

Enhanced cooperation - a suitable means to further integration?

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A. Introduction

Flexible integration has been part of Community and Union law for quite a while. Uniform integration was harder and harder to achieve as both the number of Member States and the depth of integration rose. Therefore, major steps in integration came with the price of opt-outs and special treatment, enshrined in the constitutional fabric of Union law.

The development of the instrument of enhanced cooperation, or closer cooperation as it was called then, introduced the possibility to realize certain policy projects within the realm of the Union's conferred competences, i.e. beneath the level of primary law, without the need to include all Member States. Groups of Member States could now come together and adopt legal rules that would apply to the participating members of that group only. While established as a reaction to the call for more flexibility in EU law, the instrument of enhanced cooperation remained unused for more than a decade.

Only recently, Member States started to make use of enhanced cooperation. The aim of this paper is to give some prospect for future practice. To this end, it will give an overview of the coming into being of enhanced cooperation in the chronology of flexible integration (infra B.), followed by a detailed description of the current cases of enhanced cooperation (infra C.). Based on this, it will try and draw some conclusions on the lessons learnt from recent practice (infra D.).

B. Development of flexible integration

The objective of establishing an "ever closer Union" has been part of European integration from the outset. It intends to safeguard the supranational *acquis* and further integration and by gradually removing remaining derogations¹ and legal, socio-political and economic differences between the members to the extent necessary. An ever closer union is characterised by the axiom of uniform integration of differing *national* legal orders towards a *European* legal order in which

¹ *Blanke*, in *Blanke/Mangiameli* (eds.), *The Treaty on European Union, A Commentary*, 2013, Article 1 TEU para. 26; *Calliess*, in *Calliess/Ruffert* (eds.), *EUV/AEUV*, 5th ed. 2016, Article 1 EUV para. 12 f.

rules and obligations are equally binding for all Member States,² but which does not necessarily mean centralisation of power or full harmonisation of legislation. In this context, the CJEU as early as 1964 held in its famous judgment in *Costa v. E.N.E.L.* that “*the executive force of Community Law cannot vary from one State to another [...] without jeopardizing the attainment of the objectives of the Treaty*”.³

The “concerted action” necessary for the “removal of existing obstacles”⁴ was rather easy to achieve among the six Western European States that founded the EEC. The accession of additional Member States since the 1970s, especially the Eastern enlargement of 2004/2007, led to a growth of the Union to a total of currently 28 members. This not only increased the number of decision-makers in the Community/Union; more importantly it also increased the number of voices, views, cultural and social traditions and historical experience, all of which shape each Member State’s view on the purpose, development and future of European integration. It soon became obvious that an ever closer Union in the form of uniform integration of all Member States would be harder and harder to achieve. Deeper integration and further steps forward would be more difficult in the context of the growing heterogeneity of the Community’s/Union’s members.⁵ The imminent withdrawal of the United Kingdom from the Union is a vivid example. The apparent antagonism between “ever closer union” and “united in diversity” is characteristic of the development of forms of flexible integration which also tries to find a balance between the widening and the deepening of integration.

The idea of a non-simultaneous integration dates back, inter alia, to the 1975 *Tindemans* report. Then Belgian Prime Minister *Leo Tindemans* suggested that, with regard to economic and monetary policy and with a view to the divergence of the national economic and financial situations of the Member States, “*it is impossible at the present time to submit a credible programme of action if it is deemed absolutely necessary that in every case all stages should be reached by all the States at the same time.*” Instead, he suggested that “*those States which are able to progress have a duty to forge ahead*” while the others will temporarily remain behind. The Member States staying behind then receive from the progressing States “*any aid and assistance that can be given [to] them to enable them to catch the others up*”. However, *Tindemans* expressly noted that “[*t*]his does not mean *Europe à la carte: each country will be*

² *Becker*, Differenzierungen der Rechtseinheit durch „abgestufte Integration“, *Europarecht Beiheft* 1/1998, p. 29 (33); *Bender*, Die Verstärkte Zusammenarbeit nach Nizza, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 2001, 729 (731 f.); *Blanke*, in *Grabitz/Hilf/Nettesheim* (eds.), *Das Recht der Europäischen Union: EUV/AEUV*, 2010, Article 20 EUV para. 5; *Hatje*, Die institutionelle Reform der Europäischen Union, *Europarecht*, 2001, p. 143 (160).

³ CJEU, Case 6/64, *Costa v. E.N.E.L.*, ECLI:EU:C:1964:66, p. 594.

⁴ Fourth recital of the preamble to the EEC Treaty.

⁵ *Becker*, (fn. 2), p. 40; *Bender*, (fn. 2), p. 732 f.; *Martenczuk*, Die differenzierte Integration nach dem Vertrag von Amsterdam, *Zeitschrift für europarechtliche Studien*, 1998, p.447 (448 f.).

*bound by the agreement of all as to the final objective to be achieved in common; it is only the timescales for achievement which vary.*⁶

Before the introduction of the instrument of closer or enhanced cooperation (infra 4.), flexible integration was found mostly at the level of primary EU/EC law, namely in the Schengen law and what later became the Area of Freedom, Security and Justice (infra 1.), the Economic and Monetary Union (infra 2.) and the area of the Common Foreign and Security Policy (infra 3.).⁷

1. Schengen and the Area of Freedom, Security and Justice

The first great turning point in the process of uniform and simultaneous integration came about with the Schengen Agreement of 1985 and the 1990 Schengen Convention implementing the Agreement.⁸ Five of the ten Member States of the then European Economic Community decided to deepen integration in the field of free movement of persons and the abolition of internal border controls. Since not all Member States wanted to participate in this form of closer cooperation, the willing Member States had to make use of cooperation outside the Community's legal and institutional framework by means of an international Treaty regime. It was only with the Treaty of Amsterdam that the Schengen *acquis* was transferred into the Union's legal framework (Schengen Protocol).⁹ For those Member States not willing to participate, namely Denmark, the United Kingdom and Ireland, the Treaty revision included a complex system of permanent legal opt-outs.¹⁰

For the Schengen Group (that is all Union Member States except Ireland and the United Kingdom) the development of the Schengen *acquis* works in accordance with the rules on enhanced cooperation. To this end, Article 1 of the Schengen Protocol provides that the members of the Schengen Group shall be authorised to establish closer cooperation among themselves in areas covered by provisions defined by the Council which constitute the Schengen *acquis*.

⁶ Report by Mr. *Leo Tindemans*, Prime Minister of Belgium, to the European Council, Bulletin of the European Communities, Supplement 1/76, available at: http://aei.pitt.edu/942/1/political_tindemans_report.pdf

⁷ See on this also *Böttner*, *The Development of Flexible Integration in EC/EU Practice*, in Giegerich/Schmitt/Zeitmann (eds.), *How much Differentiation and Flexibility can European Integration bear?*, 2017, p. 59 ff.

⁸ On the history of Schengen, see also *Duić*, in Blanke/Mangiameli (eds.), *The Treaty on the Functioning of the European Union*, Protocol No. 19, para. 4 ff. (forthcoming).

⁹ Now Protocol No. 19 on the Schengen *acquis* integrated into the framework of the European Union, O.J. 2012 C 326, p. 290.

¹⁰ Protocol No. 2 to the Treaty of Amsterdam, now Protocol No. 21 on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice (O.J. 2012 C 326, p. 295) and Protocol No. 22 on the position of Denmark (O.J. 2012 C 326, p. 299).

2. Economic and Monetary Union

Another important area of asynchronicity of European law is the Economic and Monetary Union,¹¹ which was introduced to EU law by the 1992 Treaty of Maastricht. Here as well, not all Member States were willing to participate in this new step of integration but were ready to let the remaining Member States proceed. Nevertheless, the consensus was that the EMU would not be based on a “pick and choose” model; it should not be up to every Member State to decide separately whether to participate or not.¹² While Denmark and the United Kingdom were granted opt-outs that were guaranteed by means of Protocols attached to the Treaties,¹³ every acceding Member State since Maastricht is under the obligation to eventually join the third stage of the EMU and introduce the euro currency. In the meantime, they are treated as “Member States with derogations”.¹⁴

Differentiation between Member States is reflected in the institutional setting of EMU. Composed of the ministers of those Member States whose currency is the euro (the “Euro Group”), the Council shall adopt measures specific to those Member States whose currency is the euro (Article 136 TFEU). The Member States forming the Eurozone shall elect a president for the Euro Group (Article 2 of Protocol No. 14) and only members of the Council representing Member States whose currency is the euro shall take part in the vote for adopting the measures.¹⁵ Similar institutional differentiation is found in the decision-making structure of the ECB, the central institution of the European System of Central Banks or, in most cases, the Eurosystem.¹⁶

The 2008 financial crisis, which developed into a “euro crisis”, led to further dynamic development and the need to enhance cooperation among the euro area members in order to overcome the situation and strengthen the EMU framework.¹⁷ As, on the one hand, the Union did not possess the required competences and, on the other hand, consensus among all Member States on a necessary Treaty amendment could not be reached, the willing Member States again

¹¹ On flexibility in EMU, see also *Deubner*, Deepened Integration in the Eurozone?, in Giegerich/Schmitt/Zeitmann (fn. 7), p. 183 ff., and *Lacchi*, How Much Flexibility Can European Integration Bear in Order to Face the Eurozone Crisis? Reflections on the EMU

inter se International Agreements Between EU Member States, in Giegerich/Schmitt/Zeitmann (fn. 7), p. 225 ff.

¹² *Louis*, L'Union européenne et sa monnaie, Commentaire J. Mégret, vol. 6, 2nd ed. 1995, p. 148.

¹³ See now, under the Treaty of Lisbon, Protocol No. 15 on certain provisions relating to the United Kingdom and Protocol No. 16 on certain provisions relating to Denmark. On Denmark, see *Howarth*, The Compromise on Denmark and the Treaty on European Union: A Legal and Political Analysis, *Common Market Law Review*, 1994, p. 765 ff.

¹⁴ See, most recently, Article 5 of the Act of Accession of Croatia, O.J. 2012 L 112, p. 21, 36.

¹⁵ With regard to institutional differentiation in the European System of Central Banks, see *Zilioli/Selmayr*, The law of the European Central Bank, 2004, chapter 4 (The European Central Bank and Differentiated Integration).

¹⁶ On this, see *Böttner*, The size and structure of the European Commission – Legal issues surrounding project teams and a (future) reduced College, *European Constitutional Law Review*, 2018, p. 37 (54 f.).

¹⁷ *Blanke*, The European economic and Monetary Union – Between vulnerability and reform, *International Journal of Public Law and Policy*, 2011, p. 402 ff.

had to resort to cooperation outside the Union's framework.¹⁸ This led to the negotiation of two international agreements, namely the Treaty establishing a European Stability Mechanism (ESM Treaty) and the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (the so-called "Fiscal Compact").¹⁹

3. Common Foreign and Security Policy

Another major achievement of the Treaty of Maastricht was the introduction of a Common Foreign and Security Policy²⁰ under the roof of the newly founded European Union. Taking into account the high obstacle that the prescribed unanimity in this policy area entailed,²¹ Member States agreed on Declaration No. 27 which provided that "with regard to Council decisions requiring unanimity, Member States will, to the extent possible, avoid preventing a unanimous decision where a qualified majority exists in favour of that decision".

The Treaty of Amsterdam introduced in Article 23(1) subpara. 2 TEU another novelty in the form of *qualified* abstention. In that case, the Member State making a formal declaration to that effect, shall not be obliged to apply the decision, but shall accept that the decision commits the Union." At first sight, this opens up the possibility of so-called "coalitions of the able and willing". Since the introduction of this possibility, CFSP actions have no longer depended on the approval and implementation of all Member States and this more flexible approach allowed for smaller groups of States to engage in a certain action or to adopt a position. On closer inspection, however, non-participation through the issuing of a formal declaration did not at all deprive the abstaining Council member from the binding effect of the adopted decision. After all, the decision made by the Council remains a "Union decision". While the abstaining State may not be obliged by and asked to actively implement this decision, it has to accept that "the decision commits the Union".²² However, these Member States are exempt from the financing of operations with military or defence implications (Article 28(3) subpara. 2 TEU-Amsterdam, now Article 41(2) subpara. 2 TEU).²³

The most important innovation as regards flexibility in the field of Common Foreign and Security Policy may be the introduction of "permanent structured cooperation" (Articles 42(6),

¹⁸ See, among others, *Uerpmann-Wittzack*, *Völkerrecht als Ausweichordnung*, *Europarecht Beiheft*, 2013, p. 49 ff.

¹⁹ On the Fiscal Compact and the ESM, see in more detail *Lo Schiavo*, *The Treaty on Stability, Coordination and Governance and the ESM Treaty: Intergovernmental Arrangements Outside EU Law, but for the Benefit of the EMU?*, in *Giegerich/Schmitt/Zeitmann* (fn. 7), p. 195 ff.

²⁰ On flexibility in CFSP, see *von Kielmansegg*, *The Common Foreign and Security Policy – A Pool of Flexibility Models*, in *Giegerich/Schmitt/Zeitmann* (fn. 7), p. 139 ff.

²¹ *Böttner/Wessel*, in *Blanke/Mangiameli* (fn. 1), Article 31 TEU, para. 3.

²² *Böttner/Wessel*, *Blanke/Mangiameli* (fn. 1), Article 31 TEU, para. 16.

²³ See *Schmidt-Radefeldt*, in *Blanke/Mangiameli* (fn. 1), Article 41 TEU, para. 18.

46 TEU and Protocol No. 10). Article 17 TEU-Nice recognised the possibility for Member States to cooperate more closely outside the Union's framework in the security policy and it was only with the Treaty of Lisbon that closer cooperation in this area was made possible within the EU framework.²⁴ According to Article 42(6) TEU, those Member States whose military capabilities fulfil higher criteria and which have made more binding commitments to one another in this area with a view to the most demanding missions shall establish permanent structured cooperation within the Union framework. The instrument of permanent structured cooperation is very similar to the instrument of enhanced cooperation,²⁵ but there are some important differences, most notably: no unanimity requirement for the authorising decision, no minimum number of participants and no equivalent to the last resort requirement in Article 20(2) TEU.

With regard to the development of differentiation and flexibility, the Common Foreign and Security Policy has taken a different road compared to the policy areas outlined above. While the extent of differentiation in the form of permanent opt-outs has been kept to a minimum, the most recent history has brought about a growing number of instruments of flexible integration. On the one hand, this may enable a dynamic development of Union foreign policy with the possibility for groups of Member States to go ahead and take further steps, which not all Member States may be willing to take. This takes account of individual concerns with regard to national sovereignty. On the other hand, this evolution bears the risk of introducing incoherence into the Union's foreign action. If different groups of Member States cooperate in individual areas of foreign policy, inconsistencies may arise and the Union as a whole may be impeded from speaking with one voice on the international scene. Therefore, flexibility in Common Foreign and Security Policy should be used with the utmost caution.

4. The Instrument of Enhanced Cooperation as Enabling Clause

Until the Treaty of Amsterdam, flexible integration was based solely on a system of international treaties and primary law opt-outs introduced in the course of Treaty revisions. With the Eastern enlargement coming up,²⁶ the Amsterdam revision introduced a primary-law based instrument by means of which groups of Member States could form closer cooperation among themselves in

²⁴ Cf. *von Kielmansegg*, in Blanke/Mangiameli (fn. 1), Article 46 TEU, para. 1-2.

²⁵ On the relationship between those two instruments, see *von Kielmansegg*, in Blanke/Mangiameli (fn. 1), Article 46 TEU, para. 30-32.

²⁶ Cf. Conference of the Representatives of the Governments of the Member States, Brussels, 5 December 1996, *The European Union today and tomorrow – A general outline for a draft revision of the Treaties*, CONF/2500/96, section V, no. 5; see also *Göler*, *Differenzierte Integration: konzeptionelle Überlegungen, politische Projekte und theoretische Ansätze*, in Stratenschulte (ed.), *Der Anfang vom Ende?*, 2015, p. 9 (11 f.).

secondary law (Articles 40, 43 f. TEU and Article 11 TEC).²⁷ Enhanced cooperation, as it is now called, is an offer to cooperate within the 'Treaties' framework rather than outside. While the introduction of this new instrument of cooperation was welcomed, the construction was considered too rigid and complex.²⁸ The Treaty of Nice reacted to this criticism and somewhat lowered the hurdles,²⁹ but a number of restrictions were retained.³⁰ However, despite all the discussions on the need to introduce a new instrument of flexible cooperation, the instrument of enhanced cooperation remained unused.

In accordance with the abolishment of the pillar structure, the Treaty of Lisbon streamlined the provisions on enhanced cooperation. The central provision is now found in Article 20 of the Union's "constitution" (the TEU), while the working details have been collected in the TFEU (Articles 326-334). In addition, a number of novel elements have been introduced such as specific *passerelle* clauses for enhanced cooperation (Article 333 TFEU) or "accelerator clauses" which provide for a sort of automatism for initiating enhanced cooperation in the field of judicial cooperation in criminal matters (Articles 82(3), 83(3), 86(1) subpara. 3, Article 87(3) TFEU).³¹

C. Practice of enhanced cooperation

Since the entry into force of the Treaty of Lisbon, the instrument of enhanced cooperation has been used in at least four cases: for the regulation on the law applicable to divorce and legal separation (Rome III) (see *infra* 1.), to regulate unitary patent protection (*infra* 2.), for a cooperation to establish a European financial transaction tax (*infra* 3.), and on the "twin regulations" for the property regimes of international couples (*infra* 4.). The European Public Prosecutor's Office has also been established by means of enhanced cooperation, but with an expedited procedure (*infra* 5.). The following section will present these cases as well as the permanent structured cooperation established in CFSP (*infra* 6.). This shall lay the foundation for the analysis of current practice and prospects for the future (*infra* section D.).

²⁷ Cf. also *Pechstein*, in Streinz (ed.), EUV/AEUV, 2nd ed. 2012, Article 20 EUV, para. 1.

²⁸ See, among others, *Janning*, Dynamik in der Zwangsjacke: Flexibilität in der Europäischen Union nach Amsterdam, integration, 1997, p. 285 ff.

²⁹ *Shan*, The Treaty of Nice: Legal and Constitutional Implications, European Public Law, 2001, p. 195 (202); *Rodrigues*, Le Traité de Nice et les coopérations renforcées au sein de l'Union européenne, Revue du Marché commun et de l'Union européenne, 2001, p. 11 (14); *Giering/Janning*, Flexibilität als Katalysator der Finalität? Die Gestaltungskraft der "verstärkten Zusammenarbeit" nach Nizza, integration, 2001, p. 146 (154).

³⁰ Cf. *Blanke*, in Blanke/Mangiameli (fn. 1), Article 20 TEU, para. 12.

³¹ *Blanke*, in Blanke/Mangiameli (fn. 1), Article 20 TEU, para. 17.

1. Law applicable to divorce and legal separation (Rome III)

Enhanced cooperation was already used for the first time within one year of the Treaty of Lisbon's entering into force, even though the initiation dates back to pre-Lisbon times. On 17 July 2006, the Commission adopted a proposal for a Council Regulation amending Regulation (EC) No 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters.³² The first orientation proposed by the Council Presidency was supported by the vast majority of Member States, only two were in opposition regarding certain aspects of the proposal.³³ As unanimity was required, the Council at its meeting of 5/6 June 2008 established that the objectives of Rome III could not be attained within a reasonable period by applying the relevant provisions of the Treaties and considered therefore to revert to enhanced cooperation.³⁴

By letters dated July 28, 2008, a group of originally eight Member States (which was sufficient under the pre-Lisbon rules) requested authorisation to establish enhanced cooperation in the area of the law applicable to divorce and legal separation.³⁵ A number of Member States joined the initiative during the course of the following months³⁶ while Greece withdrew its original declaration to participate on March 3, 2010.

By March 24, 2010, the Commission submitted a proposal for a Council Decision authorising enhanced cooperation for 14 Member States.³⁷ While the Member States' requests were made under the Nice Treaty, the submission of the Commission's proposal was submitted only after the Treaty of Lisbon entered into force. Therefore, the Council Decision had to comply with the new rules on enhanced cooperation. In June 2010, the Council authorised enhanced cooperation.³⁸ On the basis of Article 81(3) TFEU, an implementing act was adopted (the so

³² COM(2006) 399 final of 17 July 2006.

³³ Council Doc. 9566/07 of 14 June 2007, p. 3

³⁴ See Press Release of the 2887th Council meeting (Justice and Home Affairs) on 24/25 July 2008, Council Doc. 11653/08, p. 23. On the development see also *Fiorini*, Harmonizing the law applicable to divorce and legal separation – Enhanced cooperation as the way forward? *International and Comparative Law Quarterly*, 2010, p. 1143 ff.; for a historic account, see also *Henderson*, From Brussels to Rome: The necessity of resolving divorce law conflicts across the European Union, *Wisconsin International Law Journal*, 2010-2011, p. 768 (779 f.).

³⁵ Greece, Spain, Italy, Luxembourg, Hungary, Austria, Romania and Slovenia.

³⁶ Bulgaria by letter dated 12 August 2008, France by a letter dated 12 January 2009, Germany by a letter dated 15 April 2010, Belgium by a letter dated 22 April 2010, Latvia by a letter dated 17 May 2010, Malta by a letter dated 31 May 2010 and Portugal during the Council meeting of 4 June 2010. The United Kingdom, Ireland and Denmark made use of their primary law opt-outs (see on this *Böttner* (fn. 7), p. 60 f.).

³⁷ COM(2010) 104 final.

³⁸ Council Decision 2010/405/EU of 12 June 2010 authorising enhanced cooperation in the area of the law applicable to divorce and legal separation, O.J. 2010 L 189, p. 12.

called “Rome III Regulation”).³⁹ Two Member States have since acceded to the cooperation and the implementing legislation.

2. Unitary Patent Protection

The creation of unitary patent protection in the Member States of the Union together with a unified European patent litigation system has been another issue on the Commission’s agenda, which could not be pushed through for a number of years. The first proposal by the European Commission dates back to August 2000.⁴⁰ A general approach has been adopted by the Council at a meeting in May 2001⁴¹ which reflected general acceptance among the Member States on the adoption of the Community patent system. The Permanent Representatives Committee was instructed to press ahead with work on all remaining aspects that were cause of disagreement, and to resolve principal difficulties of the various delegations with the common approach. It became evident that the proposed language regime was one of these hard-to-resolve issues. The European Commission suggested that a Community patent shall have legal effect in the entire Union after it has been granted by the EPO in one of the three official languages (English, French, and German) and after the patent has been published in that language, together with a translation of the claims in the other two official languages.

A common political approach had been agreed on by March 2003⁴² and by November 2003, broad agreement had been reached on a compromise text presented by the Council Presidency. However, one delegation was unable to agree to the proposed compromise.⁴³ Further discussion led to a compromise package with alternative⁴⁴ which was put to a vote in May 2004, but with negative votes by the French, the German, the Portuguese and the Spanish delegations, the

³⁹ Council Regulation (EU) No. 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, O.J. 2010 L 343, p. 10. On the content of the regulation, see *Lemoine*, Rome III Regulation: Getting Divorced in Europe, in Giegerich/Schmitt/Zeitzmann (fn. 7), p. 251 ff.; *Zeitzmann*, Das Verfahren der Verstärkten Zusammenarbeit und dessen erstmalige Anwendung, ZEuS, 2011, p. 105 ff.; *Rudolf*, Europäisches Kollisionsrecht für Ehescheidungen – Rom III-VO, ZFE, 2012, S. 101 ff.; *Hammje*, Le nouveau règlement (UE) n°1259/2010 du Conseil du 20 décembre 2010 mettant en oeuvre une coopération renforcée dans le domaine de la loi applicable au divorce et à la séparation de corps, Revue critique de droit international privé 2011, p. 291 ff.; *Hummer*, Der Bann ist gebrochen: Die ersten Ermächtigungen zur „verstärkten Zusammenarbeit“ in der EU, EuZ, 2011, p. 83 ff.; *Ottaviano*, La prima cooperazione rafforzata dell’Unione europea, Il Diritto dell’Unione Europea 2011, S. 131 ff.; *Franzina*, The law applicable to divorce and legal separation under Regulation (EU) No. 1259/2010 of 20 December 2010, Cuadernos de Derecho Transnacional, 2011, p. 85 ff. See also *Kuipers*, The Law Applicable to Divorce as Test Ground for Enhanced Cooperation, European Law Journal, 2012, p. 201 ff.

⁴⁰ Proposal for a Council Regulation on the Community Patent of 1 August 2000, COM(2000) 412 final.

⁴¹ Council Doc. 9418/01, 2351th session of the Council “Internal Market, Consumers, Tourism”, of 30/31 May 2001, p. 8 f. and 15 f.

⁴² Council Doc. 6874/1/03, 2490th Council meeting “Competitiveness”, 3 March 2003, p. 15 ff. and Council Doc. 7159/03 of 7 March 2003.

⁴³ Cf. Council Doc. 15141/03, 2547th Council meeting “Competitiveness”, 26/27 November 2003, p. 9.

⁴⁴ Council Doc. 7119/04 of 8 March 2004.

Council could not reach unanimous agreement and the Presidency intended to bring the results of the vote to the European Council's attention⁴⁵ which decided to prescribe a "period of reflection" for the Community Patent.⁴⁶ Discussions on the proposal were re-launched in the Council after adoption by the Commission of the Communication "Enhancing the patent system in Europe" in April 2007.⁴⁷ Within that period, the Treaty of Lisbon entered into force and provided a new, specific legal basis for the creation of unitary intellectual property rights within the European Union (Article 118 TFEU) according to which unanimity was still required for deciding on the language arrangements of such titles, but all the other aspects thereof would from then on be decided upon by qualified majority under the ordinary legislative procedure. Therefore, the Presidency suggested to first focus on the draft Regulation on the European Union patent and to leave the decision on the translation arrangements to be taken at a later stage.⁴⁸

Accordingly, on 30 June 2010 the Commission adopted a proposal for a Council Regulation on the translation arrangements for the EU patent.⁴⁹ The exchange of views on the draft political orientation in the Council was supported by a very large majority of the Member States, but it was stressed that a solution should be reached quickly. In this context, different Member States already considered the option of enhanced cooperation if that were not the case.⁵⁰ After Spain and Italy had declared their persistent objection due to the planned language regime,⁵¹ it was clear that unanimity would not be reached and therefore this project could not be realised by the Union as whole. As a consequence, a group of twelve Member States⁵² addressed requests to the Commission by letters dated 7, 8 and 13 December 2010 indicating that they wished to establish enhanced cooperation. In the course of the procedure, another 13 Member States⁵³ joined the proposal so that eventually, 25 of the then 27 Member States (excluding Spain and Italy) made use of this instrument of cooperation.⁵⁴ Before long, Spain and Italy lodged judicial proceedings against the authorising decision, claiming that the creation of unitary patent protection according

⁴⁵ Council Doc. 9586/04, 2683rd Council meeting "Competitiveness", 17/18 May 2004, p. 8.

⁴⁶ Presidency Conclusions – Brussels, 17/18 June 2004, para. 42.

⁴⁷ COM(2007) 165.

⁴⁸ Council Doc. 16113/09 of 27 November 2009.

⁴⁹ COM(2010) 350.

⁵⁰ Council Doc. 14773/10, 3035th Council meeting "Competitiveness", 11/12 October 2010, p. 5 f.

⁵¹ Cf. the statement made by Italy and Spain: Council Doc. 17843/10 ADD1, 3057th Council meeting "Competitiveness" 10 December 2010, p. 8 f.

⁵² Denmark, Germany, Estonia, France, Lithuania, Luxembourg, the Netherlands, Poland, Slovenia, Finland, Sweden and the United Kingdom.

⁵³ Belgium, Bulgaria, the Czech Republic, Ireland, Greece, Cyprus, Latvia, Hungary, Malta, Austria, Portugal, Romania and Slovakia.

⁵⁴ Council Decision 2011/167/EU of 10 March 2011 authorising enhanced cooperation in the area of the creation of unitary patent protection, O.J. 2011 L 76, p. 53; see in more detail *Lamblin-Gourdin*, Les coopérations renforcées au secours du brevet unique européen?, *Revue de l'Union européenne*, no. 557, 2012, p. 254 (258 f.) and *Jaeger*, The End to a Never-Ending Story? The Unitary Patent Regime, in *Giegerich/Schmitt/Zeitzmann* (fn. 7), p. 269 ff.

to Article 118 TFEU was an exclusive EU competence and thus not an appropriate subject for enhanced cooperation. These claims have been rejected by the Court of Justice.⁵⁵ The participating Member States have adopted two implementing acts, one regulation on the patent⁵⁶ and one on the language regime⁵⁷. Here as well, judicial claims have been rejected.⁵⁸ Italy eventually gave up its resistance and joined the enhanced cooperation in September 2015.⁵⁹

3. Financial Transaction Tax

As a reaction to the economic and financial crisis and as a means to dry out one of its sources, the Member States discussed the introduction of a tax on the purchase and sale of certain financial instruments, the so called financial transaction tax. The debate originated from the desire to ensure that the financial sector, who was given part of the blame for the crisis itself, contributes substantially to the costs of the crisis in order to disincentivise these institutions from engaging in risky activities in the future. Several EU Member States had already taken individual, divergent action in the area of financial sector taxation.

The European Council of June 2010 agreed that Member States should introduce systems of levies and taxes on financial institutions to ensure fair burden-sharing and to set incentives to contain systemic risk.⁶⁰ However, it was reported in the conclusions that the Czech Republic reserved its right not to introduce these measures. In late 2010, the Commission explored the option of taxation of the financial sector.⁶¹ In fall of the following year, the Commission presented a proposal for a Council Directive on a common system of financial transaction tax.⁶² As a legal basis it indicated Article 113 TFEU, which requires unanimity in the Council.

⁵⁵ CJEU, Joined Cases C-274 and 295/11, *Spain and Italy v. Council*, ECLI:EU:C:2013:240. See further *Jaeger*, Einheitspatent – Zulässigkeit der Verstärkten Zusammenarbeit ohne Spanien und Italien, *Neue Juristische Wochenschrift*, 2013, p. 1998 ff.; *Pistoia*, Enhanced cooperation as a tool to ... enhance cooperation? *Spain and Italy v. Council*, *Common Market Law Review*, 2014, p. 247 ff.

⁵⁶ Parliament/Council Regulation (EU) No. 1257/2012 of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection, O.J. 2012 L 361, p. 1.

⁵⁷ Council Regulation (EU) No. 1260/2012 of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection with regard to the applicable translation arrangements, O.J. 2012 L 361, p. 89.

⁵⁸ CJEU, Case C-146/13, *Spain v. Parliament and Council*, judgment, ECLI:EU:C:2015:298, and Case C-147/13, *Spain v. Council*, ECLI:EU:C:2015:299.

⁵⁹ Notification by Italy of its intention to participate in the enhanced cooperation in the area of the creation of unitary patent protection, Doc. No. ST 10621 2015 INIT of 7 June 2015.

⁶⁰ European Council of 17 June 2010, Conclusions, EUCO 13/10, para. 16; affirmed by the European Council of 24/25 March 2011, Conclusions, EUCO 10/11, para. 15.

⁶¹ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Taxation of the Financial Sector, COM(2010) 549 final of 7 October 2010.

⁶² COM(2011) 594 final of 28 September 2011.

Despite numerous meetings of the Council “Working Party on Tax Questions – Indirect Tax (FTT)”, which prepared the dossier for adoption, the Council took note in its orientation debate in August of 2012 that, in the light of views expressed by the Member States, support for a financial transaction tax as proposed by the Commission was not unanimous.⁶³ At the same time the Presidency noted the support of a significant number of delegations for considering enhanced cooperation. Most notably, the Austrian delegation made a declaration that “[t]aking into account the current state of the negotiations on the introduction of a financial transaction tax Austria declares that such an introduction should be made possible by enhanced cooperation”.⁶⁴

As discussions in the Council did not lead to results, let alone the required unanimity, a group of eleven Member States⁶⁵ decided to go ahead and introduce the financial transaction tax by means of enhanced cooperation and by letters received between 28 September and 23 October 2012 addressed formal requests to the Commission. The Commission presented its proposal on October 23, 2012.⁶⁶ During the Council debates, the Netherlands declared that they considered joining the enhanced cooperation, but formulated certain conditions: the financial transaction tax should not be dedicated to the EU own resources, it should be proportionate in order not to overburden the financial sector, and it should not have any direct or indirect impact on the pension funds of the Netherlands.⁶⁷

The Council authorised enhanced cooperation in January 2013,⁶⁸ with the United Kingdom, Malta, the Czech Republic and Luxembourg abstaining in the vote. Some of them delivered unilateral statements which were added to the minutes of the Council meeting.⁶⁹ Luxembourg regretted that agreement could not be reached at global or at least at Union level and considered that enhanced cooperation should not be used as a tool to impose such tax on financial institutions established in non-participating Member States. Similar concerns were raised by Malta. With a similar reasoning, the United Kingdom even expressed its opinion that it was not possible to take the view that the conditions for authorisation set out in the Treaties were not fulfilled for this particular cooperation. As a consequence the United Kingdom launched judicial

⁶³ Council Doc. 11770/12, 3178th meeting of the Council (Economic and Financial Affairs) of 22 June 2012, p. 5.

⁶⁴ Council Doc. 11770/12 ADD 1, p. 3.

⁶⁵ Namely Belgium, Germany, Estonia, Greece, Spain, France, Italy, Austria, Portugal, Slovenia and Slovakia.

⁶⁶ COM(2012) 631 final.

⁶⁷ Council Doc. 16166/12, 3198th meeting of the Council (Economic and Financial Affairs), 13 November 2012, p. 4.

⁶⁸ Council Decision 2013/52/EU of 22 January 2013 authorising enhanced cooperation in the area of financial transaction tax, O.J. 2013 L 22, p. 11. See in detail *Hernández González-Barreda*, On the European Way to a Financial Transaction Tax under Enhanced Cooperation: Multi-Speed Europe or Shortcut?, *INTERTAX*, 2013, p. 208 ff.; *Cadet/Vascega*, Fewer Woods for Robin Hood: Financial Transaction Tax under Enhanced Cooperation, *Europäische Zeitschrift für Wirtschaftsrecht*, 2013, p. 574 ff.

⁶⁹ Council Doc. 5740/13, 3215th meeting of the Council (Economic and Financial Affairs), 22 January 2013, p. 5 and 6 f.

proceedings before the Court of Justice against the authorising decision. The Court, however, turned them down due to the lack of implementing measures at the time of the legal action.⁷⁰

In February 2013, the Commission submitted a new proposal for a financial transaction tax as an implementing measure for the enhanced cooperation.⁷¹ The tedious debates on the issue continued among the participating Member States in various Working Party and Council meetings on the “building blocks” of the financial transaction tax and different options on how to avoid potential negative impacts of such a tax on retirement schemes and the part of the economy that is concerned with producing, distributing and consuming goods and non-financial services (the “real economy”).⁷² Even to this date, no implementing measure has been adopted due to disagreement amongst the participating Member States as regards the details of the tax. On the contrary, negotiations in the Council led to Estonia’s withdrawal from the enhanced cooperation in December 2015, leaving only ten Member States trying to agree on the tax.

4. Property regimes of international couples

In March of 2011, the Commission adopted two proposals for Council Regulations on jurisdiction, applicable law and the recognition and enforcement of decisions 1) in matters of matrimonial property regimes⁷³ and 2) regarding the property consequences of registered partnerships.⁷⁴ Based on Article 81(3) TFEU, which again requires unanimity in the Council, the aim of the proposals was to establish a comprehensive set of rules of international private law applicable to property regimes for marriages or registered partnerships, respectively, having cross-border implications. Because of the distinctive features of marriage and registered partnerships, and of the different legal consequences resulting from these forms of union, the framework was split into two proposals. About a year and a half later, the Council Working Party on Civil Law Matters (Matrimonial Property Regimes and Registered Partnerships), which had carried out a parallel examination of both proposals, adopted political guidelines for future deliberation.⁷⁵ After that, the proposals were subject to numerous examinations in the Working Party. Following the 10th revised version of both proposals and bilateral contacts held with some Council delegations,

⁷⁰ CJEU, Case C-209/13, *United Kingdom v. Council*, ECLI:EU:C:2014:283.

⁷¹ Proposal for a Council Directive implementing enhanced cooperation in the area of financial transaction tax, COM(2013) 71 final of 14 February 2013.

⁷² See the state of play of the proposal in Council Doc. 14415/15 of 26 November 2015, Council Doc. 9602/16 of 3 June 2016 and Council Doc. 13608/16 of 28 October 2016. See also Council Doc. 15405/17 of 7 December 2017, ECOFIN Report to the European Council on tax issues, para. 93 ff.

⁷³ COM(2011) 126 final of 16 March 2011.

⁷⁴ COM(2011) 127 final of 16 March 2011.

⁷⁵ Council Doc. 16878/12 of 30 November 2012.

two compromise texts were presented in November 2014.⁷⁶ By that time, eleven redraft texts had been presented to the Working Party, and discussed at length. It had been emphasised again that both Regulations have always been examined in parallel⁷⁷ and in so far as possible, both regulations contain parallel provisions, in order to ensure equal treatment of spouses and partners. After a period of reflection and further deliberation, preliminary political agreement was reached in November 2015.⁷⁸ It was then again underlined at a COREPER meeting that it was “of utmost importance that the two regulations be adopted together”⁷⁹ so as to ensure equal treatment of couples throughout the Union. In the end, however, no agreement could be reached among all Council representatives, mainly due to the fact that not all difficulties, mainly linked to the fact that the institutions of same-sex marriages and/or registered partnerships were not known in a number of Member States, could be resolved. While sufficient safeguards were included to ensure that domestic courts would not have to deal with, let alone introduce, foreign institutions unknown in their legal system, some Member States were concerned that, nevertheless, the recognition in their country of the property consequences of such foreign institutions would have an indirect effect on their national family law and policy.

As a consequence, the Council established that insurmountable difficulties made it impossible to attain such unanimity within a reasonable time.⁸⁰ At the same time, however, a number of Member States stated their interest to adopt the proposed measures nonetheless. Therefore, from December 2015 to February 2016, seventeen Member States addressed requests to the Commission⁸¹ for presenting a proposal to authorise enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes and jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnerships. The Commission presented its proposal in early March 2016.⁸² By letter to the Commission dated 18 March 2016, Cyprus indicated its wish to participate in the establishment of the enhanced cooperation; Cyprus reiterated this wish during the work of the Council.

⁷⁶ Council Doc. 15275/14 and 15276/14 of 10 November 2014.

⁷⁷ See Council Doc. 16171/14 of 27 November 2014, para. 8.

⁷⁸ See Council Doc. 14124/15 and Council Doc. 14125/15 of 16 November 2015 and then Council Doc. 14651/15 and Council Doc. 14652/15 of 26 November 2015.

⁷⁹ See Council Doc. 14655/15 of 26 November 2015, para. 12.

⁸⁰ Council Doc. 15062/15 ADD 1, 3433rd meeting of the Council (Justice and Home Affairs), 3/4 December 2015, p. 7.

⁸¹ Malta, Croatia and Belgium subsequently addressed requests to the Commission by letters dated 14 December 2015, 15 December 2015 and 17 December 2015 respectively, and Germany, Greece, Spain, France, Italy, Luxembourg, Portugal, Slovenia and Sweden by letters dated 18 December 2015, The Czech Republic, the Netherlands, Bulgaria, Austria and Finland addressed the same requests to the Commission by letters dated 28 January 2016, 2 February 2016, 9 February 2016, 16 February 2016 and 26 February respectively. The United Kingdom, Ireland and Denmark made use of their primary law opt-outs (see on this *Böttner* (fn. 7), p. 60 f.).

⁸² COM(2016) 108 final of 2 March 2016.

The Council eventually authorised enhanced cooperation in June 2016.⁸³ The two Commission proposals had been adopted as implementing measures for that cooperation.⁸⁴ While this is formally a whole different cooperation, it has strong ties to the enhanced cooperation on the Rome III Regulation. One would therefore imagine that the participating Member States are the same; in fact, however, the two groups overlap only in parts.⁸⁵

5. European Public Prosecutor's Office

The Treaty of Lisbon introduced a new competence for the European Union to establish a European Public Prosecutor's Office (EPPO) from Eurojust (Article 86 TFEU). It shall be responsible for investigating, prosecuting and bringing to judgment, the perpetrators of, and accomplices in, offences against the Union's financial interests, and shall exercise the functions of prosecutor in the competent courts of the Member States in relation to such offences. The regulation is subject to unanimity in the Council and consent by the European Parliament.

In July 2013, the Commission presented a proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office⁸⁶ which was transmitted to the European Parliament and the Council on July 18, 2013. A first orientation debate took place in the Council on March 4, 2014,⁸⁷ in which it was established that there is a vast consensus on the establishment of the EPPO and a general agreement on some major points of the proposal. The United Kingdom, Ireland, and Denmark made use of their opt-outs⁸⁸ and did not take part in the adoption of the proposed regulation.

By the end of 2016, a broadly agreed consolidated draft text of the full Regulation had been established and received broad conceptual support in the Council. A few Member States made

⁸³ Council Decision (EU) 2016/954 of 9 June 2016 authorising enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions on the property regimes of international couples, covering both matters of matrimonial property regimes and the property consequences of registered partnerships, O.J. 2016 L 159, p. 16.

⁸⁴ Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, O.J. 2016 L 183, p. 1; Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships, O.J. 2016 L 183, p. 30.

⁸⁵ The list of Member States for the two cases of cooperation comprises Belgium, Bulgaria, the Czech Republic, Germany, Greece, Spain, France, Croatia, Italy, Luxembourg, Malta, the Netherlands, Austria, Portugal, Slovenia, Finland and Sweden. Belgium, Bulgaria, Germany, Greece, Spain, France, Italy, Luxembourg, Malta, Austria, Portugal and Slovenia take part in both cases of enhanced cooperation, while the Czech Republic, Latvia, Lithuania, Hungary, Romania, Croatia, the Netherlands, Finland and Sweden only participate in one or the other.

⁸⁶ COM(2013) 534 final.

⁸⁷ Council Doc. 7467/14 ADD 1 of 28 March 2014, p. 7; see also Council Doc. 7095/14, Press release on the 3298th session of the Council on 3/4 March 2014, p. 16-17.

⁸⁸ Article 3 of the Protocol (No 21) on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice; Articles 1 and 2 of the Protocol (No 22) on the position of Denmark.

known that they still had reservations on a few issues and Sweden mentioned that it would not, in any case, take part in the establishment of the EPPO. The Council Presidency worked to resolve these issues and substantial advances towards a generally accepted compromise had been made by late December of 2016, which resulted in an amended full text of the draft Regulation.⁸⁹ The Council concluded that an agreement on the full text was now within reach. However, Sweden confirmed its general opposition to the adoption of EPPO. As a result, unanimity required by Article 86(1) TFEU (between all Member States except the United Kingdom, Ireland, and Denmark) could not be established.⁹⁰ A group of Member States requested, by a letter of 14 February 2017, that the draft Regulation be referred to the European Council, as foreseen in Article 86(1)(2) TFEU. On 9 March 2017, the European Council discussed the draft Regulation and noted that there was disagreement within the meaning of Article 86(1)(3) TFEU

As a consequence, a group of 16 Member States⁹¹ made use of the option to establish enhanced cooperation on the basis of Article 86(1)(3) TFEU by means of “fast-track cooperation”.⁹² Latvia,⁹³ Estonia,⁹⁴ Austria,⁹⁵ and Italy⁹⁶ joined the cooperation during the course of the following weeks. The Council eventually adopted the Regulation on EPPO in October 2017.⁹⁷ Eventually, the Netherlands decided to join the cooperation.⁹⁸

6. Permanent Structured Cooperation

The most recent practice of closer cooperation is a case of Permanent Structured Cooperation established in 2017, which resembles enhanced cooperation but is, technically speaking, a different instrument (see *supra* B.3). At its meeting in December 2016, the European Council concluded that “Europeans must take greater responsibility for their security”. In order to do so, the Heads of State or Government found that the Union and the Member States needed to do more, “including by committing sufficient additional resources” and by “reinforcing cooperation in the development of required capabilities as well as committing to making such capabilities available when necessary”.⁹⁹ Based on previous Council conclusions, in particular the conclusions

⁸⁹ Council Doc. 15760/16 COR 1.

⁹⁰ Council Doc. 5445/17 of 31 January 2017.

⁹¹ Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Finland, France, Germany, Greece, Lithuania, Luxembourg, Portugal, Romania, Slovakia, Slovenia, Spain.

⁹² See Council Doc. 8027/17 of 5 April 2017.

⁹³ Council Doc. 9546/17 of 24 May 2017.

⁹⁴ Council Doc. 10053/17 of 7 June 2017.

⁹⁵ Council Doc. 10542/17 of 21 June 2017.

⁹⁶ Council Doc. 10627/17 of 23 June 2017.

⁹⁷ Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor’s Office (‘the EPPO’), O.J. L 283/1 (2017).

⁹⁸ Council Doc. 9023/18 of 17 May 2018.

⁹⁹ European Council of 15 December 2016, Conclusions, EUCO 34/16, para. 10.

of 14 November 2016,¹⁰⁰ the European Council pointed towards Permanent Structured Cooperation as a means for the Member States to “contribute decisively to collective efforts, as well as to act autonomously when and where necessary”.¹⁰¹ It reiterated the need to launch this form of cooperation in its conclusions of June 2017¹⁰² and again in October 2017.¹⁰³

On 13 November 2017, a group of 23 Member States¹⁰⁴ informed the Council and the High Representative of the Union for Foreign Affairs and Security Policy of their intention to participate in PESCO. On 7 December 2017, two other Member States joined the request.¹⁰⁵ The joint notification¹⁰⁶ sets out the list of ambitious and more binding common commitments undertaken by participating Member States in the five areas set out by Article 2 of Protocol 10 as well as the principles and governance of PESCO.

Only a few days after the last notifications, the Council adopted the decision establishing Permanent Structured cooperation.¹⁰⁷ A roadmap for the implementation of¹⁰⁸ and a list of projects to be developed under PESCO¹⁰⁹ supplement the original decision.

D. Lessons learnt from recent practice

It is striking that despite all the claims for the necessity of an instrument of flexible integration at the level of secondary law, it took over a decade until the instrument of enhanced cooperation was first used. One could indeed argue that this is a good sign, because the mere possibility to revert to integration with a smaller group of Member States was sufficient to overcome the veto of some members of the Union and eventually reach consensus and realise a project in the Union as a whole. This may have been easy within a Union of 15 members, but is more difficult in a community of nearly 30 members.

¹⁰⁰ Council Doc. 14149/16 of 14 November 2016, conclusions on implementing the EU Global Strategy in the area of Security and Defence, in particular para. 17, where the Council considered Permanent Structured Cooperation as a means to draw on the full potential of the Treaty.

¹⁰¹ European Council of 15 December 2016, Conclusions, EUCO 34/16, para. 10 f.

¹⁰² European Council of 22/23 June 2017, Conclusions, EUCO 8/17, para. 8.

¹⁰³ European Council of 19 October 2017, Conclusions, EUCO 14/17, para. 13.

¹⁰⁴ Austria, Belgium, Bulgaria, Czech Republic, Croatia, Cyprus, Estonia, Finland, France, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, the Netherlands, Poland, Romania, Slovakia, Slovenia, Spain and Sweden.

¹⁰⁵ Ireland and Portugal notified the Council and the High Representative of their intention to participate in PESCO and associated themselves with the joint notification.

¹⁰⁶ O.J. 2017 L 331/65.

¹⁰⁷ Council Decision (CFSP) 2017/2315 of 11 December 2017 establishing permanent structured cooperation (PESCO) and determining the list of participating Member States, O.J. 2017 L 331/57.

¹⁰⁸ Council Recommendation of 6 March 2018 concerning a roadmap for the implementation of PESCO, O.J. 2018 C 88/1.

¹⁰⁹ Council Decision (CFSP) 2018/340 of 6 March 2018 establishing the list of projects to be developed under PESCO, O.J. 2018 L 65/24.

It appears that the Member States start to develop a certain routine for the realisation of policy objectives by means of flexible integration. Since the entry into force of the Treaty of Lisbon (and, to be precise, shortly before), Member States have become less hesitant to resort to enhanced cooperation in cases where agreement could not be reached within the Union at large. In this context, one can find that the Member States are cautious to establish enhanced cooperation and pay close attention to the requirement that such cooperation may only be initiated as a last resort. Most projects were deliberated among all Member States for a considerable length before they were found to be in a deadlock.

What is remarkable, however, is the fact that to this day cases of enhanced cooperation could be observed only in areas that required a unanimous decision by all Union members, thus granting a veto position to each Member State in the Council. While under the ordinary legislative procedure (qualified majority in the Council), up to three veto players could be outvoted,¹¹⁰ enhanced cooperation appears to be the only viable solution to overcome (political) stalemates in the Council if agreement by all members is required. The assessment of that fact is ambivalent. On the one hand, the implementation of enhanced cooperation often contained elements that prevented unanimity in the first place, thus making it less likely for the remaining Member States to join later. On the other hand, the accession of Member States to some forms of cooperation shows that a good implementation of enhanced cooperation can indeed have a pioneering effect, including the first-mover advantage for the cooperating Member States. However, the opposite may also happen, *i.e.* that Member States withdraw from an established cooperation. Flexibility and openness to join come with the price of openness to leave.

At the very latest since the introduction of the instrument of enhanced cooperation, one can say that the idea of flexibility and differentiation has become a generally accepted approach of integration, maybe even a “constitutional principle”¹¹¹ or an “architectural element”¹¹² of the Union.¹¹³ The development of flexible integration shows that until now it was possible, at least to a great extent, to avoid the forming of a core Europe or integration *à la carte*. Differentiation should stick to the idea of a multispeed Europe in which, eventually, all or most Member States

¹¹⁰ According to Article 16 (4) sentence 2 TEU, a blocking minority must include at least four Council members, failing which the qualified majority shall be deemed attained.

¹¹¹ *Chaltiel*, *Le traité d'Amsterdam et la coopération renforcée*, *Revue du Marché Commun et de l'Union européenne*, 1998, p. 289 f.; *Wessels*, *Verstärkte Zusammenarbeit: Eine neue Variante flexibler Integration*, in: Jopp/Maurer/Schmuck (eds.), *Die Europäische Union nach Amsterdam*, 1998, p. 187 (197); with a differing view *Bender*, (fn. 2), p. 766.

¹¹² *Blanke*, in *Blanke/Mangiameli* (fn. 1), Article 20 TEU, para. 23; see also *Göler*, (fn. 26), p. 9 (23); *Rego*, *Differenzierte Integration zwischen Einigung und Entfremdung*, in *Stratenschulte* (ed.), *Der Anfang vom Ende?*, 2015, p. 35 (37, 54).

¹¹³ See also *Zeitzmann*, *A Rather Strange Animal, this “Enhanced Cooperation” – May it Serve as King of the European Zoonion? or: Is Enhanced Cooperation Anywhere Near a Constitutional Principle?*, in *Giegerich/Schmitt/Zeitzmann* (fn. 7), p. 87 ff.

will arrive at the same level of integration in a given area. Synchronicity is no longer a fundamental principle of European integration.

However, the instrument of enhanced cooperation should be used with caution otherwise it runs the risk of remaining unimplemented or ineffective, as was the case with the financial transaction tax particularly due to the low number of participating Member States. There is also the risk that it creates a legally complex and maybe even confusing situation, for example when different cases of enhanced cooperation are closely related or overlap, while the groups of participating Member States vary (in the case of the conflict-of-law rules).

At the same time, flexible integration has not – at least so far – led to a general disintegration or fragmentation of the Union. Nonetheless, this is a constant risk,¹¹⁴ especially in the light of increased cooperation outside the Union's framework through international treaties and intergovernmental cooperation.¹¹⁵ In this regard, one should recall the principle of sincere cooperation (Article 4(3) TEU) and the primacy of Union law, which should prevent the Member States from adopting rules outside the Union's framework that could frustrate the *acquis communautaire* and call into question the ever closer Union.

Finally, if one looks at the patterns of participation of Member States in the different forms of closer cooperation (including PESCO), one may find there to be a sort of “core Europe” emerging. Eight Member States, including four of the founding members (Germany, Italy, France, Belgium) take part in all cases of cooperation, other Member States known to be hesitant towards European integration take part in only one (United Kingdom, Denmark) or two (Ireland, Poland) cases of closer cooperation. This development certainly needs attention in the future practice of flexible integration.

¹¹⁴ See, for example, *Müller-Graff*, „Differenzierte Integration“: Konzept mit sprengender oder unitarisierender Kraft für die Europäische Union?, integration, 2007, p. 129; *Blanke*, in *Blanke/Mangiameli* (fn. 1), Article 20 TEU, para. 61.

¹¹⁵ See already *Fischer*, Vom Staatenbund zur Föderation, speech given at the Humboldt-University on 12 May 2000, printed in *Loth*, Entwürfe einer europäischen Verfassung. Eine historische Bilanz, Berlin, 2002, p. 241 (250 f.).