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Enhanced Cooperation in the EU

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Introduction

In the Rome Declaration of 25 March 2017, in the context of the celebration of the 60th anniversary of the Treaty of Rome, the leaders of the twenty-seven Member States and the institutions of the European Union proclaimed that: "*We will act together, at different paces and intensity where necessary, while moving in the same direction, as we have done in the past, in line with the Treaties and keeping the door open to those who want to join later. Our Union is undivided and indivisible*[1]*".*

This statement addresses the tension between unity and asymmetry that has emerged within the legal order of the European Union. The principle of unity of law constitutes a fundamental principle of the European Union, which guides the process of European integration from the outset. Therefrom is, further, derived the principle of uniform application of the law of the European Union, which altogether require that European integration advances uniformly and simultaneously for all Member States without exceptions. It results that unity does not constitute an end in itself, but it has been established for the purposes of promoting European integration.

In a continuously expanding Europe in terms of membership and in terms of scope, it gradually became evident that this principle could not serve the process of integration as effectively as it did between a homogeneous group of Member States. The growing heterogeneity between the Member States of the European Union conflicted with the requirements of unity, which led the integration process to a standstill. To this end, instances of differentiation as pragmatic instruments[2] were introduced in the legal order of the European Union in order to accommodate the emerging diversity.

Gradually, an overall debate arose on the introduction of a general mechanism, which would enable European integration to progress, when it could not under the requirements of unity. This debate resulted in the introduction of *enhanced cooperation* into the legal order of the European Union by the Treaty of Amsterdam as a general institution of EU law for the purposes of balancing the imperatives of widening and deepening of the European Union.

According to Article 20 of the Treaty on the European Union (hereinafter: TEU), enhanced cooperation constitutes a procedure where at least nine Member States of the European Union are enabled to use the institutions of the European Union in order to advance integration amongst them in a policy field covered by the Treaties, when action by the Union as a whole is impossible and provided that certain conditions are met.

The present study is focused on the institution of *enhanced cooperation* and following a binary outline, it will examine *enhanced cooperation* as a form of differentiated integration and as an effective tool for the promotion of European integration. The purpose of the study is to demonstrate that being a form of differentiated integration, enhanced cooperation constitutes an effective tool for the purposes of advancing the integration process by reason of the legal

[1] Council of the EU, "The Rome Declaration" of 25 March 2017, States and Remarks 149/17

[2] Thym D., "Competing models for understanding differentiated integration", 2017 in De Witte B., Ott A. and Vos E. (eds), "Between Flexibility and Disintegration: The Trajectory of Differentiation in EU law, Edward Elgar Publishing, 2017, pp. 28-75

safeguards and guarantees enshrined in the provisions of the Treaties, which frame it so as to not adversely affect the integrity of the legal order of the European Union.

Part One of the present study focuses on enhanced cooperation as a form of differentiated integration, whereby reference is made, firstly, to the emergence of differentiated integration as an exception to unitary integration (Chapter A.1) and to the various instances of differentiation related to EU practice (Chapter A.2), whether they took place within (Chapter A.2.a) or outside (Chapter A.2.b) the institutional framework of the European Union. Secondly, the evolution of enhanced cooperation (Chapter B.1.a) and its current institutional framework (Chapter B.1.b) are analysed as well as its relevance to the area of Common Foreign and Security Policy (B.2) and to the Area of Freedom, Security and Justice (B.3.).

Part two of the present study seeks to demonstrate the effectiveness of enhanced cooperation as a legal tool for the promotion of European integration. In that regard, enhanced cooperation is evaluated in view of the institutional features and guarantees enshrined in its legal framework as provided by the primary law of the European Union (Chapter A) and in view of the authorised instances of enhanced cooperation (Chapter B.1) and of the case-law of the Court of Justice of the European Union (Chapter B.2).

Part One: Enhanced Cooperation as a form of differentiated integration

Chapter A: European integration and the tendency towards flexibility

A.1: The exception to the principle of unitary integration

European integration as a concept finds its origin in the Schuman Declaration of 9 May 1950, which advocated for the creation of "*a united Europe*", where peace and security would be safeguarded for the benefit of the civilization[3]. This endeavor did not constitute an abstract narrative, but corresponded to the financial, social and political needs of the European community following the experience of two World Wars[4]. The underlying political aim was that the creation of a Community of security and economic welfare would prevent the revival of hegemonic tendencies and conflicts. As a result, the European Coal and Steal Community (ECSC) was established, as proposed by the Schuman Declaration[5], marking the beginning of the integration process. European integration means, in principle, economic integration, namely the creation of a common market and the approximation of the economic policies of the Member States in order to achieve the common aim of economic welfare[6]. Nevertheless, the consecutive Treaty reforms started to point towards the aim of general integration by gradually introducing more provisions on policy fields with a non-economic character[7].

In Article 1 (2) TEU, which constitutes the founding provision of the European Union, the principle of integration is enshrined as one of the fundamental constitutional principles of the legal order of the European Union[8]. By virtue of this provision in connection with the first recital of the preamble of the TEU, the aim of creating *"an ever-closer union"* is proclaimed for the promotion of the process of European integration. The imperative of the creation of "*an ever-closer union"* has been present in the Treaties from the outset[9] and entails the requirement for deeper and more strengthened EU structures[10].

As the European Union is a creation of law, European integration should be understood as European legal integration, which is founded upon the principle of unity of law. According to this principle, the process of European integration requires that all Member States be bound by the same rules and obligations, that they have the same rights and that their participation therein be

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[3] Robert Schuman, Declaration of 9 May 1950 in Fondation Robert Schuman, European Issue No. 204, 10th May 2011, available from: https://www.robert-schuman.eu/en/doc/questions-d-europe/qe-204-en.pdf , accessed on 5.11.2021

[4] Στεφάνου Κ., «Ευρωπαϊκή Ολοκλήρωση, Τόμος Α': Γενικά και Θεσμικά Χαρακτηριστικά μετά τη Νίκαια», 6η έκδοση, Εκδόσεις Αντ. Ν. Σάκκουλα 2002, p. 50

[5] "*With this aim in view, the French Government proposes that* […] *Franco-German production of coal and steel as a whole be placed under a common High Authority, within the framework of an organisation open to the participation of the other countries of Europe the establishment of the European Coal and Steal Community*" in Robert Schuman, Declaration of 9 May 1950 in Fondation Robert Schuman, European Issue No. 204, 10th May 2011, available from: https://www.robert-schuman.eu/en/doc/questions-d-europe/qe-204-en.pdf , accessed on 5.11.2021

[6] Στεφάνου Κ., «Ευρωπαϊκή Ολοκλήρωση, Τόμος Α': Γενικά και Θεσμικά Χαρακτηριστικά μετά τη Νίκαια», 6η έκδοση, Εκδόσεις Αντ. Ν. Σάκκουλα 2002, p. 59

[7] "It is notable that under the Treaty of Maastricht the characterization "economic" was erased from the title of the European Economic Community" as in Στεφάνου Κ., «Ευρωπαϊκή Ολοκλήρωση, Τόμος Α': Γενικά και Θεσμικά Χαρακτηριστικά μετά τη Νίκαια», 6η έκδοση, Εκδόσεις Αντ. Ν. Σάκκουλα 2002, p. 61

[8] Πρεβεδούρου Ε., «άρ. 1 ΣΕΕ», 2020, in Σκουρής Β., «Συνθήκη της Λισσαβώνας, Ερμηνεία κατ' άρθρον», Εκδόσεις Σάκκουλα, 2020, p. 4

[9] First recital of the Treaty establishing the European Economic Community: *"DETERMINED to establish the foundations of an ever-closer union among the European peoples"*

[10] Πρεβεδούρου Ε., «άρ. 1 ΣΕΕ», 2020, in Σκουρής Β., «Συνθήκη της Λισσαβώνας, Ερμηνεία κατ' άρθρον», Εκδόσεις Σάκκουλα, 2020, p. 10

simultaneous. The fundamental EU law principles of primacy, direct applicability, direct effect and autonomy are stemming thereof. Moreover, the principle of unity of law entails and is complemented by the principle of uniform application of EU law, which has been proclaimed by the Court of Justice of the European Union from early on. In its *Costa v E.N.E.L* landmark judgment of 15 July 1964, the Court established that the creation of a Community with its own legal system requires that its legal rules be applied uniformly in all Member States, because, otherwise, the attainment of its objectives would be jeopardised and the principle of non-discrimination would be violated[11]. The Court confirmed this principle in a subsequent judgment, by establishing in a more explicit manner that the attainment of the objectives of the European Union requires that the legal rules stemming from the primary or secondary law of the European union apply fully at the same time and with identical effects in all Member States[12].

Further principles, whereupon European integration is based, are the principles of consensus and equality[13]. The principle of consensus is expressed through the requirement of unanimity for the adoption of legislation by the European Union, whereas manifestations of the principle of equality constitute the right of each Member State to be equally represented, to participate and to vote as guarantees for the restriction of the national sovereignty of the Member States. The principles of unity of law, of consensus and equality are, in essence, interrelated in the case of European integration.

As of today, by virtue of Article 289 (1) of the Treaty on the Functioning of the European Union (hereinafter: TFEU), the ordinary legislative procedure constitutes the rule for the adoption of legal acts by the European Union. The ordinary legislative procedure is based on the cooperation between the Commission, the Council and the European Parliament, which constitute the EU institutional triangle. Thereunder, the Commission is entrusted with the legislative initiative and the European Parliament together with the Council act as co-legislators. The equal participation of the Council and the European Parliament in the decision-making process ensures the double legitimacy of the legal acts adopted through the direct representation of the European citizens in the European Parliament and through the representation of the Member States in the Council[14]. Depending on the policy field concerned, the Member States in the Council decide either unanimously or through the qualified majority voting procedure and the act adopted is uniformly applicable to all the Member States of the European Union according to the principle of unity of law. Presently, decision-making by the European Union in the majority of the policy fields falls under the rule of qualified majority voting. Nevertheless, the European legislator has maintained the rule of unanimity with regard to policy fields closely related to national sovereignty.

The process of integration guided by the principle of unity of law, as analysed above, was effective as long as it regarded a homogeneous group of Member States[15]. The gradual enlargement of the European Union increased the diversity within the EU legal order in view of the diverging

[11] CJEU, judgment of 15 July 1964, C-6/64, *Flaminio Costa v E.N.E.L*, ECLI:EU:C:1964:66, pp. 593-594

[12] CJEU judgment of 13 July 1972, C-48/71, *Commission of the European Communities v Italian Republic*, ECLI:EU:C:1972:65, para. 8

[13] Στεφάνου Κ., «Ευρωπαϊκή Ολοκλήρωση, Τόμος Α': Γενικά και Θεσμικά Χαρακτηριστικά μετά τη Νίκαια», 6η έκδοση, Εκδόσεις Αντ. Ν. Σάκκουλα 2002, pp. 68-73

[14] Κτενίδης Ι., «άρ. 289 ΣΛΕΕ», 2020, in Σκουρής Β., «Συνθήκη της Λισσαβώνας, Ερμηνεία κατ' άρθρον», Εκδόσεις Σάκκουλα, 2020, p. 1855

[15] Στεφάνου Κ., «Ευρωπαϊκή Ολοκλήρωση, Τόμος Α': Γενικά και Θεσμικά Χαρακτηριστικά μετά τη Νίκαια», 6η έκδοση, Εκδόσεις Αντ. Ν. Σάκκουλα 2002, p. 91

national characteristics and interests between its Member States. As of today, by virtue of Article 4 (2) TEU, the respect for the national identities of the Member States by the European Union is explicitly provided. However, the growing heterogeneity within the European Union coupled with the requirement of unanimity for legislative decision-making eventually became a restraint to the development of the integration process. Even though the policy fields, where unanimity was replaced by the rule of qualified majority voting, increased under the consecutive Treaty reforms, it became clear that the aim of advancing European integration and the prospect of enlargement of the European Union could not proceed in parallel for functional reasons[16]. The national differences between the Member States worked as a restraint to the aim of deepening integration, when on account thereof several Member States were not able or even unwilling to participate in the proposed legislative actions.

To this end, flexibility was introduced in the legal order of the European Union as a compromise solution, that would allow for the national interests and preferences of all Member States to be accommodated and, at the same time, for the integration process to proceed effectively. According to the definition offered by Groenendijk N., "*flexible integration refers to an instance of integration that takes place among some but not all members of an already existing (larger) integration scheme*[17]". In the literature, the notion of flexibility is often interchangeable with the notion of differentiation, used as generic terms in order to cover all the existing schemes and mechanisms of this nature. Differentiation has been the subject of a theoretical debate between the Member States of the European Union for a long time, which, essentially, reflects the existing ambiguity with regard to the effectiveness and compatibility of schemes of differentiation with the endeavor of European integration.

The debate on differentiation within the European Union started after the first enlargement in 1973, when the United Kingdom, Ireland and Denmark became Member States. In 1974, the German Chancellor Willy Brandt introduced for the first time, for the purposes of contributing to the integration process rather than of destroying its foundations, the idea of attributing an "*vanguard role*" to the economically stronger Member States, by permitting them to advance integration, while the other Member States would be temporarily exempt due to objective differences[18]. In the same spirit, in 1975 the Belgian Prime minister L. Tindemans, when negotiations took place on the establishment of an Economic and Monetary Union, supported that: "*It is impossible at the present time to submit a credible programme of action if it is deemed absolutely necessary that in every case all stages should be reached by all the States at the same time*[19]". This perception reflects the concept of *a Europe of multiple speeds*, whereby

[16] De Witte B., "Variable geometry and differentiation as structural features of the EU legal order", 2017 in De Witte B., Ott A. and Vos E. (eds), "Between Flexibility and Disintegration: The Trajectory of Differentiation in EU law, Edward Elgar Publishing, 2017, p. 9-28

[17] Groenendijk N., "Enhanced Cooperation under the Lisbon Treaty", Paper presented at the research meeting on European & International Affairs, Aalborg University, March 9, 2011, p. 2-7. In his elaboration, Groenendijk N. distinguishes between four different schemes that flexible integration can take on the basis of two criteria: the institutional framework in which it takes place and the policy field which it regards. These schemes are new integration, odd integration, alternative integration and differentiated integration.

[18] Blanke, "EUV Art. 20 Verstärkte Zusammenarbeit", in Grabbitz/Hilf/Nettesheim/Blanke, "Das Recht der Europäischen Union", 72. EL. Februar 2021, Rn. 7

[19] Tindemans L., "European Union. Report to the European Council", Bulletin of European Communities, Supplement 1/76, available from: http://aei.pitt.edu/942/1/political_tindemans_report.pdf, accessed on 6.11.2021

differentiation is temporal and is based on objective criteria[20]. Thereunder, some Member States would proceed faster than others, but all of them would arrive eventually at the same destination. Subsequently, other concepts were developed which provided for differentiation in space, in content and in the form of determining the participating Member States[21]. In particular, in 1994, while the discussions on the Treaty of Maastricht and on the establishment of the Economic and Monetary Union were on going, the concept of *a core Europe* was developed by the German politicians W. Schäuble and K. Lamers[22], which received the support of German and French politicians. This concept was based on a differentiation in space and provided for the creation of a narrower institutional framework within the institutional framework of the European Union, which pointed towards the establishment of a federal Europe in line with the Schuman Declaration[23]. On the other hand, the concepts of *a Europe à la carte* or *a Europe of variable geometry* were developed on the basis of differentiation in content and were largely supported by the United Kingdom. They advocated for the accommodation of national interests by providing for selective participation in the policies of the European Union. All these concepts reflect rather political perceptions of the Member States supporting them, such as in the case of the creation of *a core Europe* or *a Europe à la carte*, which appear to be in contrast with the maintenance of unity within the EU legal order. In any case, they remain mere theoretical, in that none of them has been acknowledged or adopted by the Treaties.

It is supported that, in spite of the aforementioned political concepts on differentiated integration, differentiation has been introduced into the legal order of the European Union as a necessity in order to accommodate the dual objectives of deepening and widening of the European Union. The present study will distinguish between the scattered instances of differentiation in the form of differential application of the common EU rules[24], which, as it will be demonstrated, have always existed in the legal order of the European Union and the notion of differentiated integration. The notion of differentiated integration (*abgestufte Integration*) was, first, coined by Eberhard Grabitz in 1984[25] and reflects the contrast with the principle of unitary integration. Essentially, differentiated integration describes schemes of integration, wherein only some of the Member States of the European Union take part in order to advance integration among themselves with regard to a specific policy field. The Member States of the European Union have established such schemes within and outside the institutional framework of the European Union. The question underpinning the whole debate is whether differentiated integration can serve the aim of European

[20] Thym D., "Competing models for understanding differentiated integration", 2017 in De Witte B., Ott A. and Vos E. (eds), "Between Flexibility and Disintegration: The Trajectory of Differentiation in EU law, Edward Elgar Publishing, 2017, pp. 29-30

[21] Μπόσκοβιτς Κ., «άρ. 20 ΣΕΕ», 2020, in Σκουρής Β., «Συνθήκη της Λισσαβώνας, Ερμηνεία κατ' άρθρον», Εκδόσεις Σάκκουλα, 2020, p. 181

[22] Schäuble W. and Lamers K., "Überlegungen zur europäischen Politik", 1.9.1994, available from https://www.bundesfinanzministerium.de/Content/DE/Downloads/schaeuble-lamers-papier-1994.pdf?__blob=publicationFile&v=1, accessed on 6.11.2021

[23] "*The pooling of coal and steel production should immediately provide for the setting up of common foundations for economic development as a first step in the federation of Europe*" in Robert Schuman, Declaration of 9 May 1950 in Fondation Robert Schuman, European Issue No. 204, 10th May 2011, available from: https://www.robert-schuman.eu/en/doc/questions-d-europe/qe-204-en.pdf , accessed on 6.11.2021

[24] De Witte B., "The Law as Tool and Constraint of Differentiated Integration", EUI Working Papers, Robert Schuman Centre for Advanced Studies, RSCAS 2019/47, p. 1

[25] Thym D., "Competing models for understanding differentiated integration", 2017 in De Witte B., Ott A. and Vos E. (eds), "Between Flexibility and Disintegration: The Trajectory of Differentiation in EU law, Edward Elgar Publishing, 2017, p. 38; Blanke, "EUV Art. 20 Verstärkte Zusammenarbeit", in Grabbitz/Hilf/Nettesheim/Blanke, "Das Recht der Europäischen Union", 72. EL. Februar 2021, Rn. 2

integration and safeguard the core values of the European Union or it is rather likely to lead the European Union to a *"disintegration"*[26].

Enhanced cooperation constitutes such a form of differentiated integration embedded in the primary law of the European Union in as much as it enables the willing Members States to deepen integration among themselves without being hindered by the Member States which are unwilling or unable to follow. Opposite to the schemes of differentiated integration, which existed in the EU legal order before the introduction of enhanced cooperation, where the participating Member States and the policy field concerned were pre-defined, the latter constitutes the first institutionalisation in the EU legal order of an abstract and generally applicable form of differentiated integration, in that neither the Member States participating nor the area, where it is implemented, are pre-determined. Although enhanced cooperation as a form of differentiated integration entails the danger of *disintegration,* it has been framed by the authors of the Treaties in such a way that it serves effectively the purpose for which it has been established, namely the promotion of European integration.

A.2: Flexibility in EU practice

According to De Witte B., differentiation constitutes a structural element of the legal order of the European Union[27]. It is, in fact, true that manifestations of flexibility related to EU practice, derogating from the requirements of the principle of unity, have existed from the outset and continue to exist in parallel with enhanced cooperation. These have taken the form of derogations from the uniform application of EU rules or of actual schemes of differentiated integration. Such schemes were, first, introduced by the Treaty of Maastricht and, in essence, created a fertile ground for the introduction of enhanced cooperation under the Treaty of Amsterdam. All these instances have been divided into two categories on the basis of whether they have been established within (A.2.a.) or outside the legal framework of the European Union (A.2.b.) and are analysed below.

A.2.a: Differentiation in the EU legal order

Instances of flexibility can be detected in several provisions of EU primary law. Firstly, reference should be made to Directives, which as legal acts of secondary law of the European Union are binding to all Member States, which have the obligation to transpose them into their national legal orders within a specific time-period. Nevertheless, Directives entail flexibility in as much as the Member States are afforded the discretion to decide on the form and methods of their transposition[28]. Furthermore, transitional periods and temporary derogations, which may be

[26] De Witte B., "Variable geometry and differentiation as structural features of the EU legal order", 2017 in De Witte B., Ott A. and Vos E. (eds), "Between Flexibility and Disintegration: The Trajectory of Differentiation in EU law, Edward Elgar Publishing, 2017, p. 26

[27] De Witte B., "The Law as Tool and Constraint of Differentiated Integration", EUI Working Papers, Robert Schuman Centre for Advanced Studies, RSCAS 2019/47, p. 2

[28] According to Article 288 TFEU: "*A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods"*; De Witte B., "Variable geometry and differentiation as structural features of the EU legal order", 2017 in De Witte B., Ott A. and Vos E. (eds), "Between Flexibility and Disintegration: The Trajectory of Differentiation in EU law, Edward Elgar Publishing, 2017, p. 10

introduced by virtue of accession agreements concluded on the basis of Article 49 (2) TEU[29] or in case of adoption of Regulations, constitute instances of flexibility in as much as they provide for the temporal differential application of certain EU rules.

Additionally, primary EU law contains safeguard clauses which allow for the Member States to introduce or maintain stricter national rules than those provided by EU law or which allow derogations from the fundamental freedoms on the basis of certain conditions[30]. These provisions are particularly relevant to the internal market, which is a constituent part of the process of European integration. By virtue of Articles 26 and 114 TFEU, the aim of the establishment and the functioning of an internal market, where the free movement of goods is ensured, is to be achieved through the adoption of harmonised rules. Exceptionally, Articles 36 TFEU and 114 (4) and (10) TFEU, which entail instances of flexibility in the form of acceptable national derogations from common EU rules, have the underlaying purpose of addressing the resulting tension between harmonised rules and the diversity of national interests[31].

Nevertheless, all the aforementioned instances should be regarded as providing for the differential application of certain EU rules in the Member States rather than as schemes of differentiated integration in the sense of a cooperation between some Member States in a policy field with the purpose of promoting integration. They differ therefrom in that they provide for derogations specific to individual Member States, which are, mainly, temporal or are being closely monitored by the institutions of the European Union[32].

The legal regime of opt-outs constitutes a more appropriate example of differentiated integration, in that they allow for the exception of the Member States concerned from an overall policy area, where the remaining Member States have taken further steps to deepen integration, even though they do not constitute cooperation schemes in a strict sense. Recourse to opt-outs was, firstly, introduced under the Treaty of Maastricht with regard to the establishment of the Economic and Monetary Union. As elaborated by De Witte B., the opt-outs from the Economic and Monetary Union granted to the United Kingdom, Ireland and Denmark were the "*unexpected outcome of the negotiations of that treaty*", which resulted in "*forced differentiation*"[33]. In the same manner, opt-outs were granted to the very same Member States in the Area of Freedom, Security and Justice[34]. As of today, opt-outs are granted by means of Protocols. Thereunder, the Member States concerned are exempted from the measures adopted by the Union as a whole in the respective policy areas. Therefore, it could be argued that they constitute forms of *negative* differentiated integration, in that the Member States concerned exempt themselves from legislative actions which advance integration among the other Member States.

[29] Böttner R., "The Constitutional Framework for Enhanced Cooperation in EU law", Leiden, The Netherlands: Brill | Nijhoff, 2021, Chapter 2, pp. 21-22

[30] Article 114 (4) and (10) TFEU and Articles 36, 45 (3) and (4) and 51, 52 TFEU respectively

[31] Vos E. and Weimer M., "Differentiated integration or uniform regime? National derogations from EU internal market measures", 2017 in De Witte B., Ott A. and Vos E. (eds), "Between Flexibility and Disintegration: The Trajectory of Differentiation in EU law, Edward Elgar Publishing, 2017, pp. 304-305

[32] Böttner R., "The Constitutional Framework for Enhanced Cooperation in EU law", Leiden, The Netherlands: Brill | Nijhoff, 2021, Chapter 2, pp. 22

[33] De Witte B., "The Law as Tool and Constraint of Differentiated Integration", EUI Working Papers, Robert Schuman Centre for Advanced Studies, RSCAS 2019/47, p. 3

[34] Protocol (No 21) on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice and Protocol (No 22) on the position of Denmark

As well as individual provisions, in the primary law of the European Union are embedded specific schemes of differentiated integration as manifestations of flexibility, which establish cooperation between several Member States in a specific policy field. As the first example of closer cooperation between several Member States, the supplementary programmes in the field of research and technological development should be mentioned, which were provided for in the Title on "Research and Technological Development" of the Single European Act, adopted in 1986[35]. Thereunder, the willing Member States could agree among themselves upon the financing of such programmes and the Council was competent for adopting the rules applicable[36].

Nevertheless, the most emblematic scheme of differentiated integration established within the legal order of the European Union is the Economic and Monetary Union, which has triggered the debate on differentiation in the European Union[37] and was introduced by the Treaty of Maastricht[38]. By virtue of Article 3 (4) TEU, one of the objectives of the European Union is the establishment of "*an economic and monetary union whose currency is the euro".* Introduced by the Treaty of Maastricht, the establishment of the Economic and Monetary Union had to be achieved in three stages, namely by the establishment of the free movement of capitals between the Member States, the convergence of the national economic policies of the Member States and strengthening of cooperation between them and between their national central banks and thirdly, the implementation of a common monetary policy under the aegis of the Eurosystem and the gradual introduction of the single euro currency in all Member States of the European Union. While the first and second stages have been completed, the transition from the second to the third stage is subject to the fulfillment of certain criteria, which are called the *convergence criteria* and are laid down in Article 140 TFEU and in Protocol nr. 13 on the Convergence Criteria annexed to the TFEU. Consequently, all Member States are under the obligation to fulfill the convergence criteria in order to be able to join the third stage of the EMU project.

In the construction of the Economic and Monetary Union, differentiation is manifested in various forms. Firstly, it is demonstrated in terms of membership. The Member States, which have not fulfilled the aforementioned convergence criteria yet, are considered as Member States with a derogation, whose legal status is regulated by virtue of Articles 139-144 TFEU[39]. Therefrom results a temporal differentiation in the process of integration between the Member States which have fulfilled the convergence criteria and have adopted the euro as a single currency of the European Union and those which have not done so yet. The explicit obligation of every Member State to become part of the EMU project at some point highlights, however, the intention of the

[35] Blanke, "EUV Art. 20 Verstärkte Zusammenarbeit", in Grabbitz/Hilf/Nettesheim/Blanke, "Das Recht der Europäischen Union", 72. EL. Februar 2021, Rn. 24

[36] According to Article 130l of the Single European Act: *"In implementing the multiannual framework programme, supplementary programmes may be decided on involving the participation of certain Member States only, which shall finance them subject to possible Community participation. The Council shall adopt the rules applicable to supplementary programmes, particularly as regards the dissemination of knowledge and the access of other Member States".*

[37] "*Economic and Monetary Union* […] *is often regarded as the paradigm of differentiated integration in the EU*" as in Van den Bogaert St. and Borger V., "Differentiated integration in EMU", 2017, in De Witte B., Ott A. and Vos E. (eds), "Between Flexibility and Disintegration: The Trajectory of Differentiation in EU law, Edward Elgar Publishing, 2017, p. 209

[38] The Treaty of Maastricht was signed on 7 February 1992 in Maastricht and was set in force on 1 November 1993. It constitutes the foundation Treaty of the European Union.

[39] According to Article 139 TFEU: *"Member States in respect of which the Council has not decided that they fulfil the necessary conditions for the adoption of the euro shall hereinafter be referred to as 'Member States with a derogation"*.

European legislator to retain the provisional character of this form of differentiation between the Member States of the European Union as an exception to the rule of unitary integration[40]. The same applies to the Member States acceding to the European Union, which are under an obligation to adopt the euro and that obligation may be suspended only temporarily[41].

The legal opt-outs granted to Denmark, the United Kingdom and Ireland[42] constitute a further instance of differentiation integration with regard to membership within the Economic and Monetary Union, which provide that these Member States are not obliged to accede to the Economic and Monetary Union, regardless of whether they fulfill the convergence criteria. The opt-out status of these Member States is regulated by means of Protocols annexed to the TFEU[43]. Under the Treaty of Maastricht, Denmark was provided with the right to notify to the Council its intention to not participate in the third stage of the EMU[44]. Denmark made use of this right and by virtue of Protocol (No 16) annexed to the TFEU, it is to be treated as a Member State with a derogation. Accordingly, by virtue of Protocol (15) annexed to the TFEU, the United Kingdom and Ireland were under no obligation to enter the third stage of the EMU project, unless it notified to the Council its intention to do so. It was, also, provided that it retained its powers in the field of monetary policy according to national law. Its status differed from the status of Denmark in as much as it was not to be treated as a Member State with a derogation and detailed provisions were established on which provisions on the EMU would apply to it[45]. Lastly, reference should be made to the status of Sweden, which, in view of the referendum held in 2003 in Sweden rejecting its participation in in the Economic and Monetary Union, decided to not adopt the euro. While it is, officially, considered as a Member State with a derogation, the unwillingness of Sweden to join the euro zone is in practice acknowledged by the European Union[46].

The differentiation in membership in the Economic and Monetary Union has as a corollary the differentiation in its institutional setting. Firstly, as Böttner R. explains, whereas the European Central Bank and the national central banks of the Member States of the European Union form the European System of Central Banks, only the national central banks of the Member States whose currency is the euro together with the European Central Bank form the Eurosystem[47]. Further expressions of differentiation in the institutional setting of the Economic and Monetary Union are to be found in Article 136 TFEU, which provides that the Council composed of the ministers of those Member States whose currency is the euro shall adopt measures specific to those Member

[40] Böttner R., "The Constitutional Framework for Enhanced Cooperation in EU law", Leiden, The Netherlands: Brill | Nijhoff, 2021, Chapter 2, p. 29

[41] Van den Bogaert St. and Borger V., "Differentiated integration in EMU", 2017, in De Witte B., Ott A. and Vos E. (eds), "Between Flexibility and Disintegration: The Trajectory of Differentiation in EU law, Edward Elgar Publishing, 2017, p. 211

[42] Even though it is no longer a Member State of the European Union, references will be made to the United Kingdom because of its particular relevance to this issue.

[43] Protocol (No 15) on certain provisions relating to the United Kingdom of Great Britain and Northern Ireland and Protocol (No 16) on certain provisions relating to Denmark

[44] Blanke, "EUV Art. 20 Verstärkte Zusammenarbeit", in Grabbitz/Hilf/Nettesheim/Blanke, "Das Recht der Europäischen Union", 72. EL. Februar 2021, Rn. 25

[45] Van den Bogaert St. and Borger V., "Differentiated integration in EMU", 2017, in De Witte B., Ott A. and Vos E. (eds), "Between Flexibility and Disintegration: The Trajectory of Differentiation in EU law, Edward Elgar Publishing, 2017, pp. 212-213

[46] ibid, p. 213

[47] Böttner R., "The Constitutional Framework for Enhanced Cooperation in EU law", Leiden, The Netherlands: Brill | Nijhoff, 2021, Chapter 2, p. 29-30

States and in Article 137 TFEU which refers to the Eurogroup, wherein only the ministers of the Member States whose currency is the euro participate.

Lastly, the Treaty of Maastricht, which introduced differentiation in the legal order of the European Union, provided for a further scheme of differentiated integration in the field of social policy[48]. In 1989, all Member States of the European Union, except for the United Kingdom, adopted the Community Charter of Fundamental Social Rights for Workers, which, in principle, had a merely declaratory character. Under the Treaty of Maastricht, a Protocol was adopted, which had the purpose of attributing a legally binding character to the provisions of the Charter and of enabling the Member States, which were contracting parties to the Charter, to make use of the institutions, the mechanisms and the procedures provided by EU law in order to adopt the legal acts and decisions necessary under the Charter[49]. The United Kingdom was granted an opt-out, whereby it was exempted from the deliberations and decisions of the Council on this matter[50]. Nevertheless, the opt-out granted to the United Kingdom was abolished by the Treaty of Amsterdam, which incorporated the Protocol into the text of the Treaties. As of today, the respective Treaty provision is Article 151 TFEU.

A.2.b: Differentiation outside the institutional framework of the European Union

Under the first paragraph of Article 20 TEU "*Member States which wish to establish enhanced cooperation between themselves within the Union's non-exclusive competences may make use of its institutions* […]*".* It results from the wording of this provision that the establishment of enhanced cooperation is not obligatory to the Member States willing to achieve deeper integration between themselves, but it rather provides an alternative for the Member States to pursue integration outside the framework of the European Union. Schemes of cooperation between Member States of the European Union in the form of international agreements have been present from the beginning of European integration and they have not seized to exist even after the introduction of enhanced cooperation into the legal order of the European Union. In the literature, these international treaties have been characterised as international satellite treaties, in that they complement EU integration in spite of being established outside the institutional framework of the European Union[51].

According to Article 350 TFEU, "*the provisions of the Treaties shall not preclude the existence or completion of regional unions between Belgium and Luxembourg, or between Belgium, Luxembourg and the Netherlands, to the extent that the objectives of these regional unions are not attained by application of the Treaties"*. The so-called *Benelux clause* was first introduced under the provision of Article 233 of the Treaty of Rome and is emblematic for the legal order of the European Union in that a scheme of international cooperation between three Member States of the European Union, which allows them to pursue deeper integration between

[48] Blanke, "EUV Art. 20 Verstärkte Zusammenarbeit", in Grabbitz/Hilf/Nettesheim/Blanke, "Das Recht der Europäischen Union", 72. EL. Februar 2021, Rn. 26

[49] Article 1 of Protocol (No 14) on Social Policy annexed to the Treaty establishing the European Community

[50] Article 2 of Protocol (No 14) on Social Policy annexed to the Treaty establishing the European Community

[51] Thym D., "Competing models for understanding differentiated integration", 2017 in De Witte B., Ott A. and Vos E. (eds), "Between Flexibility and Disintegration: The Trajectory of Differentiation in EU law, Edward Elgar Publishing, 2017, p. 48

themselves outside its legal order, is acknowledged explicitly by the primary law of the European Union[52].

In the same manner as the Economic and Monetary Union in the case of differentiated integration taking place within the legal order of the European Union, the most prominent example of differentiated integration between the Member States of the European Union taking place outside the institutional framework of the European Union is the Schengen Agreement and the Convention implementing the Schengen Agreement[53]. Deviating from the principle of unitary integration, five Member States, following the establishment of the internal market, resorted to the intergovernmental method with the aim of advancing integration in a policy field falling outside the scope of application of the founding Treaties, but very closely associated with one of the fundamental freedoms of the European Union, the free movement of persons: the abolition of internal border controls[54]. It is interesting to notice that in the preamble of the Schengen Agreement an explicit reference is made to the aim of creating an *"ever closer union"*[55]. This provision demonstrates that, despite constituting an instrument of international law, the Schengen Agreement afforded a prominence to the process of European integration. This consideration in view of the evolution of the Schengen acquis within the legal order of the European Union supports the argument that schemes of differentiated integration have the capacity to contribute to the development of the integration process. Gradually until 1995, all the Member States of the European Union had acceded thereto, except for the United Kingdom, Ireland and Denmark, which maintained a special status. Under the Treaty of Amsterdam, the Schengen Agreements were *communitarised* by being incorporated into the legal order of the European Union through a Protocol[56] and ever since, they constitute regular EU law and form part of the Union acquis. They are commonly referred to as the *Schengen acquis*. To the United Kingdom, Ireland and Denmark were granted legal opt-outs[57], following the paradigm of the opt-out regime introduced by the Treaty of Maastricht within the framework of the Economic and Monetary Union.

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[52] Blanke, "EUV Art. 20 Verstärkte Zusammenarbeit", in Grabbitz/Hilf/Nettesheim/Blanke, "Das Recht der Europäischen Union", 72. EL. Februar 2021, Rn. 29 and European Parliament, Policy Department for Citizens' Rights and Constitutional Affairs, Directorate General for Internal Policies of the Union, PE 604.987, Study requested by the AFCO Committee, "The Implementation of Enhanced Cooperation in the European Union", October 2018, available from: https://www.europarl.europa.eu/RegData/etudes/STUD/2018/604987/IPOL_STU(2018)604987_EN.pdf, accessed on 6.11.2021, p. 13

[53] The Schengen Agreement was signed in 14.06.1985 between Belgium, Germany, Luxembourg, France and the Netherlands and the Convention implementing the Schengen Agreement was signed in 19.06.1990 by the same States and set in force in 1995. The Schengen Agreement aimed at the abolition of internal border controls and the introduction of the freedom of movement of persons between the contracting Member States, while the Schengen Convention was adopted as supplementary to the Schengen Agreement and provided for the arrangements and safeguards for the establishment of an area without internal border controls.

[54] Κουσκουνά Μ., «Ο χώρος Σένγκεν και η προσφυγική κρίση», Δικαιώματα του Ανθρώπου, Επιθεώρηση Ατομικών και Κοινωνικών Δικαιωμάτων No 70/2016, p. 914

[55] According to the Preamble of The Schengen Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders: "*AWARE that the ever closer union of the peoples of the Member States of the European Communities should find its expression in the freedom to cross internal borders for all nationals of the Member States and in the free movement of goods and services"*

[56] Protocol integrating the Schengen acquis annexed to the Treaty of Amsterdam and current Protocol (No 19) integrating the Schengen Acquis into the framework of the European Union annexed to the Treaty on the functioning of the European Union

[57] Article 3 and 4 of Protocol (No 19) integrating the Schengen acquis into the framework of the European Union annexed to the Treaty on the functioning of the European Union

Currently, the *Schengen acquis* is part of the Area of Freedom, Security and Justice, as laid down in Title V of Part Three of the Treaty on the Functioning of the European Union[58]. The Schengen Agreements have been regarded as an early form of enhanced cooperation[59] established between the Member States of the European Union outside the institutional framework of the European Union, whereby several common characteristics can be identified, such as that they did not regard a policy field of exclusive competence of the European Union, remained open to the participation of further Member States of the European Union, intended to further the integration process and did not affect the Community acquis.

The model of the *Schengen acquis* was followed by the Treaty of Prüm, which had an analogous evolution. It is supported in the literature that the contracting parties intended to establish *"a kind of a "Schengen III" treaty"*[60]. The Treaty of Prüm was signed in 2005 in Prüm between seven Member States[61] of the European Union in order to strengthen cross-border cooperation with regard to combating terrorism, cross-border crime and illegal immigration by intensifying and accelerating the exchange of information between authorities[62]. In this case, the contracting Member States had recourse to an international law instrument for advancing integration between them with regard to one of the fundamental freedoms of EU law, the free movement of persons, even though enhanced cooperation had already been introduced into the legal order of the European Union. The adoption of the Treaty of Prüm as an international agreement between some Member States of the European Union was criticized for "*creating a hierarchy within the European Union*", "*provoking a relapse of EU integration*", "*lacking transparency*" and *"for dismantling trust between the EU Member States*", while, on the other hand, it has been praised for its "*rapid progress which encouraged the rest of the EU to adopt the Prüm system*" and it has been justified under the argument of "*heaviness of the decision-making process within the EU*"[63]. In the Treaty it was made provision for its future integration in the legal framework of the European Union[64], which eventually took place with the Council Decisions 2008/615/JHA and 2008/615/JHA and their provisions are binding for all Member States, even for the Member States which enjoy a special status in the Area of Freedom, Security and Justice[65].

More recently, by reason of the economic crisis, the Member States of the European Union recognised the imperative of *enhancing* cooperation among them in order to overcome the crisis and to strengthen the structures of the Economic and Monetary Union, albeit not within the framework of an *enhanced cooperation*. As supported, it could not be achieved within the institutional framework of the European Union, in general, due to the lack of competences of the

[58] Article 67 et seq. TFEU

[59] Κουσκουνά Μ., «Ο χώρος Σένγκεν και η προσφυγική κρίση», Δικαιώματα του Ανθρώπου, Επιθεώρηση Ατομικών και Κοινωνικών Δικαιωμάτων No 70/2016, p. 914

[60] Luif P., "The Treaty of Prüm: A replay of Schengen?", Paper for the Panel "Subgroups of member states in the EU's external and internal security: Does flexibility work?", European Union Studies Association, Tenth Biennial International Conference, May 17–19, 2007, Montreal, Canada, p. 7

[61] Belgium, Germany, France, Luxembourg, the Netherlands, Austria and Spain

[62] European Parliament, Committee on Civil Liberties, Justice and Home Affairs, Working document on a Council Decision on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime, 10.04.2007

[63] Luif P., "The Treaty of Prüm: A replay of Schengen?", Paper for the Panel "Subgroups of member states in the EU's external and internal security: Does flexibility work?", European Union Studies Association, Tenth Biennial International Conference, May 17–19, 2007, Montreal, Canada, pp. 15-17

[64] Article 1 (4) of the Treaty of Prüm

[65] Μπόσκοβιτς Κ., «άρ. 20 ΣΕΕ», 2020, in Σκουρής Β., «Συνθήκη της Λισσαβώνας, Ερμηνεία κατ' άρθρον», Εκδόσεις Σάκκουλα, 2020, p. 183

European Union and the lack of consensus on a necessary Treaty amendment[66]. Thus, Member States resorted to the adoption of two international law instruments: the Treaty establishing a European Stability Mechanism (the ESM Treaty) and the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (the Fiscal Compact). The latter entails an explicit provision for its future incorporation in the legal order of the European Union[67] as the Treaty of Prüm did, which, consequently, demonstrates an overall tendency emerging from the paradigm of the *Schengen acquis* towards the communitarisation of international law instruments established between the Member States of the European Union. A distinctive characteristic of these instruments of international law is that they provide for the participation of the EU institutions. For both of these instruments, it has been advocated that they could have been adopted under the provisions on enhanced cooperation[68]. In particular, with regard to the ESM Treaty, Messina M. has observed that the legality of its establishment under the provisions on enhanced cooperation has been indirectly acknowledged by the case law of the Court of Justice[69]. Although they would still involve only some of the Member States of the European Union, they would have advanced integration amongst them within the framework of EU law.

Lastly, a brief reference should be made to the distinction made in the literature between *internal* and *external differentiated integration.* The former refers to schemes of differentiated integration in which participate only Member States of the European Union, whereas the latter covers schemes in which participate Member States of the European Union and third countries. Such examples constitute the accession Treaties and the European Economic area[70]. In this context, the EU-Turkey statement of 18 March 2016[71] could be mentioned as a further and more recent example, if it is viewed in light of its broader character as an informal agreement between the Member States of the European Union and a third country.

The above analysis demonstrates that flexibility as a reality has been part of the integration process from the outset, introducing exceptions to the principle of unity for the accommodation of diversity in the European Union. Consequently, it can be concluded that the introduction of enhanced cooperation in the legal order of the European Union was the result of *a natural course of events*. The scattered instances of differentiation in primary EU law and the tendency to the adoption of international law instruments by the Member States willing to advance integration showed the way to the introduction of a form of differentiated integration into the legal order of the European Union as a general and abstract mechanism. It should be, also, seen as an offer to the Member States to cooperate within the institutional framework of the European Union rather than outside, in that enhanced cooperation entails the advantage of constituting EU law and involving

[66] Blanke, "EUV Art. 20 Verstärkte Zusammenarbeit", in Grabbitz/Hilf/Nettesheim/Blanke, "Das Recht der Europäischen Union", 72. EL. Februar 2021, Rn. 30; Böttner R., "The Constitutional Framework for Enhanced Cooperation in EU law", Leiden, The Netherlands: Brill | Nijhoff, 2021, Chapter 2, p. 31

[67] Article 16 of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union

[68]Messina M., "Strengthening economic governance of the European Union through enhanced cooperation: a still possible, but already missed, opportunity, E.L. Rev. 2014, 39 (3), pp. 404-417

[69] CJEU judgment of 27 November 2012, *Thomas Pringle v Government of Ireland and others*, C-370/12, ECLI:EU:C:2012:756, para. 64 and 105; Messina M., "Strengthening economic governance of the European Union through enhanced cooperation: a still possible, but already missed, opportunity, E.L. Rev. 2014, 39 (3), pp. 409-412

[70] Tekin F., "Differentiated Integration: An alternative conceptualization of EU-Turkey relations", 2021 in Reiners W., Turhan E. (eds), "EU-Turkey Relations", 2021, Palgrave Macmillan, Cham., pp. 161-162

[71] Council of the EU, EU-Turkey statement of 18 March 2016, Press release 144/16

the institutions of the European Union opposite to international treaties which are governed by the rules and principles of public international law.

Chapter B: Introduction of the mechanism of Enhanced Cooperation in the legal order of the European Union

B.1: From Closer to Enhanced Cooperation

Enhanced cooperation as a form of differentiated integration was introduced for the first time in the legal order of the European Union by the Treaty of Amsterdam. Next to the general provisions regulating enhanced cooperation, specific provisions were laid down with regard to its implementation in the Community pillar and in the third pillar of Justice and Home Affairs. The Treaty of Nice introduced amendments to the provisions on enhanced cooperation, while it extended its scope to the second pillar of Common Foreign Security Policy as well. The legal framework of enhanced cooperation was further amended by the Treaty of Lisbon, which shaped it into its present form.

B.1.a: From the Treaty of Amsterdam to the Treaty of Nice

Even though the principle of unanimity was gradually replaced by the rule of qualified majority voting in all the more policy fields, the growing heterogeneity within the European Union by reason of its subsequent enlargements and the increase of the scope of EU law prevented the process of European integration from developing. As a result, the debate on flexibility within the European Union intensified, which led, eventually, under the regime of the Treaty of Amsterdam[72] to the introduction of enhanced cooperation under the notion of *closer cooperation* into the legal order of the European Union by virtue of initiatives taken by Germany and France[73] for the promotion of European integration.

The general rules on closer cooperation were laid down in Articles 43 to 45 in Title VII of the former TEU, while more specific rules were set out in Article 11 TEC for its application in the Community pillar and in Title VI TEU for its application in the third pillar of Justice and Home Affairs[74]. The area of Common Foreign Security Policy was exempted, initially, from its scope. The established legal framework provided that if at least a majority of the Member States agreed on the establishment of closer cooperation, they were able to make use of the institutional and legal framework of the European Union with the aim of advancing integration subject to the fulfillment of certain conditions[75]. Closer cooperation had to be established as a last resort with the aim of furthering the objectives of the Union and protecting and serving its interests[76]. It could not affect the Community acquis and it had to respect the principles of the Treaties and the single institutional

[72] The Treaty of Amsterdam, which amended the Treaty on the European Union, the Treaties establishing the European Communities and certain related acts, was signed in 1997 and entered into force in 1999.
[73] "France and Germany with the common letters of President Shirak and Chancellor Kohl of 6.12.95 and the Ministers of Foreign Affairs of 17.10.96 supported strongly the introduction of a flexibility clause in the Treaty under reform" as in Στεφάνου Κ., «Ευρωπαϊκή Ολοκλήρωση, Τόμος Α': Γενικά και Θεσμικά Χαρακτηριστικά μετά τη Νίκαια», 6η έκδοση, Εκδόσεις Αντ. Ν. Σάκκουλα 2002, p. 101
[74] See in that regard Chapter B.3 of Part one of the present study.
[75] 43 (1) and 43 (1) (d) TEU; European Convention on Enhanced Cooperation, ConV 723/03, 14 May 2003, p. 5
[76] 43 (1) (c) and 43 (1) (a) TEU

framework of the Union[77]. It was, further, required that each closer cooperation be open to all Member States[78], whereas, particularly, with regard to the Member States, which would not participate in a closer cooperation, it was provided that their competences, rights, obligations and interests had to remain unaffected[79].

Further conditions regulating the implementation of closer cooperation in the Community pillar excluded its establishment in the areas of exclusive competence of the Union and required that its policies, actions or programmes be unaffected, that closer cooperation did not concern the citizenship of the Union and did not discriminate between nationals of Member States, that it remain within the limits of the powers conferred upon the European Union, that it did not constitute a discrimination or a restriction of trade between Member States and that it should not distort the conditions of competition between them[80].

The procedural rules on closer cooperation required the Commission to issue a proposal, which had to get authorised by the Council acting by a qualified majority voting, after having consulted the European Parliament[81]. Member States could, also, take initiative by submitting a request to the Commission. In this occasion, the latter could either move forward by submitting a proposal or, in the opposite case, it had to inform the Member States of the reasons for not doing so[82]. Regarding the deliberations in the Council, all Member States were allowed to participate, but only those participating in the closer cooperation had the power to vote[83].

If a Member State decided to join an existing framework of closer cooperation, it had to notify its intention to the Council and the Commission. The Commission was competent to decide thereon within an overall period of four months, after addressing its opinion to the Council within three months of the receipt of the notification[84]. Lastly, the so-called *veto clause* was provided, which equipped each Member State to *block* the authorisation of a closer cooperation by declaring its intention to oppose thereto because of important and stated reasons of national policy[85].

Although it was praised as one of the major innovations of the Treaty of Amsterdam, closer cooperation was never used thereunder. In the literature, its formulation has been characterised as rather modest, which has been attributed to the tendency of the European legislator to maintain its character strictly exceptional to the rule of unitary and simultaneous integration[86]. Furthermore, it has been advocated in that regard that the complexity and the rigidness of the mechanism reflected the unwillingness of the Member States to "*depart from the principle of unity of European law too easily*" [87]. These elaborations regarding the rigidness of the established provisions can be seen as justified in the position taken by the European Parliament in its resolution in 17.05.1995, which, in spite of acknowledging the need for flexibility by reason of the increasing diversity within the

[77] 43 (1) (e) and 43 (1) (b) TEU
[78] 43 (1) (g) TEU
[79] 43 (1) (f) TEU
[80] 11 (1) (a), (b), (c), (d) and (e)
[81] 11 (2) (1) TEC
[82] 11 (2) (3) TEC
[83] 44 (1) TEU
[84] 11 (3) TEC
[85] 11 (2) (2) TEC
[86] Blanke, "EUV Art. 20 Verstärkte Zusammenarbeit", in Grabbitz/Hilf/Nettesheim/Blanke, "Das Recht der Europäischen Union", 72. EL. Februar 2021, Rn. 14
[87] Böttner R., "The Constitutional Framework for Enhanced Cooperation in EU law", Leiden, The Netherlands: Brill | Nijhoff, 2021, Chapter 2, p. 40

European Union, it praised the unity of the institutional framework of the European Union as a fundamental principle of the European Union with the aim of excluding the possibility of creating *a core Europe* or *a Europe a la carte*[88].

The changes brought about by the Treaty of Nice[89] had a very specific aim: to *loosen up* the provisions regulating closer cooperation, renamed to *enhanced cooperation*, in order to render its enforcement more *operational*[90]. Originally, such a reform was not included on the mandate on institutional reform of the Intergovernmental Conference, but it was added after some discussion, whereby the main intention of the Commission was to prevent the establishment of cooperation schemes between the Member States outside the institutional framework of the European Union[91]. In the subsequent debates, several conceptions on flexibility and differentiation in the European Union were proclaimed, which, altogether, advocated for the necessity of increasing differentiation within a widening European Union in order to advance the integration process. Under the Treaty of Nice, enhanced cooperation was introduced in the second pillar of the Common Foreign Security Policy as well.

While closer cooperation was renamed to *enhanced cooperation* as a mere symbolic change, the remainder changes reflect the aforementioned purpose of relaxing the legal framework provided in order to render it more functional. Firstly, the threshold with regard to the participating Member States was altered to requiring a minimum of eight Member States for an enhanced cooperation to be established, thus "*replacing a relative by an absolute number*[92]". Secondly, the power of the European Parliament was reinforced, whose consent was rendered conditional to the authorisation of enhanced cooperation in the policy areas, which by virtue of Article 251 TEC required the co-decision of the Council and the European Parliament[93]. Furthermore, the level of intensity of the requirements that the community acquis and the competences rights and obligations of the non-participating Member States *be not affected*, was downgraded to *being respected* by the applicable enhanced cooperation[94]. Lastly, the veto clause was abolished, which, admittedly, constituted a profound hindrance to the evolution of enhanced cooperation in that it rendered the initiatives to establish enhanced cooperation *vulnerable* to the national interests of the non-participating Member States. As a counterweight, however, it was provided that any Member State could refer the matter to the European Council in the course of the stage of authorisation[95].

On the other hand, further requirements were introduced as safeguard clauses for maintaining the unity of the legal order of the European Union with regard to policy fields central to the process of European integration. In particular, an enhanced cooperation could not undermine

[88] Στεφάνου Κ., «Ευρωπαϊκή Ολοκλήρωση, Τόμος Α': Γενικά και Θεσμικά Χαρακτηριστικά μετά τη Νίκαια», 6η έκδοση, Εκδόσεις Αντ. Ν. Σάκκουλα 2002, pp. 101-103

[89] Treaty of Nice, which amended the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, was signed in 2001 and set in force in 2003

[90] Blanke, "EUV Art. 20 Verstärkte Zusammenarbeit", in Grabbitz/Hilf/Nettesheim/Blanke, "Das Recht der Europäischen Union", 72. EL. Februar 2021, Rn. 17

[91] Böttner R., "The Constitutional Framework for Enhanced Cooperation in EU law", Leiden, The Netherlands: Brill | Nijhoff, 2021, Chapter 2, pp. 40-41

[92] ibid, p. 44

[93] new Article 11 (2) (1) TEC

[94] new Article 43 (c) and (h) TEU; Craig P., "Enhanced Cooperation, Amendment and Conclusion", 2010 in Craig P., "The Lisbon Treaty", Oxford University Press, 2010, pp. 438-439

[95] new Article 11 (2) (2) TEC

the internal market and the economic and social cohesion of the European Union and it could not affect the Schengen acquis, which the Treaty of Amsterdam *communitarised*[96]. Lastly, the ambiguity of the provision on the condition of last resort was eliminated in that the European legislator rendered the new provision more illustrative by specifying that the requirement of last resort had to be considered as fulfilled when the Council had established that the objectives pursued by establishing enhanced cooperation could not be otherwise attained within a reasonable period[97].

While recourse to enhanced cooperation was considered once for the adoption of a proposal on a Framework Decision on criminal suspect rights, which had been vetoed by some Member States, it did not receive the necessary support[98] and enhanced cooperation remained unused under the Treaty of Nice as well. Nevertheless, the example of Italy, which changed its stance on the establishment of the European Arrest Warrant in view of the possibility available to the other Member States to establish an enhanced cooperation amongst them and Italy to be left behind, showcased a different perspective of the effectiveness of enhanced cooperation for the promotion of the integration process[99].

B.1.b: The Treaty of Lisbon

As it was elaborated in the document of the European Convention on enhanced cooperation, when the Constitutional Treaty was debated, enhanced cooperation is conceived as "*an instrument of progressive integration open to all Member States at any time"*, which aims "*to enable and encourage Member States to cooperate inside rather than outside the Union"*[100]. The Constitutional Treaty intended to consolidate the provisions on enhanced cooperation, following the abolishment of the three-pillar structure introduced by the Treaty of Maastricht. Enhanced cooperation would be applicable to all policy fields of the European Union, while several changes to the legal framework provided were proposed in order to simplify the respective provisions[101].

The Treaty of Lisbon, which succeeded the failure of the Constitutional Treaty, maintained nearly in full all the proposed provisions[102]. Consequently, as of today, enhanced cooperation is regulated by Article 20 TEU and by Articles 326 to 334 in Title III of Part Six of the TFEU. In Article 20 TEU are laid down the basic principles defining the legal framework of enhanced cooperation, while the provisions of the TFEU specify the substantive constraints and the procedural requirements for the authorisation and the functioning of this mechanism. This

[96] new Article 43 (e) and new Article 43 (i) TEU
[97] new Article 43 (a) TEU
[98] Peers St., "Enhanced Cooperation: the Cinderella of differentiated integration", 2017 in De Witte B., Ott A. and Vos E. (eds), "Between Flexibility and Disintegration: The Trajectory of Differentiation in EU law, Edward Elgar Publishing, 2017, p. 81
[99] Böttner R., "The Constitutional Framework for Enhanced Cooperation in EU law", Leiden, The Netherlands: Brill | Nijhoff, 2021, Chapter 2, p. 44
[100] European Convention on Enhanced Cooperation, ConV 723/03, 14 May 2003, p. 10
[101] ibid, p. 2
[102] The single exception was that it changed the provision on the threshold regarding the participating Member States from one third to nine Member States; Blanke, "EUV Art. 20 Verstärkte Zusammenarbeit", in Grabbitz/Hilf/Nettesheim/Blanke, "Das Recht der Europäischen Union", 72. EL. Februar 2021, Rn. 21

structure reflects the greater pattern of distinction between main and implementing Treaty introduced by the Treaty of Lisbon[103].

By virtue of the current legal framework, enhanced cooperation shall be adopted as a last resort within an area of non-exclusive competence of the European Union, provided that at least nine Member States participate therein. It should aim at furthering the objectives and protecting the rights of the European Union and reinforcing its integration process. The authorisation process is regulated by Article 329 TFEU. Thereunder, the Member States willing to establish enhanced cooperation between themselves should address a request to the Commission, which in turn may submit a proposal to the Council. Following the proposal of the Commission, the Council, having received the consent of the European Parliament, should issue its decision on the authorisation of the proposed enhanced cooperation by qualified majority voting. The Commission is entitled to not proceed to the adoption of a proposal. In that case, it should inform the Member States of the respective reasons. It should be stressed that by virtue of Article 329 TFEU the role of the European Parliament in the stage of authorisation has been significantly reinforced in comparison to the previous provisions. The option provided to the Member States to express their opposition to an enhanced cooperation in the form of the veto clause under the Treaty of Amsterdam and in the form of referring the matter to European Council under the Treaty of Nice has been completely erased under the Treaty of Lisbon so as to strengthen the flexibility of the legal framework of enhanced cooperation.

Article 330 TFEU regulates the voting rules and procedures to be followed after the authorisation of an enhanced cooperation, while it, also, establishes that, in spite of forfeiting the right to vote, the non-participating Member States are entitled to be present and take part in the deliberations of the Council. Furthermore, Article 332 TFEU provides that the expenditure resulting from the implementation of an enhanced cooperation should be borne only by the participating Member States, unless it is decided otherwise.

If a Member States decides to join an existing enhanced cooperation, the procedure laid down in Article 331 TFEU should be followed. The Member State concerned should notify its intention to the Commission and the Council, whereby the Commission is obliged to confirm its participation within four months of the date of receipt of the notification. The Commission should note whether conditions of participation exist and should adopt transitional measures if necessary for the implementation of the legal acts already adopted within the framework of the enhanced cooperation concerned. If it considers that the conditions of participation have not been fulfilled, it shall set a deadline for re-examining the request and indicate the necessary arrangements to be taken by the Member State. After that, if the Commission still considers that the conditions of participation have not been fulfill, the Member State has the option to refer the matter to the Council, which, then, is the one competent to decide thereon. It has to be acknowledged that the procedure of the *ex-post* participation of a Member State in an existing enhanced cooperation is regulated in a more detailed manner than previously, whereby the role of the Commission has been strengthened[104].

[103] Μπόσκοβιτς Κ., «άρ. 20 ΣΕΕ», 2020, in Σκουρής Β., «Συνθήκη της Λισσαβώνας, Ερμηνεία κατ' άρθρον», Εκδόσεις Σάκκουλα, 2020, p. 185; Blanke, "EUV Art. 20 Verstärkte Zusammenarbeit", in Grabbitz/Hilf/Nettesheim/Blanke, "Das Recht der Europäischen Union", 72. EL. Februar 2021, Rn. 31

[104] Blanke, "EUV Art. 20 Verstärkte Zusammenarbeit", in Grabbitz/Hilf/Nettesheim/Blanke, "Das Recht der Europäischen Union", 72. EL. Februar 2021, Rn. 22

Article 333 TFEU constitutes an innovation of the Treaty of Lisbon, which introduces the so-called passarelle clause. Thereunder, after the authorisation of an enhanced cooperation, the Council acting by unanimity may alter the rules on the decision-making process: when unanimity is required by the relevant – to the area where enhanced cooperation is implemented – provision of the Treaty, the Council may decide to act by a qualified majority voting and where a special legislative procedure is provided for the adoption of an act, the Council may decide to adopt it under the ordinary legislative procedure.

The legal framework provided by the Treaty of Lisbon for the establishment of enhanced cooperation underlines two significant features of this form of differentiated integration: its exceptional character within the legal framework of the European Union and the hidden purpose of ultimately leading back to unitary integration. The former is expressed explicitly through the requirement of last resort, whose purpose is to establish and safeguard that enhanced cooperation as a form of differentiated integration does not seek to replace the principle of unity, but it rather provides the European Union with a legal tool suitable to overcome legislative deadlocks, when common action of the Union as a whole is not possible. The latter can be detected in the emphasis given to the status of the non-participating Member States, which, under the principles of openness and transparency[105], are encouraged to participate in the deliberations of the Council and are welcomed to accede to an existing enhanced cooperation *at any time*. The procedure provided for the accession of a Member State to an existing enhanced cooperation justifies this argument as well. The detailed manner, in which it is formulated, has the purpose of ensuring that all the right steps are taken for as many Member States as possible to participate in an enhanced cooperation. To this end, the role of the Commission and of the participating Member States to an enhanced cooperation is rendered significant[106].

Furthermore, it is compelling to notice that, while the authorisation procedure and the *ex-post* participation of a Member States to an enhanced cooperation are regulated detailed and cautiously, no explicit provision is made neither on a possible exit of a Member State from nor on a complete abolition of an existing enhanced cooperation. Various theories have been undertaken in the literature in that regard. It has been supported, for example, that the provisions on the authorisation procedure could be followed for the abolition of an existing enhanced cooperation on the basis of the principle of *actus contrarius* or that it could result *de jure* in case all Member States acceded therein or in case the European Union under the assent of the Member States took action in the same policy field[107]. In the case of a Member State willing to withdraw from an enhanced cooperation, it has been advocated that Articles 331 TFEU or 50 TFEU on a withdrawal of a Member State from the European Union could be applied by analogy[108]. To the present, there has not been a case where an established enhanced cooperation has been abolished or where a Member State has withdrawn from an enhanced cooperation after its implementation[109]. Therefore,

[105] Article 20 (1) (b) TEU and 328 TFEU and Article 20 (3) TEU and 330 TFEU respectively.

[106] According to Article 328 (2) TFEU: "*The Commission and the Member States participating in enhanced Cooperation shall ensure that they promote participation by as many Member States as possible*".

[107] Μπόσκοβιτς Κ., «άρ. 20 ΣΕΕ», 2020, in Σκουρής Β., «Συνθήκη της Λισσαβώνας, Ερμηνεία κατ' άρθρον», Εκδόσεις Σάκκουλα, 2020, p. 187

[108] ibid

[109] There has been, however, a case where a Member State withdrew its request to the Commission for the establishment of enhanced cooperation before the Commission had issued its proposal to the Council and a case where a Member State withdrew its participation from an enhanced cooperation, which had been authorised, but the

there has not been any practical response to these perceptions. Nevertheless, in view of the purpose of enhanced cooperation, which is the promotion of the integration process by virtue of Article 20 TEU, it should be supported that the authors of the Treaties consciously did not regulate these cases. This view adds to the argument that the enhanced cooperation as framed by the Treaties aims at *enhancing* integration between some Member States in the short term, but in the long term it aspires to do so with regard to the Union as whole, whereby a possible withdrawal of a Member State or a subsequent abolition of an enhanced cooperation could be considered only as a setback for the integration process. Consequently, it can be supported that enhanced cooperation as a form of differentiated integration has been shaped into a legal tool for the promotion of European integration, in that its ultimate purpose is to lead back to unitary integration.

Under the Treaty of Lisbon, the provisions on enhanced cooperation were, finally, put in practice. As of today, enhanced cooperation has been authorised in five instances, namely in the areas of the law applicable to divorce and legal separation, unitary patent protection, financial transaction tax, with regard to the property regimes of international couples, covering both matters of matrimonial property regimes and the property consequences of registered partnerships and for the establishment of the European Public Prosecutor's Office. It can be concluded that the evolution of the legal framework of enhanced cooperation reflected the persistance of the authors of the Treaties to render this mechanism functional towards the aim that it serves, namely the promotion of European integration, whereon the second part of the present study will elaborate.

B.2. The specific case of the Common Foreign and Security Policy

Provisions on enhanced cooperation in this area were introduced, for the first time, by the Treaty of Nice[110]. Thereunder, the scope of this mechanism was rather limited, since it could only be authorised in order to facilitate the implementation of a joint action or common position, which was already taken, and its application was excluded with regard to matters with military or defense implications[111].

As of today, the establishment of enhanced cooperation within the area of Common Foreign and Security Policy (hereinafter: CFSP) is regulated by the general rules on enhanced cooperation as laid down in Article 20 TEU and Articles 326 to 334 TFEU, which entail three derogations specific to this area. These regard the process of authorisation, the procedure for the *ex-post* participation of a Member State to an enhanced cooperation in progress and the application of the *passarelle* clause, when an enhanced cooperation is established in the CFSP area.

By virtue of Article 329 (2) TFEU, Member States willing to establish enhanced cooperation amongst them within the area of CFSP shall address a request to the Council instead of the Commission, which has to decide by unanimity instead of qualified majority voting. The High Representative of the Union for Foreign Affairs and Security Policy and the Commission should take notice of the request and submit their opinions with regard to its consistency with the Common Foreign and Security Policy and the other policies of the European Union respectively.

implementing legal act had not been adopted yet. See in that regard Chapters B.1.a. and B.1.c. of Part two of the present study.

[110] Articles 43-45 TEU and Article 27a-e TEU (Treaty of Nice)

[111] Article 27(b) TEU (Treaty of Nice)

The European Parliament's role is restricted to only being informed, opposite to the general requirement for its consent[112].

Secondly, under Article 331 (2) TFEU, as well as to the Council and the Commission, the High Representative of the Union for Foreign Affairs and Security Policy has to be notified with regard to the intention of a Member State to participate in an enhanced cooperation in progress. Thereunder, the role of the Council is strengthened which, instead of the Commission, is entrusted with the confirmation of the participation of the Member State concerned. The latter's role is restricted to just being notified in comparison to its role under the general provisions[113]. The High Representative of the Union for Foreign Affairs and Security Policy has to be consulted by the Council. The Council may adopt transitional measures necessary with regard to the application of the acts already adopted within the framework of enhanced cooperation *mutatis mutandis* to the general procedure[114]. Thirdly, the option provided to the Council to alter the decision-making rules is precluded with regard to decisions having military or defense implications by virtue of Article 333 (3) TFEU.

The aforementioned particularities provided by way of derogation from the general legal framework of enhanced cooperation reflect the characteristic attributed, in general, to this area as a *sui generis competence* of the European Union, whereby a distinct institutional balance and decision-making procedure is provided[115]. In the case of enhanced cooperation, the role of the Council and of the High Representative of the Union for Foreign Affairs and Security Policy are strengthened in opposition to the role of the Commission and the European Parliament and at the same time the prevalence of the rule of unanimity for decision-making is maintained.

However, the presence of differentiation within the framework of the Common Foreign and Security Policy is not exhausted to falling under the scope of the provisions on enhanced cooperation. Instances of differentiation have existed therein before the introduction of this mechanism and continue to exist in parallel. Consequently, it can be concluded that flexibility constitutes an integral characteristic of the CFSP area, which has been introduced as a pragmatic instrument in order to enable integration to progress, in particular, in view of the sensitivity of this area to national sovereignty of the Member States.

Straightaway from the formalisation of the CFSP area by the Treaty of Maastricht under the second Pillar[116], an express opt-out was granted to Denmark prompted by the rejection of the Treaty of Maastricht in the Danish referendum, which was, subsequently, transformed into a Protocol annexed to the Treaty of Amsterdam[117]. Presently, the opt-out status of Denmark with regard to the CFSP is provided for in Article 5 of Protocol (No 22) annexed to the TFEU.

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[112] Article 329 (1) (2) TFEU

[113] Article 331 (1) (2) TFEU

[114] Μπόσκοβιτς Κ., «άρ. 331 ΣΛΕΕ», 2020, in Σκουρής Β., «Συνθήκη της Λισσαβώνας, Ερμηνεία κατ' άρθρον», Εκδόσεις Σάκκουλα, 2020, p. 1992

[115] Under Article 24 (1) (2): "*The common foreign and security policy is subject to specific rules and procedures* [….]"

[116] The first set of rules within the legal framework of the European Union on this policy field were laid down in Article 30 of the Single European Act referred to as European Political Cooperation as in Koutrakos P., "Foreign Policy between opt-outs and closer cooperation", 2017 in De Witte B., Ott A. and Vos E. (eds), "Between Flexibility and Disintegration: The Trajectory of Differentiation in EU law, Edward Elgar Publishing, 2017, p. 406

[117] Koutrakos P., "Foreign Policy between opt-outs and closer cooperation", 2017 in De Witte B., Ott A. and Vos E. (eds), "Between Flexibility and Disintegration: The Trajectory of Differentiation in EU law, Edward Elgar Publishing, 2017, p. 406

Thereunder, it is provided that Denmark does not participate in decisions and actions with defense implications.

Secondly, under Article 31 TEU, the option of an *ad hoc* opt-out is provided to each Member State, which enables Member States to not be bound by a decision adopted in the Council by abstaining in a vote[118]. This provision has the purpose of rendering the rule of unanimity more functional and it originates from the *constructive abstention* provided for under the Treaty of Amsterdam, when the mechanism of enhanced cooperation was not applicable in this area yet[119].

Flexibility is present, also, in the Common Foreign and Defense Policy (hereinafter: CFDP), which forms an integral part of the Common Foreign and Security Policy of the European Union[120]. Under Treaty of Lisbon, the creation of a CFDP is rendered an objective of the Treaty, instead of a possibility[121]. Under the second paragraph of Article 42 TEU, respect for the fundamental defense choices of Member States as well as for the obligations of the Member States which are parties to the North Atlantic Treaty Organization (NATO) is acknowledged. NATO could be referred to, also, as a further instance, next to the *Benelux clause*, of explicit acknowledgment in the primary law of the European Union of an international treaty concluded between several Member States outside the EU institutional framework[122]. In essence, under this provision, the European legislator undertakes to conciliate the competence attributed to the European Union for an autonomous defense policy with the neutrality or the alliances of the Member States with regard to their defense policies, whose safeguarding constitutes an indispensable requirement for the political acceptance of CSDP[123]. Consequently, in this case, flexibility is introduced in order to allow the gradual evolution of integration in the field of CSDP.

Lastly, there are provided mechanisms within the framework of CSDP, which may or should include only a group of the Member States. On the one hand, Article 42 (5) TEU in conjunction with Article 44 TEU allow the execution of a task within the framework of the European Union to be entrusted to a group of Member States and on the other hand, Article 42 (6) TEU in conjunction with Article 46 TEU[124] provide that a permanent structured cooperation should be established between those Member States which fulfill certain criteria[125] for the execution of the most demanding missions. Permanent structured cooperation (hereinafter:

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[118] According to Article 31 (1) (2) TEU: "*When abstaining in a vote, any member of the Council may qualify its abstention by making a formal declaration under the present subparagraph. In that case, it shall not be obliged to apply the decision, but shall accept that the decision commits the Union.*"

[119] Koutrakos P., "Foreign Policy between opt-outs and closer cooperation", 2017 in De Witte B., Ott A. and Vos E. (eds), "Between Flexibility and Disintegration: The Trajectory of Differentiation in EU law, Edward Elgar Publishing, 2017, pp. 407-408

[120] According to Article 42 (1) : "*The common security and defense policy shall be an integral part of the common foreign and security policy.* […]"

[121] According to Article 42 (2): "*The common security and defense policy shall include the progressive framing of a common Union defense policy*"; Κωστόπουλος Ε., «άρ. 42 ΣΕΕ», 2020 in Σκουρής Β., «Συνθήκη της Λισσαβώνας, Ερμηνεία κατ' άρθρον», Εκδόσεις Σάκκουλα, 2020, p. 246

[122] Blanke, "EUV Art. 20 Verstärkte Zusammenarbeit", in Grabbitz/Hilf/Nettesheim/Blanke, "Das Recht der Europäischen Union", 72. EL. Februar 2021, Rn. 29

[123] Κωστόπουλος Ε., «άρ. 42 ΣΕΕ», 2020 in Σκουρής Β., «Συνθήκη της Λισσαβώνας, Ερμηνεία κατ' άρθρον», Εκδόσεις Σάκκουλα, 2020, pp. 246-247

[124] As well as Protocol (No 10) on Permanent Structured Cooperation established by Article 42 of the Treaty on the European Union annexed to the Treaty on the Functioning of the European Union

[125] According to Article 42 (6): "*Those Member States whose military capabilities fulfil higher criteria and which have made more binding commitments to one another* […] *shall establish permanent structured cooperation within the Union framework*"

PESCO) can be considered as a particular – to this area – manifestation of enhanced cooperation, whose provision constitutes a significant evolution to the scope of enhanced cooperation within this area, since its establishment was completely excluded from matters with defense and military implications under the Treaty of Nice, when the scope of enhanced cooperation was extended to the second pillar.

PESCO constitutes one of the innovations of the Treaty of Lisbon, additionally to the application of enhanced cooperation in the CSDP. The legal framework for the establishment of PESCO is less restrictive than the legal framework of enhanced cooperation, a characteristic that should be attributed to the underlying purpose of rendering recourse to it more accessible to the Member States[126]. There are specific characteristics to this mechanism which distinguish it both from the general mechanism of enhanced cooperation as well as from the overall legal framework underpinning the area of CSDP. Firstly, as an exception to the – significant for this area – rule of unanimity, qualified majority voting is provided for the authorisation of PESCO, for the procedure on the *ex-post* participation of a Member State and for the suspension procedure[127]. The principle of openness is central in the establishment of PESCO in the same way as it is in the establishment of an enhanced cooperation, which becomes evident by the fact that the same conditions are laid down both for the authorisation procedure and the procedure for the ex-post participation of a Member State[128]. However, in the present case, there are laid down two specific conditions, which have to be met in order for a Member State to participate in this mechanism[129]. According to the wording of Article 46 TEU, the mechanism provided has a single character, which means that it is established once and permanently, while on the other hand, the content, that this mechanism should have, is not specified by the Treaty, which renders its applicability potentially broad[130]. Opposite to enhanced cooperation, the withdrawal or the suspension of a Member State from PESCO is explicitly outlined[131]. Lastly, it should be mentioned that this provision has been enacted and PESCO was established in 2017 by Council Decision (CFSP) 2017/2315 of 11 December 2017 establishing permanent structured cooperation (PESCO) and determining the list of participating Member States, whereby twenty-five Member States[132] are participating.

B.3 The simplified version of the Area of Freedom, Security and Justice

The Treaty of Lisbon abolished the three-pillar structure introduced by the Treaty of Maastricht. As a result, the third Pillar of Justice and Home affairs was fully integrated into the institutional framework of the European Union as the Area of Freedom, Security and Justice (hereinafter: AFSJ). Under Article 3 (2) TEU, the creation of "*an Area of Freedom, Security and Justice without internal frontiers*" constitutes one of the main objectives of the European Union,

[126] Koutrakos P., "Foreign Policy between opt-outs and closer cooperation", 2017 in De Witte B., Ott A. and Vos E. (eds), "Between Flexibility and Disintegration: The Trajectory of Differentiation in EU law, Edward Elgar Publishing, 2017, pp. 415-418
[127] Article 46 (2), (3) (2) and (4) (2) TEU
[128] Article 46 (2) and (3) TEU
[129] See Protocol (No 10) on establishing a Permanent Structured Cooperation Permanent Structured Cooperation established by Article 42 of the Treaty on the European Union annexed to the Treaty on the Functioning of the European Union
[130] Κωστόπουλος Ε., «άρ. 46 ΣΕΕ», 2020 in Σκουρής Β., «Συνθήκη της Λισσαβώνας, Ερμηνεία κατ' άρθρον», Εκδόσεις Σάκκουλα, 2020, pp. 259-261
[131] Article 46 (5) and (4) respectively
[132] The United Kingdom (before Brexit), Denmark and Malta have not taken part yet.

while the relevant provisions of this policy area constitute Title V of Part Three of the TFEU. Under Article 4 (2) (j) TFEU, the AFSJ constitutes an area of shared competence between the European Union and its Member States. The evolution of this policy area from a form of a more intergovernmental than supranational cooperation under the three-Pillar structure to a shared competence of the European Union is explained, on the one part, due to its close relevance to the provisions of free movement and, on the other part, due to its sensitivity to national sovereignty of the Member States.

This area is relative to the debate on differentiated integration, since it entails various features of differentiation. This is demonstrated by the opt-out regimes granted to the United Kingdom, Ireland and Denmark[133] with regard to the Protocol on integrating the Schengen Acquis in the legal framework of the European Union as well as with regard to the overall policy area and by the explicit provision of a *simplified* version of the legal tool of enhanced cooperation in four instances, namely in Articles 82 (3), 83 (3) and 86 (1) (c) TFEU with regard to judicial cooperation in criminal matters and in Article 87 (3) TFEU with regard to police cooperation. In parallel, the general provisions on enhanced cooperation are applicable to the overall area, which have already been used twice in the policy field of judicial cooperation in civil matters, which forms part of AFSJ.

Under Articles 82 (3) and 83 (3) TFEU, Member States are provided with the so-called *emergency brake*, which allows them to suspend the ordinary legislative procedure on the adoption of a draft Directive on the harmonization of their procedural and substantive criminal rules respectively and refer the matter to the European Council, when they consider that fundamental aspects of their criminal justice system would be affected by the rules to be adopted. This intergovernmental enclave, for the purpose of preserving fundamental aspects of the national systems of criminal justice of the Member States, was included as an institutional counterweight to laying down the qualified majority voting as the rule for decision-making in the Area of Freedom, Security and Justice[134]. As it is provided, if the Member States do not reach consensus within the European Council, the legislative procedure stops and the legal act is not adopted.

To this end, by virtue of Articles 82 (3) (b) and 83 (3) (b) TFEU respectively, the Member States willing to proceed to the adoption of the proposed Directive are provided with the option to establish enhanced cooperation among themselves, whereby a simplified procedure for its authorisation is established as a derogation from the general provisions of the Treaties on enhanced cooperation. This provision reflects the underlying purpose of preventing the indefinite cancellation of a legislative process and consequently, of deepening integration. In contrast to the abovementioned *emergency brake*, this provision has been coined as an *emergency accelerator*, since it enables the adoption of EU legislation and consequently, the promotion of European integration within the framework of an enhanced cooperation established under more favorable conditions than those provided under the general provisions on enhanced cooperation[135].

[133] See in that regard Chapter A.2.a. of Part one of the present study.
[134] Παπακυριακού Θ., «άρ. 82 ΣΛΕΕ», 2020, in Σκουρής Β., «Συνθήκη της Λισσαβώνας, Ερμηνεία κατ' άρθρον», Εκδόσεις Σάκκουλα, 2020, pp. 885-887; Γιαννακούλα Α., «άρ. 83 ΣΛΕΕ», 2020, in Σκουρής Β., «Συνθήκη της Λισσαβώνας, Ερμηνεία κατ' άρθρον», Εκδόσεις Σάκκουλα, 2020, p. 899
[135] Γιαννακούλα Α., «άρ. 83 ΣΛΕΕ», 2020, in Σκουρής Β., «Συνθήκη της Λισσαβώνας, Ερμηνεία κατ' άρθρον», Εκδόσεις Σάκκουλα, 2020, p. 899

The characterisation *simplified* stems from the procedure provided for the authorisation of enhanced cooperation, because it derogates from the general procedure of authorisation of an enhanced cooperation as established by Articles 20 TEU and 326-334 TFEU. More specifically, if at least nine Member States are willing to establish enhanced cooperation on the basis of the proposed Directive, opposite to the procedure laid down in Articles 20 (2) TEU and 329 TFEU, they should only notify their intention to the European Parliament, the Council and the Commission and the procedure is deemed to be authorised. Accordingly, these provisions should be considered as *lex specialis* to the general provisions of the TEU and TFEU on enhanced cooperation.

The same *emergency accelerator* has been laid down in Article 86 (1) (3) TFEU for the establishment of a European Public Prosecutor's Office from Eurojust. In principle, a European Public Prosecutor's Office had to be established by means of a Regulation in accordance with a special legislative procedure, where the Council had to decide unanimously after obtaining the consent of the European Parliament. If unanimity could not be reached in the Council, a group of at least nine Member States could refer the draft Regulation to the European Council. If consensus was not reached in the European Council as well, then at least nine Member States could proceed to the adoption of the draft Regulation by establishing enhanced cooperation under the sole procedural condition of notifying the European Parliament, the Council and the Commission by way of derogation from the general provisions on the establishment of enhanced cooperation. Ultimately, the simplified procedure of enhanced cooperation was, in fact, used and the European Public Prosecutor's Office was established in 2017 by virtue of Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO')[136].

Lastly, an identical provision to the aforementioned instances has been laid down with regard to police cooperation in Article 87 (3) (3) TFEU. As a rule, a special legislative procedure has to be followed for the adoption of measures on operational cooperation between the authorities of the Member States, which requires unanimity in the Council following the consultation of the European Parliament. The requirement of unanimity reflects the reservation of the Member States with regard to matters of national internal security[137]. It results therefrom that, in the same manner as in the field of judicial cooperation in criminal matters, recourse to the same simplified version of enhanced cooperation has been introduced as a counterweight to the rule of unanimity in order to enable the progress of integration. Under Article 87 (3) (d), the acts which constitute a development of the *Schengen acquis* are explicitly excluded from the scope of this provision, which can be explained in view of the fact that the *Schengen acquis* already constitutes an "*informal*"[138] enhanced cooperation, whereby special provisions are applicable under the Protocol on integrating the Schengen acquis into the framework of the European Union.

Consequently, the abovementioned provisions demonstrate the intention of the European legislator to introduce a balance between the imperative of advancing the integration process and

[136] See in that regard Chapter B.1.e. of Part two of the present study.
[137] Παπακυριακού Θ., «άρ. 82 ΣΛΕΕ», 2020, in Σκουρής Β., «Συνθήκη της Λισσαβώνας, Ερμηνεία κατ' άρθρον», Εκδόσεις Σάκκουλα, 2020, pp. 953-954
[138] Κουσκουνά Μ., «Ο χώρος Σένγκεν και η προσφυγική κρίση», Δικαιώματα του Ανθρώπου, Επιθεώρηση Ατομικών και Κοινωνικών Δικαιωμάτων 70/2016, p. 2; Παπακυριακού Θ., «άρ. 82 ΣΛΕΕ», 2020, in Σκουρής Β., «Συνθήκη της Λισσαβώνας, Ερμηνεία κατ' άρθρον», Εκδόσεις Σάκκουλα, 2020, pp. 953-954

the imperative of preserving diversity, specifically with regard to an area closely related to national sovereignty. The shift from the rule of unanimity to qualified majority voting under the ordinary legislative procedure is counterbalanced by the "*emergency brake*" provided to the Member States as a means of safeguarding national divergencies of the Member States, while the adopted simplified procedure for the authorisation of enhanced cooperation functions as an *emergency accelerator* and as an incentive for the development of European integration.

Part Two: Enhanced Cooperation as an effective tool for the promotion of European Integration

Chapter A: Institutional features and guarantees as enshrined in primary EU law

As a form of differentiated integration embedded in primary EU law, enhanced cooperation constitutes the exception to the principle of unitary integration, in that it enables several Member States to advance integration amongst them in a policy area, when other Member States cannot or will not follow. At the same time, enhanced cooperation should be understood as a legal tool established by primary EU law with the purpose of promoting European integration, in that it enables the adoption of EU legislation, which has been deemed impossible for the Union as a whole, by the willing Member States, and which would, otherwise, be cancelled or realised outside the institutional framework of the European Union. The effectiveness of this legal tool towards the aim that it pursues lies exactly in the exceptional character that it maintains as the *last resort* solution, when a legislative action cannot proceed under the legislative procedures provided as the rule. Its effectiveness is the result of the balance that the authors of the Treaties successfully reached by enshrining provisions which can serve the aim of advancing the integration process and which, at the same time, safeguard the unity of the legal order of the European Union. This balancing is reflected in the substantive constraints and procedural requirements, which form the legal framework of enhanced cooperation.

A.1: Substantive constraints

The substantive constraints regulating enhanced cooperation are summarised in Article 20 TEU and specified in Articles 326-334 TFEU. These have to be observed throughout the establishment of an enhanced cooperation, which entails the stage of authorisation and the stage of implementation. It has been supported that, in essence, they constitute mere declaratory confirmations of general principles of EU law[139].

By virtue of Article 20 (1) TEU coupled with Article 326 (1) TFEU, an enhanced cooperation "*shall aim to further the objectives of the Union, protect its interests and reinforce the integration process*" and it "*shall comply with the Treaties and Union law*". These provisions express compliance with the fundamental principle of loyalty[140] by setting a positive and a negative condition to the establishment of enhanced cooperation: the promotion of integration and the respect of the Union acquis[141]. Respect of the Union acquis requires, essentially, that an enhanced cooperation comply with all the rules and principles of the legal order of the European Union enshrined in primary and secondary EU law. Under this principle, a measure or an act adopted in the framework of enhanced cooperation should not come in conflict with an existing measure or act of EU law, whereas an action undertaken by the Union as a whole in a policy field, where enhanced cooperation has been established, may have as a result the amendment or even the

[139] Thym D., "Competing models for understanding differentiated integration", 2017 in in De Witte B., Ott A. and Vos E. (eds), "Between Flexibility and Disintegration: The Trajectory of Differentiation in EU law, Edward Elgar Publishing, 2017, p. 43

[140] Article 4 (3) TEU

[141] Μπόσκοβιτς Κ., «άρ. 20 ΣΕΕ», 2020, in Σκουρής Β., «Συνθήκη της Λισσαβώνας, Ερμηνεία κατ' άρθρον», Εκδόσεις Σάκκουλα, 2020, p. 185

abolishment of an existing enhanced cooperation[142]. In line with this rational, compliance with the fundamental principle of conferral of powers[143] is explicitly laid down in Article 20 (1) TEU coupled with Article 329 (1) TFEU, which, in principle, requires that enhanced cooperation be established within the framework of the competences conferred by the Member States on the Union for the attainment of its objectives, but it, further, precludes from its scope the areas of exclusive competence of the European Union listed in Article 3 TFEU. The latter should be attributed to their significance for the maintenance of the unity of the EU legal order[144].

Lastly, the fundamental principle of coherence is enshrined in Article 334 TFEU, which, as well as to the observance of consistency among the actions undertaken within an enhanced cooperation, requires that these actions be consistent with the Union policies in general. In particular, as it has been established, this principle requires that an enhanced cooperation be consistent with Union policies in three ways: as a mechanism in general, in relation to other established cooperation schemes and in relation to the policies of the European Union[145].

The matter of the legal effects of the legal acts adopted in the framework of an enhanced cooperation is significant as well. By virtue of Article 20 (4) TEU, these are binding only to the participating Member States and they do not constitute "[…] *part of the acquis which has to be accepted by candidate States for accession to the Union*". Despite producing legal effects only for the participating Member States and despite their exclusion from forming part of the Union acquis, these legal acts constitute regular legal acts of EU law and have the same legal force for the participating Member States as any act of secondary EU law. This feature of enhanced cooperation contributes to its effectiveness for the promotion of the integration process, in particular in comparison to schemes of differentiated integration established outside the EU legal order. It results from the above analysis that the legal acts adopted within the framework of an enhanced cooperation are governed as any EU legal act by all the principles and legal rules of the European Union, such as the EU principles of primacy and, potentially, of direct effect[146].

Furthermore, by virtue of Article 326 (2) TFEU, an enhanced 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*". In essence, this provision specifies the general rule of paragraph one for compliance with the law of the European Union with regard to concrete policy fields, which have a fundamental significance for the legal order of the European Union[147]. Thereunder, the requirement of compliance by an enhanced cooperation with the fundamental freedoms is

[142] Μπόσκοβιτς Κ., «άρ. 20 ΣΕΕ», 2020, in Σκουρής Β., «Συνθήκη της Λισσαβώνας, Ερμηνεία κατ' άρθρον», Εκδόσεις Σάκκουλα, 2020, p. 187-188

[143] Article 5 (2) TEU

[144] Blanke, "EUV Art. 20 Verstärkte Zusammenarbeit", in Grabbitz/Hilf/Nettesheim/Blanke, "Das Recht der Europäischen Union", 72. EL. Februar 2021, Rn. 36

[145] Μπόσκοβιτς Κ., «άρ. 334 ΣΛΕΕ», 2020, in Σκουρής Β., «Συνθήκη της Λισσαβώνας, Ερμηνεία κατ' άρθρον», Εκδόσεις Σάκκουλα, 2020, p. 1995

[146] Μπόσκοβιτς Κ., «άρ. 20 ΣΕΕ», 2020, in Σκουρής Β., «Συνθήκη της Λισσαβώνας, Ερμηνεία κατ' άρθρον», Εκδόσεις Σάκκουλα, 2020, pp. 185-187; Miglio A., "Differentiated integration and the principle of loyalty", E.C.L. Review 2018, 14 (3), p. 480

[147] Μπόσκοβιτς Κ., «άρ. 326 ΣΛΕΕ», 2020, in Σκουρής Β., «Συνθήκη της Λισσαβώνας, Ερμηνεία κατ' άρθρον», Εκδόσεις Σάκκουλα, 2020, p. 1983

established [148]. It has been supported that this provision can be regarded as significantly restrictive, if it is considered that many policy fields have an economic dimension[149].

Article 327 TFEU constitutes a further expression of the principle of loyalty within the legal framework of enhanced cooperation, which establishes legal safeguards with regard to the status and the relationship of the participating and the non-participating Member States to an enhanced cooperation[150]. Within the legal framework of enhanced cooperation, a particular significance is attributed to the non-participating Member States, which is demonstrated both by the respective substantive and procedural requirements. As it will be elaborated on the procedural requirements as well, this feature should be read in light of the hidden purpose of this legal tool, that gradually all Member States will *(be persuaded to)* accede to the existing schemes of enhanced cooperation and thus, even if it occurs gradually, unity will be restored and integration will continue advancing for the Union as a whole. Under this provision, the principle of loyalty requires that the non-participating Member States are free to exercise their competence in the policy field, where an enhanced cooperation has been implemented and that the latter should not affect the national or international rules enforced in a non-participating Member State[151]. Reversely, the non-participating Member States should comply with this principle as well, in that they have the obligation to not impede the authorisation and the implementation of an enhanced cooperation between the participating Member States. However, this obligation should not be understood as requiring non-participating Member States to take positive measures in support of an enhanced cooperation[152]. This view is supported, also, by the provision of Article 332 TFEU, which, in principle, requires only the participating Member States to borne expenditure resulting from the implementation of an enhanced cooperation.

A.2: Procedural requirements

As well as to the substantive constraints, the procedural rules provided reflect the aim of the authors of the Treaties to safeguard the fundamental rules and principles of the European Union in order to render enhanced cooperation an effective legal tool for the promotion of European integration.

One of the most important features is the role attributed to the institutions of the European Union, which has been stressed by the Court of Justice as well[153]. Firstly, the overall involvement of the EU institutions in this legal framework affords an advantage to enhanced cooperation in comparison to the adoption of international law instruments, in that the interests of the Union as a

[148] Thym D., "Competing models for understanding differentiated integration", 2017 in in De Witte B., Ott A. and Vos E. (eds), "Between Flexibility and Disintegration: The Trajectory of Differentiation in EU law, Edward Elgar Publishing, 2017, pp. 44-45
[149] ibid, p. 44
[150] Μπόσκοβιτς Κ., «άρ. 327 ΣΛΕΕ», 2020, in Σκουρής Β., «Συνθήκη της Λισσαβώνας, Ερμηνεία κατ' άρθρον», Εκδόσεις Σάκκουλα, 2020, p. 1985; Miglio A., "Differentiated integration and the principle of loyalty", E.C.L. Review 2018, 14 (3), p. 484
[151] Μπόσκοβιτς Κ., «άρ. 327 ΣΛΕΕ», 2020, in Σκουρής Β., «Συνθήκη της Λισσαβώνας, Ερμηνεία κατ' άρθρον», Εκδόσεις Σάκκουλα, 2020, p. 1985
[152] ibid
[153] CJEU, Judgment of 16 April 2013, Joined Cases C-274/11 and C-295/11 *Kingdom of Spain and Italian Republic v Council* ECLI:EU:C:2013:240, para. 52

whole and of the non-participating Member States individually are being safeguarded, while parliamentary and judicial guarantees are provided for the benefit of European citizens[154].

In view of the role attributed to the three EU institutions in the procedure of authorisation of an enhanced cooperation, the latter has been characterised as "*a vehicle for compromise, which supports the emergence of a basic political consensus about the suitability of differentiation*[155]". In spite of the fact that the initiative for the establishment of enhanced cooperation is given to the Member States and even if all legal requirements are met, the ultimate decision rests with the political discretion of the three EU institutions[156]. In that regard, by virtue of Article 329 (1) TFEU, the Commission is not obliged by the Treaties to submit a proposal on the request of the Member States, but it is given a margin of discretion to decide[157], while the authorisation is subject to the co-decision of the European Parliament and the Council. The Council decides by qualified majority voting, wherein all Member States take part[158]. According to the case-law of the Court of Justice of the European Union, the Council enjoys a broad margin of appreciation when it examines the fulfillment of the criteria provided for the authorisation of enhanced cooperation[159]. Lastly, under the provisions on enhanced cooperation introduced by the Treaty of Lisbon, the role of the European Parliament has been significantly strengthened, in that the authorisation of an enhanced cooperation is subject to its consent regardless of the area which it concerns[160], which, essentially, increases the democratic legitimacy of this legal tool.

Furthermore, the role of the Commission as the guardian of the Treaties becomes evident throughout the overall legal framework of enhanced cooperation. Under Article 328 TFEU, the Commission has the obligation to keep "*regularly informed the European Parliament and the Council on the developments in enhanced cooperation*", while at the same time it should promote – together with the participating Member States – "*participation by as many Member States as possible*". It is entrusted with the decision on whether an authorisation procedure will be initiated as well as on the accession of a Member State to an existing enhanced cooperation[161]. Additionally, the Commission together with the Council are afforded the task of ensuring that each enhanced cooperation be compatible with the principle of coherence enshrined in Article 334 TFEU. The Commission, in particular, should observe compliance with the principle of coherence during the authorisation stage and for the information of the Council by virtue of Article 328 (2) TFEU[162].

Lastly, the entirety of the legal conditions for the authorisation and implementation of enhanced cooperation are subject to judicial review by the Court of Justice of the European Union,

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[154] European Convention on Enhanced Cooperation, ConV 723/03, 14 May 2003, p. 10; Blanke, "EUV Art. 20 Verstärkte Zusammenarbeit", in Grabbitz/Hilf/Nettesheim/Blanke, "Das Recht der Europäischen Union", 72. EL. Februar 2021, Rn. 32

[155] Thym D., "Competing models for understanding differentiated integration", 2017 in in De Witte B., Ott A. and Vos E. (eds), "Between Flexibility and Disintegration: The Trajectory of Differentiation in EU law, Edward Elgar Publishing, 2017, p. 47

[156] ibid, p. 46-47

[157] "Member States which wish to establish enhanced cooperation […], shall address a request to the Commission. The Commission *may* submit a proposal to the Council to that effect."

[158] Article 20 (2) TEU and Article 329 (1) (2) TFEU

[159] CJEU, Judgment of 16 April 2013, Joined Cases C-274/11 and C-295/11 *Kingdom of Spain and Italian Republic v Council* ECLI:EU:C:2013:240, para. 52-53; See in that regard Chapter B.2 of Part two of the present study.

[160] Article 329 (1) (2) TFEU

[161] Articles 329 (1) and 331 (2) TFEU

[162] Μπόσκοβιτς Κ., «άρ. 334 ΣΛΕΕ», 2020, in Σκουρής Β., «Συνθήκη της Λισσαβώνας, Ερμηνεία κατ' άρθρον», Εκδόσεις Σάκκουλα, 2020, p. 1995

whereby the Court of Justice has the power to observe compliance with the limits laid down in the Treaties on enhanced cooperation[163]. The scope of judicial review relates to the overall legal framework of enhanced cooperation in that it covers the stage of authorisation, the stage of implementation and matters of membership in an enhanced cooperation[164]. As provided by the case-law of the Court, a broad discretionary power is, however, afforded to the Council when it has to make political assessments, as in the case of the examination on the fulfillment of the conditions of last resort and of reasonable period for the authorisation of an enhanced cooperation by the Council[165]. Consequently, the involvement of the EU institutions in the legal framework of enhanced cooperation guarantees the maintenance of the unity of the EU legal order and, at the same time, safeguards the effective implementation of each enhanced cooperation for the promotion of the integration process.

Besides the involvement of the EU institutions in the establishment of enhanced cooperation, two legal safeguards are provided in the form of legal requirements for the authorisation of an enhanced cooperation, whose analysis reinforces the argument that enhanced cooperation is framed in such a way that it is ensured that precedence is given to the unity of the EU legal order. Firstly, according to Article 20 (2) TEU, "*the decision authorising enhanced cooperation shall be adopted by the Council* […] *provided that at least nine Member States participate in it*". When this provision was examined during the debates on the Constitutional Treaty, the dilemma expressed was whether a proportion of Member States should be reintroduced following the example of the Treaty of Amsterdam, which provided for a minimum threshold of one third of the Member States, or whether to reset a specific number as under the Treaty of Nice, which required the participation of at least eight Member States. At last, the proposed threshold was set to one third of the Member States in view of the fact that a specific number did not make sense in a Union where the number of the Member States is not stable[166]. The Treaty of Lisbon changed this provision setting the minimum threshold to nine Member States with no further geographical criterion. It is supported, that this threshold reflects a compromise solution between a threshold in line with the limit of qualified majority voting in the Council and a threshold of five or six Member States which would point towards *a core Europe*[167].

Secondly, according to Article 20 (2) TEU, "*the decision authorising enhanced cooperation shall be adopted by the Council as a last resort, when it has established that the objectives of such cooperation cannot be attained within a reasonable period by the Union as a whole*". The purpose of this provision is that enhanced cooperation be maintained as *the exception to the rule* because only in this case it can effectively promote the process of integration. The European legislator seeks to safeguard that precedence is given to the adoption of legal rules by the Union as a whole. Only if the Council establishes that this is not possible within a reasonable time period and provided that at least nine Member States take part as well as that the further

[163] Blanke, "EUV Art. 20 Verstärkte Zusammenarbeit", in Grabbitz/Hilf/Nettesheim/Blanke, "Das Recht der Europäischen Union", 72. EL. Februar 2021, Rn. 33; Μπόσκοβιτς Κ., «άρ. 20 ΣΕΕ», 2020, in Σκουρής Β., «Συνθήκη της Λισσαβώνας, Ερμηνεία κατ' άρθρον», Εκδόσεις Σάκκουλα, 2020, p. 186

[164] Böttner R., "The Constitutional Framework for Enhanced Cooperation in EU law", Leiden, The Netherlands: Brill | Nijhoff, 2021, Chapter 7, pp. 257-278

[165] CJEU, Judgment of 16 April 2013, Joined Cases C-274/11 and C-295/11 *Kingdom of Spain and Italian Republic v Council* ECLI:EU:C:2013:240, para. 54

[166] European Convention on Enhanced Cooperation, ConV 723/03, 14 May 2003, p. 19

[167] Μπόσκοβιτς Κ., «άρ. 20 ΣΕΕ», 2020, in Σκουρής Β., «Συνθήκη της Λισσαβώνας, Ερμηνεία κατ' άρθρον», Εκδόσεις Σάκκουλα, 2020, p. 186

conditions laid down in Article 329 TFEU are fulfilled, the authorising decision may be adopted. The provision is, however, rather abstract with regard to the definition of the notion of reasonable period and with regard to when it should be considered that the objectives pursued cannot be attained. It has been supported, that this matter may arise, if a legislative proposal is pending before the Council, because it has not obtained the majority required for its adoption[168] and that, in any case, it is not required that a formal failure of a legislative procedure has occurred[169]. However, this ambiguity should be considered as consciously provided by the authors of the Treaties in order to afford the Council a broad margin of appreciation when making the relevant assessment. This argument has, already, been confirmed by the case-law of the Court of Justice[170].

Lastly, the principles of openness and transparency, which govern the overall legal framework of enhanced cooperation, are laid down by primary EU law as legal guarantees for the effectiveness of enhanced cooperation. According to Article 20 (1) (2) TEU, the principle of openness requires that an enhanced cooperation "*be open at any time to all Member States*", whereas Articles 328, 330 and 331 TFEU lay down the detailed rules on its application in all the stages of establishment of an enhanced cooperation. Thereunder, the Council and the Commission can neither exclude from nor force a Member State to take part in an enhanced cooperation[171]. The decision on an ex-post participation of a Member State to an enhanced cooperation is entrusted to the Commission in view of its role as the guardian of the Treaties, which has the obligation together with the participating Member States in enhanced cooperation to promote participation therein[172]. However, in case the Commission does not confirm the participation of a Member State to an existing enhanced cooperation by reason of the fact that the participation conditions have not been fulfilled, the Member State concerned has the option to refer the matter to the Council. This safeguard clause highlights the significance attributed to the promotion of participation of as many Member States as possible in an enhanced cooperation, which should be read in view of the hidden purpose of enhanced cooperation to gradually restore unity for the purposes of European integration.

On the other hand, Article 20 (3) TEU in conjunction with Article 330 TFEU, which provide that the non-participating Member States may participate in the deliberations of the Council, even though they do not have the right to vote, may be regarded as an expression of the principle of openness as well as an expression of the principle of transparency. In essence, these provisions have a double purpose. On the one part, the principle of transparency constitutes a general principle of EU law, which is enshrined in Article 15 TFEU and is closely related to the principles of democracy and rule of law[173]. In the context of the provisions on enhanced cooperation, this principle guarantees and safeguards the legality of the actions undertaken within the framework of an enhanced cooperation, and in particular the legality of the deliberations of the

[168] Μπόσκοβιτς Κ., «άρ. 20 ΣΕΕ», 2020, in Σκουρής Β., «Συνθήκη της Λισσαβώνας, Ερμηνεία κατ' άρθρον», Εκδόσεις Σάκκουλα, 2020, p. 186

[169] Thym D., "Competing models for understanding differentiated integration", 2017 in in De Witte B., Ott A. and Vos E. (eds), "Between Flexibility and Disintegration: The Trajectory of Differentiation in EU law, Edward Elgar Publishing, 2017, p. 48

[170] CJEU, Judgment of 16 April 2013, Joined Cases C-274/11 and C-295/11 *Kingdom of Spain and Italian Republic v Council* ECLI:EU:C:2013:240, para. 53-54; See in that regard Chapter B.2 of Part two of the present study.

[171] European Convention on Enhanced Cooperation, ConV 723/03, 14 May 2003, p. 19

[172] Article 328 (1) (2) TFEU

[173] Καψάλη Β., «άρ. 15 ΣΛΕΕ», 2020, in Σκουρής Β., «Συνθήκη της Λισσαβώνας, Ερμηνεία κατ' άρθρον», Εκδόσεις Σάκκουλα, 2020, pp. 384-385

Council, which is for the benefit of the participating and non-participating Member States and of the Union as a whole. On the other part, as it has been argued, these provisions elevate the deliberations of the Council within the framework of an enhanced cooperation to matters of general interest of the European Union[174]. The underpinning purpose is to maintain a constant dialogue between the participating and the non-participating Member States by allowing the considerations of the latter to be heard as well and consequently, to promote participation of as many Member States as possible.

Consequently, by virtue of the analysis above, it is demonstrated that the effectiveness of enhanced cooperation towards the aim of promoting European integration lays in the legal safeguards and guarantees forming its legal framework. In the next chapter, the practical implementation of these provisions will be examined.

Chapter B: Enhanced Cooperation in Practice

B.1: Enhanced Cooperation in view of the authorised instances

Enhanced cooperation was put in practice for the first time after the entry into force of the Treaty of Lisbon. Until then, the respective provisions had never been used, which is attributed to their rather inflexible and rigid character. As of today, enhanced cooperation has been authorised in five instances, which will be outlined in the present chapter. Following a chronological order, these instances concern the area of the law applicable to divorce (B.1.a.), the area of the creation of unitary patent protection (B.1.b.), the area of financial transaction tax (B.1.c.), the area of property regimes of international couples (B.1.d) and the establishment of a European Public Prosecutor's Office (B.1.e.).

B.1.a: Enhanced Cooperation in the area of the law applicable to divorce and legal separation

The first enhanced cooperation to ever be authorised regarded the area of the law applicable to divorce and legal separation. The debate on the adoption of such legislation for the European Union as a whole had already begun before the entry into force of the Treaty of Lisbon. The reason was that the lack of such legislation in connection with the gradual increase of the number of international couples resulted in the tendency of the couples willing to divorce to *rush to court* in order to safeguard that the most favorable to them legislation would be applied in their case[175]. At the time, the legal act regulating jurisdiction in matrimonial matters in the European Union was the Brussels II Regulation[176], which did not cover the respective matter.

[174] Böttner R., "The Constitutional Framework for Enhanced Cooperation in EU law", Leiden, The Netherlands: Brill | Nijhoff, 2021, Chapter 5, p. 195

[175] Cantore C.M., "We're one, but we're not the same: Enhanced Cooperation and the Tension between Unity and Asymmetry in the EU", Perspectives on Federalism, 2011, vol. 3, issue 3, p.E-11

[176] Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, OJ L 338, 23.12.2003, p. 1–29.

Taking note of this reality, the Commission issued in 2005 a Green Paper on the applicable law and jurisdiction in divorce matters[177] in order to initiate the debate thereon, which in 2006 was followed by the proposal of the Commission for the adoption of a Regulation, widely known as the Rome III Regulation[178]. It, essentially, consisted in amendments of the Brussels II Regulation with the purpose of enhancing "*legal certainty, predictability, flexibility and access to court*[179]" for international couples as regards divorce and legal separation cases. The legal basis of the proposed Regulation required unanimity for its adoption.

In 2008 the Council reached the conclusion that unanimity was impossible to be achieved "*at the time and in the foreseeable future*" and thus, that "*the objectives of the proposal could not be attained within a reasonable period*"[180], whereas the United Kingdom, Ireland and Denmark had already made use of their opt-outs. As a result, eight Member States[181] took the initiative to submit their requests to the Commission for the authorisation of enhanced cooperation in this area. Gradually all the more Member States[182] joined this initiative, whereas Greece withdrew its request before the enhanced cooperation was authorised in spite of being one of the first Member States to submit a request[183], leaving a total of fourteen requesting Member States.

For nearly two years, the Commission did not respond to the request of the Member States. After the entry into force of the Treaty of Lisbon in December 2009, the new European Commission approved the request and issued a proposal for the authorisation of enhanced cooperation[184]. In July 2010, the Council, having received the consent of the European Parliament and having established that all the substantive and procedural requirements were met[185], adopted Council Decision (EU) 2010/145 of 12 July 2010 authorising enhanced cooperation in the area of the law applicable to divorce and legal separation. Consequently, the participating Member States proceeded to the adoption of Council Regulation (EU) 1259/2010 of 20 December 2010 implementing enhanced cooperation in the respective area, commonly referred to as Rome III Regulation. It has to be stressed that between the time of the requests for the authorisation of enhanced cooperation and the time of its authorisation and implementation, the Treaty regime changed and hence, the legal bases for the adoption of the legal acts. Under the present institutional framework, the legal bases for the adoption of the measures concerned by the authorised enhanced cooperation are Articles 81 (2) (c) and 81 (3) TFEU in the field of judicial cooperation in civil matters, which constitutes the third chapter of the Area of Freedom, Security and Justice provided for in Title V of Part Three of the TFEU.

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[177] Green Paper on applicable law and jurisdiction in divorce matters, [COM(2005) 82 final]
[178] Proposal for a Council Regulation of 17 July 2007 amending Regulation (EC) No 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters [COM (2006) 399 final]
[179] ibid, p. 3
[180] Council Decision (EU) 2010/405 of 12 July 2010 authorizing enhanced cooperation in the area of the law applicable to divorce and legal separation, preamble nr. 4
[181] Greece, Spain, Italy, Luxembourg, Hungary, Austria, Romania and Slovenia. It is reminded, that under the Treaty of Nice, the threshold on the participating Member States to an enhanced cooperation was set to eight Member States.
[182] Belgium, Bulgaria, Germany, France, Latvia, Malta and Portugal
[183] Council Decision (EU) 2010/405 of 12 July 2010 authorizing enhanced cooperation in the area of the law applicable to divorce and legal separation, preamble nr. 5
[184] Peers St., "Divorce, European Style: the first authorization of enhanced Cooperation", E.C.L. Review 2010, 6 (3), p. 346
[185] Council Decision (EU) 2010/405 of 12 July 2010 authorizing enhanced cooperation in the area of the law applicable to divorce and legal separation, preamble nr. 7

After the authorisation and implementation of this enhanced cooperation, three more Member States decided to accede thereto[186] and thus, as of today seventeen Member States participate in this enhanced cooperation.

B.1.b: Enhanced Cooperation in the area of the creation of unitary patent protection

The creation of unitary patent protection, a policy field closely related to the internal market and the promotion of competition, constitutes the second instance, where enhanced cooperation has been established. The protection of patents in Europe has been regulated under the European Patent Convention, an intergovernmental agreement signed in 1973 in Munich, to which all the Member States of the European Union are contracting parties, except for the European Union itself[187]. According to the procedure provided thereunder, an application is submitted to the European Patent Organization (hereinafter: EPO), established by the European Patent Convention, which is responsible for granting protection. The protection granted, however, is not uniform throughout the territory of the contracting Member States, but it is confined only to the states, where it is requested. The effectiveness of this procedure is undermined due to the scope of the granted protection, which does not cover automatically the whole territory of the European Union and due to the expenses mainly resulting from the translation costs. In practice, each Member State can require complete translation of the patent into its own language, which as a process entails high costs and works against the competitiveness of the European countries.

There have been durable legislative attempts of the European Union to provide for a legal framework in this policy field, whereby patent protection would be granted uniformly throughout its whole territory. In 1997, the Commission issued a Green Paper for the adoption of a Regulation for the creation of a unitary patent[188] and in 2000, it issued a formal proposal[189], according to which a Community patent valid in all Member States would be granted by the EPO. In 2009, the Council had reached an agreement thereon, except for the issue of the translation arrangements. In 2010, the Commission issued a proposal for the adoption of a Regulation specifically with regard thereto, which provided that English, French and German would be the translation languages[190].

In the meantime, the Treaty of Lisbon was set in force, which, by virtue of Article 118 TFEU, provided a new legal basis for the adoption of legislation on the uniform protection of intellectual property rights throughout the Union. While under the first paragraph of this Article the application of the ordinary legislative procedure is set as the rule, the second paragraph of the same Article introduces a derogation therefrom for the adoption of measures on the language arrangements for the intellectual property rights. Thereunder, a special legislative procedure is to be followed, which requires unanimity and consultation of the European Parliament. This matter constituted the point on which the Member States could not reach an agreement. Particularly, in spite of agreeing, in general, with the creation of unitary patent protection, Spain and Italy opposed

[186] Greece, Lithuania and Estonia
[187] Peers St., "The constitutional implications of the EU patent", E.C.L. 2011, 7 (2), pp. 229-266
[188] Promoting innovation through patents - Green Paper on the Community patent and the patent system in Europe [COM (97) 314 final]
[189] Proposal for a Council Regulation on the Community patent [COM (2000)412 final], OJ C 337E, 28.11.2000, pp. 278–290
[190] Proposal for a Council Regulation (EU) on the translation arrangements for the European Union patent [COM (2010) 350 final]

to the adoption of the proposed legislation on the translation arrangements, in that they requested that Spanish and Italian be included in the translation languages. This disagreement led them to challenge, afterwards, the validity of the Council Decision authorising the enhanced cooperation.

In 2010, the Council established that no agreement would be reached "*in the foreseeable future*" with regard to the Regulation on the translation arrangements, which constituted an indispensable part of the overall legal framework on unitary patent protection to be adopted[191]. This led twelve Member States[192] to submit requests to the Commission for the authorisation of enhanced cooperation in the area of unitary patent protection[193]. Subsequently, thirteen more Member States[194] followed this initiative. The Commission proceeded to the adoption of a proposal and the Council, having received the consent of the European Parliament and having established that the necessary substantive and procedural requirements were fulfilled[195], adopted Council Decision (EU) 2011/167 of 10 March 2011 authorising enhanced cooperation in the area of the creation of unitary patent protection between a total of twenty-five participating – from the start – Member States, with the expected exceptions of Spain and Italy.

In the authorising decision, opposite to the other instances, the Council provided several specifications on the rules which the legal acts implementing the enhanced cooperation would have to include. Specifically, it provided that the protection of unitary patent, which would take the form of uniform protection throughout the territories of the participating Member States, would be granted by the EPO and that the translation arrangements had to be simple, cost-effective and correspondent to the translation arrangements laid down in the respective proposal presented in 2010 by the Commission combined with elements of compromise proposed in 2010 in the Council[196]. With regard to the translation arrangements, the Council provided that the application for a patent having unitary effect could be filed in any language of the European Union, but the patent would be granted only in one of the official languages of the EPO, without further translations being required. In 2012, two legal acts were adopted for the implementation of the authorised enhanced cooperation, namely Regulation (EU) No 1257/2012 of the European Parliament and of the Council of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection and Council Regulation (EU) No 1260/2012 of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection with regard to the applicable translation arrangements.

In 2011, Spain and Italy, the two non-participating Member States, brought actions for annulment of the authorising decision before the Court of Justice of the European Union, which for the first time would have the opportunity to rule on the provisions regulating enhanced cooperation. Therefore, the respective judgment of the Court of Justice is significant for the understanding of this legal tool and it will be analysed in the subsequent chapter. For the present

[191] Council Decision (EU) 2011/167 of 10 March 2011 authorising enhanced cooperation in the area of the creation of unitary patent protection, preamble nr. 4
[192] Denmark, Germany, Estonia, France, Lithuania, Luxembourg, the Netherlands, Poland, Slovenia, Finland, Sweden and the United Kingdom.
[193] Council Decision (EU) 2011/167 of 10 March 2011 authorising enhanced cooperation in the area of the creation of unitary patent protection, preamble nr. 4
[194] Belgium, Bulgaria, the Czech Republic, Ireland, Greece, Cyprus, Latvia, Hungary, Malta, Austria, Portugal, Romania and Slovakia.
[195] Council Decision (EU) 2011/167 of 10 March 2011 authorising enhanced cooperation in the area of the creation of unitary patent protection, preamble nr. 8
[196] ibid, preamble nr. 7

elaboration, suffice it to mention that the Court of Justice in its judgment of 16 April 2013, *Joined Cases C-274/11 and C-295/11, Kingdom of Spain and Italian Republic v Council* dismissed these actions by rejecting all the pleas based on alleged defects of the contested decision[197].

Spain maintained its objection to the adopted legislation within the framework of this enhanced cooperation and launched in 2013 two separate actions for annulment of both Regulations implementing enhanced cooperation in this area. By its judgments of 5 May 2015, *C-146/13 and C-147/13*, the Court of Justice dismissed both actions. The respective judgments will not be analysed in full in the present study, in that the pleas[198] put forward by Spain in each action did concern enhanced cooperation as such, but referred to the substantive measures adopted for its implementation. However, it should be stressed that they are significant in so far as they add to the positive stance of the Court of Justice towards the mechanism of enhanced cooperation.

To the opposite, Italy neutralised its opposition and in 2015 decided to join the existing enhanced cooperation by notifying its intention to the Commission. The Commission, after establishing that no particular conditions of participation were provided in the authorising decision and that the participation of Italy would only strengthen the existing enhanced cooperation[199], approved its participation by adopting Commission Decision (EU) 2015/1753 of 30 September 2015 on confirming the participation of Italy in enhanced cooperation in the area of the creation of unitary patent protection.

B.1.c: Enhanced Cooperation in the area of financial transaction tax

The debate on the introduction of additional taxation on the financial sector emerged as a consequence of the outburst of the financial crisis and it was, in principle, initiated in the international sphere[200]. In line therewith, in September 2011, the Commission issued a proposal for the adoption of a Council Directive on a common system of financial transaction tax on the basis of Article 113 TFEU[201]. Thereunder, the Council is competent to adopt harmonisation measures in the field of indirect taxation, provided that they are necessary for the attainment of the objectives of the internal market. This provision requires that a special legislative procedure be followed, whereby the Council should adopt the harmonising measures unanimously, after having consulted the European Parliament and the Economic and Social Committee. The requirement of unanimity and the control provided to the Council demonstrate the significance of this policy field to the national sovereignty of the Member States[202].

In its proposal, the Commission provided for the adoption of a tax which would cover transactions relating to all types of financial instruments, charged at the moment when the financial

[197] See in that regard Chapter B.2 of Part two of the present study
[198] CJEU judgment of 5 May 2015, Case C-146/13, Kingdom of Spain v European Parliament and Council, para. 23 and CJEU judgment of 5 May 2015, Case C-147/13, Kingdom of Spain v Council, para. 21
[199] Commission Decision (EU) 2015/1753 of 30 September 2015 on confirming the participation of Italy in enhanced cooperation in the area of the creation of unitary patent protection, preamble (5)
[200] Van Cleynenbreugel P. and Devroe W., "The financial transaction tax project", 2017 in De Witte B., Ott A. and Vos E. (eds), "Between Flexibility and Disintegration: The Trajectory of Differentiation in EU law", Edward Elgar Publishing, 2017, p. 283
[201] Proposal for a Council Directive on a common system of financial transaction tax and amending Directive 2008/7/EC [Com (2011) 594 final]
[202] Αναγνωστοπούλου Δ., «άρ. 113 ΣΛΕΕ», 2020, in Σκουρής Β., «Συνθήκη της Λισσαβώνας, Ερμηνεία κατ' άρθρον», Εκδόσεις Σάκκουλα, 2020, p. 1167

transaction occurred. As elaborated by the Commission, the purpose of the proposed Directive was to provide for "*a common European approach* […] *consistent with the internal market*" in so far as it aimed at preventing the increase of diverging national measures taken with regard to this matter likely to provoke a fragmentation of the internal market, at ensuring that the financial sector as such and in relation to other sectors contributes fairly to the costs of the financial crisis and at decreasing the incentives of financial institutions to engage in financial activities likely to provoke future crises[203].

Nevertheless, in 2012 it was established by the Council that unanimity could not be reached. The United Kingdom and Sweden opposed to the adoption of the proposed Directive, whereas France and Italy proceeded to the adoption of national legislation on this area[204]. To the opposite, eleven Member States[205] decided to pursue the adoption of the proposed legislation[206] in the framework of an enhanced cooperation and in September and October 2012 addressed their respective requests to the Commission. The Council, having received the consent of the European Parliament and having established that the substantive and procedural requirements were fulfilled[207], proceeded to the adoption of Council Decision (EU) 2013/52 authorising enhanced cooperation in the area of financial transaction tax. Consequently, the Commission issued in 2013 its proposal of a Directive implementing the enhanced cooperation authorised[208]. Currently, despite the overall intention of the participating Member States to proceed with the adoption of the harmonisation measures within the framework of the enhanced cooperation, it is still being debated on the proposed Directive by reason of several technical issues arising with regard to the substance of the legal rules[209], whereas one Member State, Estonia, communicated in March 2016 its decision to withdraw from the authorised enhanced cooperation by means of a letter addressed to the then Secretary General of the Council[210]. With ten remaining participating Member States, the present constitutes the "smallest" enhanced cooperation in terms of membership and the "slowest" in terms of implementation. It has to be concluded that both the relative low number of participating Member States and the delay in the adoption of the legal act implementing enhanced cooperation by comparison to the other instances of enhanced cooperation result from the sensitivity of the respective area to the national sovereignty of the Member States.

As well as for the participating Member States, the sensitivity of this enhanced cooperation to national sovereignty is relevant also with regard to the non-participating Member States, as

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[203] Proposal for a Council Directive on a common system of financial transaction tax and amending Directive 2008/7/EC [Com (2011) 594 final], p. 2

[204] Van Cleynenbreugel P. and Devroe W., "The financial transaction tax project", 2017 in De Witte B., Ott A. and Vos E. (eds), "Between Flexibility and Disintegration: The Trajectory of Differentiation in EU law", Edward Elgar Publishing, 2017, p. 284

[205] Belgium, Germany, Estonia, Greece, Spain, France, Italy, Austria, Portugal, Slovenia and Slovakia

[206] As provided in preamble nr. 6 of Council Decision (EU) 2013/52 authorising enhanced cooperation in the area of financial transaction tax, the Member States requested that the scope and objectives of the enhanced cooperation be based on the Directive proposed by the Commission in 2011.

[207] Council Decision (EU) 2013/52 authorising enhanced cooperation in the area of financial transaction tax, preamble and preamble nr. 8

[208] Proposal for a Council Directive implementing enhanced cooperation in the area of financial transaction tax [COM (2013) 71 final]

[209] Van Cleynenbreugel P. and Devroe W., "The financial transaction tax project", 2017 in De Witte B., Ott A. and Vos E. (eds), "Between Flexibility and Disintegration: The Trajectory of Differentiation in EU law", Edward Elgar Publishing, 2017, p. 287

[210] Document 7808/16 FISC 47 LIMITE, https://data.consilium.europa.eu/doc/document/ST-7808-2016-INIT/en/pdf accessed 3 November 2021

demonstrated by the stance of the United Kingdom, which in 2013, after the Commission adopted its proposal for a Directive implementing the enhanced cooperation, brought an action for annulment of the authorising Council Decision on the grounds that it affected the rights and the legal rules of the non-participating Member States. In its judgment of 30 April 2014, *Case C-209/13 United Kingdom v Council*, the Court of Justice dismissed it by reason of the fact that the pleas alleged by the United Kingdom did not concern constituent elements of the contested decision and thus, they could not be reviewed on the basis of the respective action for annulment, which concerned the validity of that decision[211].

B.1.d: Enhanced Cooperation in the area of property regimes of international couples

The area of property regimes of international couples constitutes the second instance, in which enhanced cooperation was authorised in the policy field of judicial cooperation in civil matters. In 2011, the Commission issued two proposals for the adoption of two Council Regulations on jurisdiction, applicable law and recognition and enforcement of decisions on the property regimes of international couples[212], which regulated matrimonial property regimes and property consequences of registered partnerships. The proposal for the adoption of two separate Regulations reflected the legal differences between the institutions of matrimony and registered partnership. The legal basis for the adoption of such legislation are Articles 81 (2) (a) and (c) and 81 (3) TFEU, which provide for the adoption of measures regarding jurisdiction, applicable law and recognition and enforcement of judgments on matters of family law with cross-border implication by the Council following a special legislative procedure. Thereunder, the adoption of such legislation is subject to the requirement of unanimity and the previous consultation of the European Parliament. The rule of unanimity indicates the significance of this area for the national legal orders of the Member States of the European Union, which corresponds to the overall rationale underlying the Area of Freedom, Security and Justice, whereof judicial cooperation in civil matters is part.

Despite lengthy debates on the proposed Regulations and attempts to introduce safeguards, which would dissolve the concerns of certain Member States, unanimity could not be reached in the Council. In view of the aforementioned differences between the national legal systems and traditions of the Member States, which in the present instance concerned the non-recognition by some Member States of the institutions of same-sex marriages or of registered partnerships, these Member States questioned whether their national policy on family law would in fact remain intact[213]. Consequently, in 2015 the Council concluded formally that an agreement could not be reached by the Union as a whole within a reasonable period[214].

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[211] CJEU, Judgment of 30 April 2014, Case C-209/13 United Kingdom v Council, ECLI:EU:C:2014:283, para. 33-40

[212]Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes [COM (2011) 126 final] and Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnerships [COM (2011) 127 final]

[213] Böttner R., "The Constitutional Framework for Enhanced Cooperation in EU law", Leiden, The Netherlands: Brill Nijhoff, 2021, Chapter 3, pp. 57-58

[214] Council Decision (EU) 2016/954 of 9 June 2016 authorizing 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, preamble nr. 4

Gradually, between December 2015 and March 2016 eighteen Member States[215] addressed requests to the Commission for the authorisation of enhanced cooperation in this area. In June 2016, the Council, having received the consent of the European Parliament and having established that all the substantive and procedural requirement were fulfilled[216], proceeded to the adoption of 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.

In the authorising decision, it was explicitly provided that the enhanced cooperation would be implemented by the simultaneous adoption of the two separate legal acts, in order to ensure that the entire scope of enhanced cooperation in this area would be covered and that the principle of non-discrimination with regard to the citizens falling within the framework of each implementing act would be observed[217]. Consequently, Council Regulation (EU) 2016/1103 of 24 June 2016 and Council Regulation (EU) 2016/1104 of June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes and in matters of the property consequences of registered partnerships respectively were adopted on the same day and as provided would be applicable in full as from 29 of January 2019[218].

To conclude, it is rather noticeable that, while the enhanced cooperation in the area of the law applicable in divorce matters and the present enhanced cooperation form part of the same policy field, the Member States participating in each instance do not overlap entirely[219].

B.1.e: Enhanced Cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO')

According to Article 86 TFEU, the Council is competent to establish a European Public Prosecutor's Office from Eurojust, whose scope of competence is limited to the combat of crimes affecting the financial interests of the European Union. The procedure to be followed requires the adoption of a Regulation under a special legislative procedure, whereby the voting rule is unanimity and the consent of the European Parliament is conditional. Although attempts towards the adoption of legislation on the establishment of a European Public Prosecutor's Office were already taken within the legal order of the European Union under the Treaty of Amsterdam and

[215] Malta, Croatia, Belgium, Germany, Greece, Spain, France, Italy, Luxembourg, Portugal, Slovenia, Sweden, the Czech Republic, the Netherlands, Bulgaria, Austria and Finland, whereas Cyprus submitted its request after the Commission had issued its proposal on the authorization of Enhanced Cooperation in this area.

[216] Council Decision (EU) 2016/954 of 9 June 2016 authorizing 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, preamble nr. 8

[217] Council Decision (EU) 2016/954 of 9 June 2016 authorizing 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, preamble nr. 7

[218] Article 70 of Council Regulation (EU) 2016/1103 and Article 70 of Council Regulation (EU) 2016/1104 of June 2016

[219] Böttner R., "The Constitutional Framework for Enhanced Cooperation in EU law", Leiden, The Netherlands: Brill Nijhoff, 2021, Chapter 3, pp. 59-60

the Treaty of Nice, an explicit competence of the Council was introduced under the Treaty of Lisbon[220].

In 2013, the Commission issued a proposal for a Council Regulation on the establishment of a European Public Prosecutor's Office[221]. Except for the opt-outs enacted by the United Kingdom, Ireland and Denmark from the beginning, it received, in general, a vast support[222]. On the other hand, the review of the national parliaments with regard to the compliance of the proposed Regulation with the principle of subsidiarity led to a different conclusion, which, however, did not persuade the Commission to introduce changes to or withdraw the proposed Regulation[223]. In 2016, while the Council had established a draft text of the Regulation to be adopted, which, as proclaimed, received a broad acceptance, Sweden declared its decision to oppose to the establishment of a European Public Prosecutor's Office, which had as a result the lack of unanimity[224].

Consequently, seventeen Member States followed the procedure laid down in Article 86 (1) (2) TFEU, which ended with the notice of the European Council that there was disagreement within the meaning of the third subparagraph of this Article. Article 86 (1) (3) TFEU constitutes a *lex specialis* to the provisions on the general legal framework on enhanced cooperation and has been characterised as an emergency accelerator or, in other words, as a simplified version of enhanced cooperation. As it has been developed in a former chapter[225], the simplifying factor lays in the fact that in four instances in the area of freedom, security and justice, one of which is this provision, enhanced cooperation is deemed to be authorised only by virtue of the notification of the willing Member States to the Commission, the Council and the European Parliament by derogation from the general rules governing the process of authorisation of enhanced cooperation. Sixteen Member States[226] enacted the application of this provision and notified their intention to establish enhanced cooperation with regard to the adoption of a Regulation for the establishment of a European Public Prosecutor's Office to the three institutions of the European Union. Subsequently and before the enhanced cooperation was deemed to be authorised, four other Member States[227] adhered thereto.

In October 2017, the Council proceeded to the adoption of Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO'). After its adoption, two further Member States, the Netherlands and Malta, decided to join the existing enhanced cooperation. According to Article 86 (1) (3), after enhanced cooperation is authorised as provided thereunder, the general rules on enhanced cooperation are applicable. Therefore, following the procedure laid down in Article 331 TFEU on the ex-post participation of a Member State to an existing enhanced cooperation, they

[220] Böttner R., "The Constitutional Framework for Enhanced Cooperation in EU law", Leiden, The Netherlands: Brill Nijhoff, 2021, Chapter 3, p. 60
[221] Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office [COM (2013) 534 final]
[222] Böttner R., "The Constitutional Framework for Enhanced Cooperation in EU law", Leiden, The Netherlands: Brill Nijhoff, 2021, Chapter 3, p. 61
[223] ibid
[224] ibid, pp. 61-62
[225] See in that regard Chapter B.3 of Part one of the present study
[226] Belgium, Bulgaria, Croatia, Cyprus, the Czech Republic, Finland, France, Germany, Greece, Lithuania, Luxembourg, Portugal, Romania, Slovakia, Slovenia and Spain
[227] Latvia, Estonia, Austria and Italy

notified their intention to the Commission, which, having established that the respective Regulation does not set out any particular conditions for the participation to this enhanced cooperation[228], issued Commission Decisions (EU) 2018/1094 and (EU) 2018/1103 confirming their participation. Consequently, a total of twenty-two Member States are currently participating in the enhanced cooperation on the establishment of the European Public Prosecutor's Office. Lastly, under the last article of Council Regulation (EU) 2017/1939, the Commission was required to adopt a decision within three years of the entry into force of this Regulation, whereby it would determine the date on which the European Public Prosecutor's Office would assume its investigative and prosecutorial tasks. Therefore, in May 2021, the Commission proceeded to the adoption of the respective Decision and set this date to 1 of June 2021[229].

In view of the analysis above on the instances of enhanced cooperation in the legal order of the European Union, significant features of this mechanism can be drawn which showcase its effectiveness as a legal tool for the promotion of European integration. A common characteristic to all instances is that the requirement of unanimity was provided for the adoption of the initially proposed legal act by the Union as a whole. Therefore, it results that recourse to the provisions on enhanced cooperation was, indeed, a pragmatic response to the legislative deadlock, which each instance had reached, whereby in all instances discussions were ongoing for a long time. Consequently, enhanced cooperation in these instances enabled the adoption of legislation within the legal order of the European Union which, otherwise, would not be adopted or would be realised outside the legal order of the European Union.

Nevertheless, enhanced cooperation would not be effective in pursuing its purpose, which is the promotion of European integration[230], if it led to a *fragmented* European Union by becoming the *soft option* for the Member States in the case of disagreement on legislative actions. As it has already been elaborated, the effectiveness of this legal tool lays precisely in that the provisions of primary EU law on enhanced cooperation define its scope by enshrining legal safeguards and guarantees which maintain its exceptional character. From the review on the five decisions authorising enhanced cooperation, it stems that they follow the same rationale of strictly defining the scope of each enhanced cooperation in compliance with the requirements of the provisions of the Treaties. In particular, in each instance, the Council outlines clearly the scope of each enhanced cooperation in a detailed manner by repeating, in essence, one by one the respective conditions laid down in the Treaties. Each decision authorising enhanced cooperation consists of two articles and is, in principle, limited to observing the fulfillment of the conditions set out in the Treaties for the authorisation of enhanced cooperation, whereas the Council may include specific guidelines on the legal framework to be established by the subsequent implementing legal act, if it deems it necessary[231]. Significance should be drawn to the specific reference made by the Council that

[228] Commission Decision (EU) 2018/1094 of 1 August 2018 confirming the participation of the Netherlands in the enhanced cooperation on the establishment of the European Public Prosecutor's Office, para. (5) and Commission Decision (EU) 2018/1103 of 7 August 2018 confirming the participation of Malta in the enhanced cooperation on the establishment of the European Public Prosecutor's Office, para. (7)
[229] Article 1 of Commission Implementing Decision (EU) 2021/856 of 25 May 2021 determining the date on which the European Public Prosecutor's Office assumes its investigative and prosecutorial tasks
[230] Article 20 (1) TEU
[231] Council Decision (EU) 2011/167, preamble nr. 7 and Council Decision (EU) 2016/954, preamble nr. 7

compliance with the Charter of Fundamental Rights of the European Union should be observed in the framework of enhanced cooperation[232].

With regard to the legal acts implementing enhanced cooperation, in principle, there is no provision within the legal framework set by the Treaties on enhanced cooperation which explicitly requires the adoption of a specific legal act. As it results from the reviewed instances, they can take the form of either a Regulation or a Directive, determined by the proposal of the Commission, which enjoys the legislative initiative. This feature should be seen in view of the broad discretion that is attributed to the EU institutions by the provisions of enhanced cooperation.

Furthermore, it has to be stressed that in all the cases of established enhanced cooperation, except for the case of the area of financial transaction tax, several Member States have chosen to join the existing frameworks in the course of time. This observation contributes to the argument that the legal of enhanced cooperation is framed so as to promote the participation of as many Member States as possible, which, eventually, may lead unitary integration to be restored.

Lastly, it has been elaborated, previously, that there is no provision in the legal framework of enhanced cooperation on the issue of a possible withdrawal of a Member State from an enhanced cooperation. From the practice, two occassions can be derived, where a Member State is allowed to withdraw from an enhanced cooperation. Firstly, a Member State can withdraw its request to the Commission for initiating the procedure of authorisation of enhanced cooperation, before the Commission has issued a proposal to the Council thereon, as in the case of Greece in the enhanced cooperation in the area of the law applicable to divorce and legal separation[233]. Secondly, a Member State can withdraw its participation in an enhanced cooperation, which has been authorised, but it has not been implemented yet, by means of a letter to the Secretary General of the Council, as in the case of Estonia with regard to enhanced cooperation in the area of financial transaction tax[234].

B.2. Enhanced Cooperation in view of the case-law of the Court of Justice of the European Union

As it has been already established, the involvement of the EU institutions in the legal framework of enhanced cooperation constitutes one of the features of this mechanism, which renders it effective for the promotion of European integration as a legal tool and distinguishes it as a form of differentiated integration from such schemes established outside the institutional framework of the European Union, in that its exceptional character can be safeguarded and the interests of the Union as a whole can be taken into account. In particular with regard to the Court of Justice, its involvement provides the legal framework of enhanced cooperation with judicial guarantees.

[232] Council Decision (EU) 2010/405, preamble nr. 14 and Council Decision (EU) 2016/954, preamble nr. 15
[233] Greece withdrew its request on 3 March 2010 and the Commission issued its proposal on 24 March 2010; Council Decision (EU) 2010/405 of 12 July 2010 authorizing enhanced cooperation in the area of the law applicable to divorce and legal separation preamble nr. 5
[234] Document 7808/16 FISC 47 LIMITE, https://data.consilium.europa.eu/doc/document/ST-7808-2016-INIT/en/pdf, accessed 3 November 2021

In principle, the case-law of the Court of Justice with regard to enhanced cooperation is limited. From the introduction of enhanced cooperation in the legal order of the European Union until presently, the Court of Justice has had the opportunity to rule on its provisions solely in two instances on the basis of actions for annulment of a Council Decision authorising enhanced cooperation. The first such actions were brought before the Court of Justice in 2011 with regard to the area of the creation of unitary patent protection by Spain and Italy. In its examination, the Court joined the two actions and in April 2013 issued its first judgment with regard to this uncharted – up to this time – mechanism. Lack of competence of the Council for the authorisation of enhanced cooperation in the respective area, misuse of powers, infringement of the condition of last resort, infringement of Articles 20 (1) TEU, 118, 326 (2) and 327 TFEU and disregard for the judicial system of the European Union were the five pleas, whereupon Spain and Italy based their actions for annulment of Council Decision 2011/167/EU[235].

The second instance took place within the framework of enhanced cooperation in the area of financial transaction tax. In 2013, the United Kingdom brought an action for annulment of the Council Decision authorising enhanced cooperation in this area before the Court of Justice on the grounds that Articles 327 TFEU and 332 TFEU were infringed by the respective Council Decision. According to the United Kingdom, Article 327 TFEU would be infringed in so far as the proposed by the Commission Directive implementing enhanced cooperation in the area of financial transaction tax would produce extraterritorial effects, whereas Article 332 TFEU would be infringed in so far as the financial transaction tax based on the tax principles proposed would impose costs on the non-participating Member States[236].

The Court of Justice dismissed both instances of actions for annulment of Council Decisions authorising enhanced cooperation by rejecting all the alleged pleas[237]. Nevertheless, from the respective judgments, significant elements can be derived for the better understanding of the provisions on enhanced cooperation. Furthermore, the positive stance of the Court of Justice towards the implementation of enhanced cooperation for the promotion of European integration is demonstrated.

Firstly, the Court of Justice has specified the extent of the judicial review that it may exercise on a Council Decision authorising enhanced cooperation. In its judgment on the action for annulment brought by the United Kingdom against the Council Decision authorising enhanced cooperation in the area of financial transaction tax, the Court established that its judicial review is limited to the examination of the validity of such a Decision in light of the substantive and procedural conditions laid down in the provisions of the Treaty for the authorisation of enhanced cooperation[238]. At the same time, the Court provided a distinction between the judicial review exercised on the authorising decision and on a measure provided by the legal act implementing an authorised enhanced cooperation[239], whereon it based its subsequent reasoning. With this judgment, the Court of Justice established, essentially, that pleas based on substantive law

[235] CJEU, Judgment of 16 April 2013, Joined Cases C-274/11 and C-295/11 *Kingdom of Spain and Italian Republic v Council*, ECLI:EU:C:2013:240, para. 9
[236] CJEU, Judgment of 30 April 2014, Case C-209/13 *United Kingdom v Council*, ECLI:EU:C:2014:283, para. 16
[237] CJEU, Judgment of 16 April 2013, Joined Cases C-274/11 and C-295/11 *Kingdom of Spain and Italian Republic v Council*, ECLI:EU:C:2013:240, para. 26, 41, 59, 86, 93, 94; CJEU, Judgment of 30 April 2014, Case C-209/13 *United Kingdom v Council*, ECLI:EU:C:2014:283, para. 40
[238] CJEU, Judgment of 30 April 2014, Case C-209/13 *United Kingdom v Council*, ECLI:EU:C:2014:283, para. 33
[239] ibid, para. 34

objections on measures provided for the implementation of an enhanced cooperation cannot be brought at the stage of its authorisation, in that at this point the judicial review is restricted to observing compliance of the authorising decision with the substantial and procedural requirements laid down in the Treaties.

Therefore, the Court dismissed the action for annulment brought by the United Kingdom by concluding that the principles of taxation, which it challenged for being in breach of Article 327 TFEU, did not form constituent elements of the authorising decision and consequently, they could not be reviewed in the context of the respective action for annulment[240]. The Court applied the same reasoning to the second plea, where it concluded that the contested decision did not contain any provision with regard to Article 332 TFEU and that such a plea could not be examined before the legal act implementing the enhanced cooperation authorised in this area is adopted[241].

Furthermore, in the context of the actions for annulment brought by Spain and Italy against the Council Decision authorising enhanced cooperation in the area of the creation of unitary patent protection, adopting the view put forward by Advocate General Bot in his Opinion, the Court of Justice established that the Council enjoys a broad discretionary power when it makes assessments of a political nature in the framework of an enhanced cooperation. Consequently, the judicial review exercised by the Court thereon should be confined to ascertaining that the Council has acted impartially and carefully and to examining the adequacy of the reasons provided by the Council[242]. In that regard, the Court of Justice stressed the significance that is attributed, in general, to the EU institutions in the authorisation procedure of an enhanced cooperation[243]. This consideration of Court acknowledges, further, the broad margin of discretion that has been afforded to the European legislature by Treaties in the legal framework of enhanced cooperation in view of its significance for the promotion of European integration.

On the same occasion, the Court of Justice ruled, for the first time, *on the non-exclusive competence condition* laid down in Article 20 (1) TEU for the establishment of an enhanced cooperation. In support of their plea, the applicants claimed that the Council infringed the provision of this Article, which excludes the establishment of enhanced cooperation in an area falling under the exclusive competence of the European Union. In their view, the competence for the creation of European intellectual property rights provided for in Article 118 TFEU falls within the ambit of competition rules, which, according to Article 3 (1) (b) TFEU, constitutes an area of exclusive competence of the European Union[244]. The Council opposed thereto by supporting that the competence provided under Article 118 TFEU falls within the ambit of the internal market, which under Article 4 (2) (d) constitutes a shared competence between the European Union and the Member States[245].

The Court of Justice rejected the claim of the applicants by establishing that the competences conferred by both paragraphs of Article 118 TFEU fall within the ambit of the

[240] ibid, para. 35-36
[241] ibid, para. 37-39
[242] CJEU, Judgment of 16 April 2013, Joined Cases C-274/11 and C-295/11 *Kingdom of Spain and Italian Republic v Council*, ECLI:EU:C:2013:240, para. 53-54; AG Opinion of 11 December 2012, Joined Cases C-274/11 and C-295/11 *Kingdom of Spain and Italian Republic v Council*, ECLI:EU:C:2012:782, para. 27-29
[243] CJEU, Judgment of 16 April 2013, Joined Cases C-274/11 and C-295/11 *Kingdom of Spain and Italian Republic v Council* ECLI:EU:C:2013:240, para. 52
[244] ibid, para. 10-14
[245] ibid, para. 15

functioning of the internal market. Under Article 118 (1) TFEU, measures for the creation of European intellectual property rights are to be established "*in the context of the establishment and functioning of the internal market*", whereas Articles 4 (2) (d) and 26 TFEU provide that the area of the internal market constitutes a shared competence of the European Union and that the measures for the establishment or the functioning of this area may cover any competence attaching to the objective of creating *"an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured"* as provided for in Article 26 (2) TFEU[246]. Secondly, even though it stressed the importance of the rules on intellectual property for the maintenance of undistorted competition within the internal market, the Court clarified that an interpretation placing Article 118 TFEU in the ambit of competition rules would extend the scope of this area unduly, contrary to the provision of Article 2(6) TFEU that the exercise of the competences of the European Union is to be determined solely by the provisions of the Treaty with regard to this area[247]. In essence, it established that the rules with regard to the competences of the European Union apply in the legal framework of enhanced cooperation in the same manner as they do in the overall legal order of the European Union. Furthermore, it is significant with regard to the extent that enhanced cooperation as a legal tool may have that the Court interpreted broadly the scope of the internal market as a shared competence area in contrast with its rather narrow interpretation on the exclusive competence area of competition rules, where the establishment of enhanced cooperation is excluded[248].

Additionally, the Court of Justice analysed *the condition of last resort* for the authorisation of an enhanced cooperation and *the notion of reasonable period*, which are laid down in Article 20 (2) TEU. In particular, under their third plea, Spain and Italy invoked the infringement of the condition of last resort. In their view, this condition has to be observed strictly and a period of six months, that in the present case elapsed between the Commission proposal of a regulation for the language arrangements and the proposal for enhanced cooperation, did not correspond thereto[249]. Furthermore, Italy in particular claimed that the Council erred by failing to conduct a proper examination and to give reasons[250].

The Court of Justice analysed the condition of last resort in view of the purpose of enhanced cooperation, which by virtue of Article 20 (1) TEU is to "*further the objectives of the Union, protect its interests and to reinforce its integration process*"[251]. Accordingly, this purpose would not be attained, if enhanced cooperation worked as a deterrent for the Member States against taking every measure possible to reach a compromise which would allow the adoption of a legislation for the Union as a whole. Only then, when the Member States have exhausted all possible means, the Council may conclude that "*the objectives of the such cooperation cannot be attained within a reasonable period by the Union as a whole*[252]" and consequently, that the authorisation of enhanced cooperation constitutes a last resort. According to the Court, this condition is satisfied

[246] ibid, para. 16-21
[247] ibid, para. 22-24
[248] Peers St., "Enhanced Cooperation: the Cinderella of differentiated integration", 2017 in De Witte B., Ott A. and Vos E. (eds), "Between Flexibility and Disintegration: The Trajectory of Differentiation in EU law, Edward Elgar Publishing, 2017, p. 87
[249] CJEU, Judgment of 16 April 2013, Joined Cases C-274/11 and C-295/11 *Kingdom of Spain and Italian Republic v Council*, ECLI:EU:C:2013:240, para. 42-44
[250] ibid, para. 45
[251] ibid, para. 48-49
[252] Article 20 (2) TEU

only when the adoption of a legislation for the European Union as a whole is impossible in the foreseeable future[253]. By this consideration, the Court, at the same time, eliminated the existing ambiguity on the definition of the requirement of *reasonable period*, by interpreting it as meaning *foreseeable future*. It has to be stressed that the notion of *foreseeable future* had been used by the Council, already, in its first Decision authorising enhanced cooperation in the area of the law applicable to divorce and legal separation and in the contested Decision[254]. The examination of the conditions of last resort and reasonable period constitutes one of the instances, where the Council is afforded a broad margin of discretion, in that, according to the Court of Justice, it "*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 the adoption of legislation for the Union as a whole in the foreseeable future[255]"*.

Furthermore, the Court of Justice has established that the causes that may lead the Council to conclude that the objectives of a legislative action cannot be attained within a reasonable period by the Union as a whole, as is required by Article 20 (2), for the authorisation of enhanced cooperation, may vary. In particular, under their second plea, that is misuse of powers by the Council, Spain and Italy claimed that the objective of the authorised enhanced cooperation was not to contribute to the integration process, but rather that they be excluded from the negotiations and deprived of their right to oppose to the language arrangements. They maintained that the provisions of enhanced cooperation are to be used when a Member State is not able to participate in a legislative action of the Union *in its entirety*, while they disagreed solely on the language arrangements, whose establishment required unanimity. Therefore, the Council by authorising enhanced cooperation intended to circumvent the rule of unanimity provided for in Article 118 (2) TFEU on the establishment of language arrangements[256]. The Council responded to this claim by referring to the principle of openness prevailing in the legal framework of enhanced cooperation, while the parties intervening in support of the Council maintained that the objective of the mechanism is to contribute to overcoming legislative deadlocks by emphasising that enhanced cooperation is "*by no means*" excluded from areas where unanimity is required[257].

The Court rejected this plea by providing a non-exhaustive reference[258] to the reasons that may lead the Council to conclude that the condition of last resort is fulfilled. In particular, the Court mentioned, except for the case referred to by the applicants, namely that a Member State may not be ready to participate in an entire legislative action undertaken by the European Union, the examples of a possible lack of interest of a Member State or the inability of interested Member States to reach an agreement on the content of the legislative action. Furthermore, it clarified that the establishment of enhanced cooperation is not excluded from areas where the rule of unanimity is provided[259].

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[253] CJEU, Judgment of 16 April 2013, Joined Cases C-274/11 and C-295/11 *Kingdom of Spain and Italian Republic v Council*, ECLI:EU:C:2013:240, para. 50

[254] Council Decision (EU) 2010/405 of 12 July 2010 authorising enhanced cooperation in the area of the law applicable to divorce and legal separation, preamble nr. 4; Council Decision (EU) 2011/167 of 10 march 2011 authorising enhanced cooperation in the area of the creation of unitary patent protection, preamble nr. 4

[255] CJEU, Judgment of 16 April 2013, Joined Cases C-274/11 and C-295/11 *Kingdom of Spain and Italian Republic v Council*, ECLI:EU:C:2013:240, para. 53

[256] ibid, para. 27-29

[257] ibid, para. 31-32

[258] ibid, para. 36: "*The impossibility* […] *may be due to various causes, for example*, […]"

[259] ibid, para. 35-37

In the context of the same judgment, the Court of Justice provided further clarifications with regard to the legal framework of enhanced cooperation. Under their fourth plea, Spain and Italy invoked the infringement of several provisions on enhanced cooperation. Firstly, they maintained that Article 20 (1) was infringed in that the enhanced cooperation established did not create a higher level of integration but rather damaged the existing uniformity resulting from the fact that all Member States of the European Union were contracting parties to the European Patent Convention. The Court of Justice rejected this claim as unfounded by establishing that the protection provided under this convention was defined by national law, whereas the authorised enhanced cooperation would provide actual uniform protection throughout the territory of the participating Member States[260]. This consideration of the Court supports, in essence, the argument that one of the features of enhanced cooperation, which render it effective for the promotion of European integration, is that the legal acts adopted within its framework form part of EU law even if their application is limited to the participating Member States, opposite to schemes of differentiated integration established outside the legal framework of the European Union.

The applicants claimed, also, that such an enhanced cooperation infringes the principles and objectives enshrined in Article 326 TFEU, by referring specifically to the consequences which the language arrangements may provoke with regard to the fragmentation of the internal market. However, the Court of Justice clarified that the provisions of the authorising decision on the language arrangements do not constitute a component part thereof and therefore they cannot be examined under the present actions[261].

Moreover, the applicants claimed that the participating Member States have infringed Article 327 TFEU by adopting legal rules, namely the language arrangements, with which they were already aware that Spain and Italy disagreed, which, as consequence, rendered their participation impossible[262]. The Council opposed that the claim of the applicants in based on the mistaken premise that it is de facto or de jure impossible for them to participate in the enhanced cooperation in the future[263]. The Court of Justice rejected this claim as well by making three clarifications on Article 327 TFEU. With regard to its scope, it established that, on the one hand, the participating Member States in an enhanced cooperation should not adopt legal rules that might provoke legal consequences for the non-participating Member States and, on the other hand, the participating Member States are free to adopt legal rules with which non-participating Member State would not agree[264]. According to the Court of Justice, such rules would not render ineffective the opportunity of non-participating Member States of joining in the enhanced cooperation, as supported by Article 328 (1) TFEU[265].

Lastly, in their fifth plea, Spain supported that the Council disregarded the judicial system of the European Union by not specifying in the authorising Decision what the envisaged judicial system would be, which it regarded essential[266]. The Court of Justice established in that regard that a Council Decision authorising enhanced cooperation is based on the proposal of the Commission, which in turn is based on the requests of the participating Member States, which should specify

[260] ibid, para. 60-63
[261] ibid, para. 70-78
[262] ibid, para. 79
[263] ibid, para. 80
[264] ibid, para. 81-82
[265] ibid, para. 83
[266] ibid, para. 87-88

the scope and objectives of the enhanced cooperation proposed. Therefore, the Council is not required to provide in its Decision for further information than that contained in the proposal of the Commission and the requests of the Member States[267].

[267] ibid, para. 89-92

Conclusion

Differentiation constitutes a structural element of the legal order of the European Union, which has been introduced as a pragmatic instrument in order to address the tension between unity and diversity in the European Union. It is concluded that as the exception thereto, differentiated integration complements the principle of unitary integration for the purposes of promoting European integration.

The present study focused on enhanced cooperation by examining it as a form of differentiated integration embedded in primary EU law and as a tool for the promotion of the integration process. Enhanced cooperation was introduced as a general and abstract mechanism of EU law having the objective of advancing European integration by accommodating diversity. As a form of differentiated integration, it constitutes an exception to the principle of unity in that its scope in terms of membership is limited and the voting rights of the non-participating Member States are suspended. However, as a legal tool, enhanced cooperation seeks to solve the legislative paralysis often provoked by reason of the different national preferences and interests of several Member States in the European Union, in that it enables the adoption of EU legislation by those Member States which are willing to advance integration, when a legislative action for the Union as a whole cannot be undertaken.

Enhanced cooperation by its nature as a form of differentiated integration entails the danger of disrupting the unity of the EU legal order and of leading the European Union to disintegration. The evolution of the provisions on enhanced cooperation, from their introduction by the Treaty of Amsterdam to being put in practice under the Treaty of Lisbon, demonstrates that the authors of the Treaties were aware of this danger, but, at the same time, in view of its necessity, they were determined to render this mechanism effective for the promotion of European integration. In the present study, it is concluded that enhanced cooperation is, indeed, effective towards its purpose. Its effectiveness lays in the legal safeguards and guarantees enshrined in the provisions of the Treaties, which reach a balance between ensuring the unity of the EU legal order and, at the same time, enabling enhanced cooperation to be effectively implemented for the promotion of the integration process. Two main features of this mechanism are deduced from its overall legal framework: its exceptional character to the rule of unity and the hidden purpose of eventually leading back to unitary integration.

The overall review on the practical implementation of enhanced cooperation leads to the same conclusion. The limited instances of established enhanced cooperation demonstrate that the mechanism has enabled the adoption of EU legislation which could not be approved under the requirements of unity for a long time. The establishment of enhanced cooperation in these instances has been realised cautiously by the participating Member States as well as by the EU institutions, whereby there were observed several cases of non-participating Member States, which acceded *ex-post* in an existing enhanced cooperation. To conclude, the present evaluation has demonstrated that from the legal point of view, enhanced cooperation, as framed by the authors of the Treaties and provided that all the legal safeguards and guarantees are strictly observed in each instance of its establishment, can effectively contribute to reinforcing the integration process and safeguard the core values of the European Union. Nevertheless, its actual effectiveness will be

tested in the course of time, which will show whether it will continue to favor the process of European integration.

BIBLIOGRAPHY

Böttner R., "The Constitutional Framework for Enhanced Cooperation in EU law", Leiden, The Netherlands: Brill | Nijhoff, 2021

Cantore C.M., "We're one, but we're not the same: Enhanced Cooperation and the Tension between Unity and Asymmetry in the EU", Perspectives on Federalism, 2011

Craig P., "Enhanced Cooperation, Amendment and Conclusion", 2010 in Craig P., "The Lisbon Treaty", Oxford University Press, 2010, pp. 437-449

Cremona M., "Enhanced Cooperation and the Common Foreign and Security Policies of the EU", EUI Working Papers, Law 2009/21

De Witte B., Ott A. and Vos E. (eds), "Between Flexibility and Disintegration: The Trajectory of Differentiation in EU law", Edward Elgar Publishing, 2017

De Witte B., "The Law as Tool and Constraint of Differentiated Integration", EUI Working Papers, Robert Schuman Centre for Advanced Studies, RSCAS 2019/47

European Convention on Enhanced Cooperation, ConV 723/03, 14 May 2003

European Parliament, Policy Department for Citizens' Rights and Constitutional Affairs, Directorate General for Internal Policies of the Union, PE 604.987, Study requested by the AFCO Committee, "The Implementation of Enhanced Cooperation in the European Union", October 2018, available from: https://www.europarl.europa.eu/RegData/etudes/STUD/2018/604987/IPOL_STU(2018)604987_EN.pdf, accessed on 6.11.2021

European Parliament, Committee on Civil Liberties, Justice and Home Affairs, Working document on a Council Decision on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime, 10.04.2007

Groenendijk N., "Enhanced Cooperation under the Lisbon Treaty", Paper presented at the research meeting on European & International Affairs, Aalborg University, March 9, 2011

Luif P., "The Treaty of Prüm: A replay of Schengen?", Paper for the Panel "Subgroups of member states in the EU's external and internal security: Does flexibility work?", European Union Studies Association, Tenth Biennial International Conference, 17–19 May 2007, Montreal, Canada

Martenczuk B., "Enhanced Cooperation: The Practice of Ad Hoc Differentiation in the EU since the Lisbon Treaty" in Studia Diplomatica, "Variable Geometry Union: How Differentiated Integration is Shaping the EU", 2013, Vol. 66, No. 3, pp. 83-100

Messina M., "Strengthening economic governance of the European Union through enhanced cooperation: a still possible, but already missed, opportunity, E.L. Rev. 2014, 39 (3), pp. 404-417

Peers St., "Divorce, European Style: the first authorization of enhanced Cooperation", E.C.L. Review 2010, 6 (3), pp. 339-358

Peers St., "The constitutional implications of the EU patent", E.C.L. 2011, 7 (2), pp. 229-266

Pistoia Em., “Outsourcing EU law while differentiating European integration – the unitary patent’s identity in the two “Spanish rulings” of 5 May 2015”, E.L. Rev. 2016, 41 (5), pp. 711-726

Tekin F., “Differentiated Integration: An alternative conceptualization of EU-Turkey relations”, 2021 in Reiners W., Turhan E. (eds), “EU-Turkey Relations”, 2021, Palgrave Macmillan, Cham., pp. 157-181 [161]

Thym D., “The political character of supranational differentiation”, E.L. Rev. 2006, 31 (6), pp. 781-799

Thym D., “United in Diversity: The Integration of Enhanced Cooperation into the European Constitutional Order”, German Law Journal, Vol. 06, No. 11, pp. 1731-1747

German Bibliography

Blanke, “EUV Art. 20 Verstärkte Zusammenarbeit”, in Grabbitz/Hilf/Nettesheim/Blanke, “Das Recht der Europäischen Union”, 72. EL. Februar 2021

Greek Bibliography

Κουσκουνά Μ., «Ο χώρος Σένγκεν και η προσφυγική κρίση», Δικαιώματα του Ανθρώπου, Επιθεώρηση Ατομικών και Κοινωνικών Δικαιωμάτων 70/2016, pp. 913 et seq.

Σκανδάμης Ν., «Το παράδειγμα της Ευρωπαϊκής Διακυβέρνησης: Μεταξύ κυριαρχίας και αγοράς», 2006, Εκδόσεις Αντ. Ν. Σάκκουλα 2006

Σκουρής Β., «Συνθήκη της Λισσαβώνας, Ερμηνεία κατ’ άρθρον», Εκδόσεις Σάκκουλα, 2020

Στεφάνου Κ., «Ευρωπαϊκή Ολοκλήρωση, Τόμος Α’: Γενικά και Θεσμικά Χαρακτηριστικά μετά τη Νίκαια», 6η έκδοση, Εκδόσεις Αντ. Ν. Σάκκουλα 2002

Χριστιανός Β., «Εισαγωγή στο Δίκαιο της Ευρωπαϊκής Ένωσης», Νομική Βιβλιοθήκη ΑΕΒΕ 2010-2011

Online Sources

https://eur-lex.europa.eu/homepage.html

https://curia.europa.eu/jcms/jcms/Jo1_6308/fr/

https://beck-online.beck.de/Home

https://home.heinonline.org/

https://www.jstor.org/

https://legal.thomsonreuters.com/en/westlaw