De facto differentiation in the European Union

Circumventing rules, law, and rule of law

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UiA University of Agder

Doctoral Dissertations at the University of Agder 465

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Foreword

A little over three years ago, I was given the opportunity to do a PhD in political science in Kristiansand. Located on the southern and comparably speaking less rainy and less cold coast of Norway, this small town is in the centre of what the locals call the Norwegian Riviera. I was immediately charmed by their good sense of humour and laid-back attitude. Besides being surrounded by friendly people and some admittedly pretty landscapes, the conditions under which this dissertation was written are extraordinary from my German or continental European perspective. Having a full-time position with an actual salary and no extra work duties, a sizeable budget for project related expenses and yet another pool of funds to attend international conferences greatly facilitated this research and contributed to an overall pleasant stint at the University of Agder (UiA).

This very long text you are about to read, skim, or politely glance at is the most tangible outcome of my time here. While I am certainly proud of this, there are several other things I have gained and will forever cherish besides the two letters that will soon precede my name on everything from my doorbell to my driver's licence. Most importantly, I made new friends who have enriched my life and introduced me to Scandinavian culture. I was given every opportunity to explore an academic career, which leaves me with a better sense of professional direction than I had three years ago. And I even picked up a few words of Norwegian along the way. All of this was made possible thanks to a great many people who guided, challenged, and supported me in a variety of different ways.

Above all else, I want to thank Professor Stefan Gänzle, my doctoral supervisor and mentor. With his genuine kindness, unwavering support, and invaluable professional and academic advice, he guided me through this period in the best way I could imagine. He saw some potential in my initial project sketch and, in the sense of the Norwegian word for supervision (*veiledning*), truly led the way to turning this into a decent piece of research. Much more than that, he showed me the way towards a potential future in academia. Among many other things, he included me in his own research projects, entrusted me with three courses in our master's programme, and helped me build my academic network. In this context,

I would also like to thank Prof. Dirk Leuffen who hosted me at the University of Konstanz for a month in 2022 and whose seminal contributions to the field as well as his openness to debate with students inspire me. My gratitude also extends to Dr. Jens-Uwe Wunderlich, who I've had the pleasure and honour to work with in an exciting research project together with Stefan.

The entire staff of the Department of Political Science and Management deserve credit for turning my stay here into a success both on a personal and professional level. In particular, Prof. Jarle Trondal has significantly shaped my academic experience. I admire his scholarly prowess and always having an open ear for his doctoral students. I greatly benefited from his PhD seminars, enjoyed and learned from our countless arguments about the fallibility of rational choice theory, and I am thankful for all the advice I got on this and all my other academic works. Dr. Anne Pintsch also deserves special mention. She included me in various projects related to her Jean Monnet Centre of Excellence and offered me guidance throughout my first semester of teaching. In this regard, I would also like to thank my students who are just wonderful and made teaching as well as our excursion to Brussels an absolute joy. And finally, everything I did at UiA was built on a strong administrative foundation. Therefore, I would like to thank Kari and Gunhild for supporting me in my doctoral studies, all my little side-projects, and many other things.

Along the way of this journey, I met a number of people who have become very dear to me. Immediately upon arrival, I was very warmly welcomed here by the other PhD students and taken up into the illustrious circle of the Coffee Ontology – sometimes Beer Ontology. Standing out among those are my boys Johan, Laszlo, Frans, Emil and Stefan as well as Lucia who have been the backbone of my stay in Norway and provided me with everything I need: silly discussions about politics, philosophy, movies, and more; companionship in the cinema, bars, clubs, on hikes, loud parties in my tiny flat, watching football, playing World of Warcraft; as well as honest feedback on my work. I also made important acquaintances outside of UiA. At my very first and due to the pandemic unfortunately virtual UACES conference in 2021 I met Alex Schilin who initiated our joint founding of a PhD network with likeminded young scholars from all over Europe. Alex has

since become not only my academic sparring partner and regular conference buddy, but also a friend.

And finally, I would like to thank my family for their unconditional support and giving me a place to stay whenever I felt deprived of warm weather or longed for the exquisite Swabian cuisine. I'm thankful for all my friends from various previous stages of my life who have been there for me and some of whom even came to visit. And most of all, I am glad to be one of two members of the Second Banana Film Club. The other member, Lauren, is a tremendously important pillar in my life, who brings me joy, challenges me intellectually, and supports me in this and many other endeavours. Thanks, friend!

Summary in Norwegian

Europeisk integrasjon er ikke en ensrettet, ensartet prosess mot en stadig tettere union. På grunn av ulike politiske preferanser og administrativ kapasitet blant de 27 medlemslandene er det blitt vanlig praksis å tillate, eller i noen tilfeller pålegge unntak fra visse politikkområder. Unionen oppmuntrer også utvalgte ikke-medlemsland til delvis å delta i samarbeidet visse politikkområder, for eksempel Schengen-sonen, for å lette handel eller fremtidig tiltredelse. Dette kalles differensiert integrasjon. Slike ordninger er vanligvis resultatet av en juridisk prosess og nedfelt i EU-retten. Dette omtales heretter som *de jure* differensiering. Det finnes imidlertid *opt-outs* og *opt-ins* som eksisterer utenfor EUs juridiske rammeverk, og disse kalles *de facto* differensiering. Dette gjelder for eksempel Sveriges nei til euroen, Storbritannias beryktede budsjettrabatt eller den opprinnelige Schengen-avtalen. Selv om differensiert integrasjon er et underfelt av europeiske integrasjonsstudier som stadig vokser, er *de facto* differensiering fortsatt en akademisk blindsone. Denne doktoravhandlingen tar for seg denne mangelen i den akademiske litteraturen.

Hovedargumentet er at *de facto* differensiering bør betraktes som en egen form for differensiert integrasjon i EU. For å underbygge denne påstanden har avhandlingen tre hovedmål:

1. Konseptualisere *de facto* differensiering i samsvar med dets ulike empiriske manifestasjoner;
2. Undersøke hvilken rolle *de facto* differensiering spiller i EUs system for differensiert integrasjon;
3. Diskutere EUs muligheter og begrensninger når det gjelder å forhindre eller oppheve *de facto* differensiering.

I artikkel 1 legges det konseptuelle grunnlaget. Med henvisning til ulike anerkjennelsene av *de facto* differensiering og lignende begreper i litteraturen, presenterer den en omfattende definisjon. I artikkelen slås det fast at *de facto* differensiering er et speilbilde av *de jure* differensiering i den forstand at resultatet er en ulik økning eller reduksjon av sentraliseringsnivået, politikkens omfang og/eller medlemskapet i EU. Den grunnleggende forskjellen ligger i forholdet til

EU-retten. Mens den rettslige differensieringen er nedfelt i EU-retten, er ikke den faktiske differensieringen det. Dette dikotomiske forholdet kan virke trivielt, men det har stor betydning for hvordan begge differensieringsformene etableres og fungerer. Med utgangspunkt i empiriske observasjoner av flere saker som passer inn i denne definisjonen, spesifiserer artikkel 1 begrepet ytterligere og utvikler en tredelt typologi som skiller mellom de facto differensiering basert på 1) manglende overholdelse, 2) ensidige *opt-ins* og 3) formelle eller uformelle avtaler utenfor EU-retten.

Artikkel 2 undersøker om *de facto* differensiering har et spesifikt formål i EUs system for differensiert integrasjon. Kort oppsummert finner den at *de facto* differensiering faktisk kan gi gjensidige fordeler for EU-institusjonene og medlemslandene. I praksis er det ofte mer enn bare det nest beste alternativet hvis rettslig differensiering ikke er tilgjengelig, og kan gjøre EU-integrasjonen mer fleksibel når sterke nasjonale krav om differensiering møter behovet for å utøve skjønn eller pragmatisk handling. Disse tre faktorene ble identifisert på grunnlag av et teoretisk rammeverk inspirert av *rational choice* teori og en komparativ casestudie av alle de tre typene *de facto* differensiering. De ble funnet, i varierende grad, i alle tre tilfellene: 1) Sveriges avvisning av euroen, 2) Kosovos innføring av euroen og 3) EUs finanspolitiske pakt. Disse ble valgt fordi de alle ligner på andre tilfeller der lignende krav om differensiering i stedet førte til en løsning i henhold til EU-retten.

Artikkel 3 tar for seg EUs problemer med å avskaffe *de facto* differensiering i tilfeller det ikke anses som en gjensidig fordelaktig ordning, men som skadelig sett fra EU-institusjonenes side. I den forbindelse zoomer artikkelen inn på det som uten tvil er et av de mest kritiske tilfellene av *de facto* differensiering: Polens rettsreformer som har undergravd EUs rettsstatsbestemmelser siden 2015. Med utgangspunkt i en spillteoretisk modell finner artikkelen at det som hindrer effektive mottiltak fra EUs side, ikke bare er de begrensede fullmaktene i EUs rettsstatsverktøy eller manglende vilje til å bruke dem, men også den bakstreverske statens handlekraft, begrensninger på nasjonalt og overnasjonalt nivå og eksogene sjokk som gjør det vanskelig for EU å handle ut fra et utilitaristisk perspektiv. Selv om denne casestudien setter søkelys på rettsstatskonflikten, er resultatene

veiledende for alle andre tilfeller av *de facto* differensiering. Det er særlig fordi EU i mer tekniske tilfeller har færre sanksjonsmuligheter og står overfor mindre press for å reagere - både innenfra og utenfra. Til syvende og sist viser avhandlingen at EU har begrensede muligheter til å bestride medlemslandenes forsøk på å omgå EUs lover, regler og normer for ensidig å endre vilkårene for medlemskap med tilbakevirkende kraft.

Denne avhandlingen gir viktige bidrag til litteraturen om europeisk integrasjon. Den øker den konseptuelle forståelsen av differensiert integrasjon ved å øke bevisstheten om de empirisk observerbare forskjellene mellom *opt-outs* og *opt-ins* som er nedfelt i EU-retten og de som bevisst er holdt utenfor. I tillegg kaster den nytt lys over empiriske tilfeller som enten har blitt oversett eller studert parallelt med *de jure* differensiering, til tross for at de har en rekke vesentlige forskjeller.

Fra et mer praktisk perspektiv viser avhandlingen at europeisk integrasjon er mer fleksibel enn det ser ut til. På den ene siden er dette en pragmatisk måte å imøtekomme 27 heterogene medlemsland med ulike nasjonale interesser på. Dette kan også bidra til å gjøre EU mer motstandsdyktig mot destruktive krefter som EU-skepsis, som ofte næres av oppfatninger om et dominerende Brussel som ikke er lydhørt for nasjonale krav. På den annen side avslører *de facto* differensiering EU-institusjonenes relative svakhet i forhold til medlemslandene. Som vist i denne studien er det ikke alltid tilfellet at slike ordninger skapes i fellesskap eller tolereres av EU. Statene trenger ikke, og ber vanligvis ikke om, tillatelse til å omgå EU-retten, og er derfor i stand til å etablere *de facto* differensiering på egen hånd. EU-institusjonene kan bare reagere og har få effektive verktøy til rådighet for å motarbeide dette.

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List of abbreviations

abbreviation	full name
CB	Contested backsliding
EC	European Commission
ECB	European Central Bank
ECJ	European Court of Justice
EEA	European Economic Area
EEC	European Economic Community
EMU	Economic and Monetary Union
EP	European Parliament
EPP	European People’s Party
ESM	European Stability Mechanism
EU	European Union
FA	Full adherence to the rule of law
G7	Group of Seven
GDPR	General Data Protection Regulation
IGO	International governmental organisations
JHA	Justice and Home Affairs
MS	Member State
NATO	North Atlantic Treaty Organization
PiS	Prawo i Sprawiedliwość
PO	Platforma Obywatelska
QCA	Qualitative comparative analysis
R	Reduction or revocation of rule of law backsliding
RM	Retaliatory measures
S&D	Progressive Alliance of Socialists and Democrats
SGP	Stability and Growth Pact
TB	Tolerated backsliding
TFEU	Treaty on the Functioning of the European Union
TSCG	Treaty on Stability, Coordination and Governance in the EMU
U	Utility function
UK	United Kingdom

List of articles

Article 1:

Hofelich, T.C. (2022a) De facto differentiation in the European Union: circumventing rules, law, and rule of law. In Leruth, B., Gänzle, S., & Trondal, J. (eds.) *The Routledge Handbook of Differentiation in the European Union*. Routledge.

Article 2:

Hofelich, T.C. (2022b) De facto differentiation in the EU's Economic and Monetary Union – a rationalist explanation. *Journal of European Integration*, 44(8), 1113-1129. https://doi.org/10.1080/07036337.2022.2101048.

Article 3:

Hofelich, T.C. (currently under review at the *Journal of Common Market Studies*) Too little too late? How game theory explains the EU's response to rule of law backsliding in Poland.

PART I

1. Introduction

Since the Treaty of Rome came into force and established the European Economic Community (EEC) in January 1958, the unification of European nation states has taken great strides. The integration of European economies has expanded from the original six to 27 states within the partly supranational institutional structure that is today the European Union (EU). But the EU's reach practically extends across the entire continent and beyond through the European Economic Area (EEA), bilateral treaties, accession agreements, and integrative neighbourhood policy (Gstöhl 2015; Lavenex 2015; Schimmelfennig 2021). Initially pursuing mostly market-building objectives, the project of European integration has moved closer towards a political union with emerging federal structures (Hix & Høyland 2022; Kelemen 2019; Fabbrini 2016). The EU institutions have gained core characteristics of a democratic polity in its own right with a directly elected and increasingly powerful European Parliament (EP) and the European Court of Justice (ECJ) assuming the role as member states' highest judicial authority. The EU's functional scope has also widened to encompass today virtually all policy areas (Leuffen et al. 2022). Far more than a forum for intergovernmental cooperation, the EU institutions have amassed considerable decision-making power and exclusive competencies even in policy areas typically considered core state powers (Börzel & Risse 2020; Genschel & Jachtenfuchs 2014). For example, the European Commission, the EU's executive branch, is solely responsible for international trade relations, and the European Central Bank (ECB) makes monetary policy for the 20 member states that adopted the euro.

As European integration expanded, the accommodation of ever more and increasingly heterogeneous member states with disparate policy preferences, administrative capacities, or political traditions became a challenge. Already in 1975, when Europe was staggering through economic recession and the UK's first exit referendum had exposed cracks in the EEC, Belgian Prime Minister Leo Tindemans proposed, among other things, a more flexible integration regime to revitalise the project of European Union. A federalist at heart and committed to the principle of 'ever closer union,' Tindemans suggested with a view to integrate economic and monetary policy that 'those states which are able to progress have a

duty to forge ahead,' whereas 'those states which have reasons for not progressing (…) do not do so' (Tindemans 1975, p. 20). He based his proposition on a practice to some extent already present in the Treaty of Rome (ibid, p. 21; Hanf 2001). Although his call for action went unheeded for some time, the Maastricht Treaty of 1992 vindicated his approach. Due to Denmark's initial rejection of the Treaty and similarly strong concerns voiced by the UK, it ultimately contained special provisions for both member states to remain outside certain new integration steps – including the Economic and Monetary Union (EMU).

Today, the EU routinely allows or mandates member states to opt out and invites third states to opt into select provisions of EU law. After initial difficulties to agree on terminology, the literature now commonly refers to this practice as differentiated integration (Stubb 1996). Indeed, quantitative research reveals that a notable fraction of primary and secondary EU law is differentiated in nature (Schimmelfennig & Winzen 2020; Duttle et al. 2017; Chiocchetti 2023). Since Maastricht, research on differentiated integration has become a sprawling sub-field of European integration studies, permeating also other areas of research such as public administration, democratic theory, or comparative regionalism (e.g., Hooghe & Marks 2023; Leruth et al. 2022; Leuffen et al. 2022; Bellamy et al. 2022; Lord 2021; Schimmelfennig & Winzen 2020; Gänzle et al. 2020; Fossum 2015; Warleigh-Lack 2015; Holzinger & Schimmelfennig 2012; Dyson & Sepos 2010; De Neve 2007; Kölliker 2001; Egeberg & Trondal 1999).

Although the literature on differentiated integration has become vast and is ever expanding, little scholarly attention has been devoted to opt-outs and opt-ins that are not integrated in EU law. This is henceforth referred to and conceptualised as *de facto* differentiation as opposed to *de jure* differentiation which refers to derogations enshrined in EU law. Data driven research is mostly limited to the latter, i.e. differentiated integration legalised by way of amendments to primary or secondary EU law (Leuffen et al. 2023; Chiocchetti 2023; Schimmelfennig & Winzen 2020). And often, *de facto* and *de jure* opt-outs are studied side by side without paying sufficient attention to the very different ways in which they came into existence or how they operate (Jensen & Slapin 2012; Schimmelfennig & Winzen 2023). The scholarly neglect of *de facto* differentiation is surprising,

considering that a number of prominent cases fit into this mould. This includes, for example, the UK's infamous budget rebate, the original Schengen Agreement, Sweden's opt-out from EMU, several of the fiscal instruments created in response to the eurozone crisis, as well as Poland and Hungary's systematic undermining of the EU's rule of law provisions.

Against this backdrop, several questions pertaining to the most fundamental aspects of *de facto* differentiation remain unanswered. First, the few mentions of this and similar concepts in the literature as well as the immediately discernible empirical manifestations thereof suggest that something akin to *de facto* differentiation exists. But what exactly it is and how the diverse cases associated with it can be appropriately classified is unclear. Second, its very existence is puzzling. Considering that *de jure* differentiation has long been a tried and trusted means to make integration more flexible, the reason why opt-outs and opt-ins are sometimes left outside EU law is yet to be unveiled. And third, assuming that the circumvention of its own legal framework is not generally in the interest of the self-titled 'Community of Law', it is worth raising the question what the EU institutions can do against *de facto* differentiation. This doctoral research addresses these gaps in the literature by pursuing three core research objectives which can be summarised as follows:

1. Conceptualising *de facto* differentiation in accordance with its various empirical manifestations;
2. Exploring the role of *de facto* differentiation in the EU's system of differentiated integration;
3. Discussing the EU's abilities and limitations to prevent or undo *de facto* differentiation.

This dissertation is a cumulative work which consists of two single authored articles published in peer-reviewed academic journals and one single authored chapter in a major handbook. The above mentioned research objectives are addressed in detail and in this order in articles 1, 2, and 3, which can be found in the appendix (see also table 1). Article 1 lays the conceptual foundations of *de facto* differentiation and develops a three-pronged typology based on an extensive literature review and three illustrative case studies. Article 2 employs a rational

choice framework to discuss the purpose of *de facto* differentiation in the EU's system of differentiated integration. This is empirically substantiated by three cases in EMU in which such arrangements were chosen despite the alternative of *de jure* differentiation being at least in principle available. Equally based on rationalist ontology, article 3 investigates the EU's options to counteract *de facto* differentiation by way of a game theoretical approach. The empirical focus lies here on the long-lasting dispute with Poland about their undermining of the EU's rule of law provisions.

The main body of this dissertation serves the purpose to tie together the three individual pieces of research and to elaborate on the underlying reasoning with regards to theory and methodology. It is structured as follows. The remainder of this introductory section outlines the fine-grained conceptualisation of differentiated integration before turning to an overview of the main contributions and findings of the three articles. The second section elaborates on the conceptual foundations of *de facto* differentiation. Beginning with a review of the literature, this section then describes the concept and typology based on the contribution of article 1. Section three describes the theoretical foundations of this dissertation. It discusses the theories typically used to explain differentiated integration and subsequently introduces the rational choice framework which supports the analyses in articles 2 and 3. The fourth section is dedicated to methodology and data. It outlines the overarching research design and the methodological choice for a case study approach. Subsequently, it specifies the methods of data collection which are primarily based on expert interviews and document analysis. The fifth and final section concludes this dissertation. For this purpose, it links the main findings of this dissertation to the literature on differentiated integration in the EU. Moreover, it considers the implications of *de facto* differentiation as a mode of European integration both from a practical and normative perspective. Finally, it offers an outlook into the future, emphasising the lasting relevance of this research.

Table 1: Overview of the three articles

	Article 1	Article 2	Article 3
Title	De facto differentiation in the European Union – Circumventing rules, law, and rule of law	De facto differentiation in the EU's economic and monetary union – a rationalist explanation	Too little too late? How game theory explains the EU's response to rule of law backsliding in Poland
Overarching objective	Conceptualising *de facto* differentiation	Explaining the purpose of *de facto* differentiation in the EU's system of differentiated integration	Explaining the EU's abilities and limitations to undo contested arrangements of *de facto* differentiation
Research question	What characterises *de facto* differentiation?	Why were Sweden's opt-out from EMU, Kosovo's opt-in, and the Fiscal Compact realised as *de facto* differentiation although similar *de jure* solutions exist?	Why has the EU Commission pursued a gradual approach against Poland's backsliding in the rule of law?
Research design	Conceptual approach to map the nature of *de facto* differentiation and develop a corresponding typology	Comparative case study representing the three types of *de facto* differentiation in EMU	Single case study of the EU's handling of Poland's judicial reforms
Theoretical foundations	Conceptualisation	Rational choice theory	Game theory
Methods of data collection	• Literature review	• Expert interviews (N=11) • Document analysis • Literature review	• Expert interviews (N=13) • Literature review
Theoretical and conceptual contributions	• Definition of *de facto* differentiation as a distinct mode of DI • Three-pronged typology of *de facto* differentiation based on 1) non-compliance, 2) unilateral opt-ins, 3) integration outside EU law	• Tolerated arrangements of *de facto* differentiation of all three types rest on tangible benefits for both involved actors • *De facto* differentiation has a clear purpose; it provides additional flexibility, is less visible, and allows for timely and unbureaucratic solutions to accommodate heterogeneity in the EU	• Important aspects of the rule of law dispute that affect the availability and usability of enforcement measures are beyond the EU Commission's control • Due to incomplete information and the risk of backlash, a gradual and flexible approach is utility-maximal for both the EU and the backsliding state • The application of this strategy is constrained by various factors and intervening actors on the supranational and domestic level, as well as by exogenous shocks
Empirical contributions		• The *de facto* opt-out from EMU serves	• The Commission's initially weak response

		Sweden to keep the krona; the EU avoids to officially accept more opt-outs • For Kosovo, the unilateral adoption of the euro is a second-best solution; the EU could neither legally nor politically prevent it but, thus, did not endorse third state euroisation • As an international treaty the TSCG could bypass the UK's veto in the EU Council	was due to a lack of powerful tools, considerations of backlash and the misperception of Poland's utility thresholds • Because the threat of backlash remained manageable throughout the dispute and exogenous crises like Covid-19, the Commission was able to deploy stronger measures over time

1.1. The missing piece in the EU's system of differentiated integration

Because of its widespread application, differentiated integration is recognised today as a 'normal' and systemic feature of the EU (Leruth & Lord 2015; Schimmelfennig & Winzen 2020). Leuffen et al. (2013: p. 10; 2022: p. 32) define the EU's system of differentiated integration as a multi-dimensional process 'with an organisational and member state core but with a level of centralisation and territorial extension that vary by function.' On this basis, they propose to distinguish between vertical and horizontal differentiation, which quickly caught on (Fossum 2015; Schimmelfennig et al. 2015; Eriksen 2019; Leruth et al. 2022).

Vertical differentiation refers to the level of centralisation which differs in the EU from one policy area to another. In some domains the EU possesses considerable power and even exclusive competencies, whereas others remain firmly in the hands of member state governments. Trade policy, for example is deeply integrated with the EU setting product standards and external tariffs, but defence policy is only a loose arrangement of individual initiatives on the basis of voluntary cooperation (Gstöhl & De Bièvre 2018; Perot & Klose 2022). Conversely, horizontal differentiation speaks to the territorial extension of the EU's authority. EMU, for instance, affects member states to varying extent as not all have adopted the common currency (Howarth & Quaglia 2020; Schilin 2022). The same is true for the abolition of passport and border controls in the Schengen Area. Ireland has

chosen to not to participate, Bulgaria and Romania have been excluded until further notice, while third states like Switzerland or Norway have joined.

The latter case refers to an important sub-division of horizontal differentiation, namely into an internal and an external dimension (Leuffen et al. 2022; Schimmelfennig & Winzen 2020; Leruth et al. 2022). Internal differentiation pertains to the unequal validity of EU law within its territorial boundaries, which can be the result of member states having negotiated opt-outs or newly acceded states being temporarily excluded from certain policy areas. Voluntary opt-outs are relatively common (Schimmelfennig & Winzen 2020). The exclusion of member states from policy areas typically occurs as a byproduct of enlargement. For example, the 2004 enlargement round came with the condition that the old member states could restrict the free movement of workers from new member states for a transitional period of up to seven years after accession due to widespread fears of excessive labour migration (Kvist 2004). *Vice versa*, external differentiation concerns variation in the effect of EU law on third states. This is exemplified by the EEA agreement which compels Liechtenstein, Iceland, and Norway to enact EU law related to the Single Market, or Switzerland's selective integration via bilateral treaties (Gstöhl 2015; Egeberg & Trondal 1999). Moreover, the EU's conditional membership process requires candidate states to partially comply with EU law even before accession to the bloc (Schimmelfennig & Sedelmeier 2019).

In addition to this, research distinguishes between modes of differentiated integration based on intent and outcome. A longstanding and still common distinction is made between the three variants of multi speed, concentric circles, and *à la carte* (Stubb 1996; Leruth et al. 2022). The multi-speed model refers to member states pursuing the same objectives but at different speeds. EMU, for example, was designed to fit this mould, making the adoption of the euro conditional on the fulfilment of certain criteria and, thus, allowing for transition periods that differ from one member state to another (Verdun 1996). The model of concentric circles implies a more or less permanent division of member states into a progressive core that forges ahead with new integration steps and different sets of peripheral states which maintain a lower level of integration. Although frequently advocated by European leaders and the implicit idea behind the creation

of the European Political Community in 2022 (European Commission 2017; Euractiv 2017; Gänzle et al. 2022), a truly and irreversibly divided system of multi-tier integration has arguably not materialised. Europe *à la carte* means that member states are equally entitled to pick and choose which integrative steps to take and which to sit out. The Danish and British opt-outs from the Maastricht Treaty or Poland's opt-out from the EU's charter of fundamental rights are emblematic of this mode of differentiated integration.

Schimmelfennig and Winzen (2014; 2020) have somewhat simplified this three-partite model, distinguishing between instrumental and constitutional differentiation. The former resembles the multi-speed mode in that it is transitional and primarily aimed to address efficiency and distributional concerns. It is mostly used to ease the accession of new member states which may, for example, lack the administrative capacity to implement certain EU rules. Constitutional differentiation is similar to the *à la carte* model and captures a more principled objection to deepening integration, often motivated by concerns relating integration to a loss of sovereignty or national identity. Treaty revisions or, more generally, initiatives to deepen integration tend to produce this form of differentiation. The distinction between these two or the original three modes is important. Differences in how, where and to what ends differentiated integration is applied may raise normative questions anchored in democratic theory, pertaining to the democratic legitimacy of the EU or the threat of domination as a result of differentiation (Fossum 2015; Schraff & Schimmelfennig 2020; Lord 2021; Eriksen 2022). Indeed, public opinion research has found that these different types of differentiated integration matter to citizens, in particular with regards to conceptions of fairness (Moland 2023; De Blok & De Vries 2023; Schuessler et al. 2023).

While differentiated integration in all its guises marks a step towards a total increase of integration, the reverse process of disintegration has garnered attention since the mid-10s. Early research was inspired by the sovereign debt crisis, during which a potential exclusion of Greece from the eurozone was hotly debated, as well as then Prime Minister Cameron calling a referendum on the UK's membership in the EU (Vollaard 2014; Webber 2014; Leruth & Lord 2015;

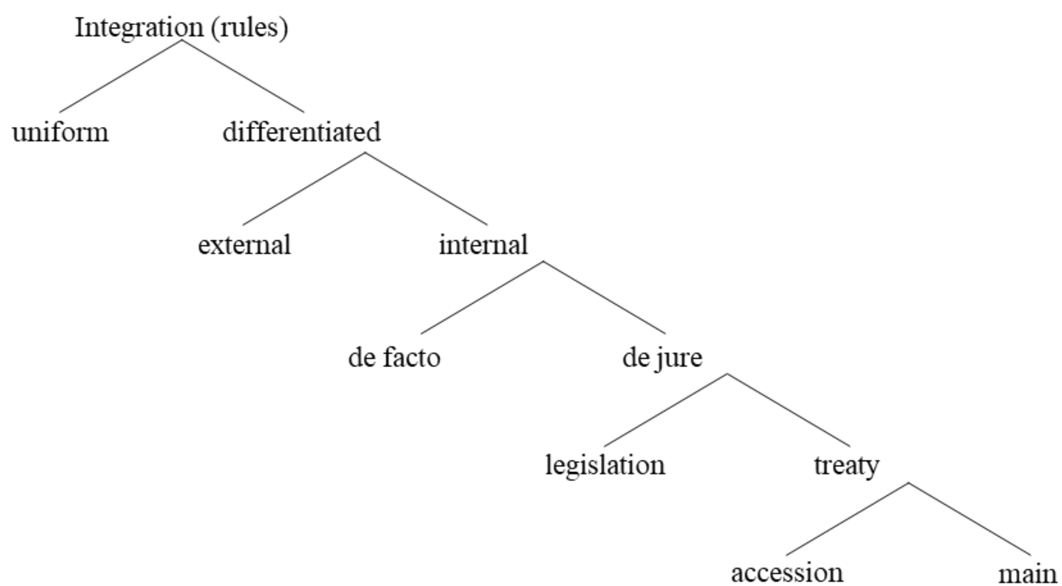
Schmitter and Lefkofridi 2016). With the UK's narrow vote to leave in June 2016, the study of disintegration climbed higher on the agenda of EU scholars. The messy separation process and the EU-UK Trade and Cooperation Agreement which ultimately defined the post-Brexit relations led to the conception of withdrawals from the EU as a process of differentiated disintegration (Schimmelfennig 2018; Leruth et al. 2019a; Gänzle et al. 2020; Glencross 2021). The differentiated nature of Brexit stems from the fact that while the UK officially left the EU, the severing of institutional ties was selective rather than complete. Under the current agreement, the UK maintains close relations with the EU, for example in trade or education. But these close ties come with the condition that exports meet the EU's product standards and contributions to the Horizon Europe budget are made (Hix et al. 2023). Moreover, Northern Ireland remains effectively part of the EU's Single Market. And Gibraltar, another constituent part of the UK, has joined the Schengen regime, and is now arguably more closely integrated than before (Skoutaris 2022). Against this backdrop, the UK's post-Brexit relationship with the EU falls squarely within the concept of external differentiated integration.

All things considered, European integration is generally conceived as a nonlinear and multidimensional process. Both integrative and disintegrative steps are often differentiated in nature. Thus, EU studies conceive of differentiation as a more general concept and constitutive element of the European Union (Leruth et al. 2022; Gänzle et al. 2020). In this sense, differentiation encapsulates the entire spectrum of European integration with all its different modes, whereby 'integration refers to an [unequal] increase – and disintegration to an [unequal] reduction – in the centralisation level, policy scope, and membership of the EU' (Schimmelfennig 2018: p. 1156). As has become increasingly common in the literature, this dissertation uses the term differentiation as an umbrella term specifically and exclusively reserved to describe the non-uniformity of both European integration and disintegration.

This broad, process-oriented definition does not specify *how* this unequal increase or reduction of various aspects of EU integration is achieved. Implicitly, it therefore includes both the establishment of differentiation within and outside the EU's legal framework. This dichotomy between *de jure* and *de facto* differentiation

has been recognised in the literature (Schimmelfennig & Winzen 2020). Nonetheless, research almost exclusively deals with the former, i.e., differentiation enshrined in some form in the Treaties or in secondary EU law. Figure 1, adopted from Schimmelfennig and Winzen (2020), underlines this by outlining the various conceptional branches of differentiation. While *de jure* differentiation branches out quite far, indicating a high level of conceptual specificity, the branch from which *de facto* differentiation springs just ends.

Figure 1: The concept tree of differentiated integration



Source: Schimmelfennig & Winzen (2020)

This lack of academic attention is surprising because there are a number of important historical and current instances of differentiation that clearly fit the definition, but which were established either informally or under international law – in any case outside the EU's legal framework. The UK's infamous budget rebate effectively created horizontal differentiation in the financial provisions of the Treaty on the Functioning of the European Union (TFEU). It was, however, never incorporated therein but instead purely based on an agreement reached at a European Council meeting in June 1984 in Fontainebleau (D'Alfonso 2016). The

original Schengen Agreement of 1985 established differentiated border management regimes within the EEC. But it was conceived as a treaty under international law, signed and ratified by five out of the then ten member states of the EEC before being transposed into EU law in 1999 (Oltmer 2022).[1] Sweden's decision not to adopt the euro is in some ways even in conflict with the Treaties, unlike Denmark's formal opt-out which has been legally sanctioned by the Maastricht Treaty (Brianson & Stegmann McCallion 2020). Conversely, Kosovo and Montenegro's adoption of the euro mirrors the external differentiated integration of the four micro-states Andorra, Monaco, San Marino, and the Vatican in EMU. But while the latter struck bilateral treaties with the EU which regulate their use of the common currency, the two Balkan states adopted the euro unilaterally.

To reiterate the main argument of this dissertation, cases like these should be seen as part of a distinct mode of differentiation. They fit the general definition provided above, but situated outside EU law they differ significantly from other instances of differentiation. Their creation, by nature, is not bound by the EU's procedural rules (Laffan & Schlosser 2015). Once established, informal arrangements can be challenged, whereas opt-outs or opt-ins integrated in EU law provide legal security (Leruth et al. 2019b). And agreements under international law are often subject to power dynamics skewed towards member states, limiting the direct involvement of the EU's supranational institutions. This dissertation, therefore, proposes to distinguish between *de facto* differentiation and *de jure* differentiation based on whether the respective case is situated outside or within EU law. This distinction is an important aspect to better understand the EU's system of differentiated integration. Moreover, the existence of *de facto* differentiation raises a number of important research questions, three of which are addressed in this dissertation. The following section summarises the contributions made by the three articles that form the basis of this dissertation.

[1] The five original signatories were Belgium, France, West-Germany, Luxembourg, and the Netherlands.

1.2. Summary of contributions and findings

What is it? Why is it there? And how can it be undone? In a nutshell, these three questions concerning *de facto* differentiation in the European Union describe the scope of this PhD thesis. The first question was the original impetus that motivated this study. It arose because the literature on differentiated integration contains several but all slightly different conceptions of forms of differentiation that are not enshrined in EU law (see the following section). Moreover, any mention thereof was mostly relegated to a sidenote in research otherwise targeting *de jure* differentiation. Despite the existence of several empirical cases of differentiation outside of EU law with obvious and arguably important distinguishable features, the literature had not yet produced a thorough conceptual grasp. The second question concerns the *raison d'être* of *de facto* differentiation and, by extension, the reasons why it should be seen and studied as a distinct mode of differentiated integration. Considering that *de jure* differentiation has long been a tried and trusted feature of European integration, the creation of *de facto* differentiation demands explanation. The third and final question deals with arrangements of *de facto* differentiation that are created autonomously by member states, and which are contested by the EU.

The main argument of this PhD thesis is that *de facto* and *de jure* differentiation should be seen as distinct modes within the EU's system of differentiated integration and studied as such. Article 1 substantiates this claim by conceptualising *de facto* differentiation alongside a three-pronged typology based on how each type is established and operates. Article 2 further adds to this by exploring rational explanations for the creation of *de facto* differentiation even though legal solutions to meet demand for differentiation were found in similar instances or appeared at least plausible. Article 3 illuminates another peculiarity of *de facto* differentiation which – unlike its *de jure* counterpart – can be challenged due to its lack of legal foundations. In this sense, it highlights the different power dynamics between EU institutions and member states that emerge in case differentiation is not subject to the EU's legal framework. The individual contributions are summarised in more detail below.

1.2.1. Article 1

This article lays the conceptual groundwork for this dissertation. It proposes a comprehensive definition of *de facto* differentiation as a 'deliberate and enduring circumvention of the EU legal framework, which leads to an unequal increase or reduction of the centralisation level, policy scope and membership of the EU.' Closely related to the conventional understanding of what constitutes differentiated (dis-)integration, this definition establishes the distinction between *de jure* and *de facto* differentiation by their location inside or outside EU law. The article, moreover, suggests a three-pronged typology of *de facto* differentiation that embraces the various kinds of differentiation outside EU law that emerged over the years, either informally or by creating differentiated integration on the basis of international law. This typology pays respect to the ways in which *de facto* differentiation is created and operates. The article distinguishes between *de facto* differentiation 1) by non-compliance, 2) by cooperation outside EU law, and 3) by unilateral opt-ins. These types are illustrated by reference to empirical cases.

The first type implies that member states deliberately and permanently engage in non-compliance with EU law in order to create conditions similar to conventional opt-outs in that EU law, although legally bound to it, is simply not or only partially implemented on the national level. This is exemplified by way of Sweden's decision not to adopt the euro despite being legally bound to do so under the current Treaty framework. The second type refers to the practice of pursuing deeper but differentiated integration not by amending or creating new EU law but by striking intergovernmental agreements under international law. The article here refers to the creation of the Fiscal Compact as an international treaty which deepens integration in economic and monetary policy to varied extent and initially not for all EU member states. The third type speaks to cases in which third states unilaterally opt into parts of the EU *acquis* and enjoy EU club goods rather than by invitation through bilateral treaties or other forms of legal access specifically provided by the EU. Kosovo and Montenegro's adoption of the euro in 2002 as non-member states and without any legal agreements with the EU or ECB are used as a case in point.

1.2.2. Article 2

The second article builds directly on the first, turning the three above mentioned empirical illustrations of the three types into thorough case studies to address the question why the EU created or tolerates these instances of differentiation *de facto* rather than *de jure*. In other words, the article is interested in the purpose of *de facto* differentiation in the EU's system of differentiated integration. To that end, it develops a rationalist model to explore the emergence of all three types of *de facto* differentiation under the assumption that both the EU and the differentiation-seeking state are utility-maximising actors. This theoretical framework was employed in three case studies representing the three types of *de facto* differentiation, i.e., 1) Sweden's rejection of the euro, 2) Kosovo's adoption of the common currency, and 3) the creation of the Fiscal Compact. Importantly, all three cases are comparable to other instances in which similar demands for differentiation led to a *de jure* solution. This allows not only for comparison across the three different types but also helps to distil the intervening variables that led to *de facto* differentiation and define its specific purpose. Qualitative data was gathered via document analysis and eleven interviews with experts from both sides, covering each case. The list of interviewees includes active or retired officials from the EU or national administrations, members of parliament, ministers, researchers and other experts. The conclusions, summarised below, contribute to the literature on differentiated integration by illuminating the purpose and functioning of a hitherto understudied phenomenon within the concept of differentiation in the EU.

The case studies demonstrate that *de facto* differentiation has a clear purpose in the EU's system of differentiated integration. Often more than just a second-best option if *de jure* differentiation is unavailable, it can make EU integration more flexible when strong national demand for differentiation meets the need for discretion or timely, pragmatic action. The benefits of the additional flexibility afforded by *de facto* differentiation for both involved parties are particularly clear in cases 2) and 3). For Kosovo, the nature of this arrangement provides access to the euro without having to comply with its convergence criteria, while the EU's monetary policy remains unaffected, and it can change the terms of this

arrangement as part of future accession negotiations. The intergovernmental structure of the Fiscal Compact offers a lot more leeway in enforcement than if it were integrated in EU law.

The lower visibility of *de facto* differentiation compared to *de jure* solutions holds further advantages. Rejecting the euro only *de facto*, Sweden bypassed public and potentially difficult negotiations in the EU Council, which served to preserve its image of an integration friendly member state rather than an 'awkward partner' with notable opt-outs. The EU, meanwhile, was spared from having to officially concede to more deviations in EMU. In the same way, by tolerating Kosovo's *de facto* use of the euro, the EU averted creating the image that it officially approved of euroisation in third states, which would contradict the EU's otherwise restrictive membership in the monetary union and might have attracted other states to follow suit. Lastly, the circumvention of the EU's legal and institutional processes makes *de facto* differentiation comparably unbureaucratic and allows for more swift decision-making. This was particularly helpful to get the Fiscal Compact passed against the UK's veto in the Council. Even if the EU had conceded to the UK's demands, moving ahead with *de jure* differentiation would have required long and potentially arduous Treaty reform at the risk of being rejected in national parliaments and referenda.

1.2.3. Article 3

While article 2 primarily highlights the potential upsides of *de facto* differentiation, the third article addresses its downsides and discusses how the EU can prevent or undo *de facto* differentiation in areas where it is deemed undesirable. This is an important issue complicated by the fact that *de facto* differentiation can be established autonomously by states (see article 1 or section 2.2). The article focuses on what are arguably the most poignant cases of contested *de facto* differentiation in the EU, the deliberate and incessant undermining of the EU's rule of law principles by some member states. Also grounded in rational choice theory, it offers a new perspective on the dispute between EU institutions tasked and committed to protect the rule of law and member states intent to undermine it. In

response to the common criticism that Brussels did ‘too little too late’ against backsliding member states, the article addresses the question why the EU Commission opted for a gradual tightening of countermeasures instead of doing ‘much more much earlier’.

To that end, it advances a game-theoretical model, loosely based on Putnam’s (1988) two-level games, which encompasses the general mechanisms underlying the rule of law dispute involving constraints and enablers on both the domestic and supranational level. On this basis, it outlines the strategic options available to the Commission and the rule of law offender in order to attain their respective utility-maximal outcome. This model is subsequently applied to a case study on the Commission’s dispute with Poland over their judicial reforms which were found to violate the EU’s rule of law provisions. Data for this case study was drawn from the extensive body of research and media reports and supplemented by 13 interviews with experts, lawyers, and policymakers from Brussels and Warsaw. The list of interviewees includes a former Polish Minister of Foreign Affairs, officials from the EU Commission and Council, members of the Polish and EU parliaments, Polish judges, representatives from civil society organisations in Brussels and Warsaw, as well as academics. The conclusions, summarised below, contribute both to the literature on the EU’s rule of law crisis and, by extension, to the research *de facto* differentiation.

The game-theoretical model demonstrates that crucial aspects determining the course of rule of law disputes are beyond the Commission’s control. In that regard, it exposes a number of factors hitherto largely ignored by the literature. First, the efficacy of EU efforts to restore the rule of law in member states are dependent on the power of its enforcement tools as much as on how the backsliding state estimates the utility gained from undermining it. Second, the model shows that as a result of incomplete information and the risk of backlash, a gradual and flexible approach promises to yield utility-maximal outcomes for both actors. Finally, the implementation of this strategy is further determined by each actor’s perception of unknown factors, constraints on the supranational and domestic level and potential exogenous shocks.

The case study illustrates that the Commission acted according to the model's expectations. Its initial response from late 2015 until the end of 2017 was not only held back by the lack of powerful enforcement tools and the misperception that the dispute could be solved by dialogue, but also by the intent to preserve a cooperative basis. Gradually learning about how far the Polish government was willing to go, the Commission began to tighten its grip in early 2018 and unleashed ever more assertive countermeasures in recent years. At the same time, the approach remained flexible enough to maintain functioning relations and cooperate in response to exogenous shocks such as Covid-19 and Russia's invasion of Ukraine. In contrast, Poland's approach somewhat defies expectations. Instead of gradually testing how far it can go before EU sanctions hit, the Polish government appears to have gone all in from the start, expecting little or manageable resistance from the Commission. Eventually, costly EU sanctions and budding domestic constraints forced it to backtrack on parts of its judicial reforms. Although retaliatory efforts were made, the threat of backlash against EU sanctions remained manageable from the Commission's perspective. All in all, the EU still fails to impose costs high enough to enforce the full restoration of the rule of law. In other words, the game appears to have reached its preliminary balance point.

In the end, this dispute is emblematic for any potential dispute on *de facto* differentiation. It shows the EU's limitations to contest member states' attempts to circumvent EU law, rules, or norms in order to unilaterally and retroactively change the terms of membership. It is safe to say the rule of law issue is special in many ways, bearing enormous normative weight and political salience. But seeing how difficult it is for the Commission to counteract it despite the existence of tailormade rule of law enforcement tools, other instances of *de facto* differentiation would likely be similarly sticky.

2. Literature, Concept, and Typology

Differentiation created outside the boundaries of EU law gained prominence and empirical relevance at least since the original Schengen Agreement was signed in 1985. On a cruise ship anchored near the eponymous village in Luxembourg where the Moselle river draws a tri-point border with France and Germany, representatives from five out of then ten EEC member states decided to abolish border controls between their territories to ease the flow of commerce and travel. The corresponding treaty deepened integration for Belgium, France, Germany, Luxembourg, and the Netherlands but created horizontal differentiation for the other five member states. Unlike the wave of treaty-based differentiation the Maastricht negotiations would unleash seven years later, EU law remained untouched by this agreement which was conceived as an intergovernmental treaty under international law. Still, it was only in the mid-2000s when differences in the legal statuses of differentiated integration in the EU first entered academic debates.

The first part of this section reviews the literature on the subject of *de facto* differentiation. Although most academic works have hitherto ignored the distinction between differentiation outside and within EU law or mention it only in passing, the few exceptions provide the foundations for the conceptualisation of *de facto* differentiation. The development of this conceptual basis is described in the second part of this section. In order to fill the gaps left in the literature on differentiated integration, the concept was developed by borrowing insights also from other fields of research. By taking cues, for example, from the literature on non-compliance and informal governance in the EU and other international organisations, it embraces its various empirical representations.

2.1. De facto differentiation in the literature

Andersen and Sitter (2006) were among the first to raise scholarly attention to informal variants of differentiation. Their research is inspired by the 2004

accession of ten new and predominantly post-communist member states[2] which in comparison to the ‘old’ member states had more limited resources, constrained administrative capacities, and widely different institutional traditions. Building on organisational theory and the literature on Europeanisation, their study assessed variation in the impact of EU policy across different sectors and states. They model four types of integration in secondary law, of which three were understood as informal differentiation. What they refer to as ‘aligned integration’ and ‘autonomous integration’ are each models in which EU law is specifically designed to provide leeway in the modalities of implementation or to accommodate divergent national preferences, respectively. Because EU law, vague and flexible as it may be, remains equally valid across all member states, these two modes do not fit with today’s most common definition of differentiation (see section 1.1) but instead account for variation in the transposition and application of EU law (Zhelyazkova & Thomann 2021). The concept of ‘deviant integration,’ however, implies a deliberate circumvention of EU law, which would create an unintended divergence in the validity of EU law akin to differentiation. In essence based on non-compliance, this mode was conceived to result from limited state capacity and/or strong domestic resistance against the implementation of a certain EU policy.

Their ideas, however, received relatively little attention and resurfaced only four years later when Dyson and Sepos (2010: p. 4) included the possibility of informal arrangements in their definition of differentiated integration. In the same volume, Howarth (2010) found empirical evidence for non-compliance as one aspect of informal differentiation in the area of industrial policy. For example, he referred to systematic breaches of the EU’s limits of state aid. In similar fashion, Holzinger and Schimmelfennig (2012) credit Andersen and Sitter in passing, acknowledging the possibility that member states opt for non-compliance instead of entering negotiations for differentiation so as to avoid costly policy obligations. Indeed, the likeness between non-compliance and differentiated integration as means for

[2] The 2004 enlargement round of the EU included: Cyprus, Czechia, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, and Slovenia.

member states to manage divergent policy preferences and/or insufficient administrative capacity in the EU has been detected before and recently regained attention (Iankova & Katzenstein 2003; Sczepanski & Börzel 2023). Scicluna (2021) depicts wilful non-compliance as a second-best alternative to resist further integration steps if demand for differentiated integration could not be met. She supports this claim by reference to the controversial refugee relocation scheme which was passed in 2015 by majority voting in the EU Council but whose implementation was refused by a number of member states.

The term *de facto* differentiation and its potential existence as a concept in its own right was first explicitly mentioned by Schimmelfennig and Winzen (2014). Not interested, however, in studying or further conceptualising it, they simply referred back to the root causes of non-compliance as outlined by Andersen and Sitter (2006) and informal forms of cooperation described by Dyson and Marcussen (2010). At the time, *de facto* differentiation found its primary empirical link in Sweden's decision by referendum not to adopt the euro. Unlike the opt-outs of Denmark and the UK which were formally negotiated and included in the Maastricht Treaty, Sweden is said to possess a '*de facto* opt-out' for lack of an equivalent legal basis (Adler-Nissen 2009; Schimmelfennig et al. 2015). Although the different nature of this case of differentiation was recognised, it was never properly investigated. Many studies then and now research this and other cases of *de facto* differentiation side by side with cases of *de jure* differentiation without considering the distinct ways in which they were created or operate (Jensen & Slapin 2012; Telle et al. 2023).

A first step towards conceptualisation was made by Leruth et al. (2019b) who listed 'the Swedish model of *de facto* differentiation' as one of five distinct modes of differentiation in the EU. Purely based on Sweden's *de facto* opt-out from the euro but acknowledging that Czechia, Hungary and Poland followed suit, they refrain from explicitly making the connection to non-compliance but highlight that the obligation to adopt the euro persists. Thus, the authors remark that this model of differentiation hinges on being tolerated by the European Commission and that this legal issue is likely to resurface in the future. This assessment is shared by Brianson and Stegmann McCallion (2020) who argue that Sweden's *de facto* opt-out

constitutes 'a tacit agreement to let sleeping dogs lie.' They further suggest that the Swedish government succeeds in covering up the awkwardness of this arrangement by being a reliable partner committed to cooperation in other policy areas of the EU.

Eriksen (2019) refers to the Fiscal Compact as a source of *de facto* differentiation due to its status as an international treaty outside of EU law. He argues that since the financial crisis non-Eurogroup member states have been 'downgraded to a secondary status' (ibid, p. 77). The Eurogroup is a subcommittee of the EU Council, where the finance ministers of states that adopted the euro coordinate their positions on economic and monetary policy ahead of the official Council meetings. He bases this on Avbelj (2013: p. 204-205) who warned that the several measures to mitigate the financial crisis, which were taken outside the EU legal framework, might create a new EU-17 that could replace what he considers an increasingly weak EU-27. This conception of *de facto* differentiation creating distinct groups within the EU mirrors the mode of variable geometry (Stubb 1996). Also in reference to the fiscal instruments created to weather the financial crisis, De Witte (2019) recognises the conclusion of international agreements outside of EU law as a distinct mode of differentiation.

Schimmelfennig (2019) points to *de facto* differentiation in reference to Poland and Hungary's ongoing violations of the EU's rule of law principles, however only in a sidenote. In doing so, he cites Kelemen (2019) who considers the normative implications of actually granting differentiation in the rule of law. Although he acknowledges that the national legal framework in Poland and Hungary already diverges significantly from the EU's rule of law principles, Kelemen does not elaborate on whether this should be seen as a kind of informal differentiation even now. Bellamy et al. (2022: p. 141) present evidence that the Polish government even argues along the lines of differentiation in defence of its controversial judicial reforms. In this regard, an interesting comparison has been struck between the efforts to install differentiation in the rule of law in the EU and similarly value-based differentiation in the US (Kelemen 2021). There, the federal government first created *de jure* differentiation to allow slavery in the southern states of the Union and later turned to 'a *de facto* form of DI (…) to perpetuate systemic racism

and disenfranchisement of African Americans through Jim Crow policies for decades after the Civil War' (ibid: p. 676). Kelemen, thus, warns that differentiated integration, *de facto* or *de jure*, can be highly problematic from both legal and democratic perspectives.

More recently, research has begun to explicitly distinguish between *de facto* and *de jure* differentiation. Schimmelfennig and Winzen (2020: p. 16) strictly separate the two and subsume under the former all kinds of differentiated implementation of otherwise uniformly valid EU law. They include differentiated implementation related to directives offering leeway in transposition, the minimum harmonisation model whereby the EU sets only baseline standards and allows member states to adopt more stringent rules, as well as non-compliance. Leuffen et al. (2022) provide no dedicated conceptualisation but acknowledge, for instance that Kosovo and Montenegro have adopted the euro 'without participating in the institutions of monetary integration' (p. 232) and that 'Monaco, San Marino, and Vatican City are de facto participants of the Schengen area' (p. 338). Thus, *de facto* differentiation gains an external dimension that includes third states. Schimmelfennig et al. (2023) define *de jure* differentiation as legally codified, as opposed to its *de facto* counterpart to which they dedicate three chapters in their special issue of *European Politics*. Two of these contributions conceptualise differentiation as a result of flexible implementation (Zbíral et al. 2023; Zeitlin & Rangoni 2023). The third focuses on non-compliance, not as a source of differentiation but rather with respect how the two concepts relate to one another (Sczepanski & Börzel 2023).

For the most part only in passing, the literature acknowledges that the establishment of differentiation may occur outside the formal structures of EU decision-making and separate from EU law. Although the term *de facto* differentiation has become more common, it is used somewhat incoherently. A comprehensive conceptualisation that embraces the variety of cases and forms of differentiation it is associated with is lacking. The literature links it to non-compliance, the informal participation of third states in EU policy areas, the creation of differentiated integration via international treaties, and differentiated implementation. As was mentioned in the second paragraph of this section, this dissertation does not consider the latter as part of *de facto* differentiation (see also

section 2.2). But the remaining three types can be considered as such and diverge in notable ways from *de jure* differentiation including the way they are created and operate. Therefore, this PhD thesis argues that a comprehensive conceptual framework is necessary to capture *de facto* differentiation in all its breadth and enshrine it as a distinct mode in the EU's system of differentiated integration.

2.2. Conceptualisation and typology

Acknowledging the existence of other terms used to describe differentiation situated outside EU law, this dissertation adopts the term *de facto* differentiation. It has become increasingly common in recent years, and it is sufficiently flexible to accommodate its various empirical manifestations. As a compound word it consists of two elements. Concerning the latter, 'differentiation,' this dissertation follows the conception thereof as an umbrella term which may refer to differentiated integration as well as disintegration (cf. Leruth et al. 2022). Schimmelfennig (2018) defines it, thus, as a process of 'an unequal increase or reduction in the centralisation level, policy scope, or membership of the EU.' For anything to be considered *de facto* differentiation, at least one of these criteria must be met. Although sometimes regarded as a form of differentiation, this excludes flexible implementation. There, EU law remains equally valid in scope and depth across all member states, no matter how much leeway in transposition it offers. While the outcomes may look different across member states, the provisions of such flexible pieces of EU law remain uniformly valid and abided by all member states.

The prefix '*de facto*' generally denotes certain practices or conditions that exist in reality, irrespective of whether they are legally recognised. It is often used in conjunction with '*de jure*' which refers, conversely, to legally notated facts, regardless of whether they have any real bearing. In the context of differentiation in the EU, this implies that *de facto* differentiation exists in reality but is not recognised by EU law. This is not to say that it is by necessity informal or even illegal. Therefore, this may include arrangements based on treaties under international law as well as handshake agreements between the EU and its member

states. Conversely, *de jure* differentiation is officially sanctioned under EU law but not necessarily active – Denmark, for instance, circumvents some of its *de jure* opt-outs in Justice and Home Affairs (Adler-Nissen 2009). In sum and reflecting its different types (see below), this dissertation defines *de facto* differentiation as a deliberate and enduring circumvention of EU law, which leads to an unequal increase or reduction of the centralisation level, policy scope, and/or membership of the EU. Table 2 provides an overview of the three types of *de facto* differentiation and empirical examples constituting arrangements either tolerated or contested by the EU.

Table 2: Empirical examples of the three types of *de facto* differentiation

Arrangement with the EU	Type		
	Non-compliance	**Unilateral opt-in**	**Formal / informal agreements outside EU law**
Tolerated	• Sweden's opt-out from EMU • Slovakia's export restrictions of pharmaceutical goods[3]	• Kosovo and Montenegro's adoption of the euro • Monaco, San Marino, and the Vatican's participation in the Schengen area	• The UK budget rebate (informal) • The Fiscal Compact (formal) • The original Schengen agreement (formal)
Contested	• Poland and Hungary's increasing differentiation in the rule of law • Long-lasting cases in the EU Commission's infringement database[4]	/	/

Source: own compilation

[3] See Zhang (2021).

[4] There is a significant number of cases in which non-compliance persists even after a second ECJ ruling – consistent with the temporality and intentionality criteria of *de facto* differentiation. Falkner (2016), for example, reports about a case in which Greece was found in violation of EU directives concerning illegal waste disposal on Crete as early as 1992. After initial inquiries were ignored, the ECJ's first ruling in 1997 found Greece guilty. Continuous non-compliance led to a second ruling in 2000 and the imposition of a daily fine of €20,000. The case was prematurely closed in 2001 after Greece had established a temporary disposal site, but it was opened again in 2006 and finally closed in 2008, after 16 years of non-compliance.

2.2.1. Type 1: deliberate and enduring non-compliance

As the previous section reveals, the literature often mentions non-compliance as a potential source of *de facto* differentiation. Indeed, some argue that both constitute means to manage divergent policy preferences or administrative capacities from the perspective of EU member states (Sczepanski & Börzel 2023; Scicluna 2021). It can also be argued that both produce a similar outcome. Akin to differentiated (dis-)integration, the result of non-compliance is effectively an unequal suspension or alteration of EU law. Although the validity of a certain piece of EU law remains uniformly intact (*de jure*), if a state fails or refuses to adhere to its provisions completely or partially, the policy scope becomes (*de facto*) differentiated. Citizens or businesses located in compliant member states remain fully affected by this piece of EU law, whereas those situated in non-compliant states effectively are not or only in part. This is not to say, however, that non-compliance should generally be seen as *de facto* differentiation. There is significant variation within the concept of non-compliance. And as argued below, this dissertation suggests that temporality and intentionality may function as key indicators to determine whether a case of non-compliance constitutes *de facto* differentiation. It is important to note, however, that there are no hard dividing lines.

Non-compliance is comparably short lived. Using the duration of the European Commission's infringement procedures as a proxy, Hofmann (2018) concludes that non-compliance typically lasts no longer than just over one year. Schimmelfennig & Winzen (2020: p. 55) found that treaty-based *de jure* differentiation lasts on average 6.5 years, while some arrangements are or seem to be permanent. The reason for this much shorter duration can be traced to non-compliance being not generally intentional and costly for member states. As was previously mentioned, non-compliance can emerge as the result of either divergent preferences or the lack of administrative capacity to implement EU rules (Tallberg 2002). From a rationalist perspective, it can be assumed that non-compliance that lasts long enough to fall within the bracket of differentiation is almost always due to preferences rather than capacity. States can be expected to remain non-compliant as long as the costs of compliance (e.g., interest group pressure) outweigh the costs of non-compliance (e.g., sanctions) (Downs et al. 1996). Thus, states which only

face capacity issues stand little to gain from non-compliance and its costs hit harder and earlier. As a result, they can be expected to shift resources early on to ensure compliance before the costs of non-compliance take effect (Börzel et al. 2012). But instead of defining a minimum threshold after which non-compliance turns into *de facto* differentiation, this dissertation suggests the delineating criteria should be intentionality and whether conscious efforts are made to protract its duration jointly or against resistance from the EU.

Most known cases of non-compliance in the EU are related to failures of notification or untimely transposition, and among these the majority is resolved in the early stages of the Commission's infringement procedure (European Commission 2020). Still, the Commission's infringement database is rife with cases that have endured for several years, often until after the ECJ issued its second, decisive ruling on the matter (Falkner 2018). More pithy cases like Sweden's opt-out from EMU or Poland and Hungary's undermining of the rule of law also fall into this category of *de facto* differentiation. The *de facto* opt-out affects Swedish businesses and citizens in much the same way as their Danish counterparts, where a *de jure* opt-out is in place. But it technically leaves Sweden in non-compliance with the Treaties which call upon all signatories except Denmark to work towards fulfilment of the convergence criteria (Leruth et al. 2019b; Brianson & Stegmann McCallion 2020). Another example is the establishment of politically controlled judicial systems in Poland and Hungary. This has created differentiation in the rule of law criteria EU member states are according to the Treaties obliged to meet, which reflects, i.a. in Polish or Hungarian citizens being subject to courts that are less objective and impartial than elsewhere in the Union (Scheppele et al. 2020).

2.2.2. Type 2: unilateral opt-ins

While *de facto* differentiation by non-compliance mostly affects the EU internally, external horizontal differentiation can also occur outside the EU's legal structures. Most commonly, however, the EU encourages and legalises the inclusion of third states choose in parts of the *acquis* (Holzinger & Tosun 2019). For example, EEA

members are required to abide by EU law in some areas, EU neighbourhood policy often sets policy alignment targets, and the accession criteria for membership candidates also include the harmonisation of policies and standards according to EU rules (Egeberg & Trondal 1999; Börzel 2011; Economides & Ker-Lindsay 2015; Schimmelfennig 2017). Of course, the impetus to partake in EU integration from outside can also be endogenous as Switzerland's partial membership in the Schengen area demonstrates (Wichmann 2009). In all these cases, opt-ins are based on a legal agreement with the EU. But the Europeanisation literature also knows rarer cases of '*de facto* interaction' with non-member states or '*de facto* opt-ins' (Lavenex 2015; Cianciara & Szymanski 2020).

De facto opt-ins effectively expand the reach of certain policy areas beyond the EU's territorial borders, but they differ from the more common *de jure* opt-ins in their unilateral nature and the lack of legal approval from the EU. Mostly benign, this involves the voluntary adoption of standards or norms, i.a., to facilitate trade. For example, the Norwegian government under Prime Minister Brundtland took considerable steps to harmonise national law with EU law in preparation for membership negotiations it hoped for. But in rarer cases states unilaterally create access to the EU's excludable collective goods. This includes the previously mentioned adoption of the euro by Kosovo and Montenegro, as well as the participation of Monaco, San Marino and the Vatican in the Schengen zone (Leuffen et al. 2022). The two Balkan states benefit from the relative stability of the euro without having to comply with the fiscal rules that apply to official members of the Eurozone. And the three micro states effectively outsource border control to their neighbouring EU member states and Frontex which protect the integrity of the Schengen area at the external borders. While these cases are tolerated, the EU has only recently, during the Brexit negotiations, demonstrated that the extension of certain benefits of EU membership outside its territory is not generally welcomed (Martill & Sus 2022).

2.2.3. Type 3: intergovernmental agreements outside EU law

Intergovernmental agreements, reached either informally or formally by concluding treaties under international law, make up the third way to establish *de facto* differentiation. It should be clarified that not all forms of cooperation or even integration among EU member states that occurs outside the EU legal framework should be considered *de facto* differentiation. EU member states engage in various partly overlapping international regimes that range from bilateral cooperation to integration in regional and international organisations (Alter & Meunier 2009; Panke & Stapel 2022). France and Germany have a long history in bilateral cooperation in industrial projects such as the creation of the aviation company Airbus or, more recently, a joint research hub for artificial intelligence. The Benelux Union, the Nordic Council, or the Visegrád Group embody sub-regional organisations in which some EU member states and third states coordinate policy and pool competencies to some extent. And membership in international organisations such as NATO or the G7 is also unequally distributed. Neither of these forms of cooperation or integration outside EU law, however, constitutes by definition differentiation because the centralisation level, policy scope and/or membership of the EU is unaffected.

Positive cases of *de facto* differentiation by integration under international law are the original Schengen agreement of 1985 which was conceived as an intergovernmental treaty and created a new differentiated border management regime within what was then the EEC. Similarly, many of the fiscal instruments created to manage the sovereign debt and eurozone crisis were outside the EU legal framework and with differentiated membership. The European Stability Mechanism (ESM), a lending facility with a capacity of €500b for member states in financial hardship, was created under international rather than EU law and includes only those EU members which have adopted the euro. Although Article 136 of the Treaty on the Functioning of the European Union (TFEU) was amended to authorise the establishment of the ESM under EU law, it remains an institution outside the reach of the EU legal framework (Tomkin 2013). Similarly, the Treaty on Stability, Coordination and Governance in the EMU (TSCG) or otherwise known as the Fiscal Compact exists outside EU law. It expands the EU's

competencies in fiscal oversight, originally had two opt-outs, and a differentiated impact on the other signatory states (Verdun 2015). The UK's budget rebate established *de facto* differentiation by way of an informal intergovernmental agreement which created an exception within the EU's provisions for budget contributions.

2.2.4. Tolerated and contested *de facto* differentiation

All three types are created by deliberately circumventing EU law. Because of that, *de facto* differentiation operates outside the EU's jurisdiction, and as a result the EU institutions are not in full control over the establishment, operation, and dismantling of these arrangements. This is an important distinction from *de jure* differentiation which is based on a fairly strict supply and demand logic (Leuffen et al. 2013; Holzinger & Tosun 2019; Schimmelfennig 2019; Malang & Holzinger 2020). There, states in demand for differentiation are effectively at the mercy of the EU institutions which decide whether or not to supply the desired exemptions on the basis of, for example, expected negative externalities, the institutional context, or the state's bargaining power (Schimmelfennig & Winzen 2020: p. 30-37). This is not the case with *de facto* differentiation. Concerning type 1, the decision to engage in, maintain, or cease non-compliance ultimately lies with states alone because the EU does not have the competency to directly interfere in domestic policymaking (Hix & Høyland 2022). As regards type 2, the unilateral nature of opt-ins creating external differentiation by default implies that the EU's typical function as gatekeeper is bypassed. And although the formal or informal agreements outside EU law that create type 3 *de facto* differentiation often include EU institutions, this is by no means necessary.

With states effectively in control over demand and supply of *de facto* differentiation, the EU institutions can respond only by either tolerating or contesting such arrangements. Toleration implies that the EU institutions either officially acknowledge the state of affairs or take no action to the contrary. Contestation, then, means that the EU makes use of its legal and political tools in order to coerce the state(s) responsible for *de facto* differentiation to change course.

Type 1 is arguably the most critical of the three because non-compliance directly undermines the EU's authority and damages the legal foundations of European integration. Against it, the EU has at its disposal i.a. its infringement procedure which can lead to financial sanctions and bad reputation. Types 2 and 3 are usually less harmful and often even in the interest of the EU because they widen the *acquis*' reach or deepen European integration, respectively. Outside the EU's jurisdiction, both types can only be contested by applying political pressure. As far as third states are involved, the EU can, e.g., tie the termination of *de facto* differentiation to incentives such as EU membership or preferential trade agreements. While informal arrangements can generally be challenged and easily reversed, those formalised under international law are much more difficult to undo because such treaties can only be dissolved by their signatories. To rectify the lack of influence the EU institutions tend to have on such arrangements, they often try to incorporate them in EU law. Thus, *de facto* differentiation manifests in the form of arrangements either tolerated or contested by the EU.

In sum, *de facto* differentiation mirrors *de jure* differentiation in that the outcome marks an unequal increase or reduction of the centralisation level, policy scope, and/or membership of the EU, but both differ substantially in the ways in which they are established and operate. The demarcation of these two modes of differentiation rests on their dichotomous relationship situated either outside or inside EU law. Without delving deep into the normative dimensions of this issue, the apparent consequences of *de facto* differentiation make studying this rarer occurrence in the EU's system of differentiated integration a worthwhile endeavour. Bypassing the EU's institutional rules and procedures, states assert a certain autonomy over the integration process at the expense of the supranational EU institutions. Such systematic circumvention of EU law inherent to *de facto* differentiation weakens the EU's foundations as a community of law and undermines its authority. Nevertheless, tolerated arrangements of *de facto* differentiation exist and demand explanation. Meanwhile the EU is grappling with undesired instances of *de facto* differentiation, which calls for a discussion concerning the EU's power to undo such contested arrangements.

3. Theoretical framework

The existence of *de facto* differentiation in all its different guises, creating both tolerated and contested arrangements, poses a number of important and puzzling questions with regards to both empirics and theory. This dissertation addresses the more fundamental ones, i.e. what is its purpose and how can it be undone if undesired. For this purpose, a sound theoretical basis is necessary. Theory driven research on differentiated integration has long been scarce (Holzinger and Schimmelfennig 2012; notable exceptions include Kölliker 2001; Ahrens et al. 2005). In the last decade, theoretical approaches have burgeoned and produced various explanations for the emergence and proliferation of differentiated integration in the EU (Leuffen et al. 2022; Malang & Holzinger 2020; Schimmelfennig & Winzen 2019). None, however, really address the particular case of *de facto* differentiation and the questions it raises. Related to the research objectives set forth in this dissertation, there is no readily applicable theory which accounts for the EU's and member states' decision to establish differentiation in the validity of EU law across member states *de facto* rather than *de jure*. Moreover, theory on how to revoke differentiation, let alone *de facto* differentiation, is extremely rare.

Therefore, this dissertation turns to rational choice theory which offers a way to understand and systematically study the decision-making procedures that define both research objectives. The first part of this section elaborates on theories of European integration, which are commonly applied to differentiated integration before turning to theoretical insights from other sub-disciplines with touching points to *de facto* differentiation. Subsequently, the second section introduces rational choice theory which forms the basis of this dissertation's theoretical framework and, finally, outlines its application in articles 2 and 3 with reference to the two research objectives.

3.1. Theories of differentiated integration

In order to explain differentiated integration in the EU, academic research often resorts to the grand theories of regional integration (Wiener et al. 2019; Hooghe &

Marks 2019). The oldest among these is neofunctionalism, which updated Mitrany's (1943) more globally minded functionalist theory to explain the emergence of the EEC and, later, other regional organisations (Haas 1958, 1967). In a nutshell, neofunctionalism postulates that regional integration occurs as a result of shared interests and interdependence among nations in a given region. Their pooling of competencies in supranational institutions primarily serves the purpose to reap economic and efficiency gains. Moreover, the theory holds that integration in one area may create spill-over effects and creates demand for integration in other policy areas. This effect is cultivated by intrinsically motivated supranational actors.

After a longer period of stagnation in European integration and apparently absent spill-over effects, liberal intergovernmentalism emerged as an alternative theory suited to explain integration as well as the lack of it (Moravcsik 1993; Moravcsik & Schimmelfennig 2019). While neofunctionalism ascribes considerable agency to supranational institutions and predicts a nearly immutable progress towards more integration, liberal intergovernmentalism posits that the process of regional integration is dominated by states' preferences and bargaining power which can both drive or hinder integration. The theory is based on a liberal model of preference formation, an intergovernmental bargaining model and a model of institutional choice that emphasises credible commitments.

Finally, the rise of Euroscepticism has challenged the further unification of Europe since the turn of the century and gave rise to the most recent addition to the grand theories of integration, i.e. postfunctionalism (Hooghe & Marks 2009). Anchored in the constructivist school of thought, the theory focuses on ideational factors that constrain rather than promote integration. Advocates of postfunctionalism consider the politicisation of integration, the spread of nationalist or Eurosceptic sentiments, and the power of referenda as among the major obstacles to further European integration.

Originally conceived to explain regional integration in general terms, the explanatory power of these theories has proved transferable to the study of differentiated integration (Leuffen et al. 2013, 2022; Schimmelfennig & Winzen 2020; Warleigh-Lack 2015). Both grounded in rationalist ontology,

neofunctionalism and liberal intergovernmentalism view differentiated integration as a practical tool to overcome negotiation deadlock and maximise the utility gains of member states with heterogeneous preferences and capacities (Warleigh-Lack 2015; Schimmelfennig 2019). Due to the consensus-oriented decision-making structure of the EU (Lewis 2019; Fabbrini & Puetter 2016), heterogeneity typically favours states defending the status quo and may limit new integration steps to the lowest common denominator. By allowing states with capacity issues or divergent preferences to opt out, integration may proceed at the speed and scope desired by the more progressive states without undermining the interests of others.

Studies based on postfunctionalism view differentiated integration as a way to accommodate member states which fundamentally oppose new integration steps in certain policy areas (Schimmelfennig et al. 2015; Winzen 2020). This fundamental opposition refers, i.a., to a perceived or real loss of sovereignty by ceding state powers to the EU as well as worries that more integration might threaten a member state's national identity. Instead of blocking progress in such cases, differentiated integration offers member states harbouring such concerns a way out, while allowing others to proceed. Despite different ontological bases, the grand theories of regional integration ultimately share the viewpoint that differentiated integration is a pragmatic tool that allows for more flexibility to accommodate divergent preferences among a rather heterogeneous cast of EU member states.

To illuminate the organisational dynamics behind differentiated integration, scholars also frequently apply the middle-range theories under the moniker of new institutionalism (March & Olsen 1983; Peters 2019). Aimed at theorising institutional change, there are three main variants within this umbrella term that differ in their ontological basis and, as a result, the factors and mechanisms deemed responsible for it. In brief, rational choice institutionalism assumes decision-makers to possess a fixed set of preferences and, correspondingly, to maximise utility by engaging in cost-benefit analysis (Shepsle 2006). Historical institutionalism posits that decision-makers can get 'locked in' by path dependency, and that far-reaching institutional change is facilitated by critical junctures (Pierson 1996). Schimmelfennig (2014) and Verdun (2015) apply these

aspects to the study of differentiated integration in the EU, explaining the core-periphery divide in EMU and the EU's response to the euro area financial crisis. Sociological institutionalism emphasises the influence of institutional rules and norms on decision-makers (Checkel 2005). Adler-Nissen (2009) makes use of this logic to explain why Denmark circumvents some of its opt-outs in Justice and Home Affairs (JHA).

Each of these theoretical approaches, however, implies that actions are constrained or enabled by a set of institutionalised rules defined by the organisation, in this case the EU. Because *de facto* differentiation circumvents these legal, institutional, and normative structures, the core mechanisms of the above-mentioned theories are no longer fully applicable. Contrary to the neofunctionalist emphasis on the actorness of supranational bodies, the creation of *de facto* differentiation marginalises or directly undermines the EU institutions. As opposed to liberal intergovernmentalism, this process does not necessarily involve bargaining among the member states, facilitated and regulated by the institutional architecture of the EU. *De facto* differentiation also contradicts the key tenets of sociological institutionalism because the very norms and practices that should make decision-makers compliant with EU rules and seek out *de jure* solutions are deliberately bypassed. And while the impetus – or the general demand for differentiation – may but need not arise from path dependency or divergent preferences related to economic or ideational motives, neither theory can explain why these are realised outside rather than within EU law.

Outside the subfield of differentiated integration, there are a few theoretical approaches that are at least partially indicative to the phenomenon of *de facto* differentiation. Although *de facto* differentiation is not always informal, research within the field of informal governance offers some insights into the EU's occasional circumvention of its own legal framework. Kleine (2013, 2014) describes the EU's choice for informal solutions that can be at odds with its legal framework as a means to dissolve potentially disruptive conflicts at the national level, sparked by cooperation within the EU. Although focused on sub-national actors, Piattoni (2006) describes the deliberate circumvention of EU rules as a way to overcome the obstructive behaviour of national authorities. Referring to the tacit

agreement among member states that diversion from the criteria defined by the Stability and Growth Pact (SGP) would not be sanctioned, Christiansen and Neuhold (2013) assert that such informal practices serve to override ineffective formal institutions. Based on the same empirical example, Stone (2011) posits that to accommodate larger, more powerful member states, smaller states occasionally tolerate their circumvention of formal rules to exert informal control over the regional organisation. All the above suggests that the EU resorts to informal governance in order to manage internal or external pressures by making its rules and procedures more flexible where legal differentiation may be politically undesirable.

In sum, these insights suggest that the circumvention of EU rules, norms, and practices may be purposeful and consensual. The purported flexibility and efficiency gains from what is dubbed here informal governance may be indicative of the role tolerated arrangements of *de facto* differentiation play in the EU's system of differentiated integration. Of course, there are notable differences between informal governance and *de facto* differentiation. First, the above literature usually refers to temporary solutions, whereas *de facto* differentiation systematically and more permanently bypasses EU rules and law. Second, and as mentioned before, *de facto* differentiation need not be informal but can be formally established under international law. And third, informal governance is seen as mostly consensual diversions from the norm, while *de facto* differentiation may be unilateral and strongly contested. Moreover, some questions remain unanswered. For instance, it is unclear why *de facto* differentiation is chosen despite the availability of *de jure* differentiation which appears more beneficial for both the EU and differentiation-seeking states. It preserves the integrity of EU law and does not undermine the authority of the EU institutions while providing the legal security for states that opt-outs or opt-ins cannot be challenged or revoked.

Considering that non-compliance is an important aspect and specific type of *de facto* differentiation, the compliance literature offers additional reference points as to why states seek it out and also how the EU can undo contested arrangements thereof. There are two main schools of thought within this literature: the enforcement approach and the management approach (Tallberg 2002; Börzel et al.

2010). The enforcement approach is inspired by rationalism and goes back to Downs et al. (1996). In a nutshell, it suggests that states weigh the costs and benefits of compliance and act accordingly. For example, by imposing sanctions the EU can attempt to enforce compliance by raising the costs of non-compliance. At the same time, the EU must remain wary of the costs of enforcement, such as binding administrative capacity in the Commission and ECJ or risking the deterioration of relations with the non-compliant member state. Instead of portraying non-compliance as a conscious choice based on intrinsic preferences, the management approach assumes that non-compliant states would like to but lack the capacity to follow supranational rules (Chayes and Handler Chayes 1993). To remedy this, the EU can offer its resources to help states to implement its rules. Because *de facto* differentiation is typically a matter of choice rather than capacity, the management approach can be disregarded. While the enforcement approach may contain some valuable insights into the mechanisms behind states' choice for *de facto* differentiation and the EU's options to undo it, it is of course directly applicable only to one of its three types.

In the end, the questions posed by the existence of *de facto* differentiation in the European Union cannot be fully addressed by any one 'off the shelf' theory from the field of integration studies. Adjacent academic areas capture some constituent parts of *de facto* differentiation and offer valuable insights. But the key question – addressed in article 2 – why actors in some cases prefer it over the more established *de jure* solutions remains unanswered. Similarly, the EU's approach to contesting undesired arrangements of *de facto* differentiation – discussed in article 3 – cannot be addressed by compliance theory alone because it largely ignores the actorness of the non-compliant state and, as a result, the complexity of such disputes. Against that backdrop, this dissertation resorts to rational choice theory to address the decision-making processes underlying the creation and handling of both tolerated and contested arrangements of *de facto* differentiation.

3.2. A rational choice approach

Rational choice theory, in the literature of political science and international relations also commonly referred to as rationalism, is a second-order or meta-theory. As such, it is concerned with foundational questions of social inquiry and makes both ontological, epistemological, and methodological assumptions (Wendt 1999). In this capacity, it forms the basis of several first-order theories which make substantive and falsifiable claims related to specific domains of social systems such as European integration and, by extension, differentiated integration. These include neofunctionalism, liberal intergovernmentalism, and, unsurprisingly, rational choice institutionalism (Pollack 2006). It also undergirds the above-mentioned theoretical insights from the fields of compliance and informal governance which appear tangentially applicable to some aspects of *de facto* differentiation.

Rational choice theory operates on a high level of abstraction and can be described, most plainly, as an approach to explain human behaviour (McNabb 2010). According to Snidal (2002), it is a 'methodological approach that explains both individual and collective (social) outcomes in terms of *individual goal-seeking under constraints*' (emphasis in original). On this basis, Pollack (2006) succinctly identifies three core constituents of rational choice theory: '(1) methodological individualism, (2) goal-seeking or utility-maximisation, and (3) the existence of various institutional or strategic constraints on individual choice.'

The term methodological individualism originates from the work of the German economist Joseph Schumpeter (1909), himself a student of sociologist Max Weber, and has since been championed by other influential social scientists such as Friedrich von Hayek (1942) and Karl Popper (1945). In a nutshell, it implies that social phenomena ought to be explained as a result of individual actions. Applications of rational choice theory in political science often diverge from this methodological doctrine. For the purpose of modelling or to achieve a more manageable empirical scope, complex phenomena are rarely disaggregated down to decision-making processes at the lowest level of individual agency, e.g., low-level bureaucrats or voters. Instead, as was foreseen by one of the founding fathers of this approach, actorness is often collectivised by treating 'states, associations,

business corporations, foundations, as if they were individual persons (Weber 1922, 13). This tends to be a point of contention (see further below), as is the assumption that the actions of such individualised actors are motivated by a set of fixed, transitive, and exogenously given preferences.

The goal-seeking or utility-maximising behaviour individuals are assumed to exhibit further implies that their actions are in accordance with their preferences. In this sense, decision-makers calculate the expected utility of each alternative option before choosing whichever course of action that supposedly yields the greatest utility. In most readings, the behaviour of such rationalist actors is seen as inherently self-interested (but see Opp 1999). This resembles the neoclassical idea of the *homo economicus* who in John Stuart Mill's words is a 'being who desires to possess wealth, and who is capable of judging the comparative efficacy of means for obtaining that end' (1829). Although in the works of (political) economists often reduced to material interests, the preferences of rationalist actors may include normative or ideational goals just the same (Snidal 2002). For example, political leaders may pursue objectives related to ideological or religious motives and, to achieve those, devise carefully calculated plans of action.

But rather than with the nature of these goals, rational choice theory is primarily concerned with the logic of action according to which they are being pursued (Elster 1986). Here, March & Olsen (1989) introduced the tripartite distinction between the logic of consequentialism, applied by rational choice approaches, as well as the logic of appropriateness and the logic of arguing, which are both situated in the realm of social constructivism. In contrast to the self-interested, calculating, and outcome-oriented behaviour of rationalist actors, the two constructivist logics emphasise the influence of rules, norms, and ideas on decision-making as well as deliberative processes (Risse 2000). This distinction is emphasised by Shepsle (1995) who, it should be noted, is associated with the rationalist school of thought:

> In place of responsive, passive, sociological man, the rational choice paradigm substitutes a purpose, proactive agent, a maximiser of privately held values. A rational agent is one who comes to a social situation with preferences over possible social states, beliefs about the world around oneself, and a capability of employing these data intelligently. Agent behaviour takes the form of choices

> based on either intelligent calculation or internalised rules that reflect optimal adaptation to experience (p. 280).

Importantly, the goal-seeking behaviour of rationalist actors is subject to various constraints. In the words of Opp (1999), 'anything that increases or decreases the possibilities of an individual to be able to satisfy her or his preferences by performing certain actions (i.e., opportunities or constraints) is a condition for performing these actions.' Friedman and Hechter (1988) list two independent sources of constraints: opportunity costs and social institutions. The former refers to the costs incurred by foregoing the benefits of other possible courses of action. Institutional constraints are related to norms, rules, or laws imposed formally or informally on actors by the social systems they inhabit. In a similar vein, Pollack (2006) locates these constraints in actors' physical and social surroundings and adds, with reference to game theory, that one actor's actions may be constrained by those of others, which may alter their estimated utility payoff. Other notable constraints emerge due to the condition of decision-making under uncertainty which relates i.a. to the effects of chance, force majeure, or cognitive deficits. While the former two can and often are more or less accurately priced into utility calculations, the latter refers to what has become known as bounded rationality thanks to Herbert Simon (1955) and others who followed his tracks in behavioural approaches to political science, organisational theory, or economics (March 1994; Jones 2003). Applying scientific insights from studies on human cognitive capacity, the concept of bounded rationality moves away from the assumption of rationalist actors being perfectly omniscient calculators. Instead, boundedly rational actors can be expected to make decisions to their best knowledge and abilities, however flawed they might be. In this sense, utility calculations might better be understood as approximations.

These fairly strong assumptions embedded within the three core tenets of rational choice theory inevitably invite criticism. With the rise of constructivism in political science and international relations around the end of the 20th century, academic debate between proponents of both schools of thought came to a head (Green & Shapiro 1994; Katzenstein et al. 1998; Fearon & Wendt 2002). Since then, these philosophical discussions have somewhat abated and, naturally, remained inconclusive. At their high level of abstraction, neither of the two second-order

theories are empirically falsifiable. There are ample instances in which decision-makers in political systems around the globe act out of calculated self-interest, just as they are constrained by social norms and rules at other times. Both meta theories, however, can be powerful 'if viewed *pragmatically* as analytical tools, rather than as metaphysical positions or empirical descriptions of the world' (Fearon & Wendt 2002). Applying one or the other to help explain a specific social phenomenon requires a number of ontological, epistemological, and methodological commitments which guide but also limit the scope of research (see the following section). Thus, each offers a different perspective and illuminates different aspects of social phenomena that need not be mutually exclusive.

The choice to develop a theoretical framework on the basis of rationalism was made for two reasons. First, and as mentioned previously, the literature does not offer readily applicable first-order theories that sufficiently address the questions related to *de facto* differentiation as presented in this dissertation. Second, the very nature of *de facto* differentiation as a deliberate circumvention of rules, norms, or laws (of the EU) to some extent undermines the logic of appropriateness which undergirds constructivist theories. In comparison, the logic of consequentialism ingrained in rationalist thought appears to have a stronger footing. This is not to say, however, that the former as well as other logics of action play no role in the creation and handling of *de facto* differentiation by states and EU institutions. But as a heuristic tool, rational choice theory seemed most promising.

The main limitations of this theoretical approach must be acknowledged and deserve to be discussed. Naturally, the assumption of goal-seeking individuals excludes from analysis other aspects of human behaviour that might explain the outcome, i.e., *de facto* differentiation. Any choice of one theory over another, however, requires setting a focus which implies making concessions. Among the most important limitations of rational choice theory is the treatment of actors and their preferences as exogenously given. With regards to the topic at hand, indubitably interesting aspects such as the composition and identity of actors as well as the origins of their preferences concerning (*de facto*) differentiation are not part of the analysis. In other words, this precludes changes in government and the potentially related changes of preferences, limiting the scope of analysis to periods

in which both can plausibly be assumed as static. Moreover, the common assumption of unitary actors who are, in reality, aggregates of a multitude of individuals with potentially heterogeneous preferences can be problematic (Arrow 1951). This may also clash with the assumption of transitivity, whereby actors who prefer A over B and B over C are expected to also prefer A over C. Because aggregate actors consist of different (groups of) individuals, the Condorcet paradox may lead to the distribution of preferences as A over B and B over C but C over A (Mueller 1979). This may lead to flawed dependent variables, but the researcher can avoid this by carefully defining actors as well as their preference orderings.

The application of rational choice theory can take various shapes. Some emphasise the normative properties of rational choice theory which imply a prescription of how actors ought to act in certain situations to increase utility (Elster 1986). Others use it more pragmatically as a positivist theory to generate insights into human behaviour in certain social or political systems (Fearon & Wendt 2002). Within the latter, there is distinction between thick rationality which pays more attention to the nature of actors' preferences and thin rationality that treats them strictly as given (Ferejohn 1991). Moreover, rational choice theory lends itself both to formal expressions of theoretical models, often in mathematic terms, or to purely verbal application of its core tenets. The latter is often referred to as 'soft' rational choice (Pollack 2006).

This dissertation employs rationalism as a pragmatic tool to better understand the decision-making processes undergirding *de facto* differentiation. The description of actors and their preferences is thinly rational, i.e., they are employed as independent variables. Whereas article 2 applies a soft rational choice approach, article 3 proposes a more formal, game theoretical model. This is briefly summarised in the following paragraphs. For more information, see the articles in the appendix.

3.2.1. The application of rational choice theory in article 2

Article 2 addresses the purpose of *de facto* differentiation in the EU's system of differentiated integration. To that end, it investigates the establishment of tolerated

or joint arrangements of *de facto* differentiation instead of tried and trusted *de jure* solutions in EMU. It starts with the assumption that these are the product of rational choice, and therefore supposedly yield certain benefits for the main actors involved. There is a differentiation-seeking member or third state government on the one side, and the EU comprising all remaining member states and its supranational institutions on the other side. In line with the rationalist paradigm, both actors are assumed to possess fixed preference orderings, derived from the literature on European integration and studies on differentiation. Defining these baseline preference orderings, however, presents a puzzle in that neither the EU nor the state is expected to strive for *de facto* differentiation in pursuit of their utility-maximal outcome (see Article 2 for a more detailed discussion).

States in demand of differentiation can be expected to prefer *de jure* solutions. This provides legal security because such arrangements cannot easily be challenged or revoked. In addition, it avoids accruing financial or reputational costs as *de facto* differentiation might, if contested by the EU institutions. Thus, the state's preference ordering is:

de jure differentiation > *de facto* differentiation > no differentiation

Although there are slight differences among the institutions, it can safely be assumed that the EU as a whole prefers uniform integration over the fragmentation of EU law. Moreover, as a self-described 'community of law' it naturally seeks to avoid any undermining of its authority in the form of circumventions of its legal framework. The EU's preference ordering is, thus:

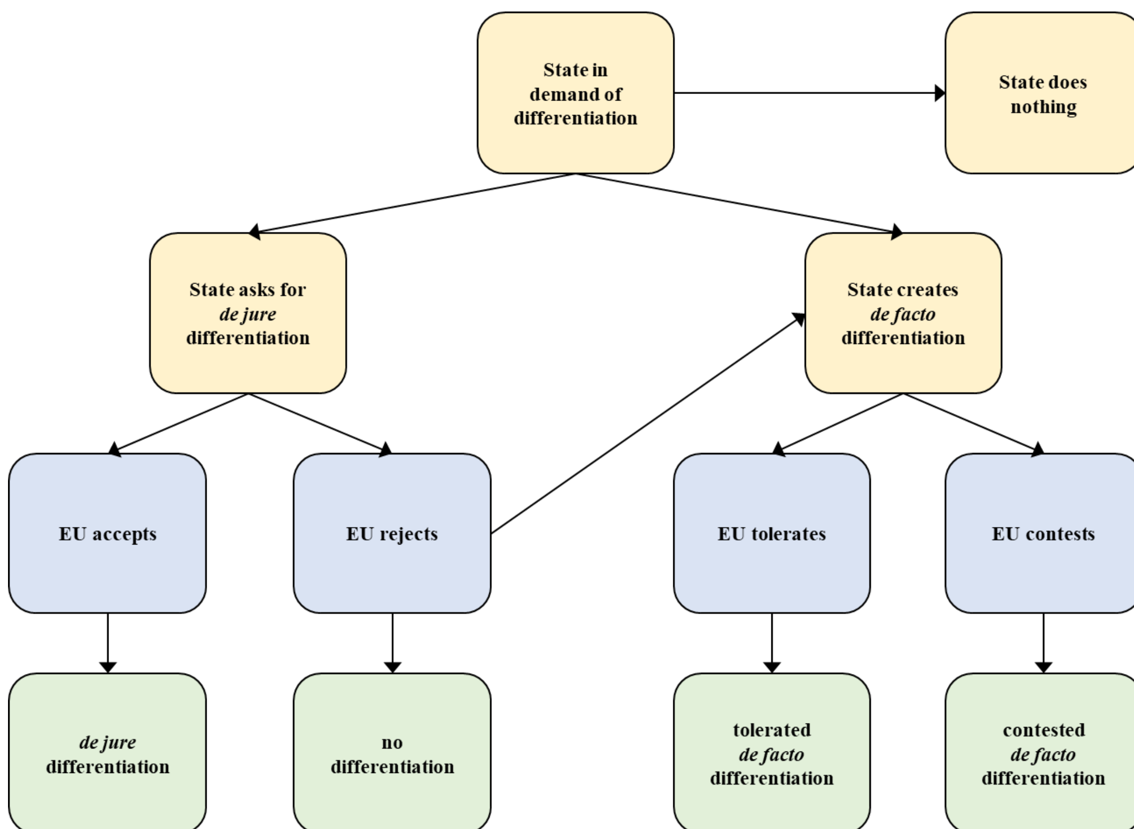
no differentiation > *de jure* differentiation > *de facto* differentiation

Against that backdrop, the article investigates two propositions which, assuming rational actors, would explain the existence of tolerated arrangements of *de facto* differentiation.

i. The presumably more desirable *de jure* option may be unavailable while *de facto* differentiation provides still more utility than no differentiation.
ii. Inherent benefits of de facto differentiation trump the utility gained from choosing de jure or no differentiation.

In order to do so, the article traces the decision-making of both actors that led to *de facto* differentiation in three cases related to EMU. The chain of decisions and interplay between the two main actors that underpin this process is illustrated in figure 1, see also the following section for methodology and data collection. Assessing whether *de jure* differentiation would have been a viable option as proposed by P1, the main analytical focus lies on identifying the potential benefits that according to P2 enticed both actors to pursue *de facto* differentiation after all. This is taking into account a broad range of factors related both to intrinsic motivations of the two main actors as well as the background against which these decisions were made.

Figure 2: The establishment of tolerated and contested arrangements of *de facto* differentiation



Source: own compilation

3.2.2. The application of rational choice theory in article 3

Article 3 discusses the EU's abilities and constraints to counteract undesired arrangements of *de facto* differentiation. In doing so, it focuses on member states' backsliding in the rule of law. These are arguably the most profound cases of contested *de facto* differentiation in the EU (the next section offers a more elaborate explanation of this case selection). The article follows a more formal interpretation of rational choice theory and develops a model based on Putnam's (1988) two-level games to map these disputes in all their complexity. Due to the EU's multi-level governance structure, this approach lends itself particularly well to outline the systemic enablers and constraints that define interactions between EU institutions and its member states (Bellamy & Weale 2015; Schelkle 2019).

In a nutshell, two-level games illustrate the decision-making dilemmas actors may face as a result of potentially conflicting interests on the international and domestic level and, thereby, lay bare the available strategic opportunities. The concept was originally developed to explain the mechanisms of negotiations between democratically accountable actors who seek an agreement on the international level but face constraints due to the need of domestic ratification. Negotiations succeed only if all actors have sufficient room for agreement on both levels, which is typically expressed as overlapping win-sets. The size of each actor's respective win-sets is defined by the preferences and bargaining power of interest groups. On this basis, Putnam builds his hypotheses about the distribution of gains and losses in such negotiations. Paradoxically, it is states facing strong domestic resistance – a narrow win-set – which typically have the strongest position on the international level because other actors with larger win-sets know that to reach a ratifiable agreement, concessions need to be made on their part. As a result, actors tend to overemphasise domestic constraints in order to project a stronger bargaining position.

Disputes in the EU over member states backsliding in matters related to the rule of law fits well within the concept of two-level games. Essentially, the acts that undermine the rule of law are carried out by member state governments on the domestic level, for example by way of judicial reforms that pave the way for political interference in courts and other legal processes. If violation with the

Treaties is detected, the EU institutions contest this on the supranational level.[5] To depict the dispute about backsliding in the rule of law as a two-level game, some alterations to the original iteration of this game-theoretical framework are necessary. First, rule of law disputes are best conceived as non-cooperative games. Although negotiations to settle individual issues within the larger dispute occasionally take place, neither of the two main actors tends to be willing to make broad concessions in order to reach an agreement on the supranational level. Instead, both actors mostly pursue hostile strategies to enforce their preferred outcome against the resistance of the other.

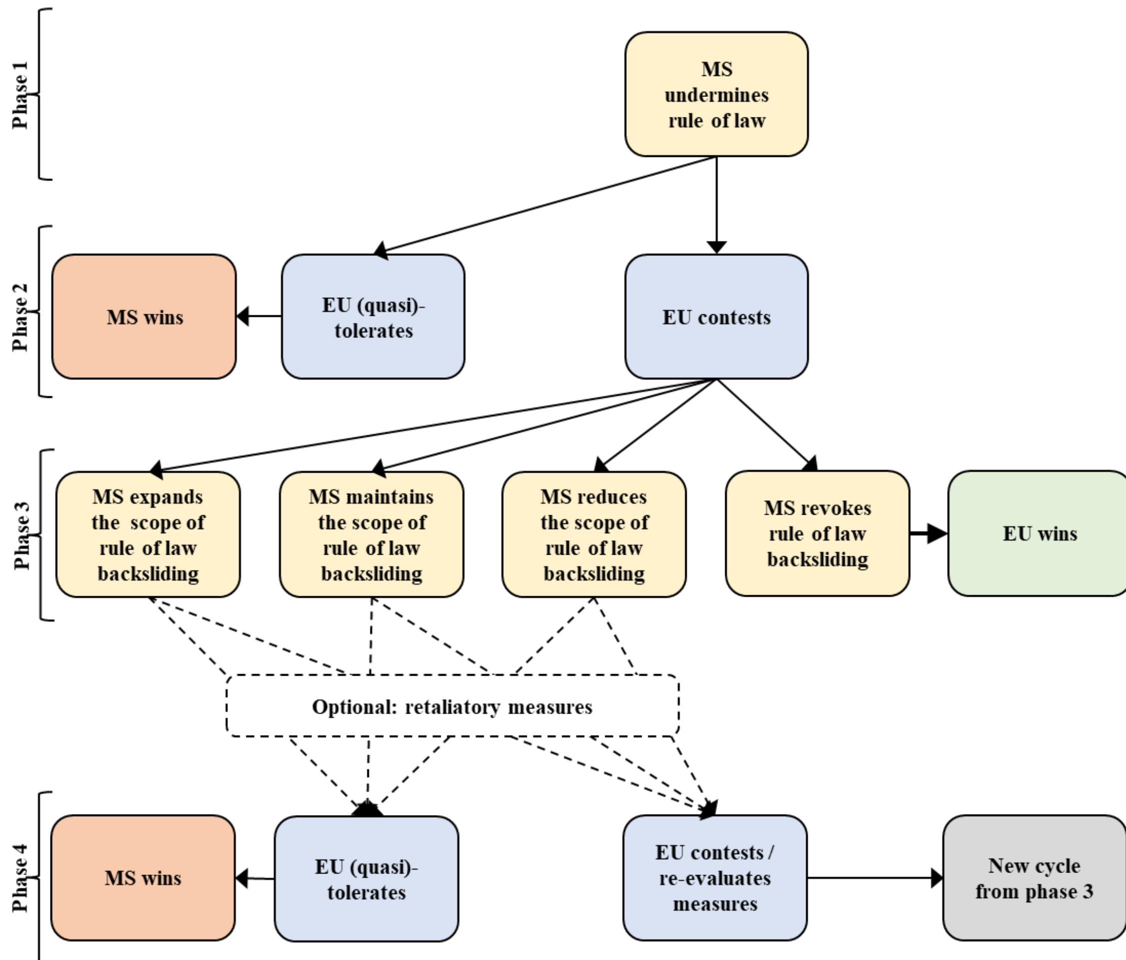
Therefore, the analytical focus of this application of Putnam's two-level game framework lies not on defining the size of potentially overlapping win-sets but on the various domestic and supranational constraints that inform actors' strategies to achieve their preferred outcomes. The two main actors in this game are defined as a member state (MS) intent to undermine the rule of law, and the EU Commission (EC) tasked and committed to protect it. There are three possible outcomes of the game. It can end in full adherence to the rule of law (FA), contested backsliding (CB), or (quasi-)tolerated backsliding (TB). The member state's preference ordering is $U_{MS}(TB) > U_{MS}(CB) > U_{MS}(FA)$. Conversely, the Commission prefers $U_{EC}(FA) > U_{EC}(CB) > U_{EC}(TB)$. Figure 2 illustrates how the game successively plays out.

On this basis, the article develops the two actors' utility functions for each outcome. Taking into account the numerous constraints on the domestic and supranational level, it further discusses the strategies both actors, assuming rational behaviour, can be expected to pursue in order to reach a utility-maximal outcome. Due to incomplete information, the risk of backlash, and the general mechanisms underlying this dispute, the model expects both actors to pursue a graded approach that successively adds more force to enforce their preferences while remaining

[5] There is, of course, also contestation on the domestic level. Demonstrably undermining the rule of law is almost certain to breed tensions with opposition parties, voters and other interest groups that are not naturally aligned with the government. The model developed in this article, however, focuses on the interactions on the supranational level, while paying close attention to constraints on both levels.

flexible and able to backtrack in case the balance point at which there are still net-positive results is overstepped. This is then tested in a case study on the Commission's dispute with Poland over their judicial reforms between 2015 and 2022.

Figure 3: The rule of law dispute



Source: own compilation

4. Methodology and data

To put this theoretical framework into practice and use it to pursue the empirical research objectives of this thesis, a number of methodological choices had to be made. Because the social sciences are not governed by natural laws, the first decision relates to the positioning of this research within the spectrum of philosophical underpinnings that guide how social systems as well as the acquisition of knowledge are understood. Essentially, this defines the ambition of this research as well as the relationship between its theoretical stipulations, empirical findings and what can be considered 'truth' from this perspective. In the social sciences, there are at least four different paradigms that inform researchers' conceptions of ontology, epistemology, and methodology. According to Guba and Lincoln (1994), these paradigmatic clusters are positivism, postpositivism, critical theory, and constructivism. This dissertation follows, by and large, classic positivist tenets. This results from a pragmatic choice for a research design that is suitable to address the stated objectives.

A key feature of positivist research is ontological realism which assumes that the object of inquiry exists in reality – as opposed to it being socially constructed. Here, this is reflected in the depiction of *de facto* differentiation as a facet or a tool in European integration. In this sense, it is a neutral object that can be used by actors such as the EU institutions or governments to achieve certain ends. Positivism is, furthermore, based on a dualist epistemology which implies that phenomena can be studied objectively because the investigator and the object of inquiry are considered independent, separate entities. This requires a value-free and unbiased position of the researcher. The results are then expected to be 'true' and generalisable. Of course, this is not uncontroversial if interpreted *in sensu stricto*. But few among the large caste of positivist scholars who have driven studies on differentiated integration forward over the past few decades would be so bold – or naïve. Finally, positivist studies typically follow a deductive approach by which hypotheses derived from theory are verified empirically. As outlined in the previous section, this study generates expectations concerning the purpose of *de facto* differentiation and the EU's ability to undo it by drawing on rational choice theory. Although positivist research has over the past fifty years or so gained

a predisposition for quantitative methods, this study employs a qualitative research design. This is primarily due to the relative scarcity of cases and focusing on the causal mechanisms according to which *de facto* differentiation is established and operates.

This section elaborates on the more concrete methodological decisions that were made to produce a feasible and expedient research design. This involves determining the type of data suitable for the analysis of the respective research questions. And, related to this, it was necessary to choose from among the broad variety of scientific tools available to social scientists the most adequate means to obtain to the right kind and sufficient amount of data. The structure is as follows. The first part details the research design with reference to the case study approach used in all three articles. It devotes particular attention to the respective type of case study applied throughout this dissertation and explicates the case selection. The second and final part describes the respective methods of data collection. It elaborates on the application of two different methods – document analysis and interviews – chosen for the purpose of triangulation. Moreover, it exposes the respective sources and explicates the techniques used to gather and analyse data.

4.1. Research design: The case study approach

Case studies have served as a popular method to research differentiation in the European Union since the early days of this sub-field of integration studies. Egeberg and Trondal (1999) studied the case of Norway to assess the extent of policy harmonisation among the differentially integrated EEA member states. Adler-Nissen (2009) used the cases of Denmark and the UK to demonstrate how member states circumvent the loss of influence in decision-making as a result of their opt-outs. Kroll and Leuffen (2014) combined within-case analysis and comparative case studies to study the use of the enhanced cooperation framework in secondary EU law. More recently, Genschel et al. (2023) conducted numerous mini case studies to test hypotheses concerning the effects of constitutional differentiation with regards to exclusion and the potential of reintegration by other means. These applications of the case study approach differ on many levels. Some

are interested in one specific case, whereas others study a larger population of cases; the research purposes vary between the testing and development of theory; and both quantitative and qualitative data are used to substantiate the authors' arguments. All this speaks to the great versatility of this method, which makes it a popular tool for researchers in this and many other areas in the social sciences.

Before describing how it was applied in this research, it is important to understand how the case study method works and what it offers. The object of analysis is, unsurprisingly, one or more (n number of) cases. The definition of a case, however, is less straightforward. Gerring (2007) describes it rather generically as 'a spatially delimited phenomenon (a unit) observed at a single point in time or over some period of time. It comprises the type of phenomenon that an inference attempts to explain.' Ragin and Becker (1992), however, identified four distinct interpretations of what constitutes a case based on a symposium that brought together eight social scientists proficient in conducting case study research. These are the product of two dichotomous variables pertaining to how cases are understood as well as conceived. The first dichotomy understands cases as either real empirical units or as theoretical constructs that exist primarily to serve the researcher's interest. The second dichotomy distinguishes whether cases are either specifically made within the context of research or constitute generally known theoretical entities. This is illustrated in Table 3.

Table 3: What is a case?

Understanding of cases	**Case conceptions**	
	Specific	**General**
As empirical units	1. Cases as found	2. Cases are objects
As theoretical constructs	3. Cases are made	4. Cases are conventions

Source: Ragin and Becker (1992)

The first cell describes a case treated as an empirical unit which emerges only as part of the research process due to its high degree of specificity. For example, a researcher interested in the establishment of socialist regimes will first need to determine and subsequently verify the empirical boundaries of such regimes. The

second type of case differs in that researchers do not feel inclined to define it because it is a generally known and accepted object of analysis. Research on the resilience of international governmental organisations (IGOs) in crisis situations, for instance, can draw on officially sanctioned lists of IGOs to determine the population of cases. The third cell, then, treats cases as theoretical constructs imposed on empirical evidence over the course of research. The first exemplary researcher might, for example, identify new subsets of socialist regimes which possess distinct theoretical properties. The fourth type of case refers equally to theoretical constructs but such that have become canon in the relevant field of research – think Marxist or Maoist strands of socialism.

Regardless of how cases are constructed, their analysis does not automatically follow the tenets of the case study approach. Case studies are typically associated with a small-n research design which implies a more in-depth analysis of a select few cases as opposed to the large-n approach which uses statistical methods to analyse a higher number or the entire population of cases more superficially (Gerring 2007). Ever since statistics entered the realm of the social sciences, methodological disputes about the superiority of either of the two approaches have haunted researchers but inevitably remained fruitless. Without delving further into the debate about quantitative versus qualitative research, the choice ultimately depends on two critical factors. On the one hand, the size of the population of cases determines whether a large-n research design is even possible. There are no exact boundaries for either the maximum number of cases that make a qualitative small-n design viable or the minimum number of cases that make a statistically driven large-n approach feasible. Moreover, there is a middle ground occupied by methods such as qualitative comparative analysis (QCA) for assessing sample sizes both too large for small-n case studies and too small for large-n statistical studies (Ragin 1987). On the other hand, each approach has certain advantages and disadvantages that make it more or less suitable to address the stated research objectives; see for example George and Bennet (2005) for a general overview.

What, then, is a case study, and what is it good for? Definitions of the case study method diverge about as much as definitions of the case itself. Gerring (2007) understands it as ‘the intensive study of a single case where the purpose of that

study is – at least in part – to shed light on a larger class of cases (a population),' acknowledging that case study research may incorporate several cases to allow for *cross-case* analysis (emphasis in original). The ambition to produce generalisable knowledge is shared by many, including George and Bennett (2005). Conversely, Stake (1995) contends that 'we do not study a case primarily to understand other cases (…) our first obligation is to understand this one case.' While the purpose of the case study method is somewhat contested, its scope and nature is more commonly accepted. In essence, it generates an in-depth and multi-faceted understanding of complex contemporary phenomena (cases) within their real-world context (Yin 2018). As a result, there is not one but several ways to design a research project based on the case study approach. Gerring (2007) proposes a covariational typology that takes into account the number of cases, the type of variation in the dependent and independent variable (spatial or temporal), as well as the location of this variation (cross-case or within-case). This is illustrated in table 4.

Table 4: Types of case studies

<table>
<tr><th rowspan="2">Cases</th><th rowspan="2">Spatial variation</th><th colspan="2">Temporal variation</th></tr>
<tr><th>No</th><th>Yes</th></tr>
<tr><td rowspan="2">one</td><td>None</td><td>(logically impossible)</td><td>1. Single-case study (diachronic)</td></tr>
<tr><td>Within-case</td><td>2. Single-case study (synchronic)</td><td>3. Single-case study (synchronic + diachronic)</td></tr>
<tr><td>several</td><td>Cross-case & within-case</td><td>4. Comparative method</td><td>5. Comparative-historical method</td></tr>
</table>

Source: Gerring (2007) (adapted)

With this categorisation, Gerring (2007) seeks to refute the contentious N=1 criticism, which case study research is often subjected to. He demonstrates that with an increasing number of cases and the necessity of variation within the case study, the number of observable data points can be increased almost indefinitely. Type 1, the diachronic single-case study, exhibits variation in one case over a certain period of time, therefore creating at least two datapoints if the analysis is

limited to studying only the before and after states of a certain event. Type 2, the synchronic single-case study, represents a single point in time but contains variation by analysing n number of subsets within the one case under investigation. Type 3 combines both approaches. Type 4, the comparative method, expands the number of cases to allow for comparison both across cases as well as within at a single point in time. And type 5, the comparative-historical method adds to that the temporal dimension which further increases the potential number of observations.

The choice between these different case study designs follows the pre-defined objectives of the researcher. While Gerring (2007) focuses on causal relationships, Nair et al. (2023) posit that the research objectives and by extension the purpose of case studies may either be exploratory or explanatory. The former is interested in the properties of the dependent or independent variable, but not so much in causality. This resembles what Schwandt and Gates (2018) term descriptive case studies which pursue the objective to 'develop a complete, detailed portrayal of some phenomenon.' Descriptive studies often involve only a single case that is chosen, for example because it had hitherto not been studied, is a unique occurrence or, conversely, regarded as an ideal-typical case as in the landmark 'Middletown' studies by Robert and Helen Lynd (1929). Comparative designs are sometimes chosen to look for commonalities or differences between cases that, taken together, enhance the description or overall understanding of a certain phenomenon.

Case studies with an explanatory focus deal with causal relationships, centred on either the dependent or independent variable, or both. This tends to involve the development or testing of hypotheses or theories. According to George and Bennet (2005), the case study approach is particularly well-suited for this endeavour. They argue that this is i.a. due to its selective nature which affords researchers a high level of conceptual validity, and because in-depth analysis allows for a closer exploration of causal mechanisms. For this very purpose, case studies are a typical venue for the application of process-tracing (Beach & Pedersen 2019; Bennett & Checkel 2015). Geared towards the testing and development of hypotheses, Gerring (2007) proposes nine different techniques of case selection that ensure higher levels of external validity or generalisability – see table 5.

Table 5: Techniques of case selection in explanatory case studies

Technique	Definition	Uses	Representativeness
1. Typical	Cases (one or more) are typical examples of some cross-case relationship.	Hypothesis testing.	By definition, the typical case is representative.
2. Diverse	Cases (two or more) illuminate the full range of variation on X_1, Y, or X_1/Y.[6]	Hypothesis generating or testing.	Diverse cases are likely to be representative in the minimal sense of representing the full variation of the population.
3. Extreme	Cases (one or more) exemplify extreme or unusual values on X_1 or Y relative to some univariate distribution.	Hypothesis generating (open-ended probe of X_1 or Y).	Achievable only in comparison to a larger sample of cases.
4. Deviant	Cases (one or more) deviate from some cross-case relationship.	Hypothesis generating (to develop new explanations of Y).	After the case study is conducted, it may be corroborated by a cross-case test, which includes a general hypothesis (a new variable) based on the case study research. If the case is now an on-lier, it may be considered representative of the new relationship.
5. Influential	Cases (one or more) with influential configurations of the independent variables.	Hypothesis testing (to verify the status of cases that may influence the results of a cross-case analysis.	Not pertinent, given the goals of the influential-case study.
6. Crucial	Cases (one or more) are most- or least-likely to exhibit a given outcome.	Hypothesis testing (confirmatory or disconfirmatory).	Assessable by reference to prior expectations about the case and the population.

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[6] Gerring (2007) uses the standard labels of dependent variables as X and independent variables as Y. X_1 refers to the 'causal factor of special theoretical interest,' whereas X_2 signifies the 'control (background) variable, or vector of controls (if there are any).'

7. Pathway	Cases (one or more) where X_1 and not X_2 is likely to have caused a positive outcome (Y=1).	Hypothesis testing (to probe causal mechanisms).	May be tested by examining residuals for the chosen cases.
8. Most-similar	Cases (two or more) are similar on specified variables other than X_1 and Y.	Hypothesis generating or testing.	May be tested by examining residuals for the chosen cases.
9. Most-different	Cases (two or more) are different on specified variables other than X_1 and Y.	Hypothesis generating or testing.	May be tested by examining residuals for the chosen cases.

Source: Gerring (2007) (adapted)

Despite or perhaps as a result of the relative ubiquity of the case study approach, criticism in particular related to the generalisability of results from small-n research prevails and deserves mention. Most notably, King et al. (1994) questioned i.a. the ability of qualitative research to produce strong causal inference due to difficulties in determining the actual effect of independent or intervening variables due to the relatively small number of observations. But as George and Bennet (2005) point out, much of this criticism is fuelled by a faulty conflation of standards that define the external validity of quantitative research with the tenets and purpose of qualitative approaches. In this regard it is important to understand that the generalisability of case studies differs substantially from statistical methods. Yin (2018) suggests that instead of thinking about cases as a sample of a larger population which begs for broad cross-case comparison, case studies derive their external validity from what he refers to as analytic generalisation. By 'corroborating, modifying, rejecting, or otherwise advancing theoretical concepts' that form the theoretical foundations of case studies, or 'new concepts that arose upon the completion of [a] case study,' the empirical findings translate into a conceptually higher level than that of the specific case (ibid).

A more serious concern is case selection bias, which still ranks high among the oft-mentioned pitfalls in qualitative social science research (Collier & Mahoney 1996;

Bell-Martin & Marston 2021).[7] 'Selection bias refers to the situation where a non-random selection of cases results in inferences that are not representative of the population' (Nair et al. 2023). The case study approach, in fact, prescribes a careful selection rather than a random choice. However, cases are often chosen because they appear interesting, important, or simply convenient to study due to, e.g., the researcher's location or language skills. This, somewhat, randomises the case selection process, which undermines the logic of the case study approach and diminishes the external validity of empirical findings. But this problem can be overcome by methodically selecting as prescribed by the various academic contributions that filled the case study approach with sophistication.

4.1.1. The application of the case study approach in this dissertation

All three individual articles which together compose this doctoral thesis apply the case study approach, albeit in different ways. Here, cases are generally understood as specific empirical units or 'cases as found' (see table 3). Suitable cases are identified based on the definition of *de facto* differentiation as advanced in this dissertation. Despite the admittedly high level of conceptual specificity, these cases are viewed as real examples of a broader phenomenon rather than theoretical constructs created purely for the sake of this research.

The choice in favour of a case study research design was informed by two key factors. First, the number of cases that fall within the definition of *de facto* differentiation is well below the threshold that would make statistical analysis viable. There are only few high profile cases based on non-compliance such as the informal opt-outs from the euro, the rule of law violations and other examples mentioned throughout this thesis. The potential number of more technical cases of non-compliance that by virtue of their long duration might constitute cases of *de facto* differentiation is higher. Data from 2016 finds that 95 infringement

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[7] Selection bias is not unique to qualitative research. Geddes (1990) demonstrates that 'the cases you choose affect the answers you get' in both small-n and large-n studies.

proceedings were still open after the ECJ had delivered its judgment and 10 remained open even after a second ruling (Falkner 2018). However, to determine whether these cases truly constitute *de facto* differentiation would require case-specific qualitative assessment. While unilateral opt-ins of non-member states in the form of adopting the EU's standards or regulation are not uncommon, cases that are more far-reaching, potentially problematic, and, thus, more interesting to study are fewer than a handful. And formal or informal agreements outside of EU law that instilled differentiated integration are, next to the original Schengen Accord, mostly limited to the few facilities created in response to the financial crisis.

Second, while this approximate population of cases would perhaps suit semi-quantitative approaches such as QCA, a qualitative approach that offers in-depth insights into causal relationships lends itself particularly well to the research objectives of this thesis. In particular articles 2 and 3 are built around research questions that emphasise decision-making processes and causal mechanisms, which call for a more thorough analysis. The following paragraphs describe the application of the case study approach in each article.

The first article has primarily foundational ambitions. Breaking into new conceptual territory, it identifies and defines *de facto* differentiation as a distinct mode of differentiated integration in the European Union. Based on an extensive literature review, it develops a three-pronged typology to refine the concept. It then employs comparative case studies with the principal purpose to illustrate how these three types of *de facto* differentiation manifest in reality. In doing so, the case study exhibits an exploratory design. Restricted in scope, the case studies, however, do not offer a true in-depth analysis of each case and remain limited to a cursory description of the characteristics that define each of the three cases with regards to the previously established conceptual typology.

Although the intention of this article was not to explain any causal relationships, the case selection was informed by Gerring's (2007) diverse technique (see table 5) to prepare for a future in-depth analysis. The three types of *de facto* differentiation differ substantially in the way they are created and operate. Thus, choosing cases that represent all three types ensures the maximum variation in

dependent and independent variables across the entire population. Article 2 properly exploits this research design. See the following paragraphs for a more detailed explanation of the reasoning behind case selection. The case representing type 1, *de facto* differentiation by non-compliance, is Sweden's decision not to adopt the euro without possessing a formal opt-out enshrined in the Treaties. Type 2, *de facto* differentiation by unilateral opt-in, is covered by Kosovo's adoption of the euro without any legal agreement with the EU. And type 3, *de facto* differentiation by formal or informal agreement outside EU law, is represented by the creation of the Fiscal Compact as an intergovernmental treaty under international law.

Article 2 seeks to uncover the purpose of *de facto* differentiation in the EU's system of differentiated integration. In other words, it is aimed at identifying the intervening variables that explain why demand for opt-outs or opt-ins in some cases led to the creation of *de facto* differentiation even though legal solutions had previously been found in similar instances. To that end, it employs a rationalist theoretical framework outlining the mechanisms by which *de facto* differentiation can be established as well as utilitarian considerations why states and the EU would engage in or tolerate it. This is subsequently tested in a comparative case study that follows a clear explanatory purpose with the ambition to develop new theoretical insights. The results and contribution in terms of theory development can be summed up as follows: *De facto* differentiation is often more than just a second-best option if *de jure* differentiation is unavailable. It can make EU integration more flexible when strong national demand for differentiation meets the need for discretion or timely, pragmatic action.

This research is built on the comparative case study design (see table 4). With the intent to find reasons for the purpose of *de facto* differentiation that are applicable to all three types, the analysis benefits from the diverse case selection technique (see table 5). By ensuring the greatest possible variation, it enhances the explanatory power of the intervening variables found to lead towards *de facto* differentiation in all three cases and increases generalisability. It should be noted, of course, that all three cases establish differentiation in EMU. The decision for cases situated in one and the same policy areas was made to improve cross-case

comparability. More precisely, it allows to control for factors that might influence the demand and supply of differentiation pertaining to differences between policy areas. For example, some policy areas like foreign and defence policy generally offer more leeway for member states due to their intergovernmental design, whereas market or trade related policies require more harmonisation as a result of their more supranational characteristics.

Furthermore, in order to explain why demand for differentiation has led to a *de facto* solution, it was important to choose cases where a comparable *de jure* alternative exists or was at least plausible. The Swedish case can be compared to the legal opt-outs from EMU, which were granted to Denmark and the UK. Kosovo's informal opt-in stands in direct contrast to other small third states' adoption of the common currency via bilateral treaties as applies to Andorra, Monaco, San Marino, and the Vatican. And the Fiscal Compact was originally designed as an amendment to the EU Treaties before the solution outside EU law was found and implemented. These comparisons to other cases where similar independent variables led to a different outcome formed a crucial analytical component to determine the intervening variables that led to *de facto* differentiation in the three case studies.

The third article investigates the EU's abilities and limitations to contest *de facto* differentiation. Its empirical focus lies on Poland's undermining of the EU's rule of law principles, which can be viewed as one of the most poignant cases of contested *de facto* differentiation in the EU. And on this basis, it addresses the question whether the EU's gradual response was indeed 'too little too late' as suggested by much of the literature on this subject. To address this, the article advances a game-theoretical model based loosely on Putnam's (1988) two-level games which encompasses the general mechanisms underlying the rule of law dispute with regards to the constraints and enablers situated on both the domestic and supranational level. From this model it is deduced that the utility-maximal strategies on both sides embody a gradual approach building up and, conversely, contesting this kind of *de facto* differentiation.

This proposition is then tested in a single-case study defined by variation in both the spatial and temporal dimension (see table 4). The case study is centred on the

EU Commission's rule of law dispute with the Polish government and analyses the positions and steps taken by both actors during the period between 2015 and 2022. The starting point for this timeframe was chosen because in late 2015, almost immediately after winning the general election, the Polish government undertook the first steps towards *de facto* differentiation in this area. The end date reflects the schedule of this PhD project and unfortunately not the point when the rule of law was restored in Poland. The spatial variation relates to the analysis of both actors and constitutes, next to pursuing a game-theoretical approach, the key novelty of this research. Hitherto, the actorness of the state had often been overlooked in discussions of the Commission's ability to combat rule of law infringements – or *de facto* differentiation for that matter.

The decision to study the rule of law dispute between the EU Commission and Poland embodies the crucial case selection technique (see table 5). Against the backdrop of this article's overarching ambition to assess the EU's ability to contest and undo *de facto* differentiation, this case is the most likely to produce a determined reaction from the EU. Not only does the violation of one of the Union's founding principles call for vigorous defence of its values, but the Commission also possesses more numerous and powerful enforcement tools in this case than in others. The Article 7 procedure or the various rule of law-specific monitoring and shaming tools are not applicable in other contested cases of *de facto* differentiation located on a more technical level of non-compliance. Thus, studying the mechanisms that enable and limit the EU's response in this case increases the generalisability to other cases where the Commission's powers are fewer and the motivation to act may be lower.

The dispute with Hungary would have been a logical alternative case study. It is similar in nature to the chosen case but differs on a number of important variables. As this case study is built on the theoretical foundations of two-level games, domestic factors play an important role. Where in the Polish case EU measures are supported by a large fraction of civil society, strong parliamentary opposition and largely free media, the Hungarian government faces far fewer domestic constraints. But notable differences can also be found on the supranational level. Membership of *Fidesz*, the party governing Hungary, in the influential centre-right

European Parliament group European People's Party (EPP) was only withdrawn in 2021 and long hampered EU countermeasures against democratic and rule of law backsliding in Hungary. Both differences complicated the EU's response and make for a less compelling case in line with the crucial case selection technique.

4.2. Methods of data collection

Case studies are not limited to a specific type of data collection. In fact, researchers typically draw on a broad variety of data and tools to gather or access it in order to do justice to the complexity of the object of analysis and to get in-depth insights. This may involve analysing existing sets of data as well as generating new original data using quantitative methods such as surveys or qualitative tools like interviews, experiments or ethnographic field research (Gerring 2007). Furthermore, the use of different data collection techniques improves the reliability and validity of results in qualitative research by triangulation, i.e. to seek corroboration of findings in diverse sources (Jones 1996). This dissertation follows this approach in the two more empirically-oriented articles 2 and 3.

As a matter of principle, all three case studies sought to incorporate as many readily available data from secondary literature as possible. Most of the cases studied here have been studied before, even though from different perspectives or with different objectives in mind. Nevertheless, a lot of the knowledge produced by others has proved transferrable and forms the basis on which this new research builds. The secondary sources this dissertation draws upon range from, primarily, academic research output to reports from think tanks and news outlets covering certain aspects of the cases in question.

The novelty of this research project, however, required gathering new data to fill some of the gaps in the literature. This was done through a combination of qualitative document analysis and expert interviews. This methodological mix is commonplace in qualitative social science research because the two approaches complement each other well and, thereby, facilitate triangulation.

Qualitative document analysis describes a methodical assessment of textual evidence, which involves skimming, reading, and, crucially, interpreting text (Bowen 2009). The interpretive part of document analysis is open to various highly sophisticated techniques such as critical discourse analysis which provides deeper contextual insights based on the specific use of language (Wodak & Meyer 2016). On a more basic level, document analysis serves the purpose to gather factual information. To that end, this method bears several advantages over other means of obtaining qualitative data. According to Bowen (2009), document analysis is relatively efficient as well as cost and time-effective, and data is often readily available thanks to online archives or scholarly databases. Yin (2018) further highlights its unobtrusiveness, pertaining to the fact that unlike interviews, experiments, or ethnographic observations, textual evidence is unaffected by the researcher's presence. Moreover, he underlines that documents may contain a high level of detail and precision in addition to covering a broad range of events or actors over a potentially indefinite period of time.

The reliability and validity of facts drawn from textual evidence is, however, complicated by the selective nature in which the author(s) record or omit facts as well as their commitment to truth (Caulley 1983; Yin 2018). As a result, it falls upon the researcher to carefully evaluate the content and quality of documents. With these drawbacks but also its advantages in mind, Yanow (2007) neatly describes the contribution of document analysis in a multi-method research design:

> Documents can provide background information prior to designing the research project, for example prior to conducting interviews. They may corroborate observational and interview data, or they may refute them, in which case the researcher is 'armed' with evidence that can be used to clarify, or perhaps, to challenge what is being told, a role that the observational data may also play (p. 411).

In this dissertation, document analysis was used in this spirit, functioning as a secondary means of data collection mainly aimed at corroboration. This method was applied to a limited extent in the more conceptually-minded article 1 and plays a more vital role in articles 2 and 3. It proved particularly useful to analyse cases that had hitherto received little academic attention, such as Kosovo's adoption of the euro. This reflects in the uneven number of documents analysed in the respective case studies. Table 6 provides an exhaustive list of the documents

analysed as part of the case studies featured in this dissertation. These comprise mainly legal texts, policy briefs, official statements and other documents issued by relevant government institutions. It should be noted that not all documents were analysed in their entirety. In some cases, only the sections relevant to the case study were given thorough consideration. Moreover, only some of the listed documents were cited in the respective articles.

Table 6: Key documents analysed in the case studies

Articles 1 and 2	**Case 1: Sweden's de facto opt-out from EMU**
	European Central Bank. 2020. "Convergence Report." Available here
	European Commission. 2002. "The Euro Area in the World Economy – Developments in the First Three Years." Available here
	European Commission. 2003. "Broad guidelines of the economic policies of the Member States and the Community (for the 2003-05 period)." Available here
	House of Commons. 2003. "The Swedish referendum on the euro". Available here
	Jonung, L. (DG ECOFIN). 2003. „To be or not to be in the euro? Benefits and costs of monetary unification as perceived by voters in the Swedish euro referendum 2003". Available here
	Case 2: Kosovo's unilateral adoption of the euro
	Deutsche Bundesbank. 2001. "Protokoll der Pressekonferenz der Deutschen Bundesbank am 25. Juni 2001". Available here
	Deutsche Bundesbank. 2001. "Protokoll der Pressekonferenz im europäischen Haus in Berlin am 17. Juli 2001: DM-Bargeld-Umtausch in Osteuropa und der Türkei". Available here
	Council of the European Union. 2015. "Stabilisation and Association agreement between the European Union and the European Atomic Energy Community, of the one part, and Kosovo*, of the other part". Available here
	ECOFIN. 2000. "2301st Council Meeting". Press release. Available here
	European Commission. 2020. "Commission Staff Working Document – Kosovo* 2020 report". Available here
	Svetchine, M. (Chief officer Central Banking Authority of Kosovo). 2005. "Kosovo Experience with Euroization of its Economy. Speech at Bank of Albania". Available here
	United Nations Interim Administration Mission in Kosovo. 2001. "Administrative Direction No. 2001/24". Available here
	Case 3: The Fiscal Compact
	"Treaty on Stability, Coordination and Governance and Governance in the Economic and Monetary Union". 2012. Available here
	House of Commons Library. 2012. „The Treaty on Stability, Coordination and Governance in the Economic and Monetary Union: views in other member states. Available here
	European Parliament. 2022. "Integration of the Fiscal Compact into Secondary EU Law – Q4 2017". Available here

Article 3	Case: The rule of law dispute between Poland and the EU Commission
	von der Leyen, U. 2019. "A Union that strives for more – My agenda for Europe." Available here
	European Commission. 2021. "Report from the Commission – Monitoring the Application of European Union Law – 2020 Annual Report". Available here
	European Commission. 2021. "Commission Staff Working Document – General Statistical Overview – Accompanying the document Report from the Commission – Monitoring the application of European Union law – 2020 Annual Report". Available here
	European Commission. 2017. "Reasoned Proposal in Accordance with Article 7(1) of the Treaty on European Union regarding the Rule of Law in Poland – Proposal for a Council Decision on the Determination of a Clear Risk of a Serious Breach by the Republic of Poland of the Rule of Law". Available here
	European Commission. 2020. "Member State's compliance with EU law in 2019: more work needed". Press release. Available here
	European Parliamentary Research Service. 2019. "Protecting the rule of law in the EU – Existing mechanisms and possible improvements". Briefing. Available here
	The Chancellery of the Prime Minister. 2018. "White Paper on the Reform of the Polish Judiciary." Available here
	Iustitia, Polish Judges Association. 2018. "The Response of the Polish Judges Association 'Iustitia' to the White Paper on the Reform of the Polish Judiciary. Available here
	Supreme Court of the Republic of Poland. 2018. "Opinion on the White Paper on the Reform of the Polish Judiciary". Available here
	Polish Government. 2018. "Differences and similarities of the judiciary regulations in Poland and other EU member states – selected examples". Available here

Source: own compilation

The main approach to gather new qualitative data for this PhD research was by conducting research interviews. Kvale (1996) defines this method as 'an interview whose purpose is to obtain descriptions of the life world of the interviewee with respect to interpreting the meaning of the described phenomena.' There are different types of interview techniques. Jones (1996) distinguishes broadly between the highly structured standardised interview and the qualitative interview. In the former, the interviewer follows the exact order and wording of his or her questionnaire and often requires interviewees to choose from a number of pre-defined answers. In contrast, qualitative interviews contain a larger degree of freedom for both interviewer and interviewee. Interviews falling in this category range from completely unstructured formats which appear almost conversational to semi-structured interviews in which the interviewer follows a guide or

questionnaire but liberally deviates from it for the purpose of asking follow-up questions or to dig deeper into certain aspects of the answers provided by the interviewee.

The choice between these two different interview techniques depends on the research objectives. Weiss (1994) lists four distinct research aims for which the qualitative interview, the method used in this dissertation, is particularly appropriate. It may serve to 1) develop detailed descriptions; 2) integrate multiple perspectives; 3) describe processes; and 4) learn how certain events are interpreted. As is the case with document analysis, the information provided by interviewees should not be mistaken for truthful descriptions of reality but must be seen as personal accounts of lived experiences, which are by default subjective. Therefore, the meaning of interview data must be extracted by the interviewer through interpretation (Brinkmann 2014). In order to raise the reliability and validity of data collected in this fashion, it is useful to conduct several interviews to compare individual accounts and to corroborate findings with other data sources.

This dissertation employed semi-structured interviews in both empirically-oriented articles 2 and 3. Before delving into the details of how this method was applied, a few notes on the context in which the interviews were conducted deserve mention. First, this research was carried out in the European Union. Thus, the General Data Protection Regulation (GDPR) applied, which had implications for the interview process. To ensure the responsible handling and storage of personal data, all interview data were anonymised. Even though some interviewees explicitly gave permission, no direct quotes or names appear in this dissertation to ensure equal treatment. Moreover, for reasons of confidentiality, not all interviews could be recorded. Several interviewees occupying elevated positions, e.g., working for the EU institutions or member state governments preferred not to be recorded. This limited the collection of data to hand-written notetaking in some cases. Although the author is trained in speedy hand-writing, this had implications for the level of detail and exact wording that could be gained from these interviews. To mitigate this imbalance with recorded interviews, the analysis focused on raw, descriptive facts and deliberately refrained from assessing and reproducing exact

quotes or paying attention to intonation, pauses, or other utterances such as sighs or laughter.

Second, work on this dissertation began in September 2020 in the midst of the global pandemic caused by the COVID-19 virus. Health concerns, travel restrictions and governmental as well as institutional orders to limit personal contacts inevitably affected the interview process. All interviews conducted in 2021 to gather data for the second article took place on various digital video conferencing platforms such as Zoom, Microsoft Teams, or Cisco Webex. Only when vaccines had become more widespread and the threat of the virus had somewhat abated in 2022, in-person interviews became possible again. Thus, the majority of interviews conducted for article 3 took place in person in Warsaw and Brussels. However, lingering health concerns and the convenience of the aforementioned digital tools that had become commonplace during the pandemic may have informed some interviewees' preference to hold the interview digitally nonetheless. There are certainly notable differences between the two ways of conducting research interviews. Most obviously, personal presence cannot be replicated through a computer screen. At the same time, research has shown that digital tools such as Zoom are viable alternatives and hold a number of advantages related to their 'relative ease of use, cost-effectiveness, data management features, and security options (Archibald et al. 2019). In the research for this dissertation project, no notable differences between the quality of interview data gathered face to face and those obtained through digital communication could be found.

In all case studies, interviews followed the semi-structured format. For each individual case, an interview guide was designed to lead the interviewer through the interview. In some cases, the shape of this guide was slightly adapted throughout the process, because after each interview new information was acquired, which sometimes begged to be corroborated with descriptions from other interviewees. In line with the qualitative, semi-structured format, the interview guide emphasised open-ended questions. As a result, interviewees would sometimes answer multiple questions at once, and in order to follow-up or clarify certain statements, the interviewer deliberately went beyond the pre-defined questions.

The interviews were typically scheduled for a timeframe between 30 and 45 minutes on regular workdays. Most in-person interviews took place at the interviewee's workplace, although some preferred to meet at a public space such as a café or restaurant. Digital interviews found both participants either working from home or in their respective office spaces. The course of each interview followed the typical procedure. At first, the interviewer briefly presented the broader outlines of his PhD research project and the intention behind this specific interview. Subsequently, the interviewer clarified that the interview would be fully confidential (see measures outlined above) before asking for permission to record. Only with the interviewee's explicit consent would a recording be made and subsequently stored safely on the Microsoft cloud server of the University of Agder. Then, the interview proceeded according to the semi-structured format and concluded with an offer to the interviewee to ask questions themselves.

The selection of interviewees followed a pragmatic approach. The overarching objective was to gather a multitude of different perspectives of the case in question. Thus, a broad range of different experts related to the case were contacted via email with an interview request, which ensured that each interview was conducted with the written permission of the interviewee. The list of interviewees includes political actors directly or indirectly involved in the case, representatives from relevant civil society organisations, as well as academics who have extensively studied the case. In this regard, it was important to cover actors operating on both sides of the respective cases. For example, to gather data on Kosovo's adoption of the euro and how it has been handled since, interviews were conducted with relevant experts from both Brussels and Pristina. In addition to own research to identify suitable interview candidates, the interviewer also asked each interviewee for referrals in order to create a snowball effect to enlarge and refine the pool of interviewees. In total, 24 interviews were conducted for both articles 2 and 3. Table 7 provides an exhaustive, anonymised list of interviewees indicating only their role.

Table 7: List of interviewees by role

Article 2	Swedish economist and professor
	Swedish professor and expert on EMU
	Swedish economist and former government minister
	Swedish economist and expert on EMU
	Kosovar economist and former deputy government minister
	Kosovar political scientist
	Senior EU Commission official
	Senior EU Council official
	European Central bank official
	Member of the European Parliament (S&D)
	Member of the European Parliament (EPP)
Article 3	Member of the Polish Parliament (PO)
	Polish professor and expert on democratic backsliding
	Member of the Polish Parliament (PO) and former government minister
	Senior official working for a German civil society organisation in Warsaw
	Representative of the European Commission in Warsaw
	Polish professor of European Union law
	Polish judge
	Polish judge
	Senior EU Commission official
	Senior EU Council official
	Assistant to a Member of the European Parliament (S&D)
	Polish official working for a European civil society organisation in Brussels
	Administrator at the representation of a German state to the EU in Brussels

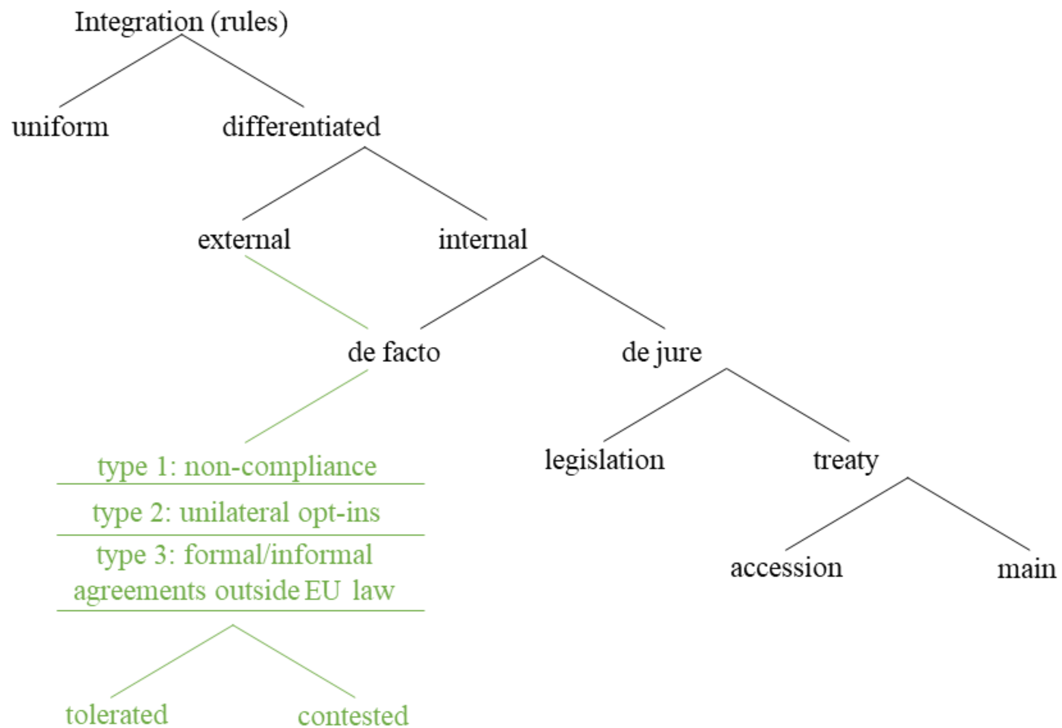
Source: own compilation

5. Conclusion and outlook

This doctoral dissertation argues that *de facto* differentiation ought to be understood as a distinct mode within the European Union's system of differentiated integration. Although this or similar concepts are occasionally referenced in the literature, their nature had been understudied. To address this gap in knowledge, this research is built on three fundamental questions: What is it? Why is it there? And how can it be undone?

Article 1 addresses the 'what' question and, thereby, substantiates the need to distinguish between *de facto* and *de jure* differentiation. With reference to the various but diverse acknowledgements of the former and similar concepts in the literature, it advances a comprehensive definition. On this basis, it establishes that *de facto* differentiation mirrors its *de jure* counterpart in that its outcome constitutes an unequal increase or reduction of the centralisation level, policy scope, and/or membership of the EU. Where the two modes fundamentally differ is in their relationship with European Union law. While *de jure* differentiation is enshrined therein, *de facto* differentiation is not. This dichotomous relationship may appear trivial, but it greatly impacts the ways in which both modes of differentiation are established and operate. Drawing on empirical observations of cases that fit this definition, Article 1 further specifies this concept and develops a three-pronged typology which distinguishes between *de facto* differentiation based on 1) non-compliance, 2) unilateral opt-ins, and 3) formal or informal agreements outside EU law. With reference to Schimmelfennig and Winzen's (2020) original depiction of the different branches of differentiation in the EU, the conceptual groundwork laid in Article 1 allows to paint a more complete image as illustrated in Figure 4.

Figure 4: Towards a more complete conceptualisation of differentiated integration in the EU



Source: adapted from Schimmelfennig & Winzen (2020)

Article 2 deals with the 'why' question and finds additional distinguishing features between *de jure* and *de facto* differentiation by looking into whether the latter has a specific purpose in the EU's system of differentiated integration. In a nutshell, it finds that *de facto* differentiation may in fact provide mutual benefits for the EU institutions and member states. Often more than just a second-best option if *de jure* differentiation is unavailable, it can make EU integration more flexible when strong national demand for differentiation meets the need for discretion or timely, pragmatic action. These three factors were identified on the basis of a theoretical framework inspired by rational choice theory and a comparative case study featuring all three types of *de facto* differentiation. They were found, to varying degree, in all three case studies: 1) Sweden's rejection of the euro, 2) Kosovo's adoption of the euro, and 3) the Fiscal Compact. Moreover, they make for an

important distinction between these and similar cases in which demand for differentiation produced a solution under EU law instead.

Article 3 tackles the 'how' question and explains the difficulties to do away with *de facto* differentiation in case it is not a mutually beneficial arrangement but indeed harmful from the perspective of the EU institutions. To that end, it zooms in on what is arguably one of the most critical cases of *de facto* differentiation: Poland's judicial reforms that have undermined the EU's rule of law provisions since 2015. Building on a game-theoretical model, the article finds that what hampers the EU Commission's countermeasures is not only the limited powers of its rule of law enforcement toolkit or a lack of willingness to use it, but also the actorness of the backsliding state, constraints on the domestic and supranational level, and exogenous shocks that complicate EU action from a utilitarian perspective. Although this case study is focused on the rule of law dispute, the results are indicative for any other case of *de facto* differentiation in particular because in more technical cases the EU possesses fewer punitive powers and faces less pressure to react – both from within and outside the Union. It ultimately shows the EU's limitations to contest member states' attempts to circumvent EU law, rules, or norms in order to unilaterally and retroactively change the terms of membership.

Altogether, by addressing the 'what,' 'why,' and 'how' questions related to *de facto* differentiation, this dissertation makes a number of important contributions to the literature on European integration and beyond. First, it enhances the conceptual grasp of differentiated integration by raising awareness to the empirically observable differences between cases enshrined in EU law and those left deliberately outside. In fact, the conceptual framework advanced here has already caught on (Cianciara 2023). Second, it casts new light on empirical cases that were either overlooked or studied alongside *de jure* differentiation despite bearing a number of significant differences. For example, despite resembling the many other cases of external differentiated integration, Kosovo's adoption of the euro had hitherto attracted very little scholarly interest. And while Sweden's *de facto* opt-out from EMU and the Fiscal Compact have been studied before, no attention was paid to how these cases differ from other instances of differentiated integration in

the way they were created and operate. Third, this study touches upon several other areas of research such as issues of compliance in international organisations or the EU's very own dilemma with member states undermining the rule of law. As regards the former, it contributes additional knowledge to the phenomenon of the EU tolerating non-compliance in certain cases (cf. Zhang 2021). And by applying game theory to the dispute between the EU Commission and Poland about the rule of law, it offers not only a novel point of view but also steers away from what tends to be a normatively driven debate centred on the efficacy of the EU's enforcement tools and its willingness to use them.

Of course, this dissertation does not hold the key to a full and comprehensive understanding of *de facto* differentiation. By nature, it is limited by its theoretical orientation as much as by the methodological choices that were made. While narrowing the contributions of this particular study, these limitations may also lead the way for future research. The findings presented here and in the three articles are based on a rationalist ontology that views *de facto* differentiation as a tool used for utilitarian purposes by the EU institutions and states. To complement that, future research could take a constructivist perspective and illuminate other, ideational, factors that were largely omitted here but may well shape the formation and operation of *de facto* differentiation to some extent. Furthermore, additional research is needed to fully grasp the handling of *de facto* differentiation. While contested arrangements are discussed here in view of the rule of law dispute, how exactly states and the EU institutions work with tolerated arrangements is only slightly touched upon. For example, are there any differences in how the Swedish and Danish opt-outs from the euro are treated by their respective national administrations and the EU institutions? Another touching point is the recent debate on Norway asserting a certain level of autonomy or 'wriggle room' within the EEA agreement and how this may relate to the UK's quest to find its place outside but closely associated with the EU (Fossum et al. 2024). Moreover, it should be acknowledged that the bending of rules and communal law is not an exclusively European phenomenon. Other regional or international organisations certainly also grapple with member states that claim additional wriggle room that cannot be accommodated within the legal framework. Thus, the concept of *de facto* differentiation may serve as a useful concept for researchers in the fields of

comparative regionalism or international relations. It would be particularly interesting to compare the extent to which this means of managing diversity is used in organisations that vary in their degree of legal institutionalisation and/or breadth of membership.

It remains to be addressed what to take away from this study in both practical and normative terms. In a nutshell, this study shows that European integration is even more flexible than the literature on differentiated integration suggests, as neither the EU institutions nor the member states are strangers to bending the rules every now and then. On the one hand, this is a pragmatic way to accommodate 27 heterogeneous member states with disparate policy preferences, administrative capacities, and political traditions. This can also be seen as a way to make the EU more resilient against destructive forces such as Euroscepticism which is often fuelled by perceptions of a domineering Brussels that is unresponsive to national demands. On the other hand, *de facto* differentiation exposes the relative weakness of the EU institutions compared to the member states. As was shown, such arrangements are not always jointly created or even tolerated by the EU but persist, nonetheless. States need not and typically do not ask for permission to circumvent EU law and are, therefore, able to establish *de facto* differentiation autonomously. The EU institutions can only react and have at their disposal but few powerful tools to contest it.

As a result, the existence of *de facto* differentiation in the European Union raises difficult normative questions. Unlike legally established derogations from the *acquis*, the systematic circumvention of EU law weakens the EU's foundations as a community of law and undermines its authority. This is particularly noticeable in grave and long-lasting violations of the EU Treaties as in the case of Poland or Hungary's backsliding in the rule of law. But also cases like Sweden's democratic rejection of the common currency or the Fiscal Compact may not be as benign as they seem. In both cases, the EU institutions are complicit in tolerating or even promoting the circumvention of the very legal framework they helped to create and are tasked to protect. Although the total number of such cases remains small, this may suggest that the EU's commitment to legal integration is less than absolute. Moreover, *de facto* differentiation may cast a different light on the

discussions surrounding the relationship between differentiated integration and autonomy on the one side, and domination on the other (Fossum 2015; Lord 2021). Recognising the benefit of democratically legitimised autonomy afforded by differentiated integration, this literature also stresses a dual threat of both in-groups dominating the sometimes involuntary out-groups by exclusion from common goods, and, vice versa, outsiders dominating insiders through free-riding. *De facto* differentiation primarily creates the latter effect. Kosovo, for example, benefits from the stability of the euro without bearing any of the costs related to the fiscal requirements of EMU.

Ultimately, the question remains what practical or scholarly relevance this study will have in the future. Although there are only few cases of *de facto* differentiation and most of them may seem comparably unimportant today, many of them are unresolved, and there is a good chance that some of them might flare up again in the future. The general elections in Poland may have turned out in favour of the opposition which pledged to restore the rule of law. But this is no easy feat. The erosion of Poland's legal foundations reaches deep, and getting rid of politically appointed judges will be difficult. And it should not be forgotten that, besides Poland, Hungary has also established *de facto* differentiation in the rule of law and been a thorn in the side of the EU for even longer. Beyond that, the interviews conducted with Commission and Council officials about Kosovo's adoption of the euro suggest that this will likely be a tricky issue once accession talks become serious. Admittedly, as long as several EU member states do not recognise Kosovo's statehood, this is unlikely to happen soon. But Montenegro is several steps ahead in the accession procedure, and their unilateral euroisation is slowly creeping onto the agenda of negotiators from Brussels and Podgorica. Similarly, the Fiscal Compact might eventually – although hopefully not – come in the spotlight again if member states' high amounts of sovereign debt trigger another financial crisis. Should this be the case, it is not implausible that its lack of truly binding and enforceable rules due to being left outside the EU's jurisdiction will be problematised by whichever signatory states that might feel that others' profligacy is to blame for the bloc's financial woes.

Finally, the rekindled enthusiasm to enlarge the Union in response to Russia's war of aggression against Ukraine might usher in a new period of mostly differentiated integration. The new candidate states Ukraine and Moldova, as well as some of the Balkan states which have been left in the waiting room for over a decade, are pressing to join the European Union fast. The von der Leyen Commission and the majority of member state leaders share this vision. But as of today, many of the current and prospective candidate states are far from comprehensively fulfilling the EU's Copenhagen Criteria for accession and might lack the administrative capacity to address this issue within a short timeframe. More differentiation – be it *de jure* or *de facto* – might be the key to reconciling geopolitical enlargement ambitions and the reality of European integration processes under the current legal framework.

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PART II

Article 2

Title:	De facto differentiation in the EU's Economic and Monetary Union – A rationalist explanation
Publication:	*Journal of European Integration*, 44(8), 1113-1129
Abstract:	Although there are various legal tools to make European integration more flexible, the EU and its member states uphold long-term arrangements of *de facto* differentiation circumventing EU law. This article assesses their role in the EU's system of differentiated integration. To that end, it advances a model based on rational choice theory, outlining the steps and conditions under which tolerated arrangements of *de facto* differentiation can emerge. This is illustrated in three case studies in Economic and Monetary Union (EMU): (1) Sweden's *de facto* opt-out from EMU; (2) Kosovo's adoption of the euro as sole legal tender, and (3) the Fiscal Compact. Data was gathered via document analysis and 11 expert interviews. The article concludes that *de facto* differentiation may constitute a viable alternative and useful means to make EU integration more flexible if strong national demand for differentiation meets the need for discretion or timely, pragmatic action.

Introduction

European integration is more differentiated than meets the eye. It is well known that the European Union (EU) allows or mandates member states to opt out of EU policy if preferences or administrative capacities diverge and encourages third states to opt in to facilitate trade or future accession (Leuffen et al., 2022; Gänzle et al. 2020; Schimmelfennig & Winzen, 2020). Differentiation is usually established via a legal mechanism that follows certain rules and procedures. But the EU also harbours differentiation arrangements that are untouched by EU law, such as Sweden's informal opt-out from Economic and Monetary Union (EMU) or the original Schengen Agreement. The literature refers to differentiation created by circumventing EU law as *de facto* differentiation (Leruth et al., 2019; Schimmelfennig & Winzen, 2020; Hofelich, 2022).

While the EU is known for sometimes strategically turning a blind eye to temporary breaches of its own rules (Kleine, 2013), engaging in long-term

arrangements that undermine EU law appears dubious. For one, the EU, and in particular its supranational institutions, should be expected to oppose any circumvention of the law they created and are tasked to protect. Moreover, it is unclear why states choose *de facto* differentiation in the first place. It lacks the legal security provided by other means to deviate from EU policy can be challenged by the EU (Leruth et al., 2019). Finally, the EU has become known as a system of differentiated integration in which legal opt-outs/ins are a viable option (Leuffen et al. 2022). What, then, is the purpose of *de facto* differentiation considering the existence of legal alternatives to accommodate states' divergent preferences in the EU?

To address this question, this article advances a rationalist model explaining the emergence of such arrangements and explores the expectations generated by this model in three case studies in EMU. It concludes that despite the apparent downsides, *de facto* differentiation may bring unique benefits to both the differentiation-seeking state(s) and the EU. It provides additional flexibility, is less visible, and allows for timely and unbureaucratic solutions . Thus, *de facto* differentiation fulfils a distinct purpose as a pragmatic alternative to the legal solutions available in the EU – although it raises normative concerns.

The article proceeds as follows. The first section briefly summarises the literature and outlines both concept and typology of *de facto* differentiation based on (1) non-compliance; (2) unilateral opt-ins; and (3) integration outside EU law. The subsequent section advances a model inspired by rational choice theory, which outlines the steps and conditions under which *de facto* differentiation can become an arrangement tolerated by the EU. The final section presents the results of three case studies covering each type of *de facto* differentiation in EMU: (1) Sweden's *de facto* opt-out from EMU; (2) Kosovo's adoption of the euro, and (3) the Fiscal Compact as an international treaty outside EU law.

Literature, concept, and typology

De facto differentiation builds on Schimmelfennig and Winzen's concept of differentiation as an unequal increase or reduction in the centralisation level, policy scope, or membership of the EU (2020). Here, differentiation is used as an

umbrella term for differentiated integration and differentiated disintegration. The distinction between *de jure* and *de facto* differentiation lies in whether the respective opt-outs or other derogations are enshrined in EU law or not (ibid: 16).

In the literature, *de facto* differentiation has received some mention but mostly in passing. Beginning with Andersen and Sitter's (2006) closely related concept of deviant integration, the circumvention of EU law or non-compliance have been conceived as alternative ways to achieve differentiation. Holzinger and Schimmelfennig (2012) acknowledge that member states may choose non-compliance over negotiating differentiation to avoid costly policy obligations while meeting the same ends. Howarth (2010) finds evidence for this in EU industrial policy, for example in deliberate breaches of the EU's limit of state aid. The most prominent example is Sweden's *de facto* opt-out from the final stage of EMU (Leruth et al., 2019). More recently, *de facto* differentiation has also been put in context with Poland and Hungary's ongoing violations of the EU's rule of law principles (Schimmelfennig, 2019).

Eriksen's interpretation of *de facto* differentiation is slightly different (2019), as it refers to informal groupings distinguishable by different levels of integration. For example, he mentions the Eurogroup, an informal body of the EU Council comprising the eurozone finance ministers. Since the financial crisis hit Europe, Eriksen contends that non-Eurogroup states have been "downgraded to a secondary status," thus establishing *de facto* differentiation (ibid: 77). This assessment is grounded in the measures taken by eurozone countries outside the EU legal framework such as the Fiscal Compact which exacerbated differentiation in EMU.

The hitherto scant literature understands *de facto* differentiation as a form of circumventing EU rules or laws, be it via non-compliance, undermining decision-making structures, or deepening integration outside EU law. In an attempt to consolidate the literature, Hofelich (2022) has developed an encompassing typology. On that basis, *de facto* differentiation can be defined as a deliberate and enduring circumvention of the EU legal framework, which leads to an unequal increase or reduction of the centralisation level, policy scope, or membership of the EU.

Type 1: deliberate and enduring non-compliance

Sczepanski and Börzel (2021) recently found likeness in the intent behind non-compliance and differentiation as both serve to accommodate the heterogeneity of preferences, power, or capacity. It is, however, important to note that there are two significant differences. First, non-compliance is usually more temporary.[18] Second, while non-compliance can be due to either a lack of capacity or divergent preferences (Tallberg, 2002), if it lasts long enough to be considered differentiation, this is almost always related to the latter. Rationalists assert that this is because states weigh the costs of compliance (e.g., interest group preferences) against the costs of non-compliance (e.g., sanctions) and will remain non-compliant until the balance tilts in favour of the latter (cf. Downs et al., 1996). Because states witnessing only capacity issues face far fewer compliance costs, they shift resources to ensure compliance in time before being hit with non-compliance costs (Börzel et al., 2012).

Thus, only the wilful protraction of non-compliance can be considered a type of *de facto* differentiation. If this is then tolerated by the EU, the practical outcome mimics that of *de jure* differentiation in that EU law applies unequally across member states. For example, Sweden's opt-out from EMU in non-compliance with the Treaties affects businesses and citizens no differently than Denmark's legal opt-out. The same applies to the EU's toleration of Slovakia's non-compliance with secondary law concerning pharmaceutical exports (Zhang, 2021).

Type 2: unilateral opt-ins

The second type of *de facto* differentiation is related to external horizontal differentiation which describes the partial adoption of the *acquis* by non-member states (Leuffen et al., 2022). Most research in that area deals with opt-ins that are induced by the EU, either as part of requirements for non-EU members of the

[18] Schimmelfennig and Winzen (2020: 55) found *de jure* differentiation to last on average several years, while infringement procedures are usually closed after just over a year (Hofmann, 2018). In order to place *de facto* differentiation in the same category, short-term deviations from the norm cannot be considered.

European Economic Area (EEA) or policy alignment targets of EU neighbourhood policy (cf. Lavenex, 2015).

In contrast to such *de jure* opt-ins mandated by bilateral agreements, *de facto* opt-ins are understudied (but see Cianciara & Szymanski, 2020). These are unilateral steps taken without explicit approval or any legal basis provided by the EU. In most cases, they take the benign shape of adopting standards or norms to facilitate trade or future accession to the EU. But there is also potential for free-riding by accessing collective goods designed to be restricted to member states. If unilateral opt-ins directly affect the territorial scope of an EU policy, they can be considered *de facto* differentiation. This applies to Kosovo and Montenegro's unilateral adoption of the euro, which expands the eurozone although only in usage, not governance of the common currency.

Type 3: integration outside EU law

To escape legislative deadlock, EU integration occasionally proceeded in the form of intergovernmental treaties rather than expanding EU law. Of course, EU member states regularly conclude international treaties among each other and with third parties. But for this to equate *de facto* differentiation, the centralisation level, policy scope or membership of the EU must be affected. This is most prominently reflected in the 1985 Schengen Agreement and, more recently, in the Fiscal Compact which expands not only the EU's fiscal policy provisions but also the Commission and ECJ's oversight.

De facto differentiation as a rational choice

What is the purpose of *de facto* differentiation, considering that there are legal alternatives for the EU to accommodate states' divergent preferences? To address this question, this article advances a theoretical model based on rational choice theory (c.f., Snidal, 2002; Pollack, 2006). Rationalism is the ontological basis of most theories used to explain differentiation, such as neofunctionalism, liberal intergovernmentalism, or rational institutionalism. The grand theories and their derivative mid-range theories, however, hardly account for possibilities or even incentives for states or institutions to circumvent EU law. Inspiration can be drawn

from studies of non-compliance in the EU, where a crude cost-benefit analysis is employed to explain compliance and enforcement (cf. Hofmann, 2018).

In the absence of theories covering the whole spectrum of *de facto* differentiation, rational choice theory appears well suited to explain what is, in essence, the result of decisions made by states and EU institutions. To use a meta-theory like rationalism in this context, several conceptual concessions must be made and clarified. First, rational choice theory assumes unitary actors. In this case, two such actors can be assumed, a differentiation-seeking state on the one side and the EU comprising all remaining members and its supranational institutions on the other. Second, actors are expected to make decisions in order to maximise or satisfy their utility. Third, these decisions are subject to a set of institutional or societal constraints which influence the costs and benefits rational actors weigh when making decisions. Finally, rationalism may contain normative properties, prescribing what rational actors ought to do. But in this article, it is applied as a positive theory generating expectations about actors' decision-making.

From a rationalist perspective, the existence of *de facto* differentiation in the EU is puzzling. On the surface, utility advantages over *de jure* differentiation are not immediately discernible. Instead, there are costly side-effects for both involved actors.

The differentiation-seeking state's costs of *de facto* differentiation differ depending on the type. Types 1 and 2 create an ambiguous legal situation at best. Because there is no legal basis, the EU can challenge such arrangements (Leruth et al., 2019). At worst, states involved in type 1 may suffer from all the negative consequences of non-compliance. Most notably, the Commission's infringement procedure may incur financial penalties. Further, bad press associated with court cases can decrease citizens' satisfaction with their government (Chaudoin, 2014). While these costs might not amass in tolerated arrangements of *de facto* differentiation, non-compliant states still diminish their reputation among other member states (Downs & Jones, 2002). Similarly, states pushing for further integration outside EU law according to type 3 risk gaining a divisive image. For instance, the establishment of the ESM during the eurozone crisis sparked fears of creating a new core EU-17 that would side-line the remaining non-euro states

(Avbelj, 2013). In comparison, the costs of *de jure* differentiation are limited. Studies have shown that even states with several opt-outs neither lose influence nor credibility in the Union if they play a constructive and active role (cf., Adler-Nissen, 2009). But if blocking deeper integration becomes habitual and demanding legal opt-outs the default policy, states risk being considered an 'awkward partner' like the UK (George, 1990).

For the EU as a whole, and in particular its supranational bodies, *de facto* differentiation is an especially heavy burden to bear. All three types undermine EU law, albeit to varying degrees. Founded as a 'community of law' and in absence of a full-fledged supranational executive authority, the integrity of its legal framework is crucial to ensure order within the Union. Moreover, *de facto* differentiation adds to the generally undesired fragmentation of policy areas. Despite its widespread *de jure* application, differentiation is still but a tolerated practice, as uniform integration remains the norm (Schimmelfennig & Winzen, 2020: 35).

Against that backdrop, the costs of *de jure* differentiation appear lower. A rationalist perspective provides two possible propositions of which one must be true for both actors to explain the existence of tolerated arrangements of *de facto* differentiation nonetheless:

> P1: The presumably more desirable *de jure* option may be unavailable while *de facto* differentiation provides still more utility than no differentiation.[19]
>
> P2: Inherent benefits of *de facto* differentiation trump the utility gained from choosing *de jure* or no differentiation.

To assess these presumptions systematically, it is important to understand how *de facto* differentiation can be established and under what conditions the respective

[19] The term 'no differentiation' was chosen for its applicability in all types and cases of *de facto* differentiation. It can either refer to the status quo (no integration) or uniform integration.

decisions are made. This is modelled in figure 1 (figure 2 in this dissertation) which outlines the process beginning with state A experiencing demand for differentiation, followed by the actions available to A and its counterpart, the EU.[20] First, each actor's preference orderings must be clarified.

Assuming state A to be in demand for differentiation, this is conventionally seen as a result of divergent preferences, capacity, and/or dependence (Schimmelfennig & Winzen, 2020: 24-30). The origins of such divergence from the EU norm are traditionally explained by engaging with integration theories (cf. Schimmelfennig & Winzen, 2019) or by taking cues from the schools of institutionalism (cf. Verdun, 2015). The nature and strength of this demand likely affect the state's decision-making. Facing strong demand, regardless of its origin, it is unlikely that the state 'does nothing' in response. In this case and taking into account the costs of *de facto* differentiation, state A's preference ordering is:

de jure differentiation > *de facto* differentiation > no differentiation.

While individual states may prefer differentiation in some areas, the EU as a collective, and certainly its supranational institutions, generally aim for uniform integration. This is i.a. because differentiation renders supranational policy-making more complex and less efficient (Schimmelfennig & Winzen, 2020: 35-36). The prevalence of unanimous decision-making despite qualitative majority voting in the EU Council further suggests that member states, too, mostly prefer uniform integration. It is common practice in EU policy-making that initial differences among member states and between EU institutions are settled in the so-called trilogues ahead of Council votes (e.g., Novak et al., 2021). If uniform integration was not the default preference, this effort could be spared, and each member state be provided with the exemption it desires in the manner of DI.

[20] Less realistic or more drastic options were omitted. For instance, a state seeking an opt-out from a certain policy could challenge its legality in court. The likelihood of winning such cases at the ECJ is very low, especially if it concerns a long-established policy. Theoretically, a state might choose to leave the EU rather than comply with a certain policy. It is, however, unlikely that taking this option precedes attempts to negotiate a *de jure* opt-out or to establish *de facto* differentiation.

Finally, the EU can be safely expected to avoid any undermining of the legal framework it created and is tasked to preserve. Thus, the EU's preference ordering is:

no differentiation > *de jure* differentiation > *de facto* differentiation.

Assuming high demand for differentiation, the model shows two pursuits of action available to state A. One is to launch negotiations with the EU about *de jure* differentiation if this is the more desirable solution (P1). At this point, the outcome is largely in the hands of the EU, as shown by the supply and demand model developed by Holzinger and Tosun (2019). Dependent on various factors such as the bargaining power of A, expected negative externalities and the institutional context, the EU may concede to *de jure* differentiation (Schimmelfennig & Winzen, 2020: 30-37). If this is denied but high demand for differentiation requires action, A can still proceed to create *de facto* differentiation.

In general, states can establish *de facto* differentiation independent of the EU's consent. Of course, non-compliance, unilateral opt-ins and integration outside the EU are by nature practices that require no involvement of the EU, which is not to say that *de facto* differentiation cannot result from an agreement between the two actors. If A expects *de facto* differentiation to yield most utility (P2), it can establish it right away without sounding out the availability of *de jure* differentiation.

The only possible actions left to the EU after A has initiated *de facto* differentiation is to either tolerate or contest it by taking legal or political action. The extent to which *de facto* differentiation is contestable depends on the type but is also highly case specific. In case of type 1, the EU has at its disposal the entire arsenal of legal measures to enforce compliance such as financial sanctions. Types 2 and 3 can only be met with political pressure, for instance by making future membership of third states contingent on revoking type 2 *de facto* differentiation. The repercussions of taking legal or political action feed into the EU's calculation of utility (P1, P2).

Ultimately, and to reiterate the rationalist propositions advanced earlier, two paths can lead towards tolerated *de facto* differentiation. It can either be a second-best

choice if *de jure* differentiation is unavailable or offer certain advantages that make it the more desirable solution to high demand for differentiation. The following case studies put both to the test.

De facto differentiation in Economic and Monetary Union

Economic and Monetary Union (EMU) was established as part of the Maastricht Treaty in 1992 and comprises a set of policies aimed at the economic convergence of EU member states. Integration in EMU is a three-staged process at the end of which states are entitled to adopt the euro. Because full participation is further contingent on the fulfilment of five economic convergence criteria, EMU is by default a differentiated policy area.[21] In addition, EMU is also home to all three types of *de facto* differentiation.

This section presents three case studies corresponding to each type of *de facto* differentiation: (1) Sweden's *de facto* opt-out from EMU (non-compliance), (2) Kosovo's unilateral adoption of the euro (unilateral opt-in), and (3) the Fiscal Compact (integration outside EU law). Each is a long-lasting instance of *de facto* differentiation clearly tolerated by the EU and, thus, suitable to assess the underlying mechanisms.

The case studies serve as a plausibility probe for the two theoretically grounded propositions. They provide empirical illustrations of the proposed mechanism and examine what factors inherent to *de facto* differentiation might make it a utility enhancing arrangement. Remaining within the limits of a single policy area was more than a simple matter of space and feasibility. The restriction to cases within EMU increases the comparability of the three otherwise rather distinct cases.

Qualitative data were gathered using both primary and secondary sources. This involved evaluating publicly available documents such as press statements, reports

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[21] The five criteria include pre-defined rates of inflation and long-term interest, a maximum of 3% annual budget deficit to GDP, a 60% limit of overall debt to GDP, and participation in the Exchange Rate Mechanism (ERM) which pegs national currencies to the Euro.

and other official data issued by the EU and the respective differentiation-seeking state(s). For cases (1) and (3) a significant body of research available in English language could also be drawn upon. In addition to that, a total of 11 interviews were conducted with experts from both sides, covering each case. The interviewees include former or still active national or EU members of parliament, ministers, public administrators, researchers and other experts.

(1) Sweden's de facto EMU opt-out

Sweden joined the EU in 1995, and although the public at the time was sceptical of replacing the Swedish krona with the euro, the government refrained from negotiating a legal opt-out like Denmark and the UK did before. According to the Treaty of Maastricht, this meant that Sweden became obliged to adopt the euro once the convergence criteria are met. However, the Swedish government had always been hesitant towards the euro and voters ultimately rejected it by referendum in 2003. Since then, successive Swedish governments have deliberately left one of EMU's convergence criteria unfulfilled – joining ERM – and tie a future adoption of the common currency to another decision by referendum.

Against that backdrop, this case can be seen as *de facto* differentiation on the basis of non-compliance. This point is driven home by the European Central Bank's (ECB) annual convergence reports which consistently stress that "Sweden has been under the obligation to adopt national legislation with a view to integration into the Eurosystem since 1 June 1998. As yet, no legislative action has been taken by the Swedish authorities […]" (ECB, 2020). The Swedish government, however, maintains the position that membership in the ERM is voluntary – and, therefore, by extension the adoption of the euro (Campos et al., 2016).

Despite being at odds concerning the legality of Sweden's *de facto* opt-out, it is to this day clearly tolerated (interviews 1-4). Only in the immediate aftermath of the 2003 referendum, statements of EU officials and eurozone governments suggested some (very mild) backlash (cf. Spiteri, 2003; BBC, 2003). Very soon, however, the issue disappeared entirely from public debates in Brussels, Stockholm, and other

parts of the EU. Several factors indicate that this is because *de facto* differentiation has been the preference of both Sweden and the EU all along.

With the clear result of the referendum, the government had no other choice but not to adopt the euro. Choosing no differentiation (no opt-out) would have been political suicide and made a mockery of democracy. The *de jure* opt-outs given to Denmark and the UK, however, raise the question why Sweden never pursued a similar solution. Instinctively, one might posit that Sweden did not deem it likely to receive a formal opt-out. After all, Denmark and the UK were in the favourable bargaining position of possessing veto power in the Maastricht Treaty negotiations.

Immediately after the referendum this seemed plausible. In that regard, a statement by former Commission spokesman on economic and monetary affairs Gerassimos Thomas after the referendum is indicative. He pointed out Sweden's treaty obligations but left it to the member states to decide whether Sweden should be given an opt-out, adding that it was "the view of the Commission that no more opt-outs should be given" (cited in Scally, 2003). Moreover, Sweden would soon have had to negotiate not only with 14 but 24 member states after the 2004 enlargement round. If such negotiations had failed and Sweden had faced a decisive 'no' from the EU, the political necessity not to adopt the euro would have become harder to carry out.

Soon after the referendum, the Lisbon Treaty negotiations bestowed upon Sweden the same veto power to formalise its opt-out from EMU. Again, the Swedish government refrained, although other member states used their veto power to gain some concessions. Seyad (2008) speculates that this signified an implicit political commitment to adopt the euro once public opinion springs in line. This corresponds with the then conservative government's pro-euro attitude. Previously, some senior officials of the Social Democrats sought to seize this moment, but the majority in the party leadership and in parliament simply did not deem the issue important enough to make demands (interview 3). In other words, this *de facto* arrangement was considered adequate to meet demand for differentiation in EMU and the potential advantages of *de jure* differentiation negligible.

More than adequate, *de facto* differentiation may, in fact, have had a distinct benefit. Several scholars attest Swedish governments to follow a "politics of low visibility" (cf. Lindahl & Naurin, 2005). This approach serves the purpose to preserve the image of a cooperative, integration-friendly member state rather than an awkward partner with opt-outs. Indeed, since the referendum, the euro has been a non-issue in Swedish domestic politics and public discourse (interviews 1-4). A rare exception was conservative PM Fredrick Reinfeldt's plea for the euro in 2009, which failed to spark a serious debate (Reinfeldt, 2009). In addition to keeping its *de facto* opt-out under the radar, Sweden succeeds to cover it up with reliability and committed cooperation in other policy areas (Brianson & Stegmann McCallion, 2020). Hardly possible with a *de jure* opt out, the lower visibility of *de facto* differentiation allows Sweden to have the best of both worlds.

Faced with Sweden's decision for *de facto* differentiation, the EU was left to decide whether to tolerate or to contest it. In principle the Commission could have taken Sweden to court for violation of the Treaties, but this was and remains politically impossible. Trying to force Sweden to adopt the euro against citizens' democratically expressed will would likely have destabilised the Union and stoked Eurosceptic sentiments not only in Sweden but across Europe. Thus, the EU's first preference of uniform integration was unavailable.

Left with *de facto* or *de jure* differentiation, the costs of the former actually seemed lower. Either way, the EU would have to concede to more differentiation in EMU, but offering a *de jure* opt-out at the time appeared riskier for the EU. In view of the impending accession of ten new member states which might make similar demands, the EU was arguably prudent to not (openly) make any more concessions with regards to the common currency.[22]

Interestingly, interview data (3, 4) suggests that the Swedish opt-out has been a two-way bargain from the beginning. Apparently, the Swedish government and the

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[22] With hindsight, this expectation has proven wrong. Poland, Czechia, and Hungary have basically copied the Swedish approach.

Commission verbally agreed that to secure public support for EU membership in the 1994 referendum, the euro issue should be left aside, and Sweden never be pushed to adopt it against its will. The EU conceded to this because expanding membership to Scandinavia was a prime objective at the time. The Commission, however, insisted on the informality of this agreement because it was unwilling to cede further opt-outs from EMU.

In summary, this case corresponds with P2. *De facto* differentiation arguably provides most utility for both Sweden and the EU. For Sweden, the low visibility of this arrangement allows the government to uphold the role as a decidedly pro-integration member and to continue using the krona. The EU saves face, being spared from having to concede to additional legal opt-outs from EMU, and it can live with the relatively few negative externalities the situation has produced.

(2) Kosovo's de facto EMU opt-in

Kosovo formally adopted the euro as its sole official currency in January 2002.[23] This step is rooted in decisions made after the war with Serbia had ended in June 1999. Following several periods of hyperinflation in the 1990s, trust in the previously shared dinar was low, and a stable currency was necessary to rebuild the country after the ravages of war. Thus, the United Nations Interim Administration Mission in Kosovo (UNMIK) quickly passed regulation allowing the use of the Deutsche Mark (DM) and other currencies as legal tender. The DM soon became the *de facto* currency, as it was already in wide circulation and foreign aid mostly delivered in cash (Svetchine, 2005). With the impending cash changeover in the eurozone, Kosovo followed suit, supported again by UNMIK regulation.[24]

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[23] Montenegro has also unilaterally adopted the euro despite not being a member of the EU.

[24] See UNMIK/DIR/2001/24:
https://unmik.unmissions.org/sites/default/files/regulations/02english/E2001ads/ADE2001_24.pdf

The adoption of the euro by non-EU states expands the eurozone, even if only in the use and not in the governance of the common currency. Therefore, this case can be seen as *de facto* differentiation by unilateral opt-in. The unilateral nature of the adoption of the DM and later the euro was made clear by then German Bundesbank President Ernst Welteke. At a 2001 press conference, he explained that these steps required no participation of the Bundesbank and that there were no inquiries concerning the central bank's approval (Bundesbank, 2001a).

To this day, the EU has never explicitly criticised Kosovo for its *de facto* opt-in (interview 5). Instead, ECB directives helped to facilitate the transition, albeit unintentionally (interview 7). For instance, regulation was passed that facilitated the logistics of switching to the euro outside the eurozone.[25] In general though, the EU strictly opposes unilateral euroisation (interview 6, 7). In November 2000, an ECOFIN council report clarified that "any unilateral adoption of the single currency (…) would run counter to the underlying economic reasoning of EMU in the Treaty, which foresees the eventual adoption of the euro as an endpoint of a structured convergence process (ECOFIN, 2000). This position was seconded by an EU Commission report following the same argumentation (EU Commission, 2002).

For Kosovo, the initial decision to adopt the DM created a lock-in effect in that the impending replacement of legacy currency with the euro almost necessitated the young Balkan state to follow suit (interviews 5-10). In principle, Kosovo could have replaced the DM with any other publicly traded currency or created its own. While the former would have posed at least logistical issues related to the import and exchange of coins and banknotes, the latter would have put Kosovo's fledgling economy at risk because it was largely import-oriented and, thus, benefited from the stability of the DM. Consequently, the adoption of the euro was nearly inevitable, leaving open only the question of how to do it.

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[25] See for example guideline ECB/2001/8 which allowed Kosovo's Central Bank to frontload €100m in cash ahead of 1 January 2002:
https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32001O0008&qid=1614092665179.

As the euro is technically reserved for EU members, a *de jure* solution for Kosovo could only have mimicked the bilateral treaties between the EU and the microstates Andorra, Monaco, San Marino and the Vatican City. These allow and regulate the use of the common currency, including an allocated quota to mint coins. Whether such an arrangement could have been reached is highly questionable. The microstates' historically close relationships with their larger EU neighbours facilitated these treaties (interview 7, 8), and so did, probably, their very sound economic indicators. In all these regards, Kosovo was lacking.

But in view of plans to join the EU in the future, a legal agreement might have been beneficial for Kosovo. Granting membership to a unilaterally euroised state would set a precedent and pose certain legal and political obstacles. The progress made since suggests, however, that the unilateral use of the euro does not (yet) pose an issue for eventual EU integration (interview 9). Indeed, neither Kosovo's Stabilisation and Association Agreement with the EU (Council of the EU, 2015), nor the Commission's annual report on its implementation mention the country's use of the euro (EU Commission, 2020). The ECB's annual reports on the international role of the euro acknowledge its status in Kosovo but do not criticise it (ECB, 2020). However, interviews with EU Commission and ECB officials suggest that unilateral euroisation might become an issue in the future, as shown by the current membership negotiations with Montenegro (interview 6, 7). Yet, Kosovo never approached the EU about a *de jure* opt-in.

Kosovo's decision to unilaterally adopt the euro has been tolerated by the EU ever since. It should be noted that the EU does not possess legal means to undo it. The Treaties' provisions that bind the adoption of the euro to fulfilling the convergence criteria apply only to their signatories. Moreover, the euro is a freely traded currency and any state, in principle, may adopt it as legal tender. However, the EU's political power over membership candidates is significant.

But the EU has had little to gain from building up political pressure since the negative externalities of Kosovo's unilateral use of the euro are marginal. Due to the small size of Kosovo's economy, its use of the euro hardly affects the eurozone (interview 6, 7, 9). Moreover, the ECB bears no responsibility for Kosovo (Bundesbank 2001b, interview 7). And lastly, the issue of granting EU membership

to a state already using the euro lay far in the future at the time, and still does today. The consequences of contesting or formalising the opt-in seemed far worse. Denying war-torn Kosovo access to the euro would not only have sent a devastating message in and around the EU, it would also have undermined the EU's foreign policy objective of Western Balkan allegiance to Europe and medium-term integration in the EU (Keil & Arkan, 2015).

With 'no differentiation' out of the picture, *de jure* differentiation as offered to the four microstates would have been problematic as well. Officially extending EMU to third states irrespective of the fulfilment of the convergence criteria would have further eroded the conditionality of eurozone membership and might have attracted other states seeking access to the euro (interview 8, 9). Kosovo's contested statehood was and is another obstacle, as e.g. Spain or Greece might have objected to signing a bilateral treaty with a country they do not recognise as such (interview 10).

Against that backdrop, *de facto* differentiation was arguably the best solution for the EU. It serves the purpose of maintaining monetary stability in Kosovo without incentivising the unilateral adoption of the common currency in general. The EU also maintains the option to impose upon Kosovo the fulfilment of the Maastricht criteria if accession talks with Kosovo eventually intensify.

To sum up, for Kosovo the decision to unilaterally adopt the euro corresponds with P1. While *de jure* differentiation would have given Kosovo at least more legal security with regards to future EU accession, the *de facto* solution suffices to maintain monetary stability. For the EU, tolerating Kosovo's choice has arguably been the best available option in line with P2. It helped stabilise Kosovo's economy and cast a positive light on the EU without actively promoting the euroisation of third states.

(3) The Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (Fiscal Compact)

The Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (TSCG) is commonly referred to as the Fiscal Compact, after the title of the third and most significant section of the treaty. The TSCG is an

intergovernmental treaty signed in March 2012 by all EU member states except the UK and Czechia. It formed a major part of the EU's response to the sovereign debt crisis that hit Europe in 2009. The TSCG expands the Stability and Growth Pact and contains several measures to ensure and enforce fiscal discipline, establish closer economic policy coordination and institutionalise the governance of the eurozone. All eurozone states are bound to implement these measures, while other signatories may opt-in.[26] The Commission assumes the task to monitor compliance and shares the right with other contracting parties to bring non-compliant states before the ECJ. The final say over enforcement lies, however, with the signatory states (Dehousse, 2012).

The TSCG can be seen as a case of *de facto* differentiation by integration outside of EU law as it clearly expands the scope and centralisation level of the EU. It is somewhat special because the Commission actively participated in the process. However, the Commission was adamant to include a clause in the treaty that foresees transposition into EU law after five years. As yet, no notable steps have been taken in that regard, and, according to the EU Council, the current state of the TSCG as an international treaty works just fine (interview 11). In that regard it should be noted that interview data gathered by Laffan and Schlosser (2015) suggest that the treaty is perceived by the EU as toothless and largely symbolic ("no one cares about it").

But why, then, was the Fiscal Compact pushed through "in a rush" (ibid)? At the time, governments and the EU institutions faced immense pressure from businesses and the citizenry to present timely solutions to the eurozone crisis. Crucially, voters were losing trust in the EU and their own governments as the financial and labour markets began to flounder. Doing nothing would have shown weakness and inability to address a financial crisis the EU and in particular EMU were widely blamed for. Against that backdrop, the eurozone states and the EU institutions sought to respond by deepening integration.

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[26] Denmark and Romania have chosen to opt-in and to comply with the entire set of measures. Bulgaria maintains a partial opt-in and is only bound to the fiscal measures.

The solutions proposed, however, would have required amendments to the Treaties. Met with immediate resistance from the UK and later Czechia, uniform integration was no longer on the table, leaving only differentiated integration. Not only unwilling to participate in the Fiscal Compact, the Cameron government demanded concessions that went far beyond a simple *de jure* opt-out.[27] Even conceding to all British demands and granting *de jure* opt-outs, the lengthy process of Treaty reform that requires majorities in all national parliaments and, in some cases, even referenda rendered a quick solution within EU law unfeasible (interview 11).

Eager to present a quick crisis response, the other EU members and the Commission decided to circumvent the British veto by concluding a separate treaty outside EU law (Verdun, 2015). For the EU, the TSCG being an international treaty rather than a piece of EU legislation meant that the supranational institutions would have to accept that member states remained in control of fiscal policy. Especially for the Commission this was a clear downside, somewhat remedied by the clause mandating its later transposition into EU law. And so, Commissioner Oettinger stated that the TSCG was a "good, second best solution" (Volkery, 2011). For the signatory states, the TSCG being an intergovernmental treaty was no problem. So much so, that even though all EU member states have by now signed the treaty, its transposition into EU law is not even on the agenda.

Two related rationalist explanations can be advanced. First, surrendering their power of enforcement provides no utility to the signatory states. Second, following the tradition of the EU's other fiscal policy instruments, the member states may even prefer the Fiscal Compact being toothless. Perhaps considering the by now largely symbolic nature of the TSCG, one could even argue that the EU, too, prefers its lower visibility outside the *acquis* over having to deal with a nearly dead piece of legislation within the legal framework of EMU.

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[27] See for example Traynor et al. (2011): https://www.theguardian.com/world/2011/dec/09/david-cameron-blocks-eu-treaty.

To sum up, the TSCG confirms P2 for all involved actors except the EU institutions which had to cede power to the signatory states. But only thus could a timely and pragmatic solution be reached and conceding to the UK's outlandish demands be averted. Even now, while the EU institutions likely still prefer it being integrated in EU law, the absent progress in that regard suggests that the issue is not important enough and that the signatory states prefer its status as an international treaty outside the EU legal framework.

Conclusion

Seen through the lens of the rationalist model developed in this article, the three case studies reveal a clear purpose of *de facto* differentiation within the EU's system of differentiated integration. Of course, the findings of this article are not fully generalisable as data is limited to three cases within one policy area. Still, even across all three types of *de facto* differentiation and very different cases, a clear pattern has become visible. Most often more than just a second-best option, it may serve to make EU integration more flexible when strong national demand for differentiation meets the need for discretion or timely, pragmatic action.

The added flexibility shows – to varying extent – in all three cases. If public opinion shifts, Sweden can still initiate the adoption of the euro at any time without having to overturn a legal opt-out, while the EU can in principle try to coerce Sweden into doing so. Kosovo can use the euro without having to comply with the convergence criteria, while the EU's monetary policy remains unaffected, and it can change the terms of this arrangement as part of future accession negotiations. Finally, the TSCG's intergovernmental structure offers a lot more leeway in enforcement than if it were integrated in EU law.

The lower visibility is another beneficial factor found in all cases. Sweden's *de facto* opt-out is more suitable to preserve the image of an integration friendly core member state rather than an 'awkward partner' with opt-outs, and the EU saves face by not having to officially concede to more deviations in EMU. Similarly, by simply tolerating Kosovo's unilateral adoption of the euro, the EU did not officially sanction euroisation in third states, which could have attracted other states to

follow. And the now largely symbolic and defunct Fiscal Compact is perhaps best left for dead outside than within EU law.

Lastly, the unbureaucratic nature of *de facto* differentiation may be more efficient when urgency demands swift action. This was certainly the case of the TSCG conceived as a remedy to a crisis that necessitated swift action. Even conceding to the British demands and instating *de jure* differentiation by reforming the Treaties would arguably have taken too long and risked being rejected in national parliaments and referenda.

These findings cast a largely positive light on *de facto* differentiation, but it is important to stress that there is a serious caveat. While the cases studied in this article were rather benign, each instance of *de facto* differentiation not only undermines the uniformity of integration but, crucially, erodes the EU's legal foundations in the respective policy area. This poses several normative questions regarding European integration. For example, what are the implications for the EU – a community of law – if its own legal framework is regularly and purposefully circumvented? And how much *de facto* differentiation can the EU bear without compromising its foundations? Addressing these questions exceeds the pursuit of expanding academic knowledge. If left unanswered, the EU and the integration project as such risk losing credibility.

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