Articles

New Options for Differentiated Integration in the European Union

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The Instrument of Enhanced Cooperation: Pitfalls and Possibilities for Differentiated Integration

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Abstract: Enhanced cooperation under art. 20 TEU is a tool introduced by the Treaty of Amsterdam to allow a group of at least nine member states to adopt rules of secondary law that binds only these participating States. Introduced as an instrument to tackle problems of a Union of 27 (and more) States, it has only been used on a few occasions. However, its use (and non-use) is not only dependent solely on the number of Union member states. Shifting political attitudes in the member states and – plainly and simply – the legal framework for this tool of differentiate integration influence how and when enhanced cooperation can and will be used as an instrument to overcome deadlocks in negotiation. Against the background of member state practice, the *Article* sets out to explore the potential of enhanced cooperation.

Keywords: enhanced cooperation – differentiation – Rome III – European Patent – financial transaction tax – EPPO.

I. Introduction

In the past years, several crises have hit the Union and have put the idea of European integration to the test: the economic and financial crisis that revealed the pitfalls of asymmetric economic and monetary integration; the so called "migrant crisis", which exposed the reluctance of some member states to truly participate in certain integration projects; the rule

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of law crisis, in which the Union must defend its values against erosion in some member states; and, not least, the withdrawal of a member state, an event that no one deemed even possible when art. 50 TEU was introduced with the Lisbon Treaty. On the other hand, membership negotiations are on-going with States of the Western Balkans, which will in the long run further increase the plethora of voices and approaches in European integration – and thus the potential for political blockades when pursuing legislative projects.

It seems therefore, that uniform integration will have to be compromised for forms of flexible integration in order to enable progress in some policy areas. In other words, integration by at least some member states – while granting others the option to refrain from participation – may be preferential. Since 1998, primary law contains the instrument of enhanced cooperation (now art. 20 TEU and arts 326-334 TFEU) as a tool of flexible integration. Flexible or differentiated integration (differentiation) is understood *grosso modo* as a form of integration where legal rules do not apply to all member states uniformly or at the same time. *Enhanced cooperation* as a specific tool of differentiation allows a group of at least nine member states to realise secondary-law projects among themselves. A cooperation can only be established as a last resort (after uniform integration has failed) and must further the integration process. Non-participating member states are not bound by their legal acts but have the possibility to join an established cooperation at any time.

After having remained unused for about a decade after its introduction, five cases of enhanced cooperation plus the "permanent structured cooperation" – a similar tool in CSDP – have been established to date (and even more have been proposed). The participating States have successfully implemented four of them (except for the financial transaction tax) and in some cases, other States even acceded to the respective cooperation. On other occasions, the "threat" to forge ahead with only a limited number of States eventually led to negotiation results that included all States. The success (of the use and non-use) of enhanced cooperation has decreased the reluctance of member states to depart from uniform integration. The European institutions have also endorsed it, first and foremost the Commission in its White Paper on the Future of Europe as one possible scenario ("those who want more, do more").[1]

The practical experience delivers insights into this tool of flexible integration that exceed the theoretical discussions available thus far. It sheds light on the possibilities of enhanced cooperation, but also the risks connected to it, *i.e.*, when not all member states participate in specific legislation. The locks and limits are contained in the primary law provisions on this instrument. This *Article* sets out to discuss the practical cases of enhanced cooperation in order to set the scene of this flexibility tool (see below section II) before discussing the prerequisites for the establishment and implementation of enhanced cooperation against this practical background (esp. section III) as well as the potential scope of cooperation. It will

[1] Communication COM(2017) 2025 final of 1 March 2017 from the Commission, White Paper on the Future of Europe: Reflections and Scenarios for the EU27 by 2025, 28 ff.

focus on the relationship between participating and non-participating member states that is characterised by the principle of openness towards non-participating States on the one hand, and on the other hand by the principle of mutual non-affection. On a related note, it will also tackle the question if enhanced cooperation can be a tool to accommodate reservations to common integration – such as the ones witnessed before Brexit (section IV), and, more generally, if enhanced cooperation may be a tool to strengthen integration or if it will be a risk for cohesion and solidarity among the Union's members.

II. Setting the scene: Use and "non-use" of enhanced cooperation

Since its introduction by the Treaty of Amsterdam, enhanced cooperation (currently art. 20 TEU and arts 326-334 TFEU) has been used in no fewer than five cases: the law applicable to divorce and legal separation,[2] unitary patent protection,[3] the financial transaction tax,[4] property regimes of international couples,[5] and the European Public Prosecutor's Office (EPPO).[6] Moreover, Permanent Structured Cooperation (PESCO) has been established on the basis of art. 46 TEU.[7] Frankly, this flexibility tool in the area of foreign and security policy is different from enhanced cooperation and not a *lex specialis* case of the latter. However,

[2] Decision 2010/405/EU of the Council of 12 June 2010 authorising enhanced cooperation in the area of the law applicable to divorce and legal separation, and Regulation (EU) 1259/2010 of the Council of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation.

[3] Decision 2011/167/EU of the Council of 10 March 2011 authorising enhanced cooperation in the area of the creation of unitary patent protection, and Regulation (EU) 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, as well as Regulation (EU) 1260/2012 of the Council of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection with regard to the applicable translation arrangements.

[4] Decision 2013/52/EU of the Council of 22 January 2013 authorising enhanced cooperation in the area of financial transaction tax. No implementing act has yet been adopted, but discussions are still on-going on the basis of the Commission's Proposal COM(2013) 71 and a Franco-German proposal of 2019. As the Commission intends to include a financial transaction tax as other own resource in the next MFF, discussions are intensifying; cf Doc. 5737/21 of the Council of 12 February 2021 on financial transaction tax.

[5] Decision (EU) 2016/954 of the Council 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, and Regulations (EU) 2016/1103 and 2016/1104 of the Council of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes and in matters of the property consequences of registered partnerships.

[6] Regulation (EU) 2017/1939 of the Council of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ("the EPPO"). There is no authorising decision as enhanced cooperation for the EPPO has been established by a fast-track procedure.

[7] Decision (CFSP) 2017/2315 of the Council of 11 December 2017 establishing permanent structured cooperation (PESCO) and determining the list of participating Member States. See also European Council, *Conclusions of 14 December 2017* consilium.europa.eu.

it bears some similarities both structurally and substantially which allows to use it as a point of reference for the interpretation of the enhanced cooperation instrument.[8]

The files on establishing and implementing enhanced cooperation are all characterised by different timeframes and intensity of discussions and different levels of political controversy, all of which are factors that eventually led to enhanced cooperation.[9] For example, the EPPO had been established only after thorough and profound discussions between all member states that lasted for several years. States were determined to come to a uniform solution and discussed very detailed aspects thoroughly. Similarly, the adoption of the cooperation concerning the European patent was predated by a decade-long discussion period. On the other hand, for example, the proposal for the financial transaction tax met strong resistance in principle so that willing member states resorted to enhanced cooperation relatively quickly. The picture would be incomplete, however, if we did not take into account those files in which – although not put into place – enhanced cooperation had been considered at some point and then had been abandoned: either because agreement was reached by all member states or because the file was abandoned altogether.

There are at least three examples of files for which enhanced cooperation was discussed but eventually not used as an alternative. As early as 2005, enhanced cooperation was considered as a potential tool to overcome the deadlock regarding the proposal for passenger car-related taxes.[10] It was one part of a larger strategy to reduce CO2 emissions in order to meet the standards set by the Kyoto Protocol. The legal basis (art. 93 TEC, now art. 113 TFEU) required a unanimous decision in the Council. Due to the fiscal nature and budgetary implications of the measure, the member states did not reach an agreement. In this situation, the rapporteur in the European Parliament proposed to use enhanced cooperation by the EU members favouring the Commission's proposal.[11] Nevertheless, the dossier was abandoned altogether without any further explanation[12] but it is likely that the more integration-friendly member states were not willing to carry a burden resulting from the envisaged secondary legislation while others were not ready to do the same.

Secondly, the Commission in 2008 proposed a directive on equal treatment.[13] The legal basis was what is now art. 19(1) TFEU, which requires unanimity in the Council and

[8] See on PESCO, B Cózar-Murillo, 'PESCO as a Game-changer for Differentiated Integration in CSDP after Brexit' (2022) European Papers 1303 www.europeanpapers.eu.

[9] On the legislative history of the dossiers, see in detail R Böttner, *The Constitutional Framework for Enhanced Cooperation in EU Law* (Brill Nijhoff 2021) 47 ff.; see also C Heber, *Enhanced Cooperation and European Tax Law* (Oxford University Press 2021) 44 ff.

[10] Communication COM(2005) 261 final from the Commission of 5 July 2005 on passenger car related taxes.

[11] Report A6-0240/2006 of the European Parliament of 10 July 2006 on the proposal of a Council directive on passenger car related taxes, Explanatory statement (Rapporteur's position).

[12] Cf C Heber, *Enhanced Cooperation and European Tax Law* cit. 58.

[13] Communication COM(2008) 426 final from the Commission of 2 July 2008 on a proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation.

Parliament's consent. A first policy debate in the Council revealed mixed feelings: mostly favourable, several ministers held that their existing national legal systems already went beyond the Commission proposal. Others questioned the need to establish Community rules in this area, while supporting the principle of equal treatment.[14] This situation prevailed throughout the next years. In late 2014, the Italian Presidency considered enhanced cooperation as one possible solution.[15] The Council, however, explicitly rejected this option,[16] *inter alia* for reasons of ensuring consistency in the protection of basic rights.[17] Since then, in search for an agreement, discussions have intensified and continue to this day.

Thirdly, in 2012, the European Commission proposed a legal act for the statute of European Foundations,[18] most importantly in order to tackle problems for cross-border activities of national foundations (such as taxation issues). Despite intense discussions, a number of member states opposed the draft. The flexibility clause of art. 352 TFEU, which served as the legal basis, requires unanimity in the Council, which seemed impossible to achieve. While some Members of the European Parliament openly advocated for the use of enhanced cooperation,[19] member states decided not to make use of this option, partly because it was unclear whether art. 352 TFEU could be deployed within enhanced cooperation at all, which adds to the general reluctance to resort this legal basis in order to avoid a competence creep on the part of the Union.[20] Research has shown, however, that this provision may well be the legal basis for acts adopted by only a group of member states.[21]

[14] Cf European Council, *Press release 13405/08 (Presse 271) of 2 October 2008 on the 2893rd Council Meeting on Employment, Social Policy, Health and Consumer Affairs* www.consilium.europa.eu 6.

[15] Doc. 15166/14 of the Council of 11 November 2014 on a proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, p. 3; Doc. 15705/14 of the Council of 21 November 2014 on a proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, p. 3.

[16] Doc. 16887/14 of the Council of 23 January 2015 on the 3357th meeting of the Council (EPSCO) of 11 December 2014, p. 7 ff.

[17] Doc. 15819/14 of the Council of 21 November 2014 on a proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation (Progress Report), p. 7.

[18] Communication COM(2012) 35 final from the Commission of 8 February 2012 on the statute for a European Foundation (FE).

[19] Doc. 16715/14 of the Council of 9 December 2014 on the summary record of the meeting of the European Parliament Committee on Legal Affairs (JURI), held in Brussels on 1-2 December 2014, p. 2; C Heber, *Enhanced Cooperation and European Tax Law* cit. 56.

[20] Cf C Heber, *Enhanced Cooperation and European Tax Law* cit. 57.

[21] R Böttner, *The Constitutional Framework for Enhanced Cooperation in EU Law* cit. 156 ff.; U Derpa, *Die verstärkte Zusammenarbeit im Recht der Europäischen Union* (Brooberg 2003) 188; M Selmayr, 'Die "Euro-Rettung" und das Unionsprimärrecht: Von putativen, unnötigen und bisher versäumten Vertragsänderungen zur Stabilisierung der Wirtschafts- und Währungsunion' (2013) Zeitschrift für Öffentliches Recht 306; with doubts: C Heber, *Enhanced Cooperation and European Tax Law* cit. 57. The ECJ has ruled that reference to the Union at large ("throughout the Union" and "Union-wide" used in art. 118 TFEU) does not *per se*

Finally, there are cases in which enhanced cooperation was considered but eventually member states could agree on uniform integration. In 1997, the Commission proposed a directive on energy taxation based on what is now art. 113 TFEU, which requires unanimity in the Council.[22] In the following four years and after considerable work was done, the Council was unable to reach an agreement, which led the Commission to publicly consider the use of the enhanced cooperation mechanism.[23] By the end of the year, the Council noted that there was still no agreement on the issue.[24] The matter had been discussed by the EU leaders in the European Council in March 2002[25] and the Council was finally able to reach an agreement in October 2003 to adopt the directive.[26]

An interesting example where enhanced cooperation has *not* been used is the case of the European arrest warrant.[27] The Commission proposed a framework decision in 2001[28] whose adoption was subject to unanimity in the Council. Italy opposed the initial proposal and demanded a reduced list of offences for which double criminality would not be checked. Italy's opposition met strong resistance by the other member states, the Commission, and also national media. Both the European Parliament and the European Commission advocated for enhanced cooperation without Italy's participation should unanimity not be possible. Outside pressure and high domestic reputation costs eventually led Italy to give in so that the European arrest warrant could be adopted as an instrument by the Union as a whole.[29]

As a first aspect, we can conclude that there is a certain willingness among the member states, but also within the Union institutions, to resort to the instrument of enhanced cooperation. However, it is not always put into place, either because the costs of abandoning uniform integration are considered too high or because reluctant member states are successfully pushed into agreeing to a Union-wide measure.

prohibit enhanced cooperation: joined cases C-274/11 and C-295/11 *Spain and Italy v Council* ECLI:EU:C:2013:240 para. 68.

[22] Communication COM(97) 30 final from the Commission of 12 March 1997 on restructuring the community framework for the taxation of energy products.

[23] Agence Europe, *Bulletin Quotidien Europe No. 7897* agenceurope.eu.

[24] Doc. 15288/01 of the Council of 5 February 2002 on the 2401st meeting of the Council (ECOFIN), held in Brussels on 13 December 2001, p. 6 (as corrected by Council Doc. 15288/01 COR 1 REV 1 of 23 April 2002).

[25] European Council, *Presidency Conclusions of 15-16 March 2002* ec.europa.eu point 12.

[26] Doc. 14140/03 ADD 1 of the Council of 24 November 2003, p. 4 ff.; Directive 2003/96/EC of the Council of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity.

[27] See on this case DA Kroll and D Leuffen, 'Enhanced Cooperation in Practice: An Analysis of Differentiated Integration in EU Secondary Law' (2015) Journal of European Public Policy 353, 366 ff.; R Böttner, *The Constitutional Framework for Enhanced Cooperation in EU Law* cit. 346.

[28] Communication COM(2001) 522 final from the Commission of 19 September 2001 on a proposal for a Council Framework Decision on the European arrest warrant and the surrender procedures between the Member States.

[29] Framework Decision 2002/584/JHA of the Council of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States – Statements made by certain Member States on the adoption of the Framework Decision.

III. Legal framework for enhanced cooperation

The existing practice of use and non-use of enhanced cooperation not only gives insight into policy areas in which the member states consider flexible integration as a viable option, but also gives some clarification on the rules governing this instrument. The following section will review the legal requirements for establishing and implementing enhanced cooperation in order to draw some conclusions on the instrument's limits and possibilities.

III.1. Establishing of enhanced cooperation

As art. 20(1) TEU provides, member states which wish to establish enhanced cooperation between themselves may make use of the Union's institutions and exercise those competences and this group, as art. 20(2) TEU adds, must comprise at least nine States. First of all, and this is rather trivial, enhanced cooperation may only be established among the members of the Union, *i.e.*, the EU member states. Other States, for example non-EU members of the European Economic Area or candidate countries, cannot be included in the group of cooperating States. Enhanced cooperation is a tool to create a sub-group of cooperating States *within* the Union, not across the Union's frontiers.[30] However, as research has shown, this group may establish, under certain conditions, relations with other States based on international agreements by making use of the Union's external competences.[31] Nonetheless, this is a first safety net that shall prevent flexible integration from creating "fuzzy edges" between Union members and outside States.

Secondly, art. 20(1) TEU also states that enhanced cooperation may be established only within the framework of the Union's non-exclusive competences. Not only does this exclude all exclusive Union competences as spelled out in art. 3 TFEU from being exercised by only a group of member states. It also means that member states can only cooperate in areas for which competences have been conferred on the Union at all. If there is no Union competence – a competence that could be exercised by the Union at large – then there can be no enhanced cooperation. In other words, flexible integration under enhanced cooperation cannot exceed the boundaries of competences that *all* founding States have agreed upon. This is only possible by amending the Treaties in accordance with art. 48 TEU, a procedure that requires the consent of all EU members. This is an important lock to prevent that a "second Union" or sub-union emerges that reaches a new level of integration that has not been subject to discussion by all States.

However, this also means that, should a group of member states wish to exceed the primary-law based state of integration, they must resort to classical international law-based cooperation. In this context, it must be noted that enhanced cooperation is not an

[30] R Böttner, *The Constitutional Framework for Enhanced Cooperation in EU Law* cit. 66 ff., 210 ff.

[31] *Ibid*. 203 ff. with further references.

exclusive tool of flexibility for the EU members[32] and it seems that the CJEU shares this view.[33] In fact, the wording of art. 20(1) TEU indicates that the existence of the tool of enhanced cooperation does not prevent the member states from cooperating in other forms. Enhanced cooperation within the Union is merely an offer to these States ("*may* make use")[34] and does not exclude the possibility to work more closely together on the basis of an international agreement[35] as long as such agreement does not infringe Union law in general as required by the principles of sincere cooperation (art. 4(3) TEU)[36] and pre-emption and primacy of Union law.[37] This, of course, somewhat diminishes the integrative potential of enhanced cooperation as it cannot legally prevent intergovernmental for the benefit of supranational cooperation. Cooperation outside the EU framework on the basis of international agreements in the context of the euro crisis (European Stability

[32] *Ibid*. 67 ff.

[33] Case C-370/12 *Pringle* ECLI:EU:C:2012:756 paras 167–169; cf more clearly, case C-370/12 *Pringle* ECLI:EU:C:2012:675, opinion of AG Kokott, paras 174 ff.

[34] R Böttner, *The Constitutional Framework for Enhanced Cooperation in EU Law* cit. 67; with the same view G Gaja, 'How Flexible is Flexibility under the Amsterdam Treaty' (1998) CMLRev 855, 870; R Hofmann, 'Wieviel Flexibilität für welches Europa?' (1999) EuR 713, 727 ff.; K Langner, *Verstärkte Zusammenarbeit in der Europäischen Union* (Peter Lang 2004) 53. See also D Thym, *Ungleichzeitigkeit und europäisches Verfassungsrecht* (Nomos 2004) 297 ff.

[35] C Thun-Hohenstein, 'Die Möglichkeit einer "verstärkten Zusammenarbeit" zwischen EU- Mitgliedstaaten: Chancen und Gefahren der "Flexibilität"' in W Hummer (ed.), *Die Europäische Union nach dem Vertrag von Amsterdam* (Manz 1998) 127; G Papagianni, 'Flexibility in Justice and Home Affairs: An Old Phenomenon Taking New Forms' in B De Witte, D Hanf and E Vos (eds), *The Many Faces of Differentiation in EU Law* (Intersentia 2001) 118; B De Witte, 'Chameleonic Member States: Differentiation by Means of Partial and Parallel International Agreements' in B De Witte, D Hanf and E Vos (eds), *The Many Faces of Differentiation in EU Law* (Intersentia 2001) 237 ff.; M Kellerbauer, *Von Maastricht bis Nizza: Neuformen differenzierter Integration in der Europäischen Union* (Duncker & Humblot 2003) 254 ff.; C Lacchi, 'How Much Flexibility Can European Integration Bear in Order to Face the Eurozone Crisis? Reflections on the EMU inter se International Agreements Between EU Member States' in T Giegerich and others (eds), *Flexibility in the EU and Beyond* (Nomos 2017) 232; A von Arnauld, '"Unions(ergänzungs)völkerrecht". Zur unions- und verfassungsrechtlichen Einbindung völkerrechtlicher Instrumente differenzierter Integration' in M Breuer and others (eds), *Der Staat im Recht* (Duncker & Humblot 2013) 514; R Böttner, *The Constitutional Framework for Enhanced Cooperation in EU Law* cit. 67 ff.; with a different view V Constantinesco, 'Les clauses de "coopération renforcée"' (1997) RTDE 751, 755; B Martenczuk, 'Die differenzierte Integration nach dem Vertrag von Amsterdam' (1998) Zeitschrift für europarechtliche Studien 447, 464; R Repasi, 'Völkervertragliche Freiräume für EU-Mitgliedstaaten' (2013) EuR 45, 59 ff. holds that the use of enhanced cooperation takes precedence over *inter se* treaties under international law due to the principle of sincere cooperation in art. 4(3) TEU.

[36] Cf R Streinz, 'Die Verstärkte Zusammenarbeit: eine realistische Form abgestufter Integration' (2013) Juristische Schulung 892, 893. See in this respect art. 1 of the so called Fiscal Compact Treaty.

[37] B De Witte, 'Chameleonic Member States: Differentiation by Means of Partial and Parallel International Agreements' cit. 243 ff.; C Lacchi, 'How Much Flexibility Can European Integration Bear in Order to Face the Eurozone Crisis?' cit. 230; S Van den Bogaert and V Borger, 'Differentiated Integration in the EMU' in B De Witte, A Ott and E Vos (eds), *Between Flexibility and Disintegration* (Edward Elgar 2017) 209, 228 ff.

Mechanism, Fiscal Compact) is the most prominent example. This outside flexibility may have its cause also in a lack of inside flexibility.[38]

Furthermore, enhanced cooperation "shall aim to further the objectives of the Union, protect its interests and reinforce its integration process".[39] As a pioneering group, the members of enhanced cooperation are bound by the same set of objectives that the Union at large has been founded to achieve. Enhanced cooperation takes place within the framework of the Union and therefore it is to benefit the EU as a whole.[40] Art. 13(1) TEU has a similar wording in that it requires the Union's institutional framework, *inter alia*, to promote the Union's values, advance its objectives, and serve its interests. While objectives can be identified as those contained in art. 3 TEU, "interests" are much more difficult to assess. However, it is plain to see that the interests of an international organisation cannot be isolated from the objectives for whose attainment the organisation was founded. In fact, the main interest is the attainment of these objectives.[41] The Union's interests are a conglomerate of genuine interests of the EU itself as an (relatively) independent and specific (supranational) actor, the common interest of member states, and also partial and specific interests of individual actors, such as companies, consumers, and workers.[42] Lastly, art. 20 TEU requires enhanced cooperation to reinforce the Union's integration process. When evaluating enhanced cooperation and its potential effects on the Union and the integration process, one must also consider the principle of subsidiarity (art. 5(3) TEU), according to which the European Union can only act (outside its exclusive competences) if its action produces an added value.[43] This means that enhanced cooperation as well must produce an added value for the Union as a whole.[44] In essence, enhanced cooperation must show a positive effect on integration.[45] The institutions, most prominently the European Commission as a guardian of the Union's interests, must evaluate any cooperation (proposed or on-going) and ensure that it does not develop centrifugal forces that lead to a cleavage between the cooperating States and the remaining States, or, more generally, between States willing to pursue a path of flexible

[38] See M Kendrick, 'Brexit the Ultimate Opt-Out: Learning the Lessons on Differentiated Integration' (2022) European Papers www.europeanpapers.eu.

[39] Art. 20(1) and (2) TEU.

[40] M Schauer, *Schengen – Maastricht – Amsterdam: Auf dem Weg zu einer flexiblen Union* (Verlag Österreich 2000) 160.

[41] R Böttner, *The Constitutional Framework for Enhanced Cooperation in EU Law* cit. 84.

[42] B Horváthy, 'The Concept of "Union Interest" in EU External Trade Law' (2014) Acta Juridica Hungarica 261, 264.

[43] See, among others, HJ Blanke, 'Protocol No. 2' in HJ Blanke and S Mangiameli (eds), *The Treaty on European Union: A Commentary* (Springer 2013) 1641 ff. (on art. 1 of the protocol).

[44] M Schauer, *Schengen – Maastricht – Amsterdam* cit. 159 ff.; HJ Blanke, 'Article 20' in HJ Blanke and S Mangiameli (eds), *The Treaty on European Union* cit. 32; R Böttner, 'Eine Idee lernt laufen – zur Praxis der verstärkten Zusammenarbeit nach Lissabon' (2016) Zeitschrift für europarechtliche Studien 501, 514 ff.

[45] See in more detail R Böttner, *The Constitutional Framework for Enhanced Cooperation in EU Law* cit. 83 ff.

integration and those that wish not to do this. Practice has shown, however, that only very little requirements are imposed on the evaluation of the positive integrative effect. It is largely a comparison between enhanced cooperation and no legislation/regulation at all:[46] it is true that the rules adopted in the context of enhanced cooperation are all a "minus" compared to harmonisation across the Union. However, the regulation under enhanced cooperation with applicable rules for only a limited number of member states is usually a "plus" compared with the *status quo ante*.[47] This, of course, bears the risk that differentiation is granted to generously, which, in the long run, could jeopardise the unity of the integration project at large. The more cases of enhanced cooperation are established, the more important the requirement of a positive effect on integration of another instance of flexible integration becomes.

Taking a closer look, this has important links to another requirement: enhanced cooperation is permissible only as a "last resort", when the Council "has established that the objectives of such cooperation cannot be attained within a reasonable period by the Union as a whole".[48] The Treaties are silent on the nature of the reasons for which agreement cannot be reached – be they political, economic, legal, or other. It has been argued, in this context, that enhanced cooperation is legitimate only if there is disagreement on the question *if* the Union should act at all while there could be no enhanced cooperation if there was agreement in principle but disagreement only on the substance of the proposal.[49] This, however, is not supported by the wording of the Treaty, which allows enhanced cooperation as a last resort when "the objectives of such cooperation cannot be attained [...] by the Union as a whole". This can result from both disagreement in principle and disagreement on the substance of legal action, as the practice of the member states supports. That the objectives of enhanced cooperation cannot be attained within a reasonable period by the Union as a whole can have different causes, for example that member states are not yet ready and able to take part in a legislative initiative by the entire Union or simply the lack of interest and willingness to adopt a measure at Union level or the inability to agree to specific measures when there is consensus on an initiative in principle.[50] As the Council is

[46] *Ibid*. 92.

[47] Cf S Peers, 'The Constitutional Implications of the EU Patent' (2011) EuConst 229, 255: "half a loaf is better than none". Cf also S Peers, 'Enhanced Cooperation: The Cinderella of Differentiated Integration' in B De Witte, A Ott and E Vos (eds), *Between Flexibility and Disintegration* (Edward Elgar 2017) 76, 88.

[48] Art. 20(2) TEU.

[49] JJ Kuipers, 'The Law Applicable to Divorce as Test Ground for Enhanced Cooperation' (2012) ELJ 201, 213; also F Fabbrini, 'Enhanced Cooperation Under Scrutiny' (2013) LIEI 197, 207 ff.; F Fabbrini, 'Taxing and Spending in the Euro Zone: Legal and Political Challenges Related to the Adoption of the Financial Transaction Tax' (2014) ELRev 155, 167.

[50] *Spain and Italy v Council* cit. para. 36; cf also C Lacchi, 'Développements récents sur les coopérations renforcées' (2013) Revue des affaires européennes 785, 789 ff.; T Balagović, 'Enhanced Cooperation: Is There Hope for the Unitary Patent?' (2012) Croatian Yearbook of European Law and Policy 299, 310 ff.; P Hall, 'Verstärkte Zusammenarbeit – "Flexibilität"' in J Bergmann and C Lenz (eds), *Der Amsterdamer Vertrag* (Omnia 1998) 17; U Derpa, *Die verstärkte Zusammenarbeit im Recht der Europäischen Union* cit. 177 ff.

the forum for political agreement between the member states, it must be deduced that both incapacity as well as unwillingness – both in principle and in substance – may be legitimate causes for disagreement in the sense of the last resort principle. It only has repercussions on the intensity of debates in the Council. Furthermore, this is reinforced by the thought that otherwise member states could only choose between abandoning a project (for lack of disagreement) or negotiate until all States are willing to agree: surely, a watered-down compromise for all is no more beneficial to the integration project than an ambitious forging ahead of a group of willing States.

Going on, the Treaty text refers to the Council's finding that the *objectives* of the envisaged cooperation cannot be attained within a reasonable period of time without demanding that the pursuing of the objectives has been subject to a specific procedure. However, with regard to the rationale of this criterion and in analogy to the accelerated procedures in the Area of Freedom, Security and Justice (arts 82(3), 83(3), 86(1)(3) and 87(3)(3) TFEU),[51] one cannot reasonably argue that the *ultima ratio* character is met unless a legislative initiative has been proposed and discussed in the Council and the member states have undertaken serious efforts to find a compromise.[52] In this case, enhanced cooperation would be the last resort only if no agreement could be reached in the regular law-making procedures.[53] In any case, it can be established that as a minimum requirement the Commission must have made use of their right of initiative,[54] but there does not have to be a formal vote as long as there is a "genuine deadlock, which could arise at all levels of the legislative process".[55]

At the same time, this finding limits the potential scope of any enhanced cooperation. Disagreement can be determined only if the member states have discussed specific projects and corresponding measures. It is therefore unlikely that disagreement can be as

[51] See on this R Böttner, *The Constitutional Framework for Enhanced Cooperation in EU Law* cit. 286 ff.

[52] H Bribosia, *Les coopérations renforcées: quel modèle d'intégration différenciée pour l'Union européenne?* (EUI 2007) 97; H Ullrich, 'Enhanced Cooperation in the Area of Unitary Patent Protection and European Integration' (2010) Rivista di Diritto Industriale 325, 332.

[53] Joined cases C-274/11 and C-295/11 *Spain and Italy v Council* ECLI:EU:C:2012:782, opinion of AG Bot, para. 111. With an affirmative view JV Louis, 'La pratique de la coopération renforcée' (2013) CDE 277, 285; O Feraci, 'L'attuazione della cooperazione rafforzata nell'Unione europea: un primo bilancio critico' (2013) RivDirInt 955, 962 ff. According to F Fabbrini, 'Enhanced Cooperation Under Scrutiny' cit. 208, the requirement of last resort is met only if there is general disagreement on the "if" of a measure, not if there is disagreement on the "how".

[54] With the same view D Thym, *Ungleichzeitigkeit und europäisches Verfassungsrecht* cit. 53; see also F Martucci, 'Les coopérations renforcées, quelques années plus tard: une idée pas si mauvaise que cela?' in F Berrod and others (eds), *Europe(s), droit(s) européen(s)* (Bruylant 2015) 385, 389. With a different view the Praesidium of the European Convention, CONV 723/03 of 14 May 2003, 4 ff., 18.

[55] *Spain and Italy v Council*, opinion of AG Bot, cit. para. 111. Cf also A Cédelle and J Vella, 'Differentiated Integration in the EU: Lessons from the Financial Transaction Tax' in P Koutrakos and J Snell (eds), *Research Handbook on the Law of the EU's Internal Market* (Edward Elgar 2017) 350, 363.

far reaching so as to authorise enhanced cooperation for an entire policy area.[56] Nonetheless, disagreement on a specific act does not necessarily mean that enhanced cooperation is the last resort only for this *particular* file. Discussions can reveal that there is disagreement on legislation in a specific area for which the act in question was only the starting point. This can suggest that there is general political disagreement on policy making in certain policy field, which entails that there is no agreement on the pursuing of the Union's objectives in that particular field. The underlying objectives, however, might have a wider scope than a single act. Therefore, the area in which the enhanced cooperation would operate may be broader and not restricted to the act for which a deadlock has been established.[57] Nevertheless, authorisation may not be granted for an entire policy area but only for measures whose scope and content is foreseeable to a certain degree. Otherwise, it would be impossible to establish if the envisaged cooperation is the last resort and has in fact a positive effect on integration, *i.e.*, if the conditions for their establishment are actually met. If a whole sector is to be made subject to flexible integration, this can be done either by successively extending the original authorisation or by establishing several (individual) cases of cooperation.[58] In the latter case, it would be necessary to establish links between the individual cases of cooperation so as to not create fuzzy networks of "ins" and "outs", because this may be detrimental to integration.

In practice,[59] member states have used the enhanced cooperation mechanism only for specific dossiers that failed to reach the necessary quorum in the Council. Specifically, they were subject to unanimity voting in the Council, but certainly also cases under the ordinary legislative procedure are not barred from flexible integration. The ECJ considers that the establishment of enhanced cooperation does not constitute a circumvention of Union law if unanimity cannot be achieved in an area where it is required by the Treaties.[60] As is clear from art. 333(1) TFEU, which allows for transition from unanimity to qualified majority voting, enhanced cooperation is permissible in such policy areas.[61] Practice has shown that situations in which each individual member state has a veto are

[56] D Thym, *Ungleichzeitigkeit und europäisches Verfassungsrecht* cit. 53.

[57] *Ibid*. 53 ff.; European Convention, CONV 723/03 cit. 5 and 18; L Guilloud-Colliat, 'Le principe majoritaire et les coopérations renforcées' in F Picod (ed.), *Le principe majoritaire en droit de l'Union européenne* (Bruylant 2016) 155, 165 ff.

[58] R Böttner, *The Constitutional Framework for Enhanced Cooperation in EU Law* cit. 156.

[59] *Ibid*. 101 ff.

[60] M Lamping, 'Enhanced Cooperation: A Proper Approach to Market Integration in the Field of Unitary Patent Protection?' (2011) International Review of Intellectual Property and Competition Law 879, 910 ff., with regard to the patent cooperation, considers that enhanced cooperation undermines the protection induced by the unanimity requirement and thus constitutes an unlawful circumvention of primary law decision-making processes. With a similar, critical view J Cloos, 'Les coopérations renforcées' (2000) RMCUE 512, 514; J Raitio, 'Fragmentation in the European Union and the Enhanced Cooperation Mechanism – Can it be Abused?' (2013) Europarättslig tidskrift 507, 512 ff.

[61] *Spain and Italy v Council* cit. paras 35 ff.; L Guilloud-Colliat, 'Le principe majoritaire et les coopérations renforcées' cit. 164.

more susceptible to blockades and in those cases enhanced cooperation can easily be regarded as a "last resort".

III.2. The implementation of enhanced cooperation

The implementation of an authorised cooperation follows the rules and procedures in the Treaties, except for special voting arrangements in the Council for participating States.[62] In other words, while enhanced cooperation has a specific authorisation procedure, it does not have specific rules for law-making within that cooperation. When adopting rules for the implementation of enhanced cooperation, the participating States must respect Union law and the rights and competences of non-participating member states. Art. 20(4) TEU makes clear that acts adopted within enhanced cooperation do not form part of the *acquis communautaire*.[63] Instead, they constitute a body of specific law within the Union legal order (*acquis particulier*).[64] Moreover, the member states are bound by art. 4(3)(3) TEU to not impair the attainment of the Union's objectives. Likewise, any enhanced cooperation shall aim to further the Union's objectives and protect its interests and thus have to respect not only the legal, but also the political corpus of the Union.[65] Hence, not only the legally binding acts of the Union, but also the "soft law", have to be respected by any enhanced cooperation. In other words, the *acquis particulier* of any enhanced cooperation must comply with the *acquis communautaire*. In the event of a conflict of laws, the Union *acquis* takes precedence over the rules adopted within the framework of enhanced cooperation, since the latter cannot derogate from the application of the *acquis communautaire*.[66] Taken together with the requirement to further the integration process, the call for compliance with Union law of legal acts adopted in enhanced cooperation sets another important limit to the possible implementing acts. Not only must they not *contradict* Union law. They must not derogate from general Union law either in the sense that they cannot mean a step back in integration, *i.e.*, they cannot renounce existing rules of Union law for the cooperating States. In other words, enhanced cooperation may not be used as a means to take a step back in integration.[67]

As regards the non-participating States, art. 20(1)(2) sentence 2 TEU stipulates as a general rule that enhanced cooperation shall be open at any time to all member states. It

[62] See in detail R Böttner, *The Constitutional Framework for Enhanced Cooperation in EU Law* cit. 122 ff.

[63] See also C Delcourt, 'The *Acquis Communautaire*: Has the Concept had its Days?' (2001) CMLRev 829, 867 ff., on the Nice Treaty.

[64] R Böttner, *The Constitutional Framework for Enhanced Cooperation in EU Law* cit. 185.

[65] See, along those lines, C Delcourt, 'The *acquis communautaire*' cit. 866 (fn 180).

[66] AS Lamblin-Gourdin, 'Les coopérations renforcées au secours du brevet unique européen' (2012) RUE 254, 259; HJ Blanke, 'Article 20' cit. 48.

[67] Cf R Böttner, *The Constitutional Framework for Enhanced Cooperation in EU Law* cit. 187. See on the application of EU principles to PESCO AS Houdé and RA Wessel, 'A *Common* Security and Defence Policy: Limits to Differentiated Integration in PESCO?' (2022) European Papers www.europeanpapers.eu.

contains the right of "opting in" for any member state either at the time of the establishment of the cooperation or at any later stage.[68] This "open door" principle is specified by art. 328(1) TFEU, which provides that enhanced cooperation shall be open to all member states when it is being established, subject to compliance with any conditions of participation laid down by the authorising decision, or at any other time, subject to compliance with the acts already adopted within that framework, in addition to those conditions. Furthermore, as arts 20(3) TEU and 330(1) TFEU provide, all members of the Council may at any time take part in the negotiations on the substantive acts implementing the cooperation, irrespective of the States' participation. This means that they can articulate any potential interest or concern which might facilitate their accession to that cooperation in the future. This openness and the possibility to take part in negotiations aims to prevent that an established cooperation develops a life of its own, detached from the Union as a whole.

Furthermore, art. 327 TFEU provides that an established cooperation shall respect the competences, rights and obligations of the non-participating States and that those member states shall not impede the implementation of said cooperation by the participating States. The aim of the provision is to ensure that enhanced cooperation does not lead to the adoption of measures which prevent the non-participating member states from exercising their competences and rights and fulfilling their obligations.[69] The non-affection clause not only demands that the implementation of an on-going cooperation itself respects the competences, rights and obligations. More generally, and in combination with the principle of the equality of States (art. 4(2) TEU), member states may not be discriminated against due to their (non-)participation in enhanced cooperation.[70]

As sentence 2 of art. 328(1) TFEU adds, accession can be subject to compliance with the acts already adopted within that framework. While it is clear that any member state that wishes to join a group of pioneering States must comply with what they have already adopted for the implementation of that cooperation, one may wonder if the principle of openness restricts the participating member states in what they can adopt as implementing measures. This is particularly relevant if the group of cooperating States decides to adopt measures that have been discussed before and that prevented (politically) the participation of some member states in the first place (and thus ultimately the adoption by the Union as a whole). This applies, for example, to the language regime adopted for the European patent, which originally prevented Spain and Italy from participating because they disagreed with Spanish and Italian not being included in the list of languages for the unitary patent protection. Another example is the linking of the two regulations on property regimes of international couples (in other words, the inclusion of same-sex couples), which has been

[68] Cf HJ Blanke, 'Article 20' cit. 36.

[69] *Spain and Italy v Council* cit. para. 82; C Lacchi, 'Développements récents sur les coopérations renforcées' cit. 793.

[70] R Böttner, *The Constitutional Framework for Enhanced Cooperation in EU Law* cit. 199.

criticised by Poland especially.[71] In both cases, the implementing measures included these exact aspects that prevent some States from participating in a Union-wide adoption. However, as the ECJ has stated, participants in cooperation are free to adopt arrangements with which the non-participating States would not have agreed if they had participated. The introduction of such rules does not render ineffective the possibility for non-participating member states to join enhanced cooperation.[72] In other words, enhanced cooperation may adopt those rules that have led to the deadlock in the first place. This, however, may lead to a permanent separation between participating and non-participating States and may run counter to the character of enhanced cooperation as a sort of transition tool from flexible to uniform integration. Nevertheless, it is for the non-participating States to decide if they wish to abstain from a cooperation permanently or if they choose to accept a sort of late-mover disadvantage due to their late participation.

Furthermore, the character of a specific cooperation may make it necessary that certain requirements are fulfilled by the members to that cooperation. This is envisaged by arts 328(1) and 331 TFEU, when they refer to "conditions of participation" that can be laid down in the decision authorising enhanced cooperation. The treaties do not specify the nature of these entry conditions and current practice of enhanced cooperation does not give any indication either, but one could imagine economic indicators or the introduction of specific social, political or institutional elements as potential requirements.[73] However, it follows from the negotiations in the Constitutional Convention that the conditions of participation must be of an objective nature and cannot be established as a political instrument for the exclusion of certain member states.[74] This also means that these conditions must be formulated in such a way that they can be met by any member state. This limits the possibility to formulate conditions to the extent that they are not perceivably discriminatory to certain member states.[75] They may not lead to a limited or closed group, as this would contradict the cooperation's requirement of having a positive integrative effect.[76] To ensure this, they must be laid down in the *authorising* decision which

[71] *Ibid*. 235 ff.

[72] *Spain and Italy v Council* cit. paras 82 ff.

[73] Cf G Gaja, 'How Flexible is Flexibility under the Amsterdam Treaty' cit. 858 ff. With a different view F Amtenbrink and D Kochenov, 'Towards a More Flexible Approach to Enhanced Cooperation' in A Ott and E Vos (eds), *Fifty Years of European Integration* (T.M.C. Asser Press 2009) 181, 189, stating that "a Member State cannot be left out because of its political, economic, or social conditions if that State wishes to take part".

[74] European Convention, CONV 723/03 cit.; also B Martenczuk, 'Enhanced Cooperation: The Practice of Ad Hoc Differentiation in the EU since the Lisbon Treaty' (2013) StudDipl 83, 96; with a critical view on the language regime in the framework of enhanced cooperation on unitary patent protection, see M Lamping, 'Enhanced Cooperation: A Proper Approach to Market Integration in the Field of Unitary Patent Protection?' cit. 913.

[75] A Hatje, 'Artikel 328 AEUV' in J Schwarze and others (eds), *EU- Kommentar* (Nomos Helbing Lichtenhahn Verlag 2019) 2.

[76] Cf CR Fernández Liesa and MA Alcoceba Gallego, 'La cooperación reforzada en la Constitución Europea' in V Garrido Mayol and others (ed.), *Comentarios a la Constitución Europea* (Tirant lo Blanch 2004) 463, 485.

is subject to a vote by *all* Council members. Thus, the treaty does not require "unconditional openness"[77] but it does not place it solely in the hands of the participating member states either. The Treaty makers considered that this approach would widen the number of cases in which enhanced cooperation would be useful, as it would not in every case be depended on mere will, but rather on objective differences and even objective conditions of participation.[78] The mechanism would thus be an instrument that allows taking into account objective disparities, even if they are only temporary.[79]

As mentioned, cooperation between a group of member states in the context of an established enhanced cooperation can be extended by the authorisation of a new cooperation with identical membership or at least a sub-group of States from the group of cooperating States. In this context, participation in the first cooperation can be established as a "condition of participation" for the second cooperation in order to ensure synchrony between the two cases of cooperation and prevent the development of two groups on related topics but with asynchronous participation. This notwithstanding, it would be an objective requirement that could easily be fulfilled by any member state wishing to join a cooperation, and this condition would not be of a prohibitive character. Furthermore, this link would be justified by the intention to limit fragmentation within differentiated integration. It appears to be legally feasible to make participation in one cooperation conditional on the participation in a preceding cooperation.[80] Unfortunately, this route has not been taken by the member states when they established cooperation on property regimes of international couples in a legal environment where there has already been differentiated integration as regards Rome III (the conflict-of-law rules on divorce and separation).[81]

To sum up, the Treaties establish sufficient safeguards to ensure that sub-groups of cooperating States do not turn into closed clubs of States with their own rules. They must always fit into the existing body of EU law. In practice, however, cooperations establish to a certain degree a *de facto* limitation to participation in that the member states taking part in enhanced cooperation adopt – and this seems quite natural – those rules that led to the conflict and the establishment of that cooperation in the first place. There are, nonetheless, cases of accession – even of States that heavily resisted the adopted rules at first – which allow the conclusion that this is not a severe obstacle. In this context, flexibility in the form of enhanced cooperation can develop a centripetal effect on integration in specific areas.

[77] JA Emmanouilidis and C Giering, 'In Vielfalt geeint – Elemente der Differenzierung im Verfassungsentwurf' (2003) Integration 454, 459.

[78] European Convention, CONV 723/03 cit. 22.

[79] *Ibid*. 3.

[80] R Böttner, *The Constitutional Framework for Enhanced Cooperation in EU Law* cit. 237 ff.

[81] Belgium, Bulgaria, Germany, Greece, Spain, France, Italy, Luxembourg, Malta, Austria, Portugal, and Slovenia take part in both cases of enhanced cooperation, while the Czech Republic, Latvia, Lithuania, Hungary, Romania, Croatia, the Netherlands, Finland, and Sweden only participate in one or the other.

IV. On a related note: Pre-Brexit negotiations and differentiation

When the United Kingdom became a member of the European Communities in 1973, it did so without holding a membership referendum. Two years later, the population expressed support for EC membership, with 67 per cent in favour on a national turnout of 64 per cent.[82] A good 40 years later, the United Kingdom would hold another referendum on EU membership. On 23 June 2016, in an advisory referendum 51.9 per cent of voters were in favour of the UK's leaving the European Union (turnout 72.2 per cent). Although not legally bound by the outcome of the popular vote, the government initiated the official EU withdrawal process on 29 March 2017 as it had promised to implement the referendum's result. The exit deal negotiations led to intense discussions on the future EU-UK relations and also on the possibility to exit from Brexit.

Before the Brexit referendum, the Heads of State and Government negotiated an agreement, taking effect in the event that the UK had decided not to leave the Union.[83] This package deal consisted of a Decision of the EU Member States' Heads of State and Government (including two amendments proposed to secondary legislation in the field of social benefits and free movement) and a number of statements and declarations by the Heads of State and Government, the European Council, and the Commission, some of which contained plans for EU secondary legislation. Upon closer inspection, this package deal was more political than legal,[84] the only elements having effect on EU law being the proposed legislative acts and even they are subject to adoption and implementation by the relevant actors and procedures under the EU Treaties.[85]

Nonetheless, the question may arise whether such special situation of a member state could be accommodated by means of enhanced cooperation. In this context, we have to remember art. 326 TFEU, according to which any enhanced cooperation must comply with the *acquis communautaire*, which cannot be suspended for the group of cooperating States. This provision in combination with the requirement that enhanced cooperation must have a positive integrative effect is an important substantial limit as it makes clear that enhanced cooperation may not be used as a means to take a step back in integration.[86] It cannot serve as an instrument for "differentiated disintegration" or the subsequent instalment of "opt-outs" for unwilling or hesitant member states.[87] On the

[82] See in general D Butler and U Kitzinger, *The 1975 Referendum* (Macmillan 1976).

[83] European Council, *Conclusions of 18-19 February 2016* www.consilium.europa.eu.

[84] Cf also K Oppermann, 'Nach der Unterhauswahl ist vor dem EU-Referendum: die britische Europapolitik am Scheideweg' (2015) Integration 276, 286.

[85] S Peers, 'The Final UK/EU Renegotiation Deal: Legal Status and Legal Effect' (21 February 2016) EU Law Analysis eulawanalysis.blogspot.com.

[86] B Martenczuk, 'Enhanced Cooperation' cit. 90; HJ Blanke, 'Article 20' cit. 32; M Kellerbauer, *Von Maastricht bis Nizza* cit. 177.

[87] C Deubner, 'Harnessing Differentiation in the EU-Flexibility after Amsterdam: Hearing with Parliamentarians and Government Officials in Seven European Capitals' (European Ccmmission Forward Studies

other hand, however, it is well possible that the *status quo* is preserved for all States and only member states willing to deepen integration pursue a path of enhanced cooperation in the sense that all States except the unwilling State(s) adopt legislation in a specific field using the enhanced cooperation mechanism. While this is technically possible, it is politically undesirable and may lead to a complex system of Union-wide and cooperation-specific rules. In effect, it could lead to *de facto* opt-outs that are generally not foreseen in EU (secondary) law-making. Moreover, as participation in any case of enhanced cooperation is voluntary, this path may quickly turn into a slippery slope of cherry-picking for other States, eventually jeopardising the integration project as a whole. Thus, while differentiation *in general* may be a suitable method to accommodate serious concerns of some member states (as has been done in the past for example with Schengen or EMU), enhanced cooperation is not the tool to realise this endeavour.

V. Outlook: Dusk or dawn for enhanced cooperation?

Although discussed for a number of files, it took around a decade until enhanced cooperation was first activated. It has been said that enhanced cooperation is in fact less relevant and significant than expected by its proponents.[88] However, one should not neglect the potential of this tool of flexibility as a threat, comprising the risk of being left behind by member states willing to deepen integration.[89] Since the entry into force of the Lisbon Treaty, enhanced cooperation has become part of the reality of differentiation in European integration. It is no longer just a concept that is carried from one treaty reform to another, but it has been filled with life in recent years. It seems that the member states develop a sort of routine to realise, by means of enhanced cooperation, policy objectives for which there is no consensus among all member states. This is underlined by the fact that the cases of differentiated integration by subgroups of States – including PESCO – cover a variety of subjects.[90] Nevertheless, if we consider the adoption of the Fiscal Compact (and, depending on the Union's competence, the ESM), the member states still consider using intergovernmental cooperation over enhanced cooperation.[91] Mostly due to its constitutional limits, enhanced cooperation cannot substitute for every case in which flexibility and differentiation is needed.

Unit Working Paper 2000) 53; AS Lamblin-Gourdin, 'Les coopérations renforcées au secours du brevet unique européen' cit. 259; R Böttner, *The Constitutional Framework for Enhanced Cooperation in EU Law* cit. 87; see also CD Ehlermann, 'Engere Zusammenarbeit nach dem Amsterdamer Vertrag: ein neues Verfassungsprinzip?' (1997) EuR 362, 372; R Hofmann, 'Wieviel Flexibilität für welches Europa?' cit. 723; F Martucci, 'Les coopérations renforcées, quelques années plus tard' cit. 390.

[88] G Della Cananea, 'Differentiated Integration in Europe after Brexit: An Institutional Analysis' in I Pernice and AM Guerra Martins (eds), *Brexit and the Future of EU Politics* (Nomos 2019) 45, 73.

[89] See R Böttner, *The Constitutional Framework for Enhanced Cooperation in EU Law* cit. 338 ff.

[90] *Ibid*. 335.

[91] Cf F Fabbrini, 'Enhanced Cooperation Under Scrutiny' cit. 206.

At the same time, however, initial practical experience shows that enhanced cooperation is more suitable for the implementation of concrete legislative projects than for the further development of larger regulatory complexes. The limited scope of application of individual cases of cooperation also results from the legal framework: if such cooperation is established, it must contain an outlook on the further steps in order to assess the extent to which the cooperation actually has a positive integrative effect. In addition, the *ultima ratio* criterion requires that serious attempts have already been made to implement a specific project. This works well for individual files. In the case of a larger regulatory complex, it would be necessary for one or more States to clearly communicate from the outset that they do not (intend to) support regulations in an entire subject area.[92]

Despite the limited scope of each area, it is easy to see that enhanced cooperation is particularly suitable for resolving political blockades.[93] In all cases of enhanced cooperation to date, a Union-wide solution has failed not because of the inability but rather because of the (political) unwillingness of some member states. This is all the more true since cooperation has only taken place in cases where the Treaties require unanimity.

Interestingly, in most recent times enhanced cooperation has been considered for subjects with major political implications. While eventually not put to use, enhanced cooperation has been discussed as an option for the reform of the Dublin system or the implementation of the NextGenerationEU instrument.[94] Furthermore, with regard to the "rule of law crisis" in Poland, some authors discuss whether enhanced cooperation could be used as a means of *de facto* expulsion of an EU member state,[95] because the Union is lacking the tools for actually expelling a member from the organisation. This situation is fundamentally different from the one where one State no longer wishes to participate in (certain areas of) integration (Brexit). Clearly, since enhanced cooperation requires only a qualified majority in the Council for its establishment, this may *prima facie* appear as a legally feasible option. However, it would be a very difficult endeavour to formulate conditions of participation that would actually keep one State out. After all, the open-door principle gives every State a right to participate in any established cooperation. Entry

[92] R Böttner, *The Constitutional Framework for Enhanced Cooperation in EU Law* cit. 336.

[93] In this context, it is interesting to note that a recent study found that only 23 per cent of government officials from the (then) 28 Member States of the Union stated that "overcoming policy deadlocks" was their country's main motivation for flexible cooperation while 36 per cent wished to demonstrate benefits of collective European action through flexible cooperation. See A Möller and D Pardijs, 'The Future Shape of Europe: How the EU Can Bend Without Breaking' (2017) European Council on Foreign Relations Flash Scorecard 3.

[94] J Dempsey, 'Judy Asks: Can the EU Solve the Budget and Rule-of-Law Crisis?' (26 November 2020) Judy Dempsey's Strategic Europe, Carnegie Europe carnegieeurope.eu; S Giegold and R Repasi, 'Budget Blockade by Hungary/Poland: EU Council Presidency Should Start "Enhanced Cooperation" to Ensure Corona Aid Flows' (26 November 2020) The Greens/EFA sven-giegold.de; J Graf von Luckner, 'A Novel "Reinforced Cooperation" in the EU: The Viable Option of a NextGenEU without Poland and Hungary' (9 December 2020) Verfassungsblog verfassungsblog.de.

[95] M Chamon and T Theuns, 'Resisting Membership Fatalism: Dissociation Through Enhanced Cooperation or Collective Withdrawal' (11 October 2021) Verfassungsblog verfassungsblog.de.

conditions are allowed as long as they are not discriminatory. The only suitable criterion to exclude a member state from cooperation due to failure to comply with the Union's fundamental values would be the to implement this, for example the "rule of law", as an entry condition for further cooperation. It is hardly perceivable how this would be made operational. Moreover, it may not even be an admissible entry criterion, as Union law already has a tool (art. 7 TEU) to tackle this issue.

To sum up: enhanced cooperation as it stands is a suitable means to further the integration process in specific areas or for singular projects. However, this instrument is not the knight in shiny armour that will help the Union overcome great (structural) crises. The overall integration process as such must remain a common undertaking based on the agreement of all its constituent members. Nevertheless, enhanced cooperation is a practical tool to further integration within the common European house, not outside. Used carefully, it will not create a hard-core Europe with fuzzy edges (despite what current participation may suggest),[96] but instead be an asset to advance the Union as a whole.

[96] Cf N von Ondarza, 'Zwischen Integrationskern und Zerfaserung: Folgen und Chancen einer Strategie differenzierter Integration' (2012) SWP Study www.swp-berlin.org. For a visual representation of this, see the image published in R Böttner, *The Constitutional Framework for Enhanced Cooperation in EU Law* cit. 359.