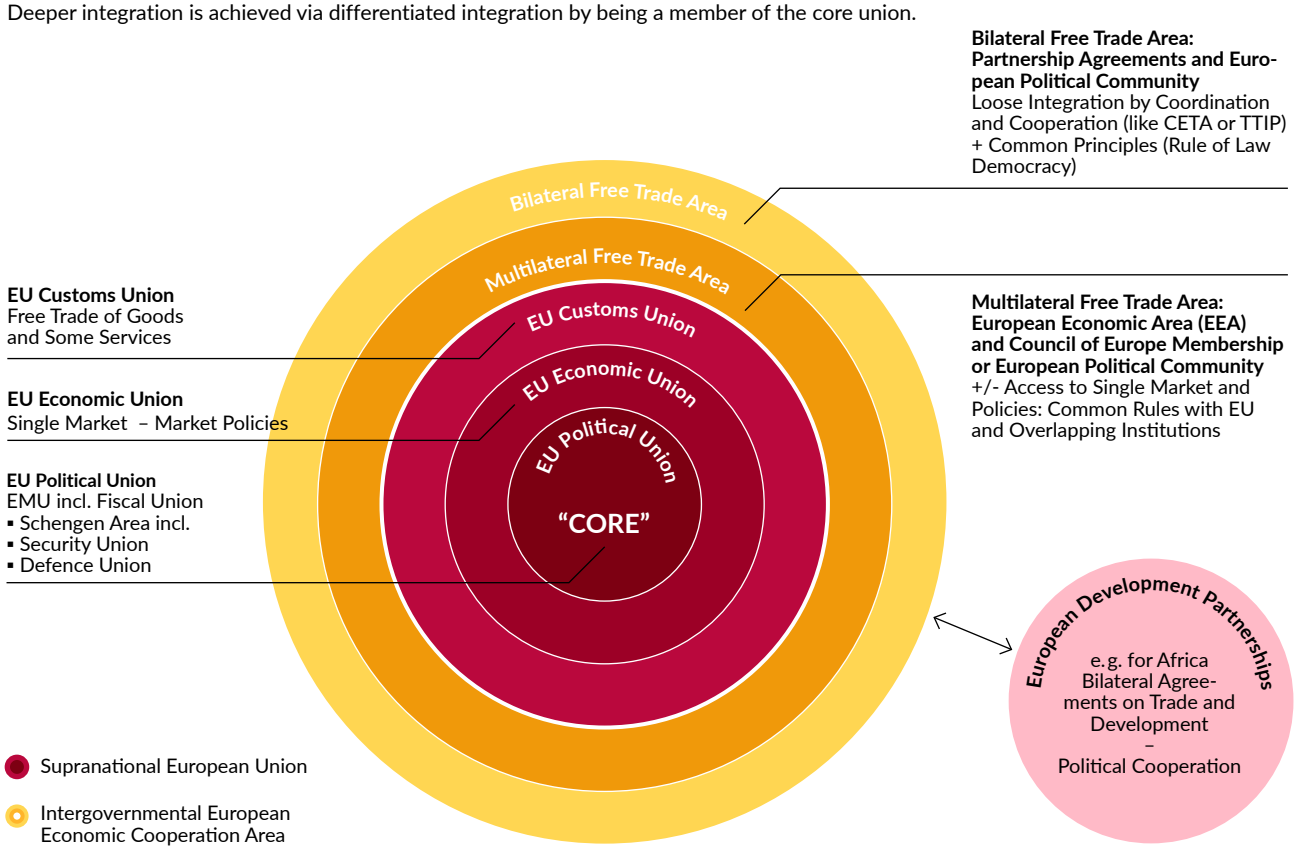
10 The following non-EU member states attended the EPC meeting held in October 2023: Albania, Andorra, Armenia, Bosnia and Herzegovina, Georgia, Iceland, Kosovo, Liechtenstein, Moldova, Monaco, Montenegro, North Macedonia, Norway, San Marino, Serbia, Switzerland, Ukraine and the United Kingdom (see European Council 2023a).

11 See also MEAE (2023), specifically pp. 6, 33 and 36, suggesting that the EPC should form the outer tier in the proposed circle model "for political cooperation without having to be bound by EU law" (p. 6). The report describes the role of the EPC as follows: "In more general terms, external differentiation also relates to the EU's enlargement and neighbourhood policy. The European Political Community (EPC) could serve as an important venue for this purpose and could be developed accordingly. External differentiation could become relevant for the future of the (enlarged) EU if individual Member States either block necessary treaty reforms and consequently negotiate new opt-outs, or even prefer a less committed status regarding European integration. In these cases, a special association status with the EU could be envisioned or even just simple participation in the EPC" (p. 33).

posed to provide a forum for exchange,[12] the inner circles of the model represent the original idea of a supranational EU based on common rules and standards. Hence, at least in the first three supranational inner circles, the long-term goal of the EU member states would remain an 'ever closer union'. However, this goal would be achieved by 'interim' differentiation in the supranational circles. As a result, the Core Union and each circle would be open to the accession of willing and able countries to form an outer circle.

Figure 2: Option 1: A new architecture for European integration built around a 'Core Union'

Deeper integration is achieved via differentiated integration by being a member of the core union.



Source: Published for the first time in Calliess (2019).

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With Option 1, a new architecture for the EU – with a political Core Union as an inner circle and less integrated concentric circles around it – would emerge, resulting in an European integration of gradation. The Core Union would share the tasks and competences of the circles surrounding it, which can range from a supranational internal market and customs union to intergovernmental cooperation. Nevertheless, the long-term goal of all member states would remain that of forging an 'ever closer union'. In this way, a more flexible architecture for Europe would be established, comprising various levels (circles) of integration that offer tailor-made solutions to new (and former) member states.

However, having such a (relatively static) Core Union at the center as well as separate concentric circles with different levels of integration around it is rejected not only by the candidate countries, but also by many EU member states (see Winzen 2023). With regard to the Core Union, they are afraid of becoming 'second-class Europeans'.

12 See European Council 2023a: "This platform for political coordination does not replace any existing organisation, structure or process, and does not aim to create new ones at this stage."

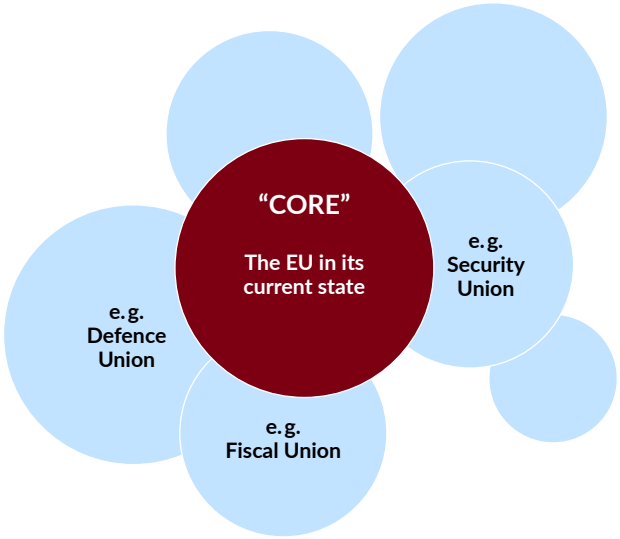
OPTION 2a

Flexibility by having pioneer groups based on the current status of the EU

Given that Option 1 – with its entirely new architecture of European integration – defines a politically rather controversial and at the same time demanding path of reform, one might be tempted to pursue a more pragmatic option. Indeed, flexibility inside the supranational EU could be achieved by a 'Europe of pioneers' based on the current status of integration. According to this scenario, deeper integration among pioneers would create additional areas in which member states (who are willing and able to do so) can decide on a case-by-case basis – rather than across the board – to deepen certain policy areas of today's EU or to open up new policy areas. Those member states not belonging to the pioneer group would remain in the EU as it is, with all the rights and obligations that come with membership, but without being obliged by the 'constitutional expectation' of Article 1 TEU[13] to participate in further integration towards an 'ever closer union'. At the same time, however, they would not be able to prevent other member states forming pioneer groups.

Figure 3: Option 2a – Europe of pioneer groups based on current status

Deeper integration is achieved via differentiated integration by being part of a pioneer group.



Source: The author

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This understanding is expressly stated in the Rome Declaration of March 2017 (Council of the EU 2017). The number of these pioneer groups would not be limited, nor would they have to follow a specific model. In other words, the number of member states taking part and the extent and form of such deeper integration could depend on the specific policy area concerned. Pioneer groups would come together not for a single measure or a single legal act, but rather for the dynamic deepening of a whole policy area and the creation of a more efficient single legal area with common rules. While the resulting advantages (including a separate budget) would only be available to the members of the pioneer group, they would still provide an incentive for other member states to join the pioneer group.

While every member state that is willing and able to is supposed to be allowed to join a pioneer group at any time, the principle of coherence (Art. 13 (1) TEU and Art. 7 TFEU) stipulates that the pioneer groups are not allowed to create new institutions (apart from specialised agencies). Instead, the existing EU institutions would be used in an intersectional manner, and their procedures and decision-making powers would be extended to the relevant pioneer group and adapted to facilitate efficient decision-making. The Commission and the European Court of Justice would ensure coherence in the relationship between the EU and the pioneer groups, while only the members of the pioneer group in question would decide in the Council and Parliament. However, each pioneer group would have its own separate budget, which would be drawn from the pioneer countries' contributions or common taxes.

13 See Calliess in Calliess and Ruffert (2022) Art. 1 marginal 9 ff.

This kind of deeper integration could be pursued through a form of enhanced cooperation under Articles 20 TEU and Article 326 et seq. TFEU (in the area of defence policy under Article 42 (6) and 46 TEU). Alternatively, especially when the EU lacks the necessary competence and there is no unanimity regarding treaty change, pioneer groups could be established by an intergovernmental treaty that would be closely linked to the legal framework of the Treaties and involve the institutions of the EU (e.g. following the example of the Fiscal Treaty) (see Calliess 2015).

Member states participating in a pioneer group by enhanced cooperation would have to adopt new rules in accordance with the respective legal basis in the Treaty. By using the above-mentioned passerelle clause of Article 333 TFEU, majority voting would become the new normal in all pioneer groups. The same would apply within a pioneer group established by an intergovernmental treaty.

Pioneer groups are essentially defined by the efficient implementation and achievement of their goals. Hence, just as the EU's doors are fundamentally open to any European constitutional democracy (Article 49 TEU), the pioneer groups would have to admit any EU member states that are willing and able to realise the ambitious objectives set by such a pioneer group (see also Article 331 (1) TFEU).

At the same time, pioneer groups would be characterised precisely by the fact that they do not reflect the lowest common denominator, but rather form an efficient and future-oriented club of the willing and able. In this respect, there can be no carte blanche for the member states of the pioneer group. Instead, once a member, they must continuously demonstrate their willingness to deliver on the jointly agreed 'pioneer goals'. If they are no longer able to do so (e.g. in the course of a crisis), the Commission can offer them financial, technical or administrative assistance from the resources of the pioneer group. However, should a member refuse this assistance or if it was no longer willing to assist in achieving the pioneer group's ambitious objectives for other reasons, it would have to leave the group and forfeit the additional advantages associated with membership. To this end, it would be mandatory for each pioneer group to have a withdrawal and an exclusion clause, which could be modelled with a view to Article 46 (4) and (5) TEU. Leaving by withdrawal or exclusion from the pioneer group, however, would not affect membership in the EU, as the member state in question would merely revert to being a 'normal' member state again with no pioneer role.

In contrast to Option 1, whose concept of gradation envisions a Core Union at its centre and decreasingly less integrated circles around it, the architecture of the EU would not be entirely changed with Option 2a. Rather, it would be enriched by the concept of additional pioneer groups in certain areas of policy. Both proposals share the notion that deeper integration can be achieved by member states willing and able to pursue this either by being a member of the Core Union (Option 1) or by being part of a pioneer group (Option 2a). However, as is the case with Option 1, the model of pioneer groups envisioned in Option 2a might raise objections by candidate countries as well as many EU member states owing to a fear of becoming 'second-class Europeans' (see Winzen 2023).

OPTION 2b

Flexibility by pioneer groups based on the internal market of the EU

Unlike the proposals discussed so far, the centre of this proposed Option 2b is a return to the historical basics of the EU – namely, the internal market. Similar to what is envisioned in Option 2a, further integration can be enhanced by forming pioneer groups. However, in contrast to Option 2a, the starting point (or core) of Option 2b would not be the EU in its current state, but just the internal market (Art. 26 (2) TFEU). This means that the core of the EU would not be defined by deeper political integration, but by the minimum economic consensus of the EU (i.e. the internal market) together with the policies flanking it in terms of regulatory policy (e.g. in the field of consumer, health and environmental protection). This approach is based on the fact that participation in the internal market and its cohesion policies, which is financed by the European funds (Article 162 with Articles 174–178 TFEU), is still the driving motive for membership in the EU.

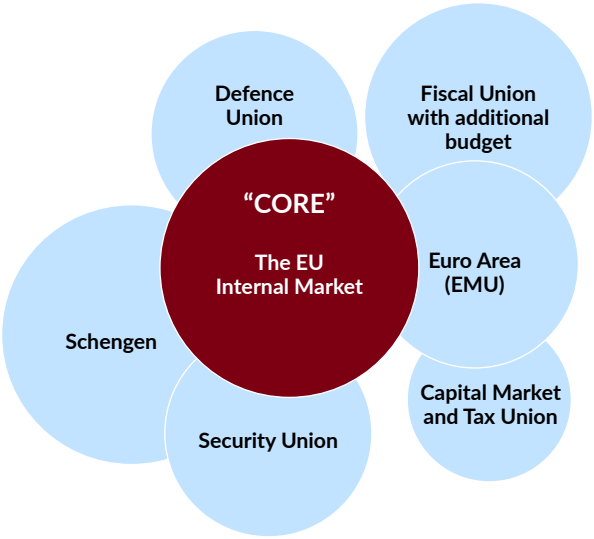
In addition to addressing the fear of becoming 'second-class Europeans', Option 2b would defuse many of the EU's conflicts, which primarily revolve around European restrictions on national sovereignty in political matters. It would also reduce the aforementioned enforcement and implementation deficits, since the internal market deals with politically less sensitive and complex policy areas, which are at the same time largely enforced in an interplay between civil society and the courts. The key idea here is the mobilisation of Union citizens for the enforcement of Union law brought about by market freedoms (see CJEU 2013), which can only be mirrored to a limited extent (if at all) in the Schengen Area, which is dependent on concretising legislative measures.

At a first glance, this approach may seem to contradict not only the historical narrative of European integration but as well the aim of an 'ever closer union'. However, a closer look reveals that further integration actually still

is the goal of Option 2b. Around the internal market core of the EU, those more integrated political spaces (pioneer groups) would form overlapping circles linked to each other by common institutions, the functional principles of the primacy of application and direct applicability of Union law, and the European regulatory principles of democracy, the rule of law, subsidiarity, solidarity and coherence. All of this, as in Option 1 and Option 2a, presupposes a common EU institutional framework. Those member states that want to realise more (political) integration (e.g. a fully functioning euro area, Schengen Area or Defence Union) could do so in pioneer groups starting from the core union defined by the internal market.

Figure 4: Option 2b – EU of pioneer groups based on the internal market

Further integration can be enhanced by forming pioneer groups.



Source: The author

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As in Option 2a, the number of these pioneer groups would not be limited, and they would not have to follow a specific model. The participating member states, as well as the scope and form of deeper integration, would depend on the specific policy area in question. The pioneer groups would lead the way with the goal of deeper integration and, in doing so, set a positive example whose spillover effect (in the form of the advantages associated with membership) would motivate other member states to join.

At the same time, pioneer groups would be defined precisely by the fact that they are not working on the basis of the lowest common denominator, but rather as an efficient and forward-looking coalition of the willing and able. Once a member of a pioneer group, states would have to demonstrate their continued willingness to achieve the jointly agreed 'pioneer goals'. Otherwise, as in Option 2a, they would have to leave the pioneer group. Consequently, as in Option 1 and Option 2a, the resulting benefits (including a special budget) that constitute the European added value of each circle or pioneer group would only be open to its members while at the same time representing an incentive to join the pioneer group. Those member states not wanting to participate in a pioneer group may remain in the internal market core with all rights and obligations (cf. Article 4 (2) and (3) TEU) but without the 'constitutional expectation' of Article 1 TEU regarding an 'ever close union'. Hence, as in Option 2a, withdrawal or exclusion from the pioneer group would not affect membership in the EU. Rather, the member state in question would revert to the core union defined by the internal market, whereby it would lose the integration advantages of the pioneer group it had left.

With the accession of new member states to the internal market core, this new architecture could be put in place and then also made available to 'old' member states as an option. Similar to Option 2a, a more flexible architecture of the EU would gradually emerge – pioneer group by pioneer group – unlike the 'one-way street' of the current EU and unlike the scenario envisioned in Option 1. The main difference between Option 2a and Option 2b would be the point of departure, so to speak, as the latter would be narrowed down to the internal market core in contrast to the EU, as in the former.

Summary

How can the EU prepare for the future and launch a reform that not only preserves but improves its ability to act? This is a question that has become even more topical since 2022: With an accession of Moldova, Ukraine and the countries of the Western Balkans to the EU politically on the horizon, the question of enlargement is once again on the European agenda. To avoid an overstretch of the EU that inevitably would lead to disintegration, the EU must undergo a reform process before taking on additional enlargement.

Already today, the diversity of the 27 EU member states increasingly results in situations in which the interests vary so widely that it is no longer possible to reach a consensus on common action, be it in enacting legislation or making the reforms necessary to strengthen the EU's ability to act. Thus, the time is ripe to discuss options for a more flexible (and simultaneously more dynamic) future architecture of the EU by means of 'coalitions' of member states that are willing and able to share the necessary competences and to deliver 'European public goods'.

The debate about the future of the EU and the necessary reforms (including the question of whether changes to the EU Treaties are necessary, appropriate and realistic) has been ongoing for some time – in public, in the EU institutions, and in dialogue between the EU member states and their citizens. And with the perspective of enlargement, it has gained new momentum. Nevertheless, there is a proverbial elephant in the room, as all proposals more or less avoid touching on the topic of differentiated integration, including approaches for a more flexible architecture for European integration.

Based on the two different basic approaches and taking the possible instruments for differentiation into account, three options for fashioning a more flexible EU via differentiated integration can be identified. All options would facilitate both the reform of the current EU 27 regarding its ability to act as well as the accession of new member states while taking their individual capabilities and capacities into account.

Option 1 would establish a new architecture for European integration that is based on the current Treaties and institutions but introduces differentiation by concentric circles (i.e. an integration of gradation). In accordance with the goal of an 'ever closer union', Option 1 is built around a supranational inner circle (Core Union) of willing and able EU member states that agree on deeper integration and, in particular, political integration.

Given that Option 1 (with its entirely new architecture of European integration) defines a politically rather controversial and at the same time demanding path of reform, one might be tempted to pursue a more pragmatic option. According to Option 2a, flexibility inside the supranational EU could be achieved by a Europe of pioneers. Based on the current status of integration, pioneer groups would create additional areas in which member states that are willing and able to do so can decide on a case-by-case basis – not across the board – to deepen certain policy areas of today's EU or to open up new policy areas. Once a member of a pioneer group, states would have to demonstrate their continued willingness to achieve the jointly agreed 'pioneer goals'. Otherwise, they would have to leave the pioneer group, either by withdrawal or exclusion.

Option 1 and Option 2a share the idea that deeper integration can be achieved via differentiated integration, either by being a member of the Core Union (Option 1) or by being part of a pioneer group (Option 2a). However, both might raise objections by candidate countries as well as many EU member states owing to the fear of becoming 'second-class Europeans'.

These concerns are met by Option 2b. Unlike in the cases of Option 1 and Option 2a, Option 2b focuses on a return to the historical basics of the EU – namely, the internal market. Similar to what is envisioned in Option 2a, further integration can be enhanced by forming pioneer groups. However, in contrast to Option 2a, the starting point (or 'core') would not be the EU in its current state, but just the internal market. This means that the core of the EU would not be defined by deeper political integration, but rather by the minimum economic consensus of the EU (i.e. the internal market) together with the policies flanking it in terms of regulatory policy. This approach based on participation in the internal market and its cohesion policies, which is financed by the European funds, is still the driving motive for membership in the EU. As in Option 2a, withdrawal or exclusion from the pioneer group would not affect membership in the EU. Rather, the member state in question would revert to the core union defined by the internal market.

A more flexible European integration is the corollary to the fact that membership in the EU – as the withdrawal clause of Article 50 TEU underlines – is based on voluntariness. In contrast to the 'one-way street' represented by today's integration process, a European working method that allows for pioneer groups could help to give rise to new forms of dynamic flexibility and avoid an overstretch of the EU

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April 2024

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Editing
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Design
Ines Meyer, Gütersloh
Cover
Montage: © ii-graphics – stock.adobe.com
Printing
Hans Gieselmann Druck und Medienhaus, Bielefeld

DOI: 10.11586/2024049