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by

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About the author

Dr. Antonio Missiroli has been NATO Assistant Secretary-General for Emerging Security Challenges from December 2017 to November 2020. Prior to that, he was the Director of the European Union Institute for Security Studies (EUISS) in Paris (2012-17). Previously, he was Adviser at the Bureau of European Policy Advisers (BEPA) of the European Commission (2010-2012); Director of Studies at the European Policy Centre in Brussels (2005-2010), and Senior Research Fellow at the W/EU Institute for Security Studies in Paris (1998-2005). He was also Head of European Studies at CeSPI in Rome (1994-97) and a Visiting Fellow at St Antony's College, Oxford (1996-97). As well as being a professional journalist, he also taught at Bath, Trento and Boston universities and at SAIS/Johns Hopkins. He has also held courses at Sciences Po (Paris) and the College of Europe (Bruges), where he leads a research seminar at the POL Department. Dr. Missiroli holds a PhD degree in Contemporary History from the Scuola Normale Superiore (Pisa) and a Master's degree in International Public Policy from SAIS/Johns Hopkins University.

Luigi Lonardo is a Lecturer at University College Cork, specialising in European Union external relations law. Prior to that, he obtained his PhD in EU Law at King's College London (2020). His PhD thesis was titled 'Coping with distinctiveness: Common Foreign and Security Policy in EU law'. He also has teaching experience at the Paris School of International Affairs (Paris) and at the University of Westminster (London).

The authors write here in a personal capacity.

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Contact details

antonio.missiroli@gmail.com and luigi.lonardo@hotmail.com

Abstract

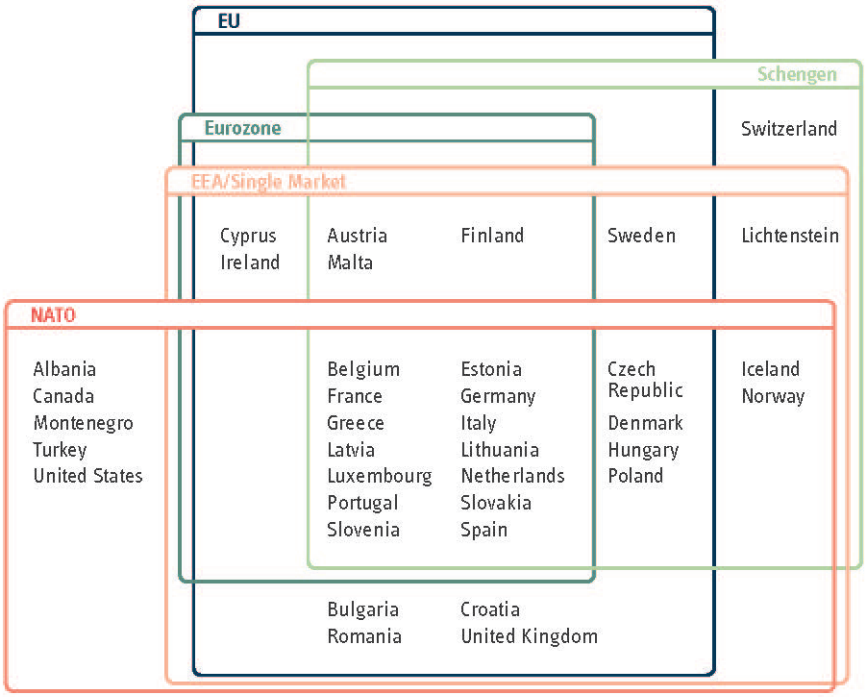
This paper provides an analysis of the way(s) in which the intent(s) and design(s) of a multi-speed Europe have evolved and have been applied in practice since the mid-1990s. Part 1 focuses on the drive toward differentiation in the discussion in the 90s and points to Economic and Monetary Union as its first (albeit implicit) case in point. Part 2 discusses how the Lisbon Treaty framed 'enhanced cooperation'. Part 3 offers an overview of the of the few specific cases so far in which those provisions have been triggered and used (family law, patent, taxation, European Public Prosecutor Office). Section 4 then zooms in on the configuration especially designed for defence: Permanent Structured Cooperation (PeSCo) – and the way in which it has been first activated, while Section 5 analyses its implementation. Finally, the paper presents a comparative assessment of these tools and their use to date. It highlights their correlation with one another as well as the original intent of facilitating differentiated integration within the EU.

Introduction

Building a 'core' Europe (*Kern-Europa*) has been a recurrent idea among the supporters of European integration: in turn, concepts like 'differentiated' or 'flexible' integration have generated a significant amount of scholarship.[1] Participation in international treaties such as those establishing the Council of Europe, NATO, the European Economic Area, the European Union itself – and, within this, the provisions regulating Schengen and the Eurozone – has indeed clustered countries across the continent into partially overlapping groups with varying degrees of economic, legal, and political integration [**Figure 1**]. To be united in diversity: this is both the objective and the challenge of Member States constantly subject to push and pull factors in the EU (and beyond). Functional and/or conceptual considerations seem to advocate closer cooperation and further integration, whereas other factors – emphasising cultural differences and competing interests – weigh in other directions.

[1] Since Alexander Stubb's first dive into the topic (A Stubb, 'A categorisation of differentiated integration', 1996, *Journal of Common Market Studies*, 34, 2, 283-295), lawyers, political scientists as well as policy-oriented think tankers have analysed, proposed or criticised the various options and formats that have emerged over the past 20 years. For an exhaustive overview see the *Journal of European Public Policy,* issue no 6, XXII, June 2015.

Figure 1: Overlapping Europes



Data: EUISS

This paper intends to provide an analysis of the way(s) in which the original intent(s) and design(s) driving the EU debate on 'multi-speed' Europe since the mid-1990s have evolved over the years in light of a changing political and institutional context, and adapted accordingly. It will cover in particular the decade following the entry into force of the Lisbon Treaty and the two related institutional cycles (December 2009-December 2019), until the eve of the UK exit from the EU (January 2020), whose implications are still impossible to discern. Special attention will be paid to differentiated integration in the domain of defence as compared to other policy areas where 'enhanced cooperation' has been allowed and enforced.

The paper will focus first on the initial drive towards differentiation in the speed and scope of integration, from the *Kern-Europa* discussion of the early 1990s to the actual implementation of EMU as its first (albeit implicit) case in point (Section 1). It will then

illustrate and analyse how the Lisbon Treaty tried to frame 'enhanced cooperation' proper (EnCo) as an enabling provision, albeit not unambiguously so – and precisely where and why (Section 2). This is followed by an overview of the few specific cases so far in which those provisions have been triggered and used – namely in such diverse fields as cross-national family law, patent, taxation and the European Public Prosecutor Office – and how and why (Section 3). The paper then moves on to the most recent configuration especially designed for the defence field – Permanent Structured Cooperation (PeSCo) – and the way in which it has been first activated (Section 4) and then implemented (Section 5). Finally, a comparative assessment of these tools and their use to date will be made, highlighting their correlation with one another as well as the original intent of facilitating differentiated integration within the EU.

1. The initial driver(s): from *Kern-Europa* to EMU – and beyond

The objective of an 'ever closer Union' was already present in the Rome Treaty. Integration has not only grown deeper among the founding members, but it has also progressed by enlargement, i.e. by extending the *acquis* to new countries and tripling the membership of the Community/Union between 1974 and 2007. Once it became apparent that the process of enlargement almost inevitably entailed giving up at least a measure of depth in the integration process, the idea of a 'core' Europe, i.e. of a few selected Member States pursuing further integration, became politically marketable. The *Kern-Europa* concept presented by the German CDU in 1994 offered a federal vision for countries united by the adhesion to the third phase of Economic and Monetary Union enshrined in the 1993 Maastricht Treaty (the initial Schengen accord would be launched just a few months later): the paper could be read precisely against the background of the political changes in Central and Eastern Europe that were making EU

membership for those countries conceivable.[2] Its rationale implied that some differentiation in the integration process would have to go beyond temporary derogations (a recurrent practice since the inception of the Community) and treaty-based exemptions or opt-outs (inaugurated with Maastricht). Around the same time, notably Denmark's opt-out from decisions with defence implications, the EU accession of three more non-NATO countries (in addition to Ireland), and recurrent blockages by a single Member State (e.g. the UK over the 'mad cow' crisis or Greece over the name dispute with FYROM) made it clear that rules allowing some flexibility were needed to accommodate different levels of ambition.

In fact, the debate over enabling deeper and potentially differentiated integration became soon entwined with the discussion over facilitating decision-making in an ever larger and less homogeneous Union. While these two drivers (and logics) were distinct, they ended up becoming part and parcel of a number of compromise package deals struck in successive treaty reform negotiations – at Amsterdam (1997), Nice (2001), the Convention on the Future of Europe (2003), the ensuing Intergovernmental Conference leading to the Constitution for Europe (2004), and finally Lisbon (2007).

The idea of a federal project around a treaty-based 'core' Europe, however, did not really materialise. The Amsterdam Treaty did grant the opportunity, for a limited number of Member States, to deepen cooperation in a subject matter covered by the Treaty (it was then called 'closer cooperation'), with special provisions for the 'third' pillar. The Nice Treaty rebranded it as 'enhanced cooperation', lowered the minimal threshold for triggering it (from a majority to just eight Member States), and reiterated that it had to contribute to deepening integration and to be used only as a 'last resort' – a caveat that reflected widespread concerns about both the integrity of the overall institutional and legal framework and the risk of a 'multi-

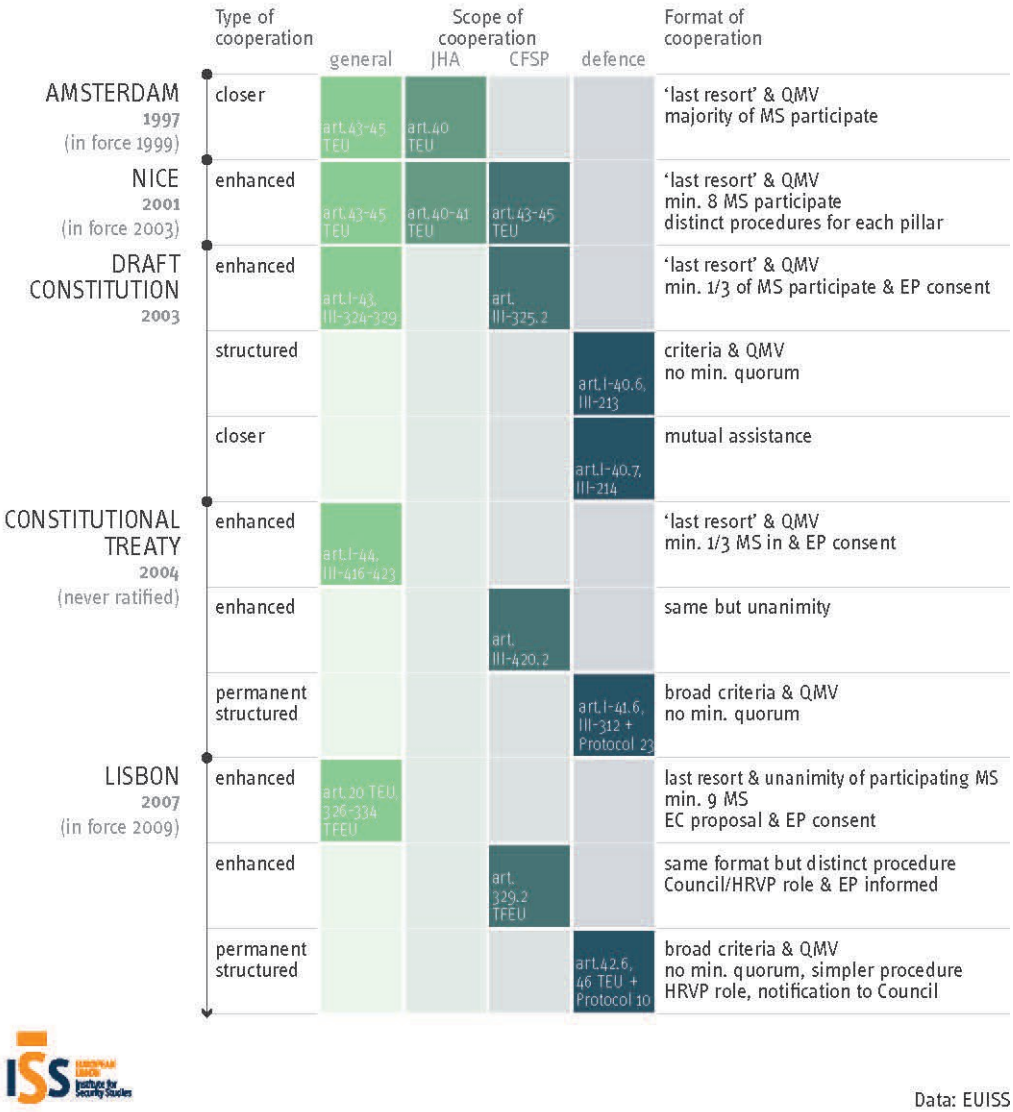
[2] According to the famous Schäuble-Lamers CDU policy paper, a geographically restricted group of five or six (founding) Member States would gradually deepen its mutual integration, widening it from monetary policy to home affairs and possibly even foreign, security and defence policy, thus creating a *noyau dur* or 'hard core' capable of attracting like-minded partners and associating them to the initial group at a later stage.

tier' (rather than multi-speed') Europe. The Nice mechanism was equally applicable to areas of co-decision and to the 'second' as well as 'third' pillar, albeit with distinct procedures for each; and it could be activated by QMV, albeit with the so-called 'emergency brake' (the possibility for a Member State to refer the matter to the European Council).[3] However, it was never used before the entry into force of the Lisbon Treaty (December 2009).

For its part, the whole 'constitutional' process of 2003-05 went further in articulating 'enhanced cooperation' as a more dynamic tool for deeper integration [**Figure 2**]; it also came up with the very notion of 'permanent structured cooperation' as the format most suitable for defence proper, as distinct from other domains (including CFSP itself). The Treaty, however, was rejected in popular referenda in 2005 and thus never ratified. While the 2004 agreed text would still constitute the basis for the negotiations leading up to Lisbon, it is commonly assumed that its failure (especially in key founding members like France and the Netherlands) contributed to cooling off the push for a 'core' Europe and softening some of its most ambitious provisions.

[3] For a convincing analysis of this phase see A Stubb, *Negotiating flexibility in the European Union: Amsterdam, Nice and beyond*, Palgrave Macmillan, London, 2002.

Figure 2: The long road to PeSCo



The establishment of EMU was far more successful: its actual implementation indeed offered a prime example of both differentiated integration in practice and enhanced cooperation *avant lettre*. Its third phase, limited in geographical scope to the Eurozone countries, constitutes in fact a special union within the Union. EMU has thus worked as a model of differentiated integration – if not in a strictly legal sense, at least in a political sense – offering both a precedent and a 'brand' to other projects in other domains.[4] In retrospect, it has also remained fairly open to all willing and able Member States, almost doubling its membership over the

[4] See the Final Report of Working Group VIII on Defence at the Convention on the Future of Europe, CONV 461/02, 16 Dec. 2002, para 54, calling PeSCo the "defence Euro-zone".

years (from 11 to the current 19) and dispelling the initial fears of an exclusive 'hard core' or *noyau dur*.

EMU also provided an original model of 'governance by convergence' in that, since its inception, it developed around so-called convergence criteria, i.e. thresholds or benchmarks – quantified in either absolute (e.g. deficit/debt ratio to GDP) or relative terms (e.g. inflation rate) and equally applicable to each individual country – to be met within a pre-defined time frame by the Member States who were willing to participate in further stages of (economic) integration.

Something similar has indeed happened with the launch of the European Security and Defence Policy (ESDP) in 1999, i.e. convergence around functional criteria related to defence capabilities: such was the logic behind the Helsinki military Headline Goal of December 1999 – whereby the objective was to put in place flexible arrangements for an expeditionary military corps (in particular, to have 50-60,000 men deployable in two months, 'earmarked' from the Member States' forces) – and the ensuing Feira civilian Headline Goal (5,000 men deployable in two months). These quantitative benchmarks, however, were meant to be met *collectively* – not individually, as was the case with EMU – through what the military call 'force generation', whereby countries commit voluntarily to contribute units and equipment for joint deployment to meet agreed targets. This approach, which factored in the asymmetry in size and capabilities among the participating countries, would be replicated and further refined in the following decade, in particular with regard to the so-called EU 'battlegroups'.[5]

In parallel, the Member States also tried to agree on more flexible rules to facilitate decision-making in areas of non-exclusive EU competence for a Union of 20-odd members. Negotiations, however, proved difficult: their main result, apart from some minor and mostly

[5] See, in general, J Howorth, *Security and defence policy in the European Union,* Palgrave Macmillan, London, 2014.

symbolic softening of the unanimity rule in the Common Foreign and Security Policy (CFSP), was the insertion in the Amsterdam Treaty of the so-called 'constructive abstention' clause (ex art.23, now art. 31 TEU). This allowed a limited number of Member States to 'qualify' their abstention on a given decision without blocking it, but also without bearing the costs it would entail: it was generally intended to facilitate decisions on crisis management operations and missions that could prove problematic for the non-aligned countries. In essence, it was an enabling provision, open to all Member States, for opting out of specific decisions rather than entire policy areas (as is the case with 'opt-outs' proper).

Interestingly, however, since 1999 art.31 TEU has been used only once, on the occasion of the launch of the EULEX Kosovo civilian mission in 2008, when Cyprus abstained. This seems to underline the Member States' ultimate preference for consensual deliberations on both foreign and security and defence policy matters. This point is also vindicated by the fact that the so-called '*passerelle*' mechanism now enshrined in art. 48.7 TEU (foreseen also explicitly for CFSP in art.31.3 TEU), which allows the Member States to shift (unanimously) to qualified majority voting (QMV) – has never been used as yet, despite recurrent calls e.g. by Commission President Jean-Claude Juncker (and more recently Ursula von der Leyen) to explore it also in CFSP matters.

2. Enhanced Cooperation: intent, design and context

It was only with the Lisbon Treaty that the rules for what is now known as 'enhanced cooperation' (EnCo) found full articulation. Yet the provision authorising that, now enshrined in art.20 TEU and art.326-334 TFEU, presents a fundamental ambiguity, immediately recognised in the literature.[6]

[6] H Bribosia, 'Les Cooperations Renforcees, in G Amato, H Bribosia and B De Witte (eds), *Genèse et destinée de la Constitution européenne*, Bruylant, Brussels, 2007.

On the one hand, in fact, the opportunity to resort to enhanced cooperation has an integrationist rationale[7] and is designed in such a way as to reinforce that objective. Indeed, since its first insertion in the Amsterdam Treaty, it was meant to be a tool of inclusion and integration, as opposed to one of exclusion and disruption.[8] That rationale is confirmed by the current stipulation (art.20.1) that EnCo "shall aim to further the objectives of the Union, protect its interests and reinforce its integration process", and that it is to be used only as "a last resort": a requirement – as the European Court of Justice (ECJ) has held – which ought to be interpreted in the light of favouring integration, because "the Union's interests and the process of integration would, quite clearly, not be protected if all fruitless negotiations could lead to one or more instances of enhanced cooperation, to the detriment of the search for a compromise enabling the adoption of legislation for the Union as a whole".[9] Similarly, the integrationist rationale is displayed in art. 326 TFEU – whereby enhanced cooperation "shall not undermine the internal market or economic, social and territorial cohesion, nor shall it constitute a barrier to or discrimination in trade or competition between Member States" – as well as art.334 TFEU, under which the Council and the Commission shall ensure the consistency of activities undertaken under enhanced cooperation with the policies of the Union.

The EnCo mechanism is available in any policy area, provided it is not a field of EU exclusive competence. It is a generalised and standardised framework, explicitly designed for a sub-set of willing EU members but conditional on preliminary institutional scrutiny (European Commission proposal, European Parliament consent) as to its specific applicability to any given case. As the ECJ has clarified,[10] it encompasses two distinct stages: an initial authorisation, and then one or more implementation measures – each adopted by Council

[7] D Thym, 'Supranational Differentiation and Enhanced Cooperation' in R Schütze and T Tridimas (eds), *Oxford Principles of European Union Law*, Oxford University Press, Oxford, 2018, 847, 848.
[8] G Verhofstadt, 'A Vision for Europe', speech to the European Policy Centre, Brussels, 21 September 2000.
[9] Joined cases C-274/*11 Spain v Council* and C-295/11 *Italy v Council* ECLI:EU:C:2013:240 Para 49.
[10] Case C-209 *UK v Council*. See also C Gerhards and W Wessels, 'Enhancing 'enhanced cooperation': constraints and opportunities of an inflexible flexibility clause, *College of Europe Policy Brief*, 1, 2019.

decision. Each decision, in turn, is to be taken by unanimity of the participating Member States (artt. 329.2 and 330 TFEU): this makes it impossible for the others to block it except through judicial review, i.e. by lodging a case in front of the ECJ. The CFSP, the former 'second' pillar, is also explicitly included in EnCo, albeit with specific modalities (art.331.2 TFEU) which entail a more robust involvement of the HRVP and the Council.

As said, EnCo is meant to be used as an option of last resort, when the Council establishes "that the objectives of such cooperation cannot be attained within a reasonable period by the Union as a whole" (art. 20.2 TEU). It enables at least nine Member States (the threshold was eight in the Nice Treaty, but EU membership was also lower back then) to adopt legislation with scope limited in geographical reach and subject matter: this excludes from obligations (and voting rights) the Member States not participating in it. And it shall be and remain open to other Member States, as participation is on a voluntary basis. Finally, and interestingly, the provisions do not envisage either the suspension of a Member State or the possibility of a withdrawal from enhanced cooperation – somewhat in line with the Eurozone rules, as painfully tested during the 2010-11 crisis.

On the other hand, the EnCo provisions may also chart "a way to block decision-making impasses",[11] thus becoming a pragmatic instrument for the asymmetric realisation of specific objectives and policies of interest to some Member States: for example, as a matter of law, the Council enjoys what appears to be a measure of *political* discretion in determining when the enhanced cooperation constitutes a question of last resort.[12] In other words, it implicitly offers a conditional option to overcome protracted political gridlock.

[11] M Cremona, 'Enhanced Cooperation and the CFSP', *EUI working paper 2009*, 1 https://cadmus.eui.eu/bitstream/handle/1814/13002/LAW_2009_21.pdf?sequence=1&isAllowed=y.

[12] On which see again Joined cases C-274/11 *Spain v Council* and C-295/11 *Italy v Council* para 53: "The Council, in taking that final decision, is best placed to determine whether the Member States have demonstrated any willingness to compromise and are in a position to put forward proposals capable of leading to the adoption of legislation for the Union as a whole in the foreseeable future", and AG opinion paras 108-111.

EnCo can thus be considered another form of differentiated integration in practice, in the absence of any treaty-based definition of that. Other cases in point, however, are *pre-defined* in application and scope, not general: apart from and beyond EMU, some type of differentiated integration already takes place, for instance, in the Area of Freedom, Security and Justice (AFSJ, the former 'third' pillar), where some obligations have limited geographical scope due to the constitutional opt-outs of Ireland and Denmark (and the UK, as long as it was a Member State). The incorporation of the Schengen Protocol into the *acquis communautaire* at Amsterdam sealed the differentiation between the UK and Ireland, on the one hand, and the rest of the Member States on the other, thus constituting *de facto* a "specific form of enhanced cooperation" –[13] albeit initiated on a voluntary basis *outside* the treaty framework, and whose authorisation by the Council is not needed because it is contained in the protocol itself.

It may also be worth mentioning, in this context, the provision enshrined in art.350 TFEU, which authorises the existence or completion of regional unions between Belgium and Luxembourg, or between those countries and the Netherlands. It is in fact another instance in which EU constitutional law allows a form of geographically limited integration – in this case, with pre-identified participants. And the Court of Justice of the EU has been keen to recognise that the Benelux court, while *sui generis*, is part of the EU judicial system.[14]

3. Enhanced Cooperation in practice

This section illustrates the way in which the EnCo provisions have been authorised and implemented so far.[15] The cases in point span across several domains, including areas as diverse as justice and home affairs, intellectual property, and taxation.

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[13] D Thym (fn 7), 860-861.
[14] Case C-337/95 *Parfums Christian Dior* EU:C:1997517 para 21; Case C-248/16 *Achmea* ECLI:EU:C:2018:158 para 48.
[15] For a first detailed narrative of the practical implementation of enhanced cooperation, see D Kroll, D Leuffen, 'Enhanced cooperation in practice. An analysis of differentiated integration in EU secondary law', *Journal of European Public Policy,* 2015, 22,3, 353.

3.1. International divorce law (IDL)

Following a 2010 Commission proposal to harmonise the conflict of legal rules on international divorces (those in which spouses had different nationalities, lived apart in different countries or not in their home nations), divergences over Member States' national law understanding of divorce became apparent. The divergence is usually explained through the tension in the substantive law regulating divorce between those Member States which take a more liberal approach as to the lawful causes for divorce (such as Sweden) and those who are more conservative (such as Malta) as well as in procedural law.

The *impasse* was due to both economic considerations (uncertainty over the applicable law could result in delayed proceedings) and the subject matter of the regulation itself, which related closely to the national identity of some Member States. After two years of inconclusive negotiations, the Council authorised originally 14 Member States[16] to adopt a Regulation on the law applicable to divorce and legal separation.[17] The objective of the enhanced cooperation consisted in ensuring "adequate solutions" in terms of legal certainty and flexibility for citizens.[18]

3.2. Unitary Patent system (UPS)

In 2007, the Commission proposed a system to make the patent system in Europe less costly and more competitive internationally. Until then, it had been based on the European Patent Office, a system requiring European patents to be validated – with differing procedures and fees – in the countries in which the patents should apply. The Lisbon Treaty provided a new legal basis in art.118 TFEU, but no compromise could be reached on the Commission

[16] Decision 2010/405/EU ([2010] OJ L189/12).
[17] *Council Regulation (EU) No. 1259/2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation*, L 343/10, 20 December 2010.
[18] Kroll, Leuffen (fn 15) 359.

proposal for the official language regime – with Italy and Spain opposing the choice of only English, French or German.

In 2011 25 Member States voted in the Council to obtain the authorisation of establishing an enhanced cooperation. Italy and Spain opposed it because they felt that the condition whereby EnCo has to be a measure of 'last resort' was not met. The case was litigated before the European Court of Justice, which took the view that the measure was in fact one of last resort because the Council had carefully and impartially examined whether Member States had demonstrated willingness to compromise in the foreseeable future, and that adequate reasons had been given for the conclusion.[19]

In the end, Italy decided to join in 2015, leaving only Spain and (for other reasons) Croatia out of the new system; with the UK departing in the wake of Brexit, the new UPS will enter into force as soon as all the related legal arrangements are ratified.

3.3. Financial Transaction Tax (FTT)

In 2011, the Commission tried to introduce indirect taxation to contribute to the harmonisation of the financial sector, which at the time showed significant divergence between Member States and was indeed at the heart of the crisis then affecting the EU.[20] Differences in the tax system of the Member States were perceived to be inefficient and potentially distorting competition. However, given the lack of consensus in the Council, the Commission eventually backed the choice of 11 Member States to go ahead with an enhanced cooperation.

The Commission did not hide the difficulties in reaching consensus. On the occasion, it displayed instead a "willingness to talk openly about other mechanisms for achieving its

[19] Joined cases C-274/11 *Spain v Council* and C-295/11 *Italy v Council*.
[20] As recalled in the explanatory memorandum to the Proposal for a Council Directive implementing enhanced cooperation in the area of financial transaction tax COM(2013)071 final.

objectives, given the difficulties of securing agreement in the Council. The Commission considered in detail a range of options, including greater use of art. 258 TFEU, resort to soft law, and use of the enhanced cooperation procedure".[21]

The *impasse* was due to countries – such as the UK and the Czech Republic – opposing the tax as they voiced concerns about its effectiveness. In particular, while there was unanimity over the benefits of a Financial Transaction Tax (FTT) at global level (the so-called 'Tobin tax'), there was no consensus about the merits of instating one in the sole EU.[22]

Finally, in January 2013, the Council authorized 10 Member States to agree upon a Directive on the FTT, on a proposal formulated by Germany, Austria, and Belgium.[23] For the remaining Member States (i.e. those who did not agree to participate in the adoption of the Directive), the negotiations are still ongoing. The UK challenged the Council decision authorising EnCo, i.a. on the grounds that it affected negatively non-participating Member States (which is prohibited by art.327 TFEU). The European Court of Justice held, in essence, that the question raised by London was not yet "ripe" for decision: with a somewhat formalistic approach, it found that the measure challenged by the UK simply authorised enhanced cooperation and did not contain, in and of itself, measures on taxation liable to adversely affect the UK's rights.[24]

The initial outcome of the enhanced cooperation was then to authorise the introduction of a FTT only in the participating Member States and to strengthen their anti-tax avoidance rules. However, the ensuing Directive for an EU FTT drafted by the Commission has stalled –

[21] P Craig and G de Burca, *EU Law: Texts, cases, materials*, Oxford University Press, Oxford, 2011, 631.
[22] Kroll, Leuffen (fn 15) 362.
[23] Council Decision 2013/52/EU of 22 January 2013 authorising enhanced cooperation in the area of financial transaction tax (OJ 2013 L 22, p. 11. The other participants are France, Greece, Italy, Portugal Slovakia, Slovenia and Spain (all Eurozone members).
[24] Case C-209/13 *UK v Council* para 36.

at least until 2019, when France and Germany came up with a new proposal which is still under negotiation – thus preventing the FTT from being adopted and the EnCo from being properly implemented.

3.4. Property regimes of international couples (PRIC)

In March 2011 the Commission adopted two proposals for regulations dealing with the property regimes of international couples (married and registered partnerships). Since no unanimity could be reached in the Council, also due to opposition from Poland and Hungary,[25] in December 2015 17 Member States requested the approval of an enhanced cooperation, which the Council granted.[26] As a result, two regulations were adopted in June 2016.[27] Similarly to the rules on international divorces, the Regulation on property regimes for international couples contains rules on conflict of laws meant to improve legal certainty for issues of applicable law, national court's jurisdiction, and recognition of decisions.

In this case, too, the Member States displayed strong and ultimately irreconcilable preferences around the subject matter of marriage, considered to be linked to a country's national identity. As a result, for instance, Poland and Hungary insisted on making public their opposition to the original regulations which included also partnerships outside marriage as well as same-sex partnerships.

3.5. European Public Prosecutor Office (EPPO)

[25] I Viarengo and P Franzina, 'General Introduction' in id (eds), *The EU Regulations on the Property Regimes of International Couples: A Commentary*, Elgar, 2020, 0.21.
[26] 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
[27] 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 regime and 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.

In July 2013, the Commission adopted a proposal for a Council Regulation on the establishment of a European Public Prosecutor Office (EPPO).[28] This was a long-standing issue, whose inclusion in the EU treaties had already been discussed at Nice but eventually rejected: the core idea behind it is to enable an EU institution, agency or body to bring alleged perpetrators of financial crimes to court(s). The Lisbon Treaty provides a legal basis for the establishment of the EPPO, and the Commission tabled a proposal envisaging a centralised system, with an independent EPPO which would have enjoyed competence to direct, coordinate, and supervise criminal investigations and to prosecute suspects in national courts.[29]

The impasse in this case was due to concerns about the principles of subsidiarity and proportionality: in other words, first several national parliaments, and then some Member States (Sweden, Poland, Hungary) voiced scepticism as to the need for an EU body to carry out the prosecution of financial crimes. Yet the effectiveness and relevance of EPPO was contested also *a priori* at political level,[30] and despite major structural changes under the Greek and Italian Council Presidencies in 2014 (such as the removal of the principle of exclusive competence),[31] no unanimity could be found.

After years of negotiations, in the spring of 2017 16 Member States decided to establish an enhanced cooperation. This was possible according to art.86.1 TFEU, which deems the authorisation for enhanced cooperation to be granted if there is no agreement in the Council, unanimity cannot be found in the European Council either, but at least nine Member States still desire to proceed. EPPO was finally implemented on such *ad hoc* legal basis in the autumn of

[28] COM (2013) 534 final.
[29] Kroll, Leuffen (fn 15), 365. See also F De Angelis, 'The European Public Prosecutor's Office (EPPO) – Past, Present, and Future', 2019, 4 *Eucrim* 272.
[30] A Brenninkmeijer, 'The European Public Prosecutor's Office: A Chronicle of a Failure Foreseen' in W Geelhoed and LH Erkelens (eds), *Shifting Perspectives on the European Public Prosecutor's Office*, Springer, New York, 2017.
[31] A Martinez Santos, 'The Status of Independence of the European Public Prosecutor's Office and Its Guarantees', in L Bachmeaier Winter, *The European Public Prosecutor's Office: The Challenges Ahead*, Springer, New York, 2018, 4.

2017 with the initial participation of 20 Member States.[32] It set up a system of shared competence between the EPPO and national authorities in combating crimes affecting the financial interests of the Union: the resulting system is a two-tier one (EU and national levels), as opposed to the centralised model originally proposed by the Commission. Albeit officially established, EPPO will only start its activity when authorised to do so by the Commission – something which, under the terms of the instrument implementing EPPO, can only take place three years after its establishment, i.e. in late 2020.

3.6 Preliminary assessment

To sum up, the five instances in which EnCo has been authorised so far[33] seem to indicate that the instrument enshrined in art.20 TEU (and related TFEU articles) has been mostly used as a vehicle to overcome political stalemate in the Council and circumvent the unanimity rule on very specific policy or legal issues. This outcome might be considered an unintended consequence of the original integrationist rationale of enhanced cooperation but not of its actual legal design, which enshrined this possibility as a sort of secondary effect. In the case of the UPS (and in part the FTT), such practice has been legitimised by the European Court of Justice. In the case of the FTT itself, however, the differences among the Member States (reflected also in the comparatively low number of participating countries) and the underlying political and legal issues that resorting to EnCo was meant to circumvent are still hampering its expected implementation.

[32] Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office.

[33] There is no case on record of rejection, either in the preliminary stage or at Council level. During the 2015 migrant crisis, a proposal was put forward to consider using EnCo with reference to the Commission's plan for a mandatory quota for the relocation of refugees in order to overcome the deadlock. The Council adopted the plan with a rare QMV procedure in September 2015, but ever since very little progress has been made in terms of practical implementation. See V Kreilinger, 'A proposal to use Enhanced Cooperation in the refugee crisis', Jacques Delors Institut, Berlin, September 2015.

Just like EMU and the Eurozone, EnCo has also proved to be fairly open and inclusive: not only have initially non-participating Member States often joined the scheme at a later stage – including Italy for the UPS – but also the overall number of participating countries ranges between 17 (IDL) and 26 (UPS, as long as the UK was in the EU): quite high, especially considering the already existing 'opt-outs' in some of those areas. In other words, EnCo does not seem to have generated any 'hard core' of Member States, as more than half of them participate in all four cases currently in force. However, unlike EMU, the actual implementation of EnCo does not seem to have boosted much deeper integration among its participating countries, nor to have generated much added value even in the specific domains it has been activated in.

Finally, EnCo has never been considered for CSFP matters, at least to date. This may be due in part to the strict conditions for its activation and in part, probably, for the apparent preference of Member States for consensual decisions in foreign policy. Yet it is also genuinely problematic to conceive of any conventional CFSP activity that would justify (and benefit from) the use of the EnCo mechanism: in fact, in this domain 'differentiation' occurs in the relations and partnerships that the EU *as a whole* formally establishes with its neighbours and partners across the world – individually or as regional blocs – so that there seems to be little scope for *internal* differentiation.[34]

4. PeSCo: intent, design and context

As compared to other major policy domains, defence presents a number of peculiarities when it comes to cross-national cooperation and integration at EU level. On the one hand, since it was first properly included in the treaties at Maastricht (1993), it has enjoyed a sort of special

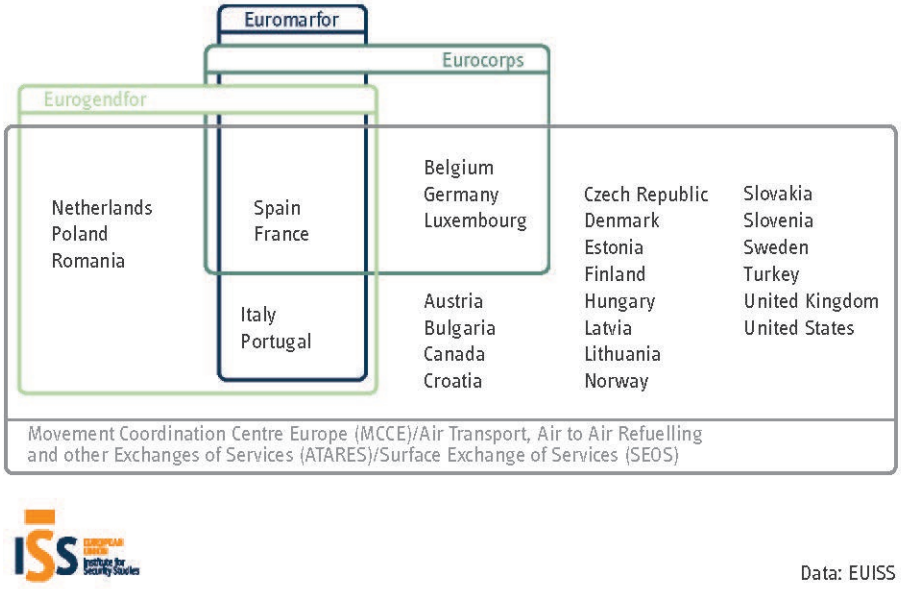
[34] See for instance S Gstöhl, 'Models of external differentiation in the EU's neighbourhood: an expanding economic community?', 2015, *Journal of European Public Policy*, 22, 6, 854-870.

status: for instance, "matters having military or defence implications" have always been singled out in terms of legal competencies and decision-making procedures. Not only has unanimity always been the rule (even 'constructive abstention' is considered equivalent to consensus), but neither the European Commission nor the European Parliament have ever played a role therein comparable even to the one they can now play in CFSP matters. The European Court of Justice has virtually no jurisdiction, and even the rules of the single market are not automatically applicable to defence markets (ex art.296 TEC, now art.346 TFEU), although since 2009 the Commission has acquired (and used) some legal competencies regarding public defence procurement procedures.[35]

On the other hand, defence cooperation between EU members (and beyond) has always occurred in relatively small groups, be it in operational terms – so-called 'coalitions of the willing', sub-regional formations, multi-national force structures [**Figure 3**], the Western European Union itself –[36] or on industrial programmes for capability development (all unthinkable without strong governmental support). In other words, while 'integration' *stricto sensu* is not really the name of the game, 'differentiation' (and arguably even fragmentation) is quite typical in the defence domain, even without considering NATO obligations.[37]

[35] For an overview of the evolution and state of play see L Beraud-Sudreau, 'Europe's defence industry after 20 years', in D Fiott (ed.), *The CSDP in 2020: The EU's legacy and ambition in security and defence*, EUISS, Paris, 2020, 59-73.
[36] A Deighton (ed.), *Western European Union 1954-1997: defence, security, integration*, EIRU, Oxford, 1997.
[37] Jolyon Howorth has defined this as 'negative differentiation', i.e. "a *status quo* that poses severe obstacles to integration" rather than facilitating it ('positive differentiation'). See J Howorth, 'Differentiation in security and defence policy', 2019, *Comparative European Politics*, 17, 261-277.

Figure 3: European military groupings



Data: EUISS

Bilateral or regional agreements mean that different Member States have different commitments. Foreign but especially security and defence policies are so prone to being carried out through agreements between Member States – often outside the EU framework –[38] that even the Lisbon Treaty has subjected this field to special rules and procedures (art. 24 TEU). Furthermore, an additional measure of differentiation is built into what the treaty rebranded as Common Security and Defence Policy (CSDP, formerly ESDP), including an *ad hoc* section under Title V.2; and Denmark has a permanent opt-out on "decisions and actions of the Union which have defence implications". [39]

[38] On the relevant debates of the 1990s and the role of 10-member WEU as a separate organization the EU could, according to the Amsterdam Treaty (art.J.7), "avail itself of", see A Missiroli, 'CFSP, defence and flexibility', 2000, WEU ISS, Chaillot Paper No 38. The WEU was put under the responsibility of HR Javier Solana in 1999, its crisis management mandate directly transferred to the EU (ex art.17, now art.42.1 TEU), and finally dissolved after the entry into force of the Lisbon Treaty, in 2011. See A Bailes, G Messervy-Whiting, 'Death of an institution: the end for WEU, a future for European defence?', 2011, Egmont Paper 46,.

[39] Art.5 of Protocol 22 annexed to the Lisbon Treaty; see also G Butler, 'The European Defence Union and Denmark's Defence Opt-Out: A Legal Appraisal', 2020, *European Foreign Affairs Review*, 1, 117. It is important to highlight, however, that Denmark a) participates in the civilian dimension of CSDP, and b) has traditionally been very active militarily outside of the EU framework, both within NATO and as part of 'coalitions of the willing': it was i.a. involved as a belligerent party (alongside the US and the UK) in Operation Enduring Freedom in Afghanistan, in 2001.

Before Lisbon, however, close(r) or enhanced cooperation between selected Member States in this domain – although a fact of life and a widespread practice – was not envisaged in and by the treaties, further highlighting its distinctive predicament. And while art.20 TEU covers in principle any policy area of non-exclusive EU competence (including CFSP), the original and shared understanding among the negotiators was that it would not be applied to "matters having military or defence implications". To further underline that, the conditions set in art.333.3 TFEU regarding the '*passerelle*' clause are even more restrictive than for CFSP.

Within CSDP proper, in fact, the treaty (art.42 TEU) offered a number of additional options for differentiation, including the possibility of conferring a task to "a group of Member States which are willing and have the necessary capability" (art.44); the establishment of a dedicated agency for capability development – the European Defence Agency (EDA) – "open to all Member States wishing to be part of it" (art.45); and, most significantly, the creation of a dedicated format for enhanced cooperation in defence, eventually defined (art.46) as Permanent Structured Cooperation (PeSCo).

The making of art.46 (and attached Protocol 10) showed a significant shift from the original intent – as formulated especially in the proceedings of the Convention on the Future of Europe (2002-03), where such "structured cooperation" was meant to be based on operationally ambitious and partly quantified criteria and aimed at establishing a true *avant-garde* acting as a 'pioneer group' – towards a much more flexible template. Accordingly, participation in PeSCo is now based on capability commitments related to multinational forces, "the main European equipment programmes" and the activity of the EDA: commitments, in other words, rather than quantified targets or strict criteria. This shift was mostly due to the concerns expressed by a number of (both old and new) Member States as to the potentially exclusive and divisive nature of the original blueprint. In the end, no minimum threshold of participants was required either, and interested Member States would simply notify their

intention to the Council, with no legal scrutiny over its scope or necessity and no precondition about it being a measure of 'last resort'. The only major innovation therein involved decision-making, as all deliberations related to the establishment of PeSCo as well as the admission of new or suspension of current participating countries would be made by qualified majority – an absolute *premiere* in defence-related matters.[40]

Despite its comparatively 'softer' design, however, PeSCo would not be seriously considered for activation long after the entry into force of the Lisbon Treaty: it even came to be labelled as 'the sleeping beauty of European defence' (a nickname once used for the WEU). Just like EnCo, in fact, PeSCo was a purely enabling provision that entailed no legal obligation or pre-defined time frame for the Member States to activate it.[41] Unlike EnCo, however, no opportunity or necessity seemed to arise to test its feasibility and utility. Early proposals for its establishment – such as the one tabled by the trio presidency of Belgium, Hungary, and Poland (June 2010), or the joint Italian-Spanish letter to HRVP Catherine Ashton asking for a debate in the Foreign Affairs Council (May 2011) – failed to generate momentum, with the Union as a whole was then entirely absorbed by the financial and Eurozone crises, and the diplomatic and security communities busy with the establishment of the European External Action Service (EEAS) and the onset and fallout of the so-called 'Arab Spring'. A change of government in the UK, in 2010, also put a brake on CSDP ambitions at large. And while the EDA was actually already in place since 2004 (with all Member States on board bar Denmark), art.45 TEU also remained dormant – if anything, because selective and voluntary participation in the execution of tasks was already common practice in CSDP missions and operations. Even when the first

[40] D Fiott, A Missiroli and T Tardy, 'Permanent structured cooperation: What's in a name?', 2017, EUISS, Chaillot Paper No. 142.

[41] The only potential deadline was set in the attached Protocol 10 (art.1.b) whereby eligible Member States were required "to have the capacity to supply by 2010 at the latest, either at national level or as a component of multinational force groups, targeted combat units for the missions planned, structured at a tactical level as a battle group, with support elements including transport and logistics [..]". Yet this requirement – set in 2007 at Lisbon, when the treaty was expected to enter into force quickly (and not, as it did eventually, in December 2009) – was already part the battlegroup 'package' and was not, anyway, a deadline for *activating* PeSCo.

ever discussion on 'defence matters' at European Council level eventually took place, in December 2013, PeSCo was not mentioned.

It was only after the shock of the Brexit referendum (23 June 2016), immediately followed by the release of the EU Global Strategy (EUGS) by HRVP Federica Mogherini, that some Member States saw not only the opportunity but also the necessity to relaunch the EU's role in this domain. The EUGS underlined the need for "*an appropriate level* of ambition and strategic autonomy" [italics added] and called the Member States "to move towards defence cooperation as the norm". It also stated that "*enhanced cooperation* between Member States in this domain should be explored. If successful and repeated over time, this might lead to a more *structured* form of cooperation, making full use of the Lisbon Treaty's potential" [italics added].[42] The language was still cautious, as the text was discussed with the EU-28 before the Brexit referendum, but the encouragement was evident. And with the expected departure of the UK – a proactive CSDP player between 1999 and 2009, a more reluctant one thereafter, but constantly sceptical of big leaps forward in institutional terms – the initiative was taken by France and Germany, who produced a first joint (non-)paper on PeSCo already in July 2016.

The paper represented a compromise between their respective approaches (the French being more ambitious and exclusive than the German one) but eventually proved quite open and inclusive – to the extent that it gathered wide support among virtually all other Member States. In late 2016, in the context of "implementing" the EUGS, the European Council mandated the HRVP to work on elements and options for an "ambitious and inclusive" PeSCo based on a "modular" approach, and in January 2017 the EEAS circulated a Food for Thought paper along these lines. For its part, in March 2017, the European Commission published a White Paper on the Future of Europe in which one of the scenarios identified ("those who want

[42] "Shared Vision, Common Action: A Stronger Europe – A Global Strategy for the European Union's Foreign and Security Policy", Brussels, 25 June 2016. On the making of the EUGS see N Tocci, *Framing the EU Global Strategy: A stronger Europe in a fragile world*, Palgrave-Macmillan, London, 2017.

more do more') envisaged new cooperation projects by willing Member States, i.a. in the domain of defence.[43] This was also the first official EU document explicitly acknowledging and identifying differentiated integration as a possible option.

In the meantime, the surprising election of Donald Trump to the White House – on a platform that cast some doubts on future US commitment to NATO – probably contributed to pushing some initially hesitant countries (e.g. Poland) to join PeSCo. Following additional preparatory work by the EEAS and the EDA and political endorsement by the European Council, therefore, in November 2017 23 Member States – on the basis of a proposal formulated by France, Germany, Italy and Spain – signed the common notification to participate. PeSCo was then officially established by 25 Member States – "whose military capabilities fulfil higher criteria [..] and which have made commitments to one another in this area [..] with a view to the most demanding missions" – through a Council Decision on 12 December 2017.[44] Only Denmark (opt-out), the UK (Brexit) and Malta (but open to joining later on) stayed out, but without opposing it. Paradoxically, the originally intended 'pioneer group' for EU defence ended up including almost all eligible Member States and being effectively supported by all – with no actual need for QMV.

The preparatory phase of the Council Decision and its immediate aftermath witnessed also a remarkable growth of policy-oriented publications devoted to PeSCo by European think tanks. Almost all highlighted the need for an ambitious approach to its implementation while often acknowledging also that its original design left the door open for different options and required continued engagement by both the Member States and the EU institutions.[45]

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[43] European Commission, 'White Paper on the Future of Europe: Reflections and Scenarios for the EU-27 by 2025', Brussels, 2017.

[44] Council Decision (CFSP) 2017/2315, establishing permanent structured cooperation (PESCO) and determining the list of participating Member States' (OJ L331/57). Portugal and Ireland joined the others on 7 December, after a supplement of consultation with their national parliaments. Ireland is a notable case in point as the country had previously struggled to ratify the Lisbon Treaty (two referenda were needed), i.a. due to its new provisions on defence.

[45] See for instance F Mauro, 'PESCO – European defence's last frontier', 2017, GRIP Report, 1; C Major, O de France and P Sartori, 'How to make PeSCo a success', 2017, IRIS, ARES Policy Paper 21; E Fabry, N Koenig

5. Permanent Structured Cooperation in practice

The relative speed at which PeSCo was launched in 2016/17 was clearly determined by the need and the will to react to a number of critical events and developments – both internal and external – showing also a concerted and convergent approach by all EU institutions and bodies.

The European Parliament started openly advocating a "European Defence Union" (EDU), a concept and terminology soon embraced by the Commission (but not the Council). In June 2017, as part of its newly minted European Defence Action Plan, the Commission launched the European Defence Fund (EDF), due to start in 2021 and to include a funding window for defence research and one for development and acquisition proper; in the shorter term, the Commission also set up a European Defence Industrial Development Programme (EDIDP) to support some specific projects in this domain, with an endowment of half a billion EUR for the period 2019-20, in addition to the 90 million already earmarked for 2017-19 in the framework of the Preparatory Action on Defence Research (PADR). For the first time, in other words, the Commission was taking over an active role also on the *demand* side of defence markets. Later on, it even set up a dedicated Directorate-General for Defence Industry and Space (DEFIS).

Still in June 2017, the EEAS got the green light to formally establish its first autonomous military headquarters (Military Planning and Conduct Capability), albeit initially limited to 'non-executive' missions, while the Council endorsed the modalities to put in place

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and T Pellerin-Carlin, "Renforcer l'Europe de la defense grace a la PeSCo: qui se met a table? Et quel est le menu?', Notre Europe/Institut Jacques Delors, Paris, Tribune, 20 octobre 2017; LM Wolfstaedter and V Kreilinger, 'European integration via flexibility tools : the cases of EPPO and PESCO', Jacques Delors Institut, Berlin, Policy Paper 209, 29 November 2017; M Drient, E Wilms and D Zandee, 'Making sense of European Defence', December 2017, Clingendael Report,; R Kempin, B Kunz, 'France, Germany and the Quest for Strategic Autonomy', December 2017, Notes du Cerfa 141, IFRI-SWP; S Biscop, 'European defence: Give PESCO a chance', 2018, Survival,60, 3, 161-180; S Blockmans, 'The EU modular approach to defence integration: An inclusive, ambitious and legally binding PeSCo?', 2018, *Common Market Law Review*, 55, 1785-1826. The European Parliament also published valuable briefing materials, such as F Mauro and F Santopinto, 'Permanent Structured Cooperation; national perspectives and state of play', DG External Policies/SEDE, 2017, and E Lazarou and AM Friede, 'Permanent Structured Cooperation (PESCO): Beyond establishment,' EPRS Briefing, March 2018.

a Coordinated Annual Review on Defence (CARD), intended to better coordinate defence planning and capability development among the Member States. Even EU-NATO cooperation gained significant momentum, starting with the Joint Declaration of July 2016 in Warsaw and the indication of seven concrete areas for further cooperation: on that basis, a common set of proposals identified more than 70 specific actions whose practical implementation has been constantly monitored since.

In fact, PeSCo was definitely *not* the only game in town, and other initiatives were gaining traction also outside the EU, potentially in competition with the logic (and the commitments) of PeSCo. In September 2017, in a major speech on Europe delivered at the Sorbonne, France's President Emmanuel Macron launched the so-called European Intervention Initiative (EII or EI2), designed to create by 2020 "a common intervention force, a common defence budget and a common doctrine for action". The following June nine European countries (including the UK and Denmark) signed a letter of intent, which did not set any criteria or conditions for joining, and assigned a coordinating role to the French Defence Ministry. Macron's initiative, tangibly more exclusive and arguably conceived to keep the UK engaged in an operational European defence framework despite Brexit, was not part of either a NATO or an EU construct and has not yet generated any significant action – although five more countries have joined.[46]

Within NATO, in the meantime, the Framework Nations Concept (FNC), launched by Germany in 2014 building on an already long-established military practice, had made headway, prompting the creation of three multi-national divisions led, respectively, by Germany, the UK

[46] See C Major and C Moelling, 'France moves from EU defense to European defense', 7 December 2017, Strategic Europe, Carnegie Europe. The nine EI2 'founding' members were – alongside France – Belgium, Denmark, Estonia, Germany, the Netherlands, Portugal, Spain and the UK. Finland joined in late 2018, while Romania, non-EU Norway, Sweden and Italy (after a change of government) followed in 2019.

and Italy.[47] And NATO's Enhanced Forward Presence in the Baltic states and Poland – deployed since 2016 to deter Russian activities in the region – was based on the same approach applied to battlegroup formations.

Yet PeSCo was arguably "the central cog in the EU's new defence machinery".[48] A list of "more binding common commitments" – albeit without any quantitative criteria[49] or specific functional requirements – to be fulfilled by the participating Member States (pMS) was attached to the initial Decision and consisted, in essence, of a call for specific projects to be approved by the Council (in PeSCo format) for future implementation. Such projects would be funded "primarily by the participating Member States that take part in an individual project", but the possibility of "contributions from the general budget of the Union" was not ruled out.[50]

A subsequent Council Decision (2018/909), in June 2018, laid out the governance of PeSCo projects – put under the joint supervision of the HRVP, the EEAS (including the EU Military Staff) and the EDA (with a key screening and coordinating role), which together constitute the PeSCo 'Secretariat' – and additional rules for their management and implementation, beyond the provisions already enshrined in the treaty (art.7.1 included also the possibility to invite the Commission "to be involved, as appropriate, in the proceedings" of a given project). The full implementation of PeSCo would encompass two distinct phases, namely 2018-20 and 2021-25, taking somewhat into account also the EU institutional and budgetary cycles.

[47] D Ruiz Palmer, 'The framework nations' concept and NATO: game-changer for a new strategic era or missed opportunity?', July 2016, NATO Defence College Research Paper 13. NATO in fact subsumed the UK so-called Joint Expeditionary Force (JEF), launched already in 2012, that brought together Denmark, the Netherlands, Norway and the Baltic states (Sweden would join in 2018).
[48] Blockmans (fn 46), 1787.
[49] At NATO's Wales summit, in September 2014, the 22 EU members that were also NATO allies pledged to increase national defence spending to 2% of their GDP by 2024 and to earmark 20% of that sum for investment in major equipment, including R&D.
[50] Council Decision (CFSP) 2017/2315, 11 December 2017, establishing permanent structured cooperation (PESCO) and determining a list of participating Member States.

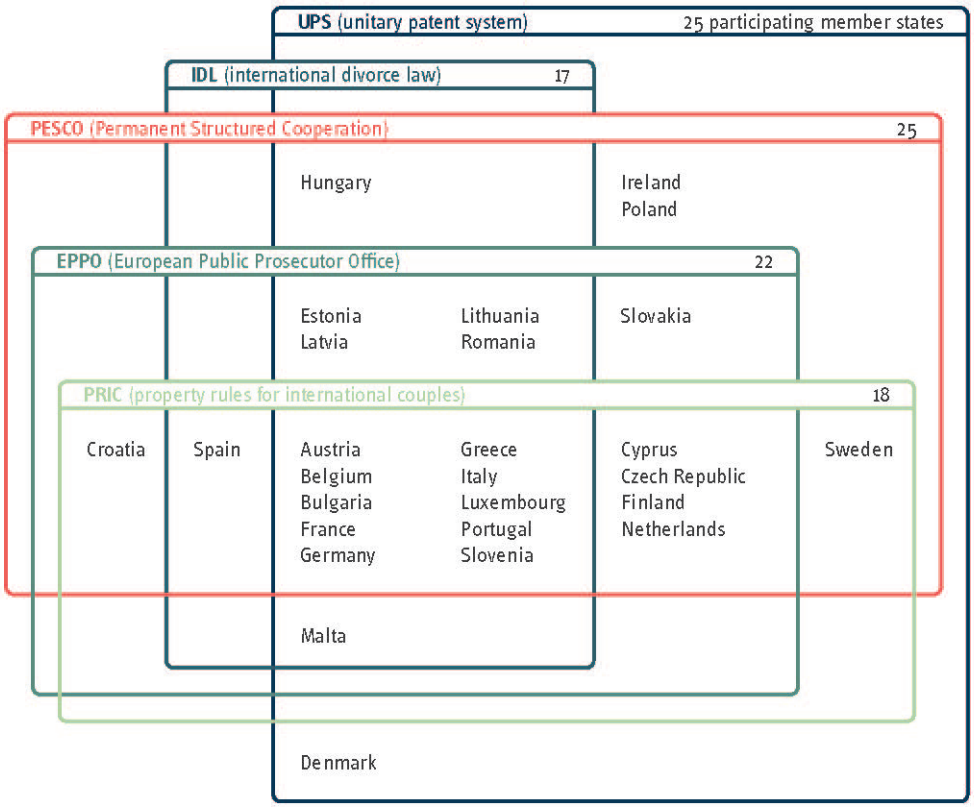
As a result, in this first phase, a total of 47 projects have been approved by the Council – in three batches: March 2018 (17), November 2018 (17), and November 2019 (13). The next call is foreseen to take place in 2021, after a comprehensive PeSCo review due by December 2020. These projects cover such different areas as training, capability development and operational readiness, and such diverse domains as air, land, maritime, cyber, and joint enablers. By design, each project is carried forward by varying groups of countries and is 'coordinated' by one or more of them. The "project members" may agree among themselves to allow other PeSCo participating Member States to join in or to become "observers". Third countries may take part in individual projects on conditions to be agreed at Council level.

PeSCo clearly appears to be the most inclusive of the mechanisms of differentiated integration tested so far, having involved virtually all *eligible* EU members bar Malta [**Figure 4**]. To date, however, none of the 25 pMS has taken part in *all* 47 PeSCo projects, nor does any of the projects have *all* 25 on board.[51] Membership varies from a minimum of two countries (for 10 projects) to a maximum of 24 (all bar Ireland) for the possibly most significant PeSCo initiative, namely Military Mobility [see below]. The average number of project participants also seems to decrease from the first to the third batch and, interestingly, only five out of the 47 projects, when launched, had a membership equal to or greater than nine (i.e. the threshold for activating EnCo). Finally, in terms of individual countries, France is the one with the highest rate of participation (in 30 projects, 10 of which as coordinator), followed by Italy, Spain and, at some distance, Germany and Greece; Central European (especially Poland and the Baltics) and Nordic countries (Finland and Sweden) are much less frequently involved. While it is partial and indeed premature to draw conclusions from such purely quantitative indicators, they may still give a sense of national preferences and inclinations vis-à-vis deeper

[51] A complete and detailed list of the 47 PeSCo projects can be found at https://pesco.europa.eu

cooperation on defence within the EU framework, especially in the absence of assured tangible financial incentives.

Figure 4: Membership of EnCo and PESCO (2020)



Data: own elaboration

It has also been observed that some of the initial projects submitted to PeSCo were already ongoing initiatives rather than new ones, and that some of them risked duplicating similar activities already under way, respectively, in the EDA and NATO frameworks. Yet again, the unusual speed at which PeSCo was launched may help explain these difficulties and inconsistencies, along with the desire of Member States to show commitment, play a coordinating role and, arguably, pre-position their projects for possible future EDF funding.

Subsequently, consolidation has clearly set in, driven also by a streamlined selection process, impacting on the overall number, scope and membership of the projects. [52]

Still, it is quite apparent that some projects have a primarily symbolic nature; that a few others do not appear particularly 'permanent' in their scope and may not even materialise; that membership of both PeSCo at large and its individual projects, too, is all but 'permanent', as the provisions allow not only later accession, but also suspension and even withdrawal of participating countries; and that there is still no identifiable common 'structure' among and across the projects. For their part, the "ambitious and more binding" common commitments formulated through the various projects are hardly binding in conventional EU legal terms, as there is no enforcement mechanism built into the PeSCo architecture: in essence, they remain voluntary ones, with incentives for compliance linked primarily to peer pressure and reputational risk, and all liable to the uncertainties of political support, national funding and, in some cases, industrial capacity. Finally, for most of the projects it is entirely conceivable that they could have been launched also outside and independently of the PeSCo framework, raising the issue of the added value PeSCo will bring under the current conditions. It is even arguable that possible future EU co-funding will make or break a number of PeSCo projects.

Any qualitative assessment becomes even more difficult in terms of 'ambition', as the notion can be applied to the degree of integration to be generated as well as to the technological and operational gains to be produced to meet pre-defined goals. Discussions and deliberations in the EU on the military 'level of ambition' have made little progress since 2009 or have been formulated in general and mainly political terms rather operational ones.[53] In both cases, anyway, only time will tell, as it may take many years (possibly even beyond the 2025 horizon) to develop and procure some of the platforms envisaged in the projects, in particular those

[52] See the more detailed analysis by S Blockmans and D Macchiarini Crosson, 'Differentiated integration within PESCO – clusters and convergence in EU defence', 2019,CEPS Research Report 2019/04.
[53] See D Barrie, B Barry, H Boyd, M-L Chagnaud, N Childs, B Giegerich, C Moelling and T Schuetz, 'Protecting Europe: meeting the EU's military level of ambition in the context of Brexit', November 2018, IISS-DGAP.

expected to meet the new capability requirements. And while national funding will remain subject to many political variables, contributions from the EU budget – mainly through the EDF (whose scope, however, is not limited to PeSCo) – are equally volatile at this stage, especially after Covid-19,[54] and at any rate may be envisaged only for some projects.

To sum up, PeSCo has been eventually activated – and partly recast – in 2016/17 in order, first, to demonstrate the Member States' political determination to reenergise CSDP and defence policy at large, while also managing internal diversity (of priorities, capabilities and resources); and, second, to show internal unity at a time when the EU appeared divided over other issues (Eurozone, migration) and potentially even dis-integrating (Brexit).

As such, PeSCo has proved to be extremely open and flexible at the source but also increasingly tight further downstream, with a maximum of inclusion at the macro level and a maximum of differentiation at the micro level, and with a clear prevalence of 'mini-lateral' clusters between like-minded, often neighbouring and similarly (or complementarily) equipped countries. This loose 'hub-and-spoke' construct, including a peculiar three-stage and three-level governance structure (treaty, Council decision(s), individual projects), represents a significant shift from the original intent and design of PeSCo – one which, however, had clearly struggled to be translated into reality.

This has made it possible to channel into a dedicated EU framework and bring under a single big tent a number of diverse old and new initiatives in the field of European defence (though not all), thus potentially reducing fragmentation. It has also offered the opportunity to resort to the EU budget to co-fund some of them. Yet PeSCo still has to prove that it can generate 'positive differentiation': it is working as a process, but its outcomes are a long way off. On the other hand, awareness of the need to streamline and prioritise work on PeSCo

[54] According to the July 2020 European Council agreement on the Multiannual Financial Framework (MFF) for the years 2021-2027, a total of 7 billion EUR is allocated to the EDF, and 1.5 billion to the Military Mobility project. The initial Commission proposal earmarked, respectively, 11.5 and 5.8 billion. See S Besch, 'Europe tests the waters of a stronger defence policy', *Financial Times*, 14 August 2020, 17.

projects is growing: in early May 2019, following the HRVP's first annual report on the status of PeSCo implementation (circulated in March), the Council issued a recommendation that highlighted the need to ensure coherence between PeSCo, CARD, the programmes managed by the Commission (such as EDIDP) and "other EU defence initiatives", as well as between all these and "the respective NATO processes"; it also invited the participating member States to make "significant progress" in various areas "in order to deliver tangible outputs and products". In June, following also a letter sent in late May by the four PeSCo 'founding' members (France, Germany, Italy and Spain), the Council invited the pMS to "make significant progress to further address the more binding commitments".[55]

This said, if there is one project that is likely to become (and be considered) a crucial test of the credibility and effectiveness of PeSCo, it is indeed Military Mobility. Initially conceived within NATO and later branded as 'the Schengen of defence' or 'military Schengen', it is coordinated by the Netherlands and aims at facilitating the cross-border movement of troops, services and goods (e.g. for military exercises) by harmonising rules and procedures (for customs, dangerous goods, trans-European transport networks) between participating countries. As such, it involves both national (sometimes even sub-national) and EU-level administrative competences, requires extra resources (including from the EU budget) for improving infrastructure and facilities, and implies a degree of harmonisation and indeed 'integration' across virtually all Member States (and beyond). The overall impact and added value of PeSCo is likely to be measured against future progress in this field and will have repercussions on EU-NATO cooperation at large – highlighting also the sensitive issue of the involvement of 'third' countries, especially non-EU NATO allies (now including the UK). In

[55] Council Recommendation, CFSP/317, CSDP/193, 6 May 2019; Council Conclusions on security and defence in the context of the EU Global Strategy, CFSP/457, CSDP 285, 17 June 2019. The HRVP Report had apparently outlined some of the commitments the pMS had hitherto failed to achieve, while the so-called PeSCo-4 had asked the Council to update and sharpen the selection process and raise the quality standards of projects; and, for those "not delivering as expected", to "be either revived or terminated".

this respect, the potential political interest in and practical benefit of involving them may clash with existing legal and procedural constraints.[56]

Another flagship project that will constitute a major test for PeSCo, albeit for different reasons, is the so-called Crisis Response Operation Core (CROC). Also part of the first batch of early 2018, CROC is meant to facilitate force generation by contributing to the creation of a "full spectrum force package" for EU crisis management capabilities. Led by Germany, it includes also France, Italy, Spain – i.e. the four main contributors to PeSCo projects – and, interestingly, Cyprus (with Belgium, the Czech Republic, Portugal and Slovenia as observers). CROC is not about setting up a standing force but rather creating a catalogue of military elements (at brigade level plus enablers) for possible future EU operations. And its main challenge will be precisely its evident overlap – and potential competition – with the other analogous initiatives currently underway outside the EU framework, including EI2 and NATO's own force structures.

The forthcoming PeSCo 'strategic review' will have to take into consideration all these elements – and possibly others, too. The COVID-19 pandemic has slowed down both political consultation and administrative work also in this domain. While the military have often contributed to the collective efforts to contain and mitigate the spread of Coronavirus, it is conceivable that political and budgetary priorities shift in the months to come and impact also on defence spending. It is also possible that the next call for PeSCo projects, in 2021, includes capabilities related to stockpiling and delivering vaccines and medical equipment for both civilian and military purposes.

On the other hand, the political drivers that triggered PeSCo in the first place are still there, both inside and outside the EU. Brexit will probably facilitate internal decision-making

[56] At the time of writing (September 2020), a proposal to this effect tabled by the Finnish EU Presidency in late 2019 is still under consideration. Meanwhile, albeit in the separate framework of the EDIDP, four entities from non-EU countries (US, Canada and Japan) have been selected for specific projects.

but will surely also complicate force generation and reduce the Union's global impact and external outreach. The security context the EU's neighbouring regions has become even more unstable and unpredictable – from Libya to Belarus, from the Eastern Mediterranean to the Levant – while Russia and China have become ever more assertive. And the prospect of a US disengagement from the defence of Europe may stimulate (and possibly impose) bolder EU defence efforts.

Conclusions

Over the past 25 years, and especially during the last decade, an evolving political context and a different set of drivers have substantially changed the way in which differentiated integration has been conceptualised, codified and eventually implemented. The original call for a *Kern-Europa*/*noyau dur/avant-garde/groupe pionnier* has given way to a more pragmatic and issue-specific approach to managing diversity. As a result, the Lisbon Treaty provisions explicitly designed to address the possibility of differentiated integration (i.e. EnCo) have thus been mainly used as tools to address political gridlock in the Council and/or to solve specific legal issues – in most cases successfully, but with a limited impact on 'integration' proper, at least so far.

For their part, the relevant Lisbon Treaty provisions devoted to differentiated integration in defence (i.e. PeSCo) have been mainly used to show collective political commitment rather than overcome political gridlock, and to put in place a relatively loose framework for mostly *mini*-lateral cooperation. Their implementation so far has confirmed the special character of defence as a policy area where 'differentiation' is the norm and 'integration' the challenge. Their practical impact can be measured only over time and will depend on a number of variables, some of which fall outside the remit (and control) of the EU as such. Yet it is likely that its flagship project on Military Mobility will constitute the main

benchmark of their success and ultimate added value – for its political and strategic relevance, its essentially *multi*-lateral nature, and the combination of national, international and EU-specific mobilisation (in regulatory and budgetary terms) it requires. In other words, to date both EnCo and PeSCo have been predominantly used to facilitate *tailored* cooperation among large clusters of Member States in specific policy or legal areas.

Finally, by comparing and combining the current EnCo and PeSCo participants [**Figure 4**], it is quite evident that different 'Europes' still overlap, even at this 'deeper' level; but also that a 'core of cores', or at least a centre of gravity of presently 10 Member States is indeed identifiable – nine of which (bar Bulgaria) are also in the Eurozone, eight in the enhanced cooperation on the FTT (bar Bulgaria and Luxembourg), and four were among the original signatories of the Schengen accord – with a strong Western and Southern European footprint.

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