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Enhancing 'Enhanced Cooperation': constraints and opportunities of an inflexible flexibility clause

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Executive Summary

- In the framework of Enhanced Cooperation in the EU less than a handful of policy projects have been realised so far.
- Procedural and substantive bottlenecks in the relevant Treaty provisions streamline the framework's application towards special legislative procedure in the area of Justice and Home Affairs.
- The framework can substantially be improved by:
  - changing the incentive structure that Enhanced Cooperation is embedded in;
  - reducing the complexity in the realm of 'subgroup integration' in the EU (especially by integrating PESCO into the Enhanced Cooperation framework);
  - strengthening the role of the European Parliament in the respective procedures.

This policy brief is based on a study commissioned by the European Parliament (see 'Further Reading' section).

20 years after the entry into force of the Treaty of Amsterdam, which introduced the framework of 'Closer Cooperation' as the precursor of today's 'Enhanced Cooperation' (EnC), and 10 years after revamping this framework with the Treaty of Lisbon, 2019 is the right moment to take stock of the accomplishments and shortcomings of a procedure that was once praised as the European Union's (EU) 'magic formula' towards differentiated integration (de la Serre & Wallace 1997: 5). Best understood as a *generalised* (applicable to a large number of policy fields) and *standardised* (prescribing a uniform and transparent process) framework of 'controlled' flexibility, EnC allows a subgroup of EU Member States (MS) to continue a legislative procedure that has been blocked in the Union's normal settings. 'Fenced in' by a common procedural set-up and substantive limits of application and range, connoting an 'inflexibilisation' of the supposed flexibility clause, EnC's promise is that political unity, legal homogeneity and institutional coherence *inside* the Treaties is reconcilable with varying degrees of MS cooperation in different policy areas. With not even a single recourse to EnC between 1999 and 2010 but repeated instances of differentiated institution-building *outside* the Treaties (e.g. Fiscal Compact) since the financial and sovereign debt crisis, the *de facto* impact of this promise must be called into question. Moreover, the implementation of Permanent Structured Cooperation (PESCO) in defence projects in 2017 – an additional, single-topic Treaty framework allowing for subgroup integration – has recently overshadowed debates on differentiated integration in the EU.

Against this backdrop, this policy brief evaluates the EnC by, first, providing a brief introduction to the subject before presenting three core insights from the analysis of the legal provisions governing EnC since the Lisbon Treaty, particularly focussing on the role of the European Parliament. Subsequently, three lessons regarding the cases of EnC 'realised' so far will be outlined. Finally, these insights will be condensed in three policy recommendations with the aim to facilitate and improve the future use of EnC in the EU.

Basis and basics of Enhanced Cooperation

The procedure establishing an EnC among a subgroup of MS is best understood by separating it into two stages, an 'authorisation stage' and a stage in which 'implementing act(s)' are adopted. Every EnC initiative, pursuable by at least nine MS only after manifest deadlock of a legislative file in the standard proceedings, needs to be authorised by Qualitative Majority Voting (QMV) in the Council of Ministers *as a whole*, following a proposal by the European Commission. In a second step, the actual legislative act is decided upon by the participating MS, thus implementing the EnC with regulations/directives binding only for this 'in-group' of EU members. It is important to emphasise that in the field of Common Foreign and Security Policy (CFSP) consensual rules for EnC apply at both stages.

So far, four cases of EnC have successfully gone through both phases, namely

1. the Law Applicable to Divorce and Legal Separation ('Rome III Regulation') in 2010;
2. the European Patent with Unitary Effect ('Unitary Patent') in 2012;
3. the Property Regimes Rules for International Couples in 2016;
4. the European Public Prosecutor's Office ('EPPO') in 2017,

while the Financial Transaction Tax ('FTT') was authorised in 2013 without any subsequent implementing acts.

Legal word: Interpreting the Treaty provisions

Prominently anchoring the general framework of EnC in Art. 20 Treaty on European Union (TEU) in addition to the 'more hidden' provisions of Art. 326-334 Treaty of the Functioning of European Union (TFEU), the MS as the 'masters' of the Treaties underlined their intention to establish EnC as the default procedure for future differentiated integration. Already foreseen in the Constitutional Treaty (Art. I-44), this symbolical, judicially irrelevant upgrading indicates that – albeit being a 'non-starter' in the decade post-Amsterdam – EnC was at that time still considered as the most promising solution to the inevitable tensions in a growing Union.

Insight 1: EnC's bias towards special legislative procedures

At the most basic level, EnC cannot arise 'out of procedural void', understood here as the discretion of a single driver who recognises a problem and suggests a solution (like, for example, the Commission in the Ordinary Legislative Procedure (OLP)). In fact, the consideration of EnC always constitutes a preliminary end of a legislative procedure, in the form of a failure to agree on a specific policy within the Community orthodoxy. Even the political leaders in the European Council, who initiated and agreed upon most forms of differentiation in the past, cannot launch the procedure 'from scratch'. This is reflected in the notion of "last resort" in Art. 20(2) TEU, which must be considered as the fundamental prerequisite of any further action.

The crucial question is obviously: when can a 'failure to agree' be ascertained? Or, to put it differently, how long and with which efforts should MS try to find a common ground preventing the application of EnC as an *ultima ratio*? The explanation to the 'last resort rule', introduced by the Nice Treaty and retained afterwards, leaves broad room for interpretation ("reasonable period") and was in the case of the Unitary Patent challenged by Spain and Italy before the Court of Justice of the European Union. In its judgement on the joined cases C-274/11 and C-295/11 (16 April 2013), the Court pointed to "the inability" of the Council to find agreement, indicated by the impossibility "to adopt such legislation in the foreseeable future" (§50). While this 'inability' is to be determined by the Council itself, the Court only examines if the Council has "carefully and impartially" (§54) examined the situation. A formal role for the European Parliament is not foreseen at this stage save its (potential) involvement in the failed legislative procedure before the final rejection in the Council. However, it must be noted that under the current rules EnC is most likely to emerge in the contexts of unanimity decisions in the Council, generally implicating a side-lined Parliament in the first place.

Insight 2: EnC's thrust away from the single market

The specification of "scope and objectives" of the EnC endeavour to be presented by a pioneering subgroup (Art. 329(1) TFEU), read together with the second paragraph of Art. 326 TFEU, can be considered as the tightest substantive bottleneck in the whole process: "Such cooperation shall not undermine the internal market or economic, social and territorial cohesion. It shall not constitute a barrier to or discrimination in trade between Member States, nor shall it distort competition between them" (see also Thym 2018: 857). Although 'not undermining the internal market' is semantically less restrictive than, for example, 'not affecting the acquis communautaire' (a provision governing EnC before the Treaty of Nice), this paragraph imposes a complex and protracted justification duty of answering the question of how a policy does not undermine the four freedoms (Peers 2017: 79). Dauntingly difficult in general, it is almost impossible if the subgroup tries to 'save' a rejected, single market-related policy in the first place. By a filter towards shared competences, EnC is streamlined away from the single market, and towards, for example, Justice and Home Affairs (JHA). More generally, this thrust is already rooted in the limitation to activate EnC only in "the framework of the Union's non-exclusive competences" (Art. 20(1) TEU).

Insight 3: EnC's 'passerelle clause' is less favourable than it seems

Following the supranational logic of the consent procedure, the Parliament is granted the role of a veto player between the Commission's elaborated proposal to authorise EnC and the Council's voting on the issue. The Parliament decides by a simple majority of the votes cast. This implies that there is no additional quorum of the majority of all members of the Parliament. In addition to the expansion of this veto right to all areas save CFSP, Art. 333 TFEU was introduced with the Treaty of Lisbon: "Where a provision of the Treaties which may be applied in the context of enhanced cooperation stipulates that the Council shall adopt acts under a special legislative procedure, the Council, acting unanimously in accordance with the arrangements laid down in Article 330, may adopt a decision stipulating that it will act under the ordinary legislative procedure. The Council shall act after consulting the European Parliament" (Art. 333(2) TFEU). Read in combination with Declaration 40 annexed to the Treaties, this strategically crucial, intermediate veto position of the Parliament has been – *prima facie* – leveraged substantively: "Member States may indicate, when they make a request to establish enhanced cooperation, if they intend already at that stage to make use of Article 333 providing for the extension of qualified majority voting or to have recourse to the ordinary legislative procedure" (Declaration 40, annexed to the TFEU).

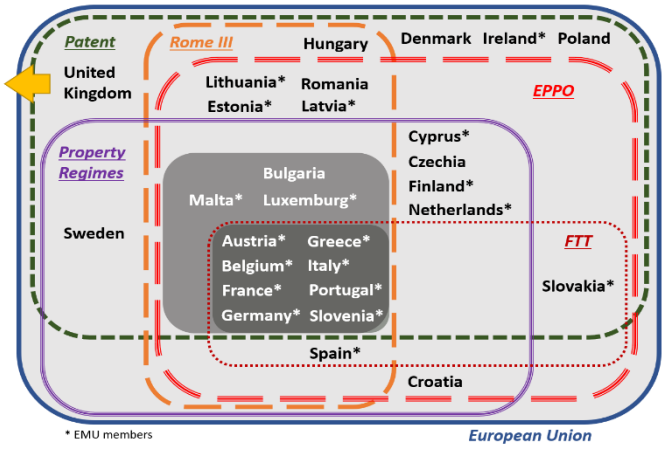
Adopting the so-called Bresso/Brok report (§40), the European Parliament underlined that it "[i]s determined to implement fully the Treaty provisions on enhanced cooperation by committing not to give its consent to any new enhanced cooperation proposals unless the participating Member States commit to activate the special 'passerelle clause' enshrined in Article 333 TFEU to switch from unanimity to QMV, and from a special to the ordinary legislative procedure." However, this favourable setting for the Parliament is complicated, protracted and restrained by national legislation and jurisdiction of MS, most prominently by the 'Lisbon judgement' of the German Constitutional Court, binding Germany's assent to the activation of Art. 333 TFEU to the respective decisions of the Bundestag (lower chamber) and Bundesrat (upper/federal chamber).

Real world: Lessons from 4 ½ cases of Enhanced Cooperation

Before turning to the key lessons derived from the 4½ cases of the EnC implemented so far, a couple of more general observations on these cases, partly illustrated in Figure 1, need to be considered:

- *Eurozone cleavage:* the core of MS participating in all cases of EnC (including FTT) consists of Eurozone members only; excluding the FTT only one non-Euro MS belongs to 'the core' (namely Bulgaria);
- *Geographical cleavage:* Northern as well as Central and Eastern European MS are less likely to participate in EnC than Western and Southern European MS (particularly the six founding members);
- *Opt-out periphery:* MS with primary law opt-outs (UK, Ireland and Denmark) constitute – together with Poland – the periphery of EnC participation;
- *Franco-German tandem*: the two biggest MS are not only part of the EnC but also participated in the respective EnC initiatives from the very beginning; they can therefore be considered as a cross-cutting driver of EnC.

Figure 1: Spaghetti bowl of EnC



Source: Own elaboration

Lesson 1: 4 ½ cases – 'EnC inventory' is sobering

The – so far – sobering inventory of EnC consists of:

- Two 'conflict-of-national-law solution schemes' already at work (Rome III Regulation and Property Regime Rules), neither of them adding 'legislative substance' on the EU level (for a detailed description of these and the other cases, see European Parliamentary Research Service 2018);
- The Unitary Patent hinging on the protracted ratification of an accompanying, additional intergovernmental treaty establishing the necessary Unitary Patent Court outside the Treaties, which is 'stuck' in the German Bundestag. Moreover, while participating in the EnC, Poland did not sign the Unitary Patent Court treaty;
- The EPPO, established in a one-time-only, short-track EnC procedure (Art. 86 TFEU), in the early phase of its institutionalisation and not operational before late 2020. The initial proposal was accompanied by 11 yellow cards of national parliaments via the Early Warning Mechanism;
- The FTT is authorised only and an agreement on the implementing acts cannot be expected in the foreseeable future.

In all these cases, the procedure from the initial proposal to the implementing act was protracted (duration between 4 and 12 years, FTT excluded).

Lesson 2: 'Legal word insights' reflected in reality

In line with above insights, it can be noted that:

a. All 4 ½ cases developed out of unsuccessful special legislative procedures after the failed attempts to achieve unanimity in the Council;
b. 3 of the 4 ½ cases fall into the area of JHA, officially called Area of Freedom, Security and Justice;
c. These 3 JHA cases face a rather smooth implementation without any major legal challenges as in the case of the Unitary Patent, which was challenged before the CJEU as it falls in the field of legal approximation in the single market.

Moreover, until now only limited '*inter*-EnC dynamics', understood as the convergence of the participating MS in adjacent or similar EnC policies, can be observed (see, for example, overlaps between the Rome III and the Property Regimes group).

Lesson 3: 'EnC's maturing' as maturing of MS attitudes

However, the most crucial impact of the implementation of EnC framework as a whole in the post-Lisbon decade is that it actually has been implemented. This non-trivial result has to be seen in the light of persistent attitudes of MS: the 'EnC's maturing' can – with great caution – be understood as a maturing of MS governments' stances towards EnC as not only a legal but also a legitimate tool of problem-solving at the EU level. Reluctant to make use of EnC under the Amsterdam/Nice provisions, MS have started to consider EnC as a problem-solving vehicle, not in the sense of mainstreaming but in the sense of daring to 'test the waters'. Beginning with – from a sovereignty and integrationist point of view – rather benign pioneering projects with neutral/no externalities (like Property Regime Rules or Rome III, see Kroll & Leuffen 2015: 358ff.) to a more delicate but with 26 participating MS almost 'complete' subgroup (Unitary Patent) and to a project with a clear danger of free-riding outsiders (EPPO), the attitudes of MS are evolving. Or to put it differently, the problem-solving propensity of MS seems to become more 'adventurous' with regard to a 'generalised' and 'standardised' framework of differentiated integration, even if it is difficult to extrapolate this observation and embark on any long-term prediction in this regard.

Recommendations: Enhancing 'Enhanced Cooperation'

To conclude, several concrete proposals can be made on how to facilitate the usage and improve the functioning, of the EnC framework, largely based on the insights and lessons presented above. For proposals 2 and 3 changes of the respective Treaty provisions would be necessary.

Proposal 1: Changing the incentive structure

EnC's central incentive is that the participating MS "may make use of [the Union's] institutions" (Art. 20(1) TEU) to implement and govern their endeavour after its approval. Preventing the

use of EU institutions/administrations for any form of differentiated integration outside the Treaties will reinforce EnC's unique selling proposition. As a norm, the European Council should refrain from searching for legal constructions outside the EU Treaties (such as the European Stability Mechanism). Moreover, increasing the synergies of EnC projects in adjacent policy fields – by allowing for additional financial and administrative incentives for participating MS in these cases – would add attractiveness and coherence at the same time.

Proposal 2: Reducing complexity

The variations of differentiated integration within the EU should be reduced by applying the same rules for EnC in CFSP (QMV for authorisation in the Council, etc.) as in the other policy fields. Furthermore, PESCO should be integrated into the EnC umbrella, a step that could incentivise further subgroup cooperation in the too often 'deadlocked' foreign, defence and security policy area.

Proposal 3: Strengthening the Parliament's role in EnC

Equipping the European Parliament with the right to initiate an EnC project if conciliation with the Council has failed after the second reading of the OLP, and establishing an EnC committee format in the Parliament to accept, amend or reject the substantive legal acts of an already authorised EnC initiative is likely to extend the framework dynamics beyond special legislative procedures.

If these recommendations are implemented, taking stock of EnC in 2029 or 2049 may well be less of a sobering exercise than it is today. Although EnC will never become the 'magic formula' some envisaged it to be in the past, the framework definitely offers enough potential to be 'tweaked' for the better – and thus raising the chances of realising crucial policy projects like the Common Consolidated Corporate Tax Base (CCCTB) or the permanent asylum-seeker distribution scheme.

Further Reading

This policy brief is largely based on: Wolfgang Wessels and Carsten Gerards, "The Implementation of Enhanced Cooperation in the EU", a study commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the Committee on Constitutional Affairs, presented in Brussels on 10 October 2018, http://www.europarl.europa.eu/RegData/etudes/STUD/2018/604987/IPOL_STU(2018)20604987_EN.pdf (consulted on 20/03/2019).

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