

Enhanced Cooperation and Economic and Monetary Union: a Comparison of Models of Flexibility *

INTRODUCTION

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The emergence of forms of flexibility in European Union law is a phenomenon that, in some respects, has been present since the dawn of the process of European integration. The Treaty establishing the European Economic Community provided the Member States with the possibility of adopting safeguard measures or of retaining under certain conditions measures that the achievement of the Customs Union would have otherwise made obligatory to abolish.¹ Even though this was a temporary form of differentiation, the Community law was not being applied uniformly throughout the European Community.

Nevertheless, it was from the time of the Maastricht² and Amsterdam Treaties that the significance of this phenomenon really became apparent. Access to the Euro was reserved to countries meeting specific economic and legal requirements, while others were granted the right to stay out. The United Kingdom, Denmark and Ireland were granted opt outs in the field of Justice and Home Affairs³ and regarding the

Schengen acquis,⁴ and the enhanced cooperation mechanism was enshrined, allowing a vanguard of Member States to advance more rapidly towards integration in particular fields.

For the last years, enhanced cooperation has been used to regulate fields such as the definition of the law applicable to divorce and legal separation⁵ in 2010 or the unitary patent protection⁶ in 2012. In 2013, an authorisation was granted by the Council to eleven Member States wishing to explore options for a financial transaction tax.⁷ Many have proposed⁸ that enhanced cooperation might be a useful instrument to complete the Economic and Monetary Union. This prospect presents some problematic aspects, on account of the difficulty of reconciling an instrument designed to provide geographical flexibility and a particular form of differentiation – the EMU – with its own defined membership and which is increasingly tending to constitute a veritable subsystem within the European Union. ■

ENHANCED COOPERATION IN THE AMSTERDAM TREATY

Since their introduction into EU law by the Treaty of Amsterdam,¹⁴ the provisions on the establishment of enhanced cooperation have been amended by subsequent treaties, which have made the conditions for their application less strict in some respects.

Indeed, the terms of the Treaty of Amsterdam, both as regards the conditions that enhanced cooperation must respect and the procedure that must be followed for instating it, were extremely restrictive.

Looking at the first of these aspects, ex Art. 43 TEU contained a very extensive and detailed list of conditions to be fulfilled in order to be able to establish an enhanced cooperation.¹⁵ To these must be added the further conditions laid down in ex Art. 11 TEC relating to cooperations established in the Community pillar¹⁶ and in ex Art. 40 TEU relating to those established in the area of police and judicial cooperation in criminal matters.¹⁷ On the other hand, the possibility of establishing enhanced cooperation in the area of common foreign and security matters (second pillar) was excluded.¹⁸

As regards the procedure for implementing enhanced cooperation, Council authorisation was envisaged in both pillars. However, whereas in the first pillar the request had to come from the states and be addressed to the Commission, which could submit a proposal on which the Council would then decide by a qualified majority after consulting the European Parliament, in the area of police and judicial cooperation in criminal matters, the

states had to put the request directly to the Council, which, after it had consulted the Commission and also forwarded the request to the European Parliament, would then decide by a qualified majority. In keeping with the intergovernmental nature of the third pillar, the Commission and European Parliament had, in this latter case, a less important role.

The possibility that an enhanced cooperation could be authorised by a qualified majority, in other words, the fact that its implementation did not require the unanimous agreement of the member states, certainly constituted an incentive for making use of this instrument. However, in relation to both of the above-mentioned pillars, the Treaty of Amsterdam made provision for recourse to a sort of emergency brake mechanism, which essentially gave any state wanting to block the procedure of establishing a cooperation the possibility of doing so. Indeed, according to ex Art. 11 TEC, if a member of the Council declared that it intended to oppose the granting of an authorisation by qualified majority for important and specific domestic policy reasons, the vote would not take place and the Council, acting by a qualified majority, could ask that the matter be referred to the Council, meeting in the composition of the heads of state or government, for a decision by unanimity. A very similar provision was contained in ex Art. 40 TEU in relation to the third pillar, the only difference being that, in this case, the matter was to be referred not to the Council, meeting in the composition of the heads of state or government, but to the European Council.

Because of this emergency brake, and the multiple conditions on which the possibility of establishing closer cooperation depended, this mechanism actually stood little chance of constituting an effective tool for flexibility.¹⁹ Indeed, it seems that, at the negotiating table, the concerns of states reluctant to allow space for forms of differentiation prevailed over those of states keen to find effective solutions to the different needs of the member states of an enlarged Europe.²⁰

This also emerges clearly if we analyse how enhanced cooperation stood to impact on voting mechanisms within the political institutions. Indeed, under the Treaty of Amsterdam, all Council members could take part in the deliberations prior to the adoption of the acts and decisions necessary in order to implement an enhanced cooperation, but only those representing member states involved in the closer cooperation could take part in the actual decision making. This meant that the states outside the enhanced cooperation, given that they could nevertheless take part in the discussion in the Council, had some scope for trying to influence its deliberations; moreover, the differentiation between states participating in and those outside the cooperation was not reflected at the level of the Commission and the European Parliament; in short, it was envisaged that these institutions would participate in the adoption of the legislation necessary to implement the enhanced cooperation in their full composition, which would thus include members from states not participating in the enhanced cooperation in question. ■

CHANGES INTRODUCED BY THE NICE TREATY

The rigidity of the mechanism as configured by the Treaty of Amsterdam was remedied only in part by the Treaty of Nice.²¹ Indeed, the changes introduced by the latter turned out to be, in some respects, more cosmetic than substantive.²²

There is no doubt that the Treaty of Nice extended the scope of application of enhanced cooperation, allowing its establishment also in relation to common foreign and security policy, a field previously excluded from the operating sphere of this mechanism of differentiation. In particular, enhanced cooperations in this field had to be “aimed at safeguarding the values and serving the interests of the Union as a whole by asserting its identity as a coherent force on the international scene”; they also had to “respect the principles, objectives, general guidelines and consistency of the common foreign and security policy and the decisions taken within the framework of that policy; the powers of the European Community and consistency between all the Union’s policies and its external activity” (ex Art. 27 A TEU). Furthermore, they could not “relate to matters having military or defence implications” (ex Art. 27 B TEU).

As regards the method for implementing closer cooperation (ex Art. 27 C TEU), member states intending to establish an enhanced cooperation between themselves in the second pillar were required to address a request to the Council, which would then be forwarded to the Commission, so that

the Commission might give its opinion on the consistency of the proposed cooperation with Union policies, and to the European Parliament, for information. Authorisation to establish the cooperation would then be granted by the Council deciding by qualified majority. However, the references that were made in ex Art. 27 C TEU to ex Art. 23(2) TEU (2nd and 3rd paragraphs) meant that, in this area too (exactly as envisaged by the Treaty of Amsterdam for enhanced cooperation in the first and third pillars), it was possible to apply the emergency brake. Indeed, this last provision established that should a member of the Council declare that it intended for important reasons of national policy to oppose the adoption of a decision to be taken by a qualified majority, the Council could “acting by a qualified majority, request that the matter be referred to the European Council for decision by unanimity”.

While the existence of this possibility was justifiable in the area of common foreign and security policy (in which decision-making procedures are of an essentially intergovernmental character, and there exists a sort of reverse flexibility in the form of the constructive abstention mechanism²³), the maintenance of an emergency brake mechanism in the Community pillar and the pillar relating to police and judicial cooperation in criminal matters was less readily justifiable, especially in the light of the fact that this same brake had been one of the reasons for the failure, up to that point, to actually use the

enhanced cooperation instrument.

Therefore, in these areas, the Treaty of Nice effectively eliminated the possibility of using an emergency brake mechanism proper. Nevertheless, there still remained, for states opposed to an enhanced cooperation, one possible way of making its establishment less straightforward. Indeed, according to the new wording of the provisions on enhanced cooperation in the Treaty of Nice, a member state could, when the Council was deciding on the enhanced cooperation, request that the matter be referred to the European Council; once the matter had been raised before the European Council, the Council would decide by a qualified majority.

As others have pointed out, this provision, despite seeming to constitute a weakened form of emergency brake mechanism,²⁴ nevertheless had the capacity to make establishment of a cooperation more difficult. First of all, the Council, following the raising of the matter before the European Council, might decide not to act. Furthermore, from a political point of view, it was very unlikely that the opposition of a member state would be overcome within the European Council, and also that the Council, following the adoption of a negative stance by the European Council, would fail to respect its position.²⁵ ■

ENHANCED COOPERATION IN THE LISBON TREATY

THE RELAXING OF THE AUTHORISATION PROCEDURE IN AREAS OTHER THAN THAT OF FOREIGN AND SECURITY POLICY

In fact, it was not until the Treaty of Lisbon that the main obstacle to the establishment of an enhanced cooperation, namely, the possibility for a single state to obstruct or hinder the procedure for implementing the mechanism, was eliminated; and it is no coincidence that the first concrete applications of this instrument followed the entry into force of this Treaty.

In line with the abandonment — formal at least — of the division of the EU into pillars, the Treaty of Lisbon lists a series of conditions, common to all areas, that must be fulfilled prior to the establishment of an enhanced cooperation.

The peculiarities of the common foreign and security policy area, which, despite the abandonment of the pillars, remains firmly in the intergovernmental mould, continue to be reflected in the procedure to be followed in order to bring about cooperation in this area. Indeed, Art. 329(2) TFEU states that the request from member states wishing to establish, between themselves, an enhanced cooperation in the framework of common foreign and security policy must be addressed to the Council and forwarded to the High Representative of the Union for Foreign Affairs and Security Policy, the Commission and the European Parliament. The authorisation is then granted by the Council deciding by unanimity. The elimination of the emergency brake, envisaged by the Treaty of Nice, is thus offset by the need for unanimous support in the Council in order to authorise the cooperation.

Conversely, in relation to enhanced cooperation in all the remaining areas, the Treaty of Lisbon does much to facilitate the use of this form of differentiation. Indeed, Art. 329(1) TFEU, denying the member states any possibility of preventing or hindering the implementation of an enhanced cooperation, establishes that, once a request to institute an enhanced cooperation has been submitted and the Commission has presented a proposal to the Council, the latter, acting by a qualified majority, should proceed with its authorisation. The difference, in the method of voting within the Council, between the area of common foreign and security policy and the other areas also exists in relation to requests, from member states, to join an existing enhanced cooperation.²⁶ ■

CONDITIONS FOR AN ENHANCED COOPERATION - I

THE NECESSARY CHARACTER OF THE COOPERATION

Even after the Treaty of Lisbon, the conditions governing the implementation of an enhanced cooperation nevertheless remain numerous. For the sake of an easier analysis of them, it is worth trying to split them into broad categories, namely those designed to restrict the use of enhanced cooperation to situations in which it is deemed

absolutely necessary; those relating to the need to comply with EU law as a whole; and those relating more specifically to relations with states outside the enhanced cooperation. It has to be acknowledged that these last two categories actually overlap to a large extent; they differ mainly in the greater emphasis placed by the former on the need to respect the unitary nature of EU law and the fundamental principles that govern its functioning, and

by the latter on the rights enjoyed by the states remaining outside the enhanced cooperation vis-à-vis those that have instead decided to be part of it.

The conditions applied in order to ensure that recourse is had to enhanced cooperation only when this is necessary are, essentially, the requirement that the cooperation include at least nine member states and the condition

that it be adopted only as a “last resort”, which is to say that recourse can be had to this form of flexibility only if the Council “has established that the objectives of such cooperation cannot be attained within a reasonable period by the Union as a whole” (Art. 20(2) TEU). They are conditions whose aim is to prevent unsuccessful negotiations from leading, each time, to one or more enhanced cooperations at the expense of efforts to reach a compromise, a circumstance that, as highlighted by the Court of Justice, would be detrimental to the interests of the Union and the integration process.²⁷

Over the years, with the successive enlargements that have seen the number of member states increasing to the current 28, the minimum number of states participating in an enhanced cooperation (a threshold designed to ensure that the group of states wanting to advance towards integration is sufficiently sizeable) has become proportionally lower and lower; today it does not even amount to a third of the EU member states.²⁸ Moreover, the fact that the states can give rise to different forms of enhanced cooperation in different areas is, as we shall see, one of the distinctive features of this form of differentiation that makes it dissimilar to pre-defined forms of differentiation such as the Economic and Monetary Union.

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The last resort criterion is one of the conditions that the Treaty of Lisbon helped to relax (compared with what was stipulated in the Amsterdam and Nice Treaties), thereby paving the way for easier recourse to the enhanced cooperation mechanism. Whereas the Treaty of Amsterdam stated that enhanced cooperation should be used only should it prove impossible to attain the objectives of the Treaties “by applying the relevant procedures laid down therein” and the Treaty of Nice underlined the need to establish “within the Council that the objectives of such cooperation cannot be attained within a reasonable period by applying the relevant provisions of the Treaties”, Art. 20(2) TEU today states that “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”.

As highlighted by the Advocate General Bot²⁹ in his opinion on the case relating to enhanced cooperation for a unitary European patent, whereas the Amsterdam and Nice Treaties were formulated in a way that implied that the Council should “follow the legislative process to its conclusion and that it was only where the proposed measure was rejected that enhanced

cooperation could be envisaged”, the wording of Art. 20(2) TEU seems to indicate that rather than having to arrive at a rejection, by a vote, of a legislative proposal, it is enough for the Council to ascertain, at any level of the legislative process, the presence of a deadlock clearly showing that a compromise is impossible.³⁰ On this basis, the Court, in relation to the unitary patent question, deemed the last resort condition to be fully met, given that “the legislative process aiming to establish a unitary patent on the EU level began in 2000 and was carried out in several stages; a considerable number of language arrangements for the unitary patent were discussed among all Member States within the Council; and none of those arrangements found support capable of leading to the adoption at EU level of a full ‘legislative package’ relating to that patent”.³¹

On the one hand, then, the Council has a degree of discretion³² in ascertaining the impossibility of reaching a compromise, given that 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 to the adoption of legislation for the Union as a whole in the foreseeable future”;³³ on the other, as the Court itself underlined,³⁴ the factors preventing the achievement of the compromise in question seem to play no role. ■

CONDITIONS FOR AN ENHANCED COOPERATION - II

RESPECT FOR EU LAW AND FOR THE SINGLE INSTITUTIONAL FRAMEWORK

The second category of necessary conditions for the establishment of enhanced cooperation (those concerning the need to comply with EU law as a whole) in turn includes conditions of different types, some of a more general nature, others linked to the principle of non-discrimination.

The more general conditions are set out in Art. 326 TFEU and Art. 20(1) TEU (second sentence), which state that enhanced cooperation must comply with the Treaties, and EU law must "aim to further the achievement of the EU, protect its interests and reinforce its integration process",³⁵ and that it may not concern matters within the framework of the Union's exclusive competences.

This latter requirement was set out differently in the Treaty of Amsterdam. Indeed, ex Art. 40 TEU, referring to enhanced cooperation in the area of police and judicial cooperation in criminal matters, demanded that this should respect "the powers of the European Community and the objectives laid down in this Title", whereas in relation to the Community pillar, ex Art. 43 TEU merely stipulated that it must not violate the "principles" of the Treaties. The absence of any reference to the powers of the Community in the latter provision had led to the doubt being raised, in the literature, that enhanced cooperation could be used to move the process of integration forward also in new areas, in which the Community had no powers to act. This interpretation was actually contradicted

by subsequent provisions in the same Treaty, where it was specified that enhanced cooperation should be used only when the objectives of the Treaties could not be attained by applying the relevant procedures laid down therein: an enhanced cooperation could be used only as a last resort, having first established that no Community measure involving all the member states could be adopted, and therefore had to concern areas in which the adoption of a uniform act throughout the Community was possible.³⁶

Moreover, this principle was reiterated by the Court in an obiter dictum in the Pringle case;³⁷ examining the opportuneness of creating the European stability mechanism through an enhanced cooperation, rather than through a treaty based on Art. 136 TFEU, the Court underlined that "It is clear from Art 20(1) TEU that enhanced cooperation may be established only where the Union itself is competent to act in the area concerned by that cooperation. However [...] the provisions of the Treaties on which the Union is founded do not confer on the Union a specific competence to establish a permanent stability mechanism such as the ESM". As highlighted by the Court itself in its judgement on the unitary patent,³⁸ the fact that the legal basis on which an act of the Union might have been established should refer the Union as a whole, yet also be the legal basis for the creation, by an enhanced cooperation, of acts binding only on the states taking part in the cooperation itself, far from amounting to a violation of the Treaties, constituted the very *raison d'être* of this form of differentiated integration.

Nevertheless, the establishment of an enhanced cooperation demands more than just the existence, in EU law, of a legal basis allowing an action by the Union as a whole; it is also necessary that the area in which the enhanced cooperation is to be implemented does not fall within the category of the Union's exclusive competences. In relation to this condition, the Lisbon Treaty does not modify what was already established in the Treaty of Nice; however, it helps to clarify which sectors fall into this category, providing, in Art. 3(1) TEU, an exhaustive list of them.³⁹

With regard to the conditions more closely related to the principle of non-discrimination,⁴⁰ under the terms of Art. 326(2) TFEU, 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 reality, however, any form of flexibility, precisely because it involves only some Member States, inevitably involves a degree of discrimination. Clearly then, the provisions just mentioned, if taken literally, constitute a major barrier to the establishment of enhanced cooperation,⁴¹ and for this reason must be interpreted with common sense. Respect for the principle of non-discrimination, in particular, should not be assessed by comparing the effects of an enhanced cooperation with the effects that would have been produced had the measure in question been adopted by all the member states, but rather by comparing the situation created following its establishment with

that which existed before it came into being.⁴² Accordingly trade discrimination or a distortion of competition between the member states can be said to have occurred if an enhanced cooperation leaves the member states outside it at a disadvantage compared with the position they enjoyed before it was established; it is clear, given the reference to trade between member states and to competition, that the more closely a cooperation is related to the key objectives of a common market and freedoms of movement, the greater the concrete risk of violating the non-discrimination principle will be.⁴³

As regards the principles that must be

respected before an enhanced cooperation can be implemented, the Treaty of Lisbon, unlike the Amsterdam and Nice Treaties, makes no mention of the principle of institutional unity. However, this omission seems to have been merely a question of form, given that the need to respect this principle nevertheless emerges from other provisions of the Treaty. The first clue that this is, indeed, the case is provided by Art. 20 TEU, according to which member states wishing “to establish enhanced cooperation between themselves within the framework of the Union’s non-exclusive competences may make use of its institutions and exercise those competences by

applying the relevant provisions of the Treaties”, expressions which seem to indicate that the enhanced cooperation cannot extend outside the institutional framework established by the TEU and TFEU.⁴⁴

This impression is confirmed by the provisions on the functioning of the Council and other political institutions, which today are almost the same as they were in the Treaty of Amsterdam. Indeed, under Art. 20(3) TEU and Art. 330 TFEU, all members of the Council may participate in its deliberations, but only those representing the member states participating in an enhanced cooperation may take part in the relative

vote.⁴⁵ The fact that enhanced cooperation affects voting in the Council, but not its composition, illustrates the will, still evident in the Treaties today, to ensure that this form of flexibility is not allowed to affect the composition of the institutions, and to avoid the creation of restricted organs, a circumstance that would, to an extent, give enhanced cooperation a certain autonomy from the institutional structure of the Union.

Also indicative of this is the fact that other political institutions (the Commission and the European Parliament) vote on enhanced cooperations in their ordinary composition. Whereas,

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in the literature, this circumstance is generally readily accepted in relation to the Commission — a body whose members, representing the interests of the Union as a whole, are required to pledge their independence from their state of origin — some doubts have been raised with regard to the European Parliament, which may even be called upon to intervene in the implementation of a cooperation.⁴⁶ Indeed, as has already been pointed out,⁴⁷ while it is true that MEPs do not represent their country of origin, it is also true that they represent the entire Union, and not just a part of it, and that allowing MEPs from countries not participating in an enhanced cooperation to take part in the vote on the adoption of measures implementing it might be deemed to be incompatible with democratic principles.⁴⁸ Even though this issue had been discussed during the Intergovernmental Conference negotiating the Treaty of Amsterdam, opposition from the European Parliament, together with the fear that the emergence of closer cooperation in relation to a variety of matters might lead to undue fragmentation of the work of the European Parliament and confusion at institutional level, ultimately resulted in the exclusion of a solution allowing the European Parliament to intervene in variable composition.⁴⁹

Therefore, institutional unity, even though it is no longer mentioned in the Treaties, continues to be a principle from which enhanced cooperations cannot deviate. ■

CONDITIONS FOR AN ENHANCED COOPERATION - III

RELATIONS WITH STATES NOT PARTICIPATING IN THE ENHANCED COOPERATION

However, it is the provisions falling within the last of the aforementioned categories of conditions, i.e. the one referring to relations between states participating and those not participating in a cooperation, that, above all, give the states remaining outside an enhanced cooperation a chance of blocking its implementation or interfering with its functioning.

NO Indeed, even though Art. 327 TFEU sets out a sort of *sui generis* principle of fair cooperation, namely the principle that the member states outside a cooperation must not impede its implementation by the states participating in it, the Treaty offers the former a number of instruments potentially able to become a kind of sword of Damocles hanging over the enhanced cooperation itself.⁵⁰

The first of these is provided by Art. 327 TFEU, which states that “Any enhanced cooperation shall respect the competences, rights and obligations of those Member States which do not participate in it”.⁵¹ Indeed, given the extremely general nature of the terms used, this

provision makes it relatively easy for states outside the cooperation to contest its legitimacy.

The same may be said of the subsequent article (Art. 328 TFEU), which sets out the principle that an enhanced cooperation must be open to all the states wishing to participate in it; this is a provision susceptible to being used as a weapon by states wanting to hinder the functioning of the cooperation. Indeed, particularly in areas in which decisions must be taken unanimously,⁵² a state joining an enhanced cooperation in order to impede its functioning would have the faculty to veto the adoption of any act within the cooperation and thus be able to force the states participating in it to accept a compromise that would fall short of what had been intended. In a sense, as already underlined, the complete openness, from their inception, of enhanced cooperations is a condition that risks undermining the rule that enhanced cooperation in any area other than that of foreign and security policy must be authorised by the Council voting by qualified majority.⁵³ Indeed, the impossibility for a single state of vetoing the authorisation of a cooperation must be set against the possibilities that

are instead open to it: that of contesting an enhanced cooperation simply by demonstrating that it would impinge on its competences, rights and obligations, and that of participating in the creation of a cooperation with the precise objective of preventing it from working.

It should be noted that the principle of enhanced cooperations open to all member states is actually fully respected only during the phase of creating a cooperation, given that the participation of a member state in an existing enhanced cooperation is subject to certain limitations. Indeed, according to Art. 331 TFEU, the participation of a member state in an enhanced cooperation that is already in progress is subject to a procedure that, in matters not relating to foreign and security policy, involves a preliminary intervention by the Commission, which checks that the conditions of participation are met and, if it eventually deems that they are not, a decision by the Council; instead, within the area of foreign and security policy it is subject to a decision by the Council. Thus, participation is dependent on an evaluation by these institutions. ■

ENHANCED COOPERATION AND FISCAL HARMONISATION

THE PROPOSAL FOR A COUNCIL DIRECTIVE IMPLEMENTING ENHANCED COOPERATION IN THE AREA OF THE FINANCIAL TRANSACTION TAX

The proposal for closer cooperation in the field of the financial transaction tax provides an illustration of how the many restrictions imposed by the Treaties on the establishment of enhanced cooperation can make this form of differentiation difficult to apply.⁵⁴ This particular cooperation, authorised by a decision of the Council on 22 January 2013,⁵⁵ which was followed by a proposal for a Council directive whose approval procedure is still ongoing, involves eleven EU member states,⁵⁶ all belonging to the eurozone.

As already mentioned in the previous sections, the practical application of the mechanism of enhanced cooperation dates back to only 2010 and the adoption of regulation 1259/2010 in the area of the law applicable to divorce and legal separation. This milestone was followed, in 2012, by the regulations 1257/2012 and 1260/2012 implementing enhanced cooperation in the areas of the creation of unitary patent protection and applicable translation arrangements.

While the implementation of enhanced

cooperation in the area of divorce and legal separation did not give rise to particular problems, the decision authorising enhanced cooperation in the field of unitary patent protection was opposed by the governments of both Spain and Italy, whose actions for annulment of the relative regulations were dismissed by the European Court of Justice in its judgment of 16 April 2013; furthermore, on 22 March 2013 Spain lodged two actions for annulment of regulations 1257/2012 and 1260/2012, which were also dismissed by the Court.⁵⁷ With regard to enhanced cooperation in the field of the financial transaction tax, the above-mentioned proposal for a

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Council directive was the subject of an opinion of the Council Legal Service,⁵⁸ which highlighted several criticalities it presents, while the decision authorising this cooperation was challenged through an action for annulment by the United Kingdom, dismissed by the Court in its judgment of 30 April 2014.⁵⁹

Therefore, whereas, in principle, the application of the enhanced cooperation mechanism to non-economic issues has presented no real problems, when sectors more closely linked to the functioning of the internal market are involved, things have proved less straightforward.⁶⁰

As stated in the explanatory memorandum to the proposed directive on the financial transaction tax, the aims of this directive, whose legal basis lies in Art. 113 TFEU, are to harmonise legislation on indirect financial taxation, ensure that financial institutions make a fair contribution to covering the costs of the recent economic crisis, ensure a level playing field with other sectors from a financial point of view, and create appropriate disincentives for transactions that do not enhance the efficiency of financial markets, in order to avoid future crises.

In seeking to identify the category of activities subject to taxation, the proposal combines the principle of establishment with elements of the principle of issue, thus making it less advantageous to relocate activities and residence outside the territory of the member states participating in an enhanced cooperation. Therefore, the tax is payable in the presence of any one of the following circumstances: a financial institution has been authorised by the authorities of, or is established in the territory of, a state participating in the enhanced cooperation; a financial institution is established outside the territory of the states participating in the enhanced cooperation, but the other party in the transaction is established in the territory of a participating member state; neither of the parties in the transaction is established in the territory of a member state participating in the enhanced cooperation, but the transaction concerns financial instruments issued in the territory of a participating member state. These criteria

will not apply if the subject liable to pay tax demonstrates that there is no link between the economic substance of the transaction and the territory of the member states participating in the enhanced cooperation.⁶¹

These criteria for determining the subjects liable to pay the tax are the very aspect criticised in the aforementioned opinion of the Council Legal Service. The main problem is the fact that, under the proposal, the tax would also be payable by financial institutions that are established in EU Member States that are not part of the enhanced cooperation, but which negotiate financial instruments with subjects that are established in a participating member state. In this circumstance, the Legal Service opines, the genuine link between the financial institution and the participating state that receives the tax, i.e. the necessary condition for exercising the power of taxation, would not exist.⁶² In other words, the participating state would be exercising its fiscal powers beyond the territory of the states bound by the closer cooperation.⁶³

The application of the above criterion, according to the Legal Service, would also result in a violation of the principle of non-discrimination. Indeed, every state taking part in the enhanced cooperation in the area of the financial transaction tax would be required to tax: the financial institutions authorised or established within its own boundaries, but also financial institutions established in non-participating states (which may or may not be EU member states) in relation to financial transactions entered into with parties established within its boundaries. However, it would not tax financial institutions established in participating member states entering into financial transactions with parties established within its own territory.

In short, transactions entered into by non-resident financial institutions would be treated differently depending on whether these institutions were established in a state participating or in one not participating in the enhanced cooperation.⁶⁴

Finally, even Art. 327 TFEU, which requires enhanced cooperations to respect the competences, rights and obligations of the member states that are not part of it, highlights the problematic aspects of the proposal under examination. The impact of enhanced cooperation on the rights and obligations of non-participating states seems, indeed, to derive from the fact, highlighted above, that those liable to pay the tax would also include financial institutions that are established in these external states but involved in financial transactions with subjects based in participating states. In other words, the states outside the cooperation, despite having decided not to participate in it and therefore not to tax financial transactions involving institutions established in their territory, would nevertheless see the effects of enhanced cooperation spreading to their financial markets.

The opinion just examined also confirms an aspect already highlighted by some of the literature, namely the difficulty of applying the enhanced cooperation mechanism to the field

of tax harmonisation. Indeed, while it is true that this sector was identified by some as a possible area for application of the enhanced cooperation mechanism,⁶⁵ it should not be forgotten that countries actually have little inducement to enter into enhanced cooper-

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ations in the field of taxation, given the risk that the economies of the participating states might become less competitive as a result.⁶⁶ Furthermore, since this whole area is closely bound up with the functioning of the internal market, problems of compatibility with the principle of non-discrimination and with the provisions relating to competition are likely to arise.

In fact, the problems of compatibility with the Treaties raised by the opinion of the Council Legal Service seem to be quite serious: taking the country where a financial institution is based as the only criterion for identifying taxable transactions clearly creates a risk that such institutions will opt to relocate to territories of member states that are not part of the cooperation; on the contrary, the taxing of institutions that are established in the territory of a non-participating state (but involved in financial transactions with partners established in a participating state) would undoubtedly affect rights and obligations of states that have opted not to be part of the enhanced cooperation.

There thus appear to be only two possible alternatives: i) enhanced cooperations that are relatively ineffective, given that the relocation of financial institutions outside the territory of the

participating member states would mean less revenue for the states that have decided to participate in them, or ii) enhanced cooperations that risk being incompatible with the Treaties on

the grounds of the effects they would have on the non-participating member states. ■

ENHANCED COOPERATION AS AN INSTRUMENT FOR À LA CARTE INTEGRATION

Ever since the 1990s, in particular, when the Maastricht Treaty extended the concept of flexibility to monetary matters, the differentiation debate within the European Union, despite running into complex attempts at classifying the different forms of flexibility,⁶⁷ has focused essentially on two different models, which reflect two different visions of the integration process. The first, which finds its fullest expression in the Schäuble-Lamers report presented to the Bundestag by the CDU/CSU parliamentary group in 1994,⁶⁸ sees flexibility as an appropriate instrument for ensuring that a homogeneous group of states, determined to take concrete steps towards greater integration, is able to create a kind of core within the EU, and therefore potentially to act as a vanguard (open to all states wanting to be part of it) spearheading the integration process. The second model, illustrated in the same year by the then British Prime Minister John Major,⁶⁹ among others, envisages a kind of à la carte European Union, given that it interprets flexibility as an instrument allowing each member state to choose, in each field, whether to cooperate more closely with the other states or avoid more advanced forms of integration.

The first model assumes that the states interested in differentiation will always be the same ones, even though the core group will remain open to new members; it also assumes that this group will, to an extent, be able to act independently of the states outside it. The second model, on the other hand, far from being based on the idea of giving rise to a sort of subsystem within the EU, seems, rather, to be driven solely by the intention of rendering the EU's decision-making mechanisms more efficient, i.e. able to circumvent the right of veto that may be exercised by one or more states on specific matters, preventing those countries wanting to undertake joint initiatives from being able to do so.

This duality of visions had also emerged during the Intergovernmental Conference before the Treaty of Amsterdam,⁷⁰ and this fact might potentially have allowed the rules on differentiated integration introduced by that Treaty to reflect both of them. However, if we consider the functioning of the mechanism of enhanced cooperation, also in the wake of the changes introduced by the Lisbon Treaty and in the light of its concrete applications in recent years, it is clear that second model is

the one that has prevailed. Certainly, analysing the conditions that, according to the Court of Justice, must govern the establishment of enhanced cooperation, it emerges that many features of this form of flexibility — the fact that enhanced cooperations do not refer to a single pre-established group (each enhanced cooperation concerns a specific group of states);⁷¹ the fact that they must be authorised by the Council, and may be implemented only as a last resort, i.e. after having first exhausted every effort to reach an agreement among all 28 member states;⁷² the fact that they must remain within the areas of competence of the Union, and may not therefore move into new areas;^[73] and the fact that they must preserve the existing institutional structure of the EU and therefore cannot create new organs — make enhanced cooperations instruments more useful for getting around the problem of unanimity in certain areas than for creating a subsystem within the EU.⁷⁴

This also seems to have been the reading of the European Parliament, which, in a resolution in 2000,⁷⁵ recommended excluding enhanced cooperation in areas not requiring a unanimous vote by the Council, thus showing that it

understood enhanced cooperation as a mechanism for circumventing the right of veto and making decision-making mechanisms within the Union more effective.

The fact is that if the Member States had wanted to embrace a model of differentiated integration that allowed the creation, within the Union, of a more closely integrated core group of states, they would have included, in the Treaties, provisions far more similar to the one contained in the draft Constitution of the European Union presented to the European Parliament by the Institutional Committee in 1994 (the so-called Herman Report). Art. 46 of this document stated that “Member States which so desire may adopt among themselves provisions enabling them to advance more quickly towards European integration, provided that this process remains

open at all times to any Member State wishing to join it and that the provisions adopted remain compatible with the objectives of the Union and the principles of its Constitution. In particular, with regard to matters coming under Titles V and VI of the Treaty on European Union, they may adopt other provisions which are binding only on themselves. Members of the European Parliament, the Council and the Commission from the other Member States shall abstain during discussions and votes on decisions adopted under these provisions”. This provision made no reference to the requirement that differentiated integration be a last resort solution, nor did it underline the conditions of prior authorisation from the Council and the involvement of a minimum number of states, or the need not to interfere with the competences, rights and obligations of the non-participating member

states. In contrast with the numerous boundaries and conditions imposed by the current Treaties in relation to the establishment of enhanced cooperation, all it demanded was compliance with the objectives and principles of the Union. Finally, a variable geometry mode of functioning was envisaged for all the political institutions, with the result that this article seemed to considerably reinforce the idea of giving a group of states wanting to advance more rapidly than the others the possibility to create an institutional subsystem of its own. [76] In other words, the wording of this article — in contrast to the current provisions on enhanced cooperation — left the member states wanting to advance towards integration plenty of freedom to do so, without being impeded by the member states not wanting to be part of this form of closer cooperation. ■

PECULARITIES OF EMU AS A “SUBSYSTEM” WITHIN THE EU

With regard to the provisions on EMU, which is of course one of the most important examples of flexibility in the process of European integration, the drafters of the Treaty of Maastricht seem to have been inspired by the first of the above-mentioned models, namely the one geared at creating a more integrated core group of states within the Union. Indeed, when the time came to move into the third phase of EMU, which included the introduction of the single currency, the Council declared that only eleven member states, the so-called states without a derogation, had attained necessary requisites to join it (this

number rising to twelve in 2001, with the accession of Greece); the member states that did not possess these requisites (i.e. the states with a derogation) would become part of the single currency only from the moment in which those requirements were met.⁷⁷ Denmark and the United Kingdom, in the meantime, had obtained, through negotiation with the other member states, the right to be excluded from the third stage; this was sanctioned by two Protocols which accorded them special status.

Clearly, then, EMU and enhanced co-operation have elements in common:

both these forms of flexibility affect the working of the Council in the same way, envisaging abstention, from the vote, of those states that are not participating (in the single currency or cooperation, respectively),⁷⁸ while nevertheless adhering to a general principle of openness towards them.⁷⁹ On closer inspection, however, they are found to be based on two entirely different systems of logic or reasoning.

This situation can be traced back to the very origin of the two forms of differentiation. The drafters of the Treaty of Maastricht had in fact intended that EMU should be a sort of necessary

stage in the integration process that would eventually lead to the actual elimination of the barriers to freedom of movement and culminate in the creation of a fully integrated European Union, in both the economic and the political sphere. The idea was that the Economic and Monetary Union would progressively include all the member states.⁸⁰ From this perspective, the first group of states, those without a derogation, were to be the vanguard group that would eventually be joined by all the remaining countries. Therefore, it was initially imagined that differentiation would be a temporary phenomenon, serving mainly as a means of overcoming the difficulties that the process of integration was bound to encounter in the course of the EU's further enlargement following the collapse of the Soviet bloc.

Precisely because it meant sharing a currency (and currency is one of the cornerstones of national sovereignty), EMU was conceived as a first step towards the creation of a not only monetary, but also economic Union, and as a step that would have repercussions on many other areas, such as economic policy coordination, fiscal harmonisation, social policy and employment. Indeed, for the EMU member states, sharing a currency meant sharing the same new needs, different from the

needs of the member states with a derogation or with special status; in short, monetary policy differs in principle from other policy areas because it affects, and is closely bound up with, far more areas of EU law.⁸¹

The mechanism of enhanced cooperation, on the other hand, seems to respond to a need for a permanent form of differentiation.⁸² Indeed, the post-Maastricht Treaty period saw a growing awareness within the EU institutions and member states of the exist-

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ence, among the states themselves, of different visions of the integration process, and thus also of the impossibility, in some areas, of reaching unanimous consensus due to the will of some states to avoid forms of closer integration. The mechanism of enhanced cooperation was introduced precisely in order to overcome this impasse. It may therefore be interpreted — as indeed may the many opt-outs granted to Denmark, the United Kingdom and Ireland in specific areas — as differentiation that is permanent in nature, but relates to individual policy areas.

The fact that the two forms of flexibility have different origins explains why EMU was allowed to derogate from the principle of institutional unity to which enhanced cooperation

should instead adhere; indeed, EMU was based on the belief that the institutions created for the management of monetary policy would, eventually, involve all the EU member states and therefore that institutional unity would ultimately be respected.

If it is true that, as already highlighted, EMU and enhanced cooperation have in common the fact that they preserve the structure and functioning of the political institutions, impacting solely on the vote in the Council, it should not be forgotten that the transition to the third phase entailed the creation of a new institution, the European Central Bank, entrusted with managing monetary policy. It should be noted that the states not taking part in the single currency are not represented in the European Central Bank's two decision-making bodies: the Governing Council and the Executive Board. Indeed, the first of these bodies is composed of the members of the Executive Board and the governors of the national central banks of the euro area countries; the second is composed of the president, the vice-president and four other members, all citizens of eurozone member states; all the members of the Executive Board are appointed by the European Council, with the participation exclusively of the heads of state or government of the states sharing the single currency.⁸³ Compared with what happens in the Council, therefore, there is a much more marked level of differentiation and the principle of institutional unity appears to have been overridden.⁸⁴

Moreover, over the years and with the increasing realisation that some states will never be prepared to relinquish their monetary sovereignty, and thus that the third phase of EMU will never

involve all Europe's member states, this trend towards the establishment of an institutional structure for the eurozone has actually become more pronounced.

First of all, in the "economic" arm of EMU, an informal body, the Eurogroup, has been created, composed solely of the economy and finance ministers of the member states sharing the single currency.⁸⁵ Although the Eurogroup is a body with no decision-making powers (but which nevertheless allows the positions of the eurozone member states to be coordinated prior to their participation in ECOFIN meetings), it provides another example of the principle of institutional unity being overridden. In fact, the provisions on voting in the Council allow the states that have not adopted the single currency to take part in the meetings and the discussion preceding the vote. On the contrary, according to the provisions on the Eurogroup, the states outside the single currency would lack not only the right to vote, but also the right to participate in the meetings of this body.⁸⁶

A further step towards progressively increasing autonomy for the eurozone within the European Union was taken by the Treaty establishing the European Stability Mechanism, which

created two new bodies responsible for ensuring the operation and management of the mechanism itself, the Board of Governors and the Board of Directors, appointed by the member states without a derogation.⁸⁷ Finally, a trend in this same direction has also emerged from recent proposals on the future developments of the European Union. Indeed, the Commission, in its communication of 28 November 2012 entitled "A blueprint for a deep and genuine economic and monetary union",⁸⁸ seeking to identify the stages towards the achievement of the ambitious ultimate objective of creating "a deep and genuine EMU conducive to a strong and stable architecture in the financial, fiscal, economic and political domains, underpinning stability and prosperity", set the short-term goal of creating a "convergence and competitiveness instrument", consisting of a fund to support the timely

"[...] over the years and with the increasing realisation that some states will never be prepared to relinquish their monetary sovereignty, and thus that the third phase of EMU will never involve all Europe's member states, this trend towards the establishment of an institutional structure for the eurozone has actually become more pronounced."

implementation of structural reforms in the eurozone member states;⁸⁹ and also identified as medium- and longer-term objectives the creation of

a eurozone autonomous fiscal capacity⁹⁰ and a true economic and fiscal union, with a central budget, its own fiscal capacity, its own Treasury, and the possibility of issuing sovereign debt.

The tangible result of such a transformation, which — as the Commission itself underlines — would require amendment of the Treaties through the procedure governed by Art. 48 TEU, would be the creation of a true economic government of the euro area: the member states without a derogation would thus share monetary, fiscal and budgetary policy, and would emerge as a more integrated core group within the Union, equipped with its own institutional structure.⁹¹ ■

ENHANCED COOPERATION AND THE FUTURE OF EMU

The Commission's proposals just mentioned, which, moreover, were taken up by the European Parliament in a recent resolution⁹² and partly reiterated

in subsequent communications⁹³ and in the December 2013 European Council Conclusions,⁹⁴ only reiterate, with clarity, the basic differences

between EMU and enhanced cooperation. Indeed, the Commission, in relation to EMU, does not consider separately the individual sectors involved,

but instead provides a global view of its future developments, given that its different aspects — fiscal, economic, budgetary, institutional — are closely intertwined.

In this framework, the tax on financial transactions is also indicated as a useful instrument, even though the institutions refer to it only in passing in the above mentioned documents. However, the Commission and the European Parliament, instead of seeing the introduction of this tax as an action in its own right, unrelated to

other aspects of EMU, seem to set it within the context of an overall picture that makes it possible to overcome the previously mentioned concerns regarding the proposal for enhanced cooperation in relation to this same tax.

If the creation of a financial transaction tax is understood as a means of creating an initial autonomous fiscal capacity for the euro area, and thus for increasing the resources available to the Economic and Monetary Union, which would be channelled into a separate eurozone budget, it will clearly concern all the member states that have relinquished their monetary sovereignty; at the same time, however, the disadvantage, for institutions based in eurozone countries, of being subject to a further tax will be offset by the benefits to be derived from the availability, in an additional budget

applying only to the eurozone states, of resources that can be used to address imbalances between member states and to support growth and development. The risk (inherent in the en-

hanced cooperation proposal) of this tax increasing the imbalances between the eurozone states, being applied only to some of them, or causing parties involved in financial transactions to move on mass to states where the tax is not applied, would thus be eliminated.

These last considerations should also be borne in mind when considering the first steps that can be taken towards a deep

and genuine economic and monetary union. In fact, while realisation of many of the objectives set by the Commission and the Parliament implies Treaty amendment under the procedure provided for in Art. 48 TEU, some advances towards the final objective can already be achieved — as underlined by these institutions themselves — by using the flexibility

“[...] while realisation of many of the objectives set by the Commission and the Parliament implies Treaty amendment under the procedure provided for in Art. 48 TEU, some advances towards the final objective can already be achieved — as underlined by these institutions themselves — by using the flexibility instruments currently offered by the Treaties.”

instruments currently offered by the Treaties.

For the reasons outlined above, enhanced cooperation does not appear to be a suitable instrument for this purpose. Indeed, the many conditions to its implementation, imposed by the Treaties, together with the fact that this is a form of cooperation open to all the member states and not a pre-established group of states defined by their sharing of a single currency, risk turning it into an obstacle to completion of EMU rather than a first step in this direction.

The EU institutions, too, seem to be aware of these difficulties. The Commission, attempting to identify the legal basis on which the above-mentioned instrument of convergence and competitiveness might be based, refers in fact to Art. 136 TFEU, or alternatively to the possibility of resorting to Art.352 TFEU “if necessary by enhanced cooperation”. Even though

the use of enhanced cooperation is taken into consideration, the use of this instrument seems to be indicated as a last resort solution, to which the use of Art. 136 TFEU should be preferred. This latter provision, albeit based on an intergovernmental approach, in fact concerns only the states without a derogation, and thus a pre-established group of states defined by

“[...] to prevent the completion of EMU from being accomplished through the signing of a treaty between eurozone states outside the framework of the Union,[96] it is to be hoped that, in the revision of the Treaties, provision might be made for a clause that makes it possible for the states without a derogation to move towards the fiscal, budgetary and economic union on which the survival of the single currency now depends.”

their sharing of a single currency; furthermore, it seems to impose on these states fewer conditions than those to which the establishment of enhanced cooperation is subject, as shown by the provisions of the Treaty establishing the European Stability Mechanism, which is based on this article.⁹⁵

The same need to identify a form of differentiated integration that fits the needs of EMU was subsequently taken up, in more general terms, by the European Parliament, which, after referring, like the Commission, to the possibility of having recourse to Art. 136 TFEU and to Art. 352 TFEU, possibly

by enhanced cooperation, stressed that “the treaty changes necessary for the completion of a genuine EMU and the establishment of a Union of citizens and states can build on the existing instruments, procedures, practices and philosophy of differentiated integration while improving their effectiveness and coherence”, in this way highlighting the need to put in place specific flexibility mechanisms for the eurozone member states.

In fact, to prevent the completion of EMU from being accomplished through the signing of a treaty between eurozone states outside the framework of

the Union,⁹⁶ it is to be hoped that, in the revision of the Treaties, provision might be made — through an amendment of Art. 136 TFEU in order to render it applicable, in the future, to scenarios other than coordination of economic policies, or by providing for a new ad hoc mechanism, which could be inspired by Art. 46 of the Herman Report — for a clause⁹⁷ that, in general, makes it possible for the states without a derogation to move towards the fiscal, budgetary and economic union on which the survival of the single currency now depends. ■

REFERENCES

1. See, for example, ex. Art. 17(4) TEEC, which reads "Where the Commission finds that in any Member State the substitution of such duty meets with serious difficulties, it shall authorise such State to retain the said duty provided that the State concerned shall abolish it not later than six years after the date of the entry into force of this Treaty. Such authorisation shall be requested before the end of the first year after the date of the entry into force of this Treaty". On this point, see C. Guillard, *L'intégration différenciée dans l'Union européenne*, Paris, Bruylant, 2006, p. 34 ff.
2. According to C. Guillard, *L'intégration*, op. cit., p. 38, the Maastricht Treaty constituted a real turning point in the history of differentiation, as it impacted on decision-making mechanisms (given the exclusion of member states with a derogation from voting in the Council) and introduced a form of differentiation, regarding the United Kingdom and Denmark, that turned out to be permanent. Other forms of differentiated integration had actually developed in the years before the Maastricht Treaty. In particular, the Schengen Treaty between France, Germany, Belgium, the Netherlands and Luxembourg, which referred to the gradual abolition of checks at their common borders, dated back to 1985 and was completed by the Convention Implementing the Schengen Agreement signed by the same states in 1990. This was a form of differentiated integration that, having initially evolved outside the institutional framework of the founding Treaties, was subsequently inserted into it by the Treaty of Amsterdam. On the Schengen agreements and their incorporation into the Treaties, see, for all, D. Curtin, *The Schengen Protocol: Attractive Model or Poisoned Chalice?*, in *Der rechtliche Rahmen eines Europas in mehreren Geschwindigkeiten und unterschiedlichen Gruppierungen* (edited by C.D. Ehlermann), Cologne, Bundesanzeiger, 1999, p. 73 ff.; S. Mazzi-Zisis, *Les accords de Schengen et la libre circulation des personnes dans l'Union européenne: exemple à suivre ou dangereux précédent?*, *ibid.*, p. 47 ff.; M. Den Boer, *The Incorporation of Schengen into the TEU: A Bridge Too Far?*, in *The European Union after the Treaty of Amsterdam* (edited by J. Monar and W. Wessels), London-New York, Bloomsbury Publishing, 2001, p. 296 ff.
3. Protocol No. 4 on the position of the United Kingdom and Ireland and Protocol No. 5 on the position of Denmark, now Protocols No. 21 and No. 22.
4. Protocol No. 2 integrating the Schengen acquis into the framework of the European Union and Protocol No. 5 on the position of Denmark, now Protocols No. 19 and No. 22.
5. Council Regulation (EU) No. 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, in OJ L 343, 29.10.2010, p. 10. The expression "enhanced cooperation" also appears in the Protocol on integrating the Schengen acquis into the framework of the European Union (now Protocol No. 19), which states that, taking into account the position of Denmark, the United Kingdom and Ireland, "it is necessary to make use of the provisions of the Treaties concerning closer cooperation between some Member States". However, as underlined elsewhere (D. Curtin, *The Schengen Protocol*, op. cit., p. 76), the flexibility, in this case, would be a predetermined flexibility, since it is the Treaties themselves that define the extent and scope of application of the said form of cooperation.
6. 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, in OJ L 361, 31.12.2012, p. 1.
7. Council decision 2013/52/EU of 22 January 2013 authorising enhanced cooperation in the area of the financial transaction tax, in OJ L 22, 25.1.2013, p. 11.
8. The idea of enhanced cooperation as an instrument for completing EMU is referred to in Art. 10 of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, signed in Brussels on 2 March 2012, which reads "In accordance with the requirements of the Treaties on which the European Union is founded, the Contracting Parties stand ready to make active use, whenever appropriate and necessary, of measures specific to those Member States whose currency is the euro, as provided for in Article 136 of the Treaty on the Functioning of the European Union, and of enhanced cooperation, as provided for in Article 20 of the Treaty on European Union and in Articles 326 to 334 of the Treaty on the Functioning of the European Union on matters that are essential for the proper functioning of the euro area, without undermining the internal market". On this point, see also C.D. Ehlermann, *Différenciation accrue ou uniformité renforcée?*, *Revue du Marché unique européen*, 5 (1995), p. 191 ff., esp. p. 207; J.-V. Louis, *Differentiation and the EMU*, in *The Many Faces of Differentiation in EU Law* (edited by B. De Witte, Hanf and Vos), Antwerp-Oxford-New York, Intersentia, 2001, p. 43 ff.; and Y. Bertoni, *Eurozone and Democracy(ies): a Misleading Debate*, *Notre Europe Policy Paper*, n. 94, July 2013, esp. p. 28, who nevertheless feels that it would be more appropriate for enhanced cooperation to concern a "comprehensive package" of initiatives.
9. On the provisions relating to enhanced cooperation contained in the Amsterdam Treaty, see, for all, V. Constantinesco, *Les clauses de « coopération renforcée »*, *Le Protocole sur l'application des principes de subsidiarité et de proportionnalité*, *Revue trimestrielle de droit européen*, 33 (1997), p. 752 ff.; G. Gaja, *How Flexible is Flexibility under the Amsterdam Treaty?*, *Common Market Law Review*, 35 (1998), p. 855 ff.; H. Kortenbergh, *Closer Cooperation in the Treaty of Amsterdam*, *Common Market Law Review*, 35 (1998), p. 833 ff.; J. Shaw, *The Treaty of Amsterdam: Challenges of Flexibility and Legitimacy*, *European Law Journal*, 35 (1998), p. 63 ff.; C.D. Ehlermann, *Differenzierung, Flexibilität und engere Zusammenarbeit*, in *Die neuen Vorschriften des Amsterdamer Vertrags*, in *Der rechtliche Rahmen*, op. cit., p. 15 ff.; G. Gaja, *La cooperazione rafforzata*, in *Il Trattato di Amsterdam*, Milan, Giuffrè, 1999, p. 61 ff.; E. Philippart, G. Edwards, *The Provisions on Closer Co-operation in the Treaty of Amsterdam: The Politics of Flexibility in the European Union*, *Journal of Common Market Studies*, 37 (1999), p. 87 ff.
10. In particular, under the terms of this article, member states wanting to cooperate more closely with each other could make use of institutions, procedures and mechanisms laid down by the founding Treaties, on condition that the cooperation in question: i) was aimed at furthering the objectives of the Union and at protecting and serving its interests; ii) respected the principles enshrined in the Treaties and in the Union's single institutional framework; iii) was used only as a last resort, it having proved impossible to reach the objectives of the Treaties under the procedures provided for therein; iv) concerned at least a majority of the member states; v) would not adversely affect the acquis communautaire and the measures adopted under the terms of the other provisions of the Treaties; vi) would not adversely affect the competences, rights, obligations and interests of the member states not participating in it; vii) would be open to all member states, allowing them to join it at any time.
11. In the first pillar, enhanced cooperation was not permitted to concern areas that were the responsibility of the Community alone, to affect Community policies, actions or programmes, or to affect citizenship of the Union or discriminate between nationals of different member states. Furthermore, it had to remain within the limits of the competences conferred on the Community by the Treaty, and could not constitute a source of discrimination in or a barrier to trade between member states, or lead to unequal conditions of competition between them.
12. The further conditions established by ex Art. 40 TEU were of a much more general and flexible nature, basically amounting to the need for the enhanced cooperation in question to respect the competences of the European Community and the objectives laid down in Title VI (police and judicial cooperation in criminal matters). The explanation for the greater number of conditions required for the establishment of enhanced cooperation

in the Community pillar compared with the area of police and judicial cooperation in criminal matters lies in the greater degree of integration and supranationality that characterised the first compared with the third pillar. In other words, it was felt that differentiation in the Community pillar posed greater risks of violation of the principles of non-discrimination and solidarity. On this point, see C. Guillard, *L'intégration*, cit., p. 390 ff.

13. As pointed out by E. Philippart, G. Edwards, *The Provisions*, op. cit., p. 99, the exclusion of the common foreign and security policy from the scope of enhanced cooperation was difficult to explain, given that it might be considered a "natural" field for application of enhanced cooperation.
14. As noted by C. Guillard, *L'intégration*, op. cit., p. 388 ff., the threat of recourse to the emergency brake has, over the years, led to the failure of various attempts to establish closer cooperation. Furthermore, as regards participation in an enhanced cooperation that has already been established, ex Art. 11 CEE, in relation to the first pillar, stipulated that the decision should be taken by the Commission, after consulting the Council; as for the third pillar, under ex Art. 40 TEU, it fell to the Council to decide, after consulting the Commission. On the incongruous nature of the rules envisaged for the first pillar, in particular as regards the advice provided by the Commission to the Council in a situation in which it is not the Council that is called upon to decide, see G. Gaja, *La cooperazione*, op. cit., p. 65.
15. On this point, see E. Philippart, M. Sie Dhian Ho, *Flexibility after Amsterdam: Comparative Analysis and Prospective Impact*, in *The European Union*, op. cit., p. 184 ff., who point out that "generally speaking, the defensive character of the enabling conditions has been deliberately reinforced at various stages of the ICG negotiations, choices being systematically made in favour of more conditions and more restrictive wording". On the debate on flexibility in the ICG setting, see A. Stubbs, *Negotiating Flexibility in the European Union*, New York, Palgrave, 2002, p. 84 ff.
16. On the changes to enhanced cooperation introduced by the Treaty of Nice, see H. Bribosia, *Les coopérations renforcées au lendemain du Traité de Nice*, *Revue du droit de l'Union européenne*, 11 (2001), p. 111 ff., who notes that the possibility of amending the provisions on enhanced cooperation was at first excluded on the grounds of the difficulty of finding a compromise, and that it was the Benelux countries that suggested that this aspect could also be addressed by the intergovernmental conference; C. Guillard, *L'intégration*, op. cit., esp. p. 388 ff.
17. In this sense, see H. Bribosia, *Les coopérations*, op. cit., p. 116, who maintains that the main contribution of the Treaty of Nice was perhaps to make the provisions on enhanced cooperation clearer and more legible.
18. The constructive abstention mechanism is currently provided for by Art. 31 TEU, which states that any member of the Council, when abstaining in a vote, may qualify its abstention by making a formal declaration; as a result, it will not be obliged to apply the decision, but will nevertheless accept that the decision commits the Union. However, the decision shall not be adopted if the members of the Council abstaining in this way represent at least one third of the member states comprising at least one third of the population of the Union.
19. D. Negrescu, G. Truica, *Can EU's Enhanced Cooperation Mechanism Provide Solutions to the "Single Undertaking" Problems of the WTO?*, *Romanian Journal of European Affairs*, 6 (2006), p. 5 ff., esp. p. 12, have defined this new mechanism a "ralentisseur".
20. In this sense, see C. Guillard, *L'intégration*, op. cit., p. 388, who points out that the optional nature of the vote in the Council following raising of the matter before the European Council emerges clearly from the fact that, during the negotiating stage, the phrase "After that matter has been raised before the European Council, the Council acts" was replaced by the phrase "After that matter has been raised before the European Council, the Council may act" (italics added). As for the other conditions required for the implementation of enhanced cooperation in the first or the third pillar, the Treaty of Nice no longer mentions the fact that enhanced cooperation must not influence Community policies, actions or joint programmes, nor affect the citizenship of, or discriminate between, nationals of the member states. These conditions are replaced by a new one, according to which the cooperation must aim to strengthen the integration process and must not undermine the internal market or economic, social and territorial cohesion. Finally, eight is established as the minimum number of states needed in order to set up an enhanced cooperation and it is made clear that the cooperation "may be undertaken only as a last resort, when it has been established within the Council that the objectives of such cooperation cannot be attained within a reasonable period by applying the relevant provisions of the Treaties".
21. Under the provisions of Art. 331 TFEU, any member state intending to participate in an existing enhanced cooperation in an area other than that of common foreign and security policy must inform the Commission and the Council of this intention. The Commission, within a maximum of four months from the date of notification, confirms the state's participation in the enhanced cooperation, if necessary adopting the measures necessary for the implementation of the acts already adopted within the framework of the cooperation. If, on the other hand, the Commission deems that the state does not meet the conditions to participate, it sets a deadline for a review of the request. If, once this period has expired and the request has been re-examined, the conditions for participation are still not deemed to be met, the Commission may refer the matter to the Council which shall act by a qualified majority (i.e. with the votes only of the states already participating in the enhanced cooperation). As for the area of foreign and security policy, on the other hand, any member state intending to participate in an existing enhanced cooperation must inform the Council, the High Representative of the Union for Foreign Affairs and Security Policy, and the Commission of this intention. The Council confirms the state's participation, after consulting the High Representative, and, on the latter's proposal, may adopt the transitional measures necessary for the implementation of the acts already adopted within the framework of the enhanced cooperation. If, on the other hand, it deems that the conditions for participation are not met, the Council indicates the measures that need to be taken in order to meet them and fixes a date for a review of the application. In all the possible scenarios relating to the entry of a new state into an enhanced cooperation in the field of foreign and security policy, the Council decides by unanimity.
22. Court of Justice, judgment of 16 April 2013, Joined Cases C-274/11 and C-295/11, Kingdom of Spain and Italian Republic v Council of the European Union, not yet published, par. 49.
23. The Treaty of Amsterdam demanded that enhanced cooperation concern at least a majority of the member states, i.e. at least eight of the fifteen. The Treaty of Nice replaced this expression with the indication of the precise number — eight — of states needed in order to set up an enhanced cooperation. Since the 2004 enlargement, this number, even after the Lisbon Treaty increased it to nine, has no longer represented the majority of the member states.
24. Opinion of Advocate General Bot delivered on 11 December 2012, Joined Cases C-274/11 and C-295/11, Kingdom of Spain and Italian Republic v Council of the European Union; Italian Republic v Council of the European Union.
25. In this sense, see J.-V. Louis, *La pratique de la coopération renforcée*, *Revue trimestrielle de droit européen*, 49 (2013), p. 277 ff., esp. p. 284.
26. ECJ, Judgment of 16 April 2013, op. cit., paragraphs 55 and 56. For a criticism of this position, see O. Feraci, *L'attuazione della cooperazione rafforzata nell'Unione Europea: un primo bilancio critico*, *Rivista di diritto internazionale*, 96 (2013), p. 955 ff., esp. p. 963.
27. Opinion of Advocate General Bot, op. cit., par. 115.
28. ECJ, Judgment of 16 April 2013, op. cit., par. 53.
29. ECJ, Judgment of 16 April 2013, op. cit., par. 36. According to the Court, the impossibility of reaching a unitary solution as referred to by Art. 20(2) TEU "may be due to various causes, for example, lack of interest on the part of one or more Member States or the inability of the Member States, who have all shown themselves interested in the adoption of an arrangement at Union level, to reach agreement on the content of that arrangement".

On this point, see T. Balagovic, *Enhanced Cooperation: is there Hope for the Unitary Patent?*, *Croatian Yearbook of European Law and Policy*, 8 (2012), p. 299 ff., esp. p. 310 ff.; J.-V. Louis, *La pratique*, cit., p. 284.

30. The ECJ, in its judgment of 16 April 2013, op. cit., par. 62, dwelt on this latter condition, underlining that the unitary patent, by conferring uniform protection in the territory of all the member states taking part in the enhanced cooperation, would favour the process of integration compared with a system in which the extent of the protection guaranteed by the patent were defined by national law.
31. In this sense, see G. Goja, *How Flexible*, op. cit., p. 863; H. Bribosia, *Différenciation et avant-gardes au sein de l'Union européenne*, *Cahiers de droit européen*, 36 (2000), p. 57 ff., esp. p. 66.; B. De Witte, *Old-Fashioned Flexibility: International Agreements between Member States of the European Union, in Constitutional Change in the EU. From Uniformity to Flexibility* (edited by G. De Búrca and J. Scott), Oxford, Hart Publishing, 2000, p. 31 ff., esp. p. 55; E. Philippart, M. Sie Dhian Ho, *Flexibility*, op. cit., pp. 185 and 193.
32. Judgment of the Court, 27 November 2012, Case C-370/12, *Pringle*, not yet published; reproduced in *Rivista di diritto internazionale*, 96 (2013), p. 580 ff. For a comment, see for all B. De Witte, T. Beukers, *The Court of Justice Approves the Creation of the European Stability Mechanism Outside the EU Legal Order*, *Common Market Law Review*, 50 (2013), p. 805 ff.; F. Martucci, *La Cour de justice face à la politique économique et monétaire: du droit avant toute chose, du droit pour une seule chose. Commentaire de l'arrêt CJUE 27 November 2012, Pringle*, *Revue trimestrielle de droit européen*, 49 (2013), p. 239 ff. According to L.S. Rossi, *L'Unione europea e il paradosso di Zenone. Riflessioni sulla necessità di una revisione dell' trattato di Lisbona. Il diritto dell'Unione europea*, 18 (2013), p. 749 ff., esp. p. 762, the Union's lack of the competences necessary to adopt the European stability mechanism should, as a logical consequence, mean that this mechanism could be adopted by the member states through an international treaty, without the need to carry out a simplified revision of Art. 136 TFEU.
33. Judgment, 16 April 2013, cit., par. 68.
34. This is a point also addressed by Advocate General Bot in his Opinion in the European patent case (delivered on 11 December 2012, op. cit.). Indeed, responding to Spain and Italy's argument that the list of exclusive competences in the aforementioned Art. 3(1) TEU was purely illustrative, and that in any case the creation of a unitary patent would fall not within the framework of the Union's shared competences, but within that of its exclusive ones, given that it would fall within the framework of the competition rules necessary for the functioning of the internal market, the Advocate General underlined that the use, in Art. 3(1) TEU, of the expression "The Union shall have exclusive competence in the following areas" was a clear indication that this was indeed an exhaustive list; he also pointed out that the fact that the unitary patent might impact on competition was not a sufficient reason for it to be considered within the framework of the competition rules.
35. According to J. Wouters, *Constitutional Limits of Differentiation: the Principle of Equality*, in *The Many Faces*, op. cit., p. 338, all the conditions that, under the Treaties, must be met in order for an enhanced cooperation to be established are essentially related to the principles of equality and non-discrimination.
36. In this sense, see G. De Búrca, *Differentiation within the Core: the Case of the Common Market, in Constitutional Change*, op. cit., p. 133 ff., esp. p. 144. It should also be noted that, contrary to the terms of the Treaty of Amsterdam (Art. 5A), it is no longer stipulated that enhanced cooperation must not affect citizenship of the Union or discriminate between nationals of member states.
37. In this sense, see T. Balagovic, *Enhanced Cooperation*, op. cit., p. 320.
38. On this point, see F. De La Serre, H. Wallace, *Flexibility and Enhanced Cooperation in the European Union: Placebo rather than Panacea?*, *Notre Europe Research and Policy Paper*, n. 2, September 1997, p. 12; G. De Búrca, *Differentiation*, op. cit., p. 148.
39. In this sense, see J.-V. Louis, *EMU and Enhanced Cooperation, in Europe Reloaded, Differentiation or Fusion?*, Baden-Baden, Nomos, 2011, p. 303 ff., esp. p. 316.
40. This provision does not imply violation of the principle of equality as it is based on an objective difference between the participating and the non-participating states and, in any case, the states' freedom to join an enhanced cooperation at any time is guaranteed by the Treaties. For more on this aspect, see J.-V. Louis, *Quelques réflexions sur la différenciation dans l'Union européenne, in Vers une Europe différenciée? Possibilités et limites* (edited by P. Manin and J.-V. Louis), Paris, Pedone, 1996, p. 33 ff., esp. p. 40; C. Guillard, *L'intégration*, op. cit., p. 149.
41. As noted by E. Philippart, G. Edwards, *The Provisions*, op. cit., p. 94, the European Parliament, having had little involvement in the setting up of an enhanced cooperation, could instead play an important role in its implementation, in situations in which, for example, it is decided that the costs of the cooperation are to be covered by the EU budget, or if it is necessary to adopt acts through a procedure that involves the participation of the Parliament itself.
42. In this sense, see H. Bribosia, *Les coopérations renforcées*, op. cit., p. 157, who argues that the lack of provision for interventions by the European Parliament in variable composition is even more incomprehensible in the light of the fact that, today, enhanced cooperation can involve just nine of the 28 member states, and therefore most of the MEPs may have been elected in countries outside the enhanced cooperation in question.
43. In this sense, see D. Negrescu, G. Truica, *Can EU's Enhanced Cooperation*, op. cit., p. 13; Editorial Comment, *What do we want? "Flexibility! Sort of ...". When do we want it? "Now! Maybe ..."*, *Common Market Law Review*, 50 (2013), p. 673 ff., esp. p. 680.
44. On this point, see H. Kortenberg, *Closer Cooperation*, op. cit., p. 847.
45. In this sense, see E. Philippart, M. Sie Dhian Ho, *Flexibility*, op. cit., p. 185.
46. A consequence of this principle is that, as stipulated in Art. 332 TFEU, "Expenditure resulting from implementation of enhanced cooperation, other than administrative costs entailed for the institutions, shall be borne by the participating Member States, unless all members of the Council, acting unanimously after consulting the European Parliament, decide otherwise". As regards relations with states joining the European Union subsequently, Art. 20(4) TEU specifies that "Acts adopted in the framework of enhanced cooperation [...] shall not be regarded as part of the *acquis* which has to be accepted by candidate States for accession to the Union."
47. According to Art. 333(1) TFEU, "Where a provision of the Treaties which may be applied in the context of enhanced cooperation stipulates that the Council shall act unanimously, the Council, acting unanimously [...] may adopt a decision stipulating that it will act by a qualified majority". Therefore, a switch from unanimity to majority voting is possible, but in any case it requires unanimous agreement in the Council.
48. On this point, see G. Goja, *How Flexible*, op. cit., p. 860, who points out that the principle of openness could actually have a dissuasive effect on a group of states intending to create an enhanced cooperation, should these states be faced with the possibility of being joined by another state that may not have the characteristics that would make it a suitable participant in the enhanced cooperation in question; Id., *La cooperazione*, op. cit., p. 64; H. Bribosia, *Les coopérations*, op. cit., pp. 141 and 143; C. Guillard, *L'intégration*, op. cit., p. 129.
49. Proposal for a Council directive implementing enhanced cooperation in the area of financial transaction tax, COM(2013) 71 fin., 14.2.2013.
50. Council decision 2013/52/EU, op. cit.
51. Belgium, Germany, Estonia, Greece, Spain, France, Italy, Austria, Portugal, Slovenia and Slovakia.
52. Judgment of 5 May 2015, Case C-146/13, *Kingdom of Spain v European Parliament and Council of the European Union*, not yet published; judgment of 5 May 2015, Case C-147/13, *Kingdom of Spain v Council of the European Union*, not yet published.
53. Council of the European Union, opinion of the legal service on the proposal for a Council directive implementing enhanced cooperation in the area of financial transaction tax (FTT), 6 September 2013.
54. Judgment of 30 April 2014, Case C-209/13,

- United Kingdom of Great Britain and Northern Ireland v Council of the European Union, not yet published.
55. On this point, see Editorial Comment, What do we want?, *op. cit.*, p. 676.
56. The proposal also sets the taxable base and minimum rates for types of financial transactions. As stated in the proposal's explanatory memorandum, "preliminary estimates indicate that the revenues of the tax could be in the order of magnitude of EUR 31 billion annually" and it is envisaged that in the future, for the countries participating in enhanced cooperation, this revenue will replace, in the Union budget, the resource based on gross national income. On this point, allow me to refer to G. Rossolillo, *Autonomia finanziaria e integrazione differenziata*, *Il diritto dell'Unione europea*, 18 (2013), p. 793 ff., esp. p. 805 ff.
57. According to the opinion (p. 7), a provision of this kind would also contravene customary international law, and in particular the principle that requires the existence of a relevant link between the state that exercises jurisdiction and the person or situation over which jurisdiction, including fiscal, is exercised.
58. This extension of its powers, according to the legal service, would not be justifiable even in relation to the objectives of the proposal, namely to increase tax revenues, to transfer some of the costs of the crisis to the financial sector and to discourage excessively risky activities. Indeed, many of the institutions subject to the tax on financial transactions would not have played any part in the origin of the crisis and, as regards the concern over the need to avoid risky activities, many operations subject to the transaction tax would be perfectly safe transactions with real economic substance.
59. [64] In the event of a transaction between an institution established in a participating member state and one established in a non-participating state, the participating member state would receive the tax twice, as opposed to only once in the event of a transaction between an institution established in that same participating member state and one established in another participating state.
60. In this sense, see H. Bribosia, *Différenciation*, *op. cit.*, p. 67, who points out that the Dutch presidency, in 1997, drew up a list of areas that could, in theory, be the subject of enhanced cooperation and that indirect taxation and, in general, accompanying measures related to EMU featured prominently in it; J.-V. Louis, *Differentiation*, *op. cit.*, p. 61.
61. In this sense, see A. Stubb, *The Amsterdam Treaty and Flexible Integration: A Preliminary Assessment*, Paper presented to the International Political Science Association Conference, Brussels, 1997; F. Milner, A. Kölliker, *How to Make Use of Closer Cooperation? The Amsterdam Clause and the Dynamic of European Integration*, European Commission Working Paper, 2000; C. Guillard, *L'intégration*, *op. cit.*, p. 482.
62. See for all, A. Stubb, *A Categorization of Differentiated Integration*, *Journal of Common Market Studies*, 34 (1996), p. 283 ff.; *Id.*, *Negotiating*, *op. cit.*, p. 123 ff.
63. *Reflections on European Foreign Policy*, a document presented to the Bundestag by the CDU/CSU parliamentary group on 1 September 1994. On the view that this document strongly influenced the flexibility debate prior to the Treaty of Amsterdam, by engendering, in many member states, the fear of being excluded from the Union's hard core, see A. Stubb, *Negotiating*, *op. cit.*, p. 67 ff.
64. Address given by John Major at the University of Leiden on 7 September 1994, available at: <http://www.johnmajor.co.uk/page1124.html>.
65. On this point see A. Stubb, *Negotiating*, *op. cit.*, esp. p. 86 ff., who points out that during the negotiation of the Treaty of Amsterdam it was, above all, the French delegation that endorsed the idea of a core group of states advancing more rapidly than the others in the integration process.
66. In this sense, see C.D. Ehlermann, *Différenciation*, *op. cit.*, p. 209 ff., p. 210, according to whom "le problème institutionnel est moins influencé par la nature ouverte ou fermée du groupe que par son caractère préétabli ou non préétabli. Un groupe préétabli suggère beaucoup plus l'existence d'un mécanisme de direction distinct que la coexistence de différents groupements ouverts". In fact, the states participating in the four enhanced cooperations thus far authorised (three already established and one still in the planning stage) are not the same ones. The only member states participating in all of them are Belgium, Germany, France and Portugal. Unless one is of the view that a core group of states advancing more rapidly than the others will take shape within the Union indirectly, in other words as the sum of the states taking part in all the enhanced cooperations that have been established, the mechanism of enhanced cooperation thus seems to be inspired more by the idea of an à la carte Europe than by that of a two-speed Europe.
67. On this point, see H. Bribosia, *Différenciation*, *op. cit.*, p. 106.
68. On this point, see E. Philippart, M. Sie Dhian Ho, *Flexibility*, *op. cit.*, p. 185.
69. In this sense, see H. Bribosia, *Les coopérations*, *op. cit.*, p. 160. On this point, see also Louis, *La pratique*, *op. cit.*, p. 282 ff., who points out that the enhanced cooperation in the area of the law applicable to divorce and legal separation undoubtedly responds to the need for more effective decision-making mechanisms, whereas the enhanced cooperation in the area of the creation of unitary patent protection and the future enhanced cooperation in the area of the financial transaction tax highlight more than anything the many obstacles in the way of the implementation of the mechanism of enhanced cooperation. According to L.S. Rossi, *Cooperazione rafforzata e Trattato di Nizza: qualigeometrie per l'Europa allargata?*, *Il diritto dell'Unione europea*, 6 (2001), p. 791 ff., esp. p. 800, the changes to the mechanism of enhanced cooperation introduced by the Treaty of Nice would instead favour a model inspired by the idea of creating a hard core of states within the Union.
70. European Parliament resolution on enhanced cooperation, 25 October 2000.
71. According to J.-L. Louis, *Quelques réflexions*, *op. cit.*, p. 43, the fact that Art. 46 of the Herman Report contemplated variable geometry functioning of the three political institutions also paved the way for the creation of a separate budget for financing the activities covered by closer cooperation.
72. Today, following the entry into the eurozone of Cyprus, Estonia, Latvia, Malta, Slovakia and Slovenia, the states without a derogation number eighteen. Although Art. 139 TFEU contains a list of provisions that apply only to the states without a derogation, the treatment of the member states with a derogation and of those with special status is, essentially, the same. On the differences, albeit minimal, between the treatment of the United Kingdom and the states with a derogation, see J. Usher, *Legal Consequences of Non-Participation in the Euro: A View from the United Kingdom*, in *Mélanges en hommage à Jean-Victor Louis*, vol. II, Brussels, Editions de l'Université libre de Bruxelles, 2003, p. 357 ff., p. 361; J.-V. Louis, *EMU*, *op. cit.*, p. 306.
73. Indeed, a characteristic of EMU, like enhanced cooperation, is that when it is necessary, within the Council (i.e. the organ representing the states), to take decisions on monetary policy, in particular with regard to the measures set out in Art. 139(2), the voting rights of the members of the Council representing member states with a derogation are suspended; corresponding provisions are contained in the Protocols relating to the United Kingdom and Denmark. Instead, the voting arrangements of the other political institutions are not affected by the non-participation of some member states in the third phase of EMU. Therefore, the Council meets in its full composition, but acts only on the basis of the votes of the representatives of the states without a derogation. The Commission and European Parliament, on the other hand, meet and vote in accordance with the ordinary procedures, i.e. with the participation of the representatives of the 28 member states. On this point, see O. Clerc, *La gouvernance économique européenne*, Brussels, Bruylant, 2012, p. 331; T. Beukers, *Constitutionalisation of the Eurozone: A Possible Way Out?*, Paper prepared for the workshop "Revising European Treaties", EUI, 11 November 2013, p. 8 ff. The enhanced cooperation solution was based on a desire to prevent a situation in which the formation of different cooperations involving different groups of states might lead the European Parliament to become splintered into various formations, resulting in a lack of clarity at institutional level; as regards EMU, on the other hand, the fact that the Commission and the European Parliament have the same composition seems to be based more than anything on the marginal role that these institutions play in sphere of monetary policy. On this point, see T. Beukers, *Constitutionalisation*, *op. cit.*, note

40; S. Marciali, *La flexibilité du droit de l'Union européenne*, Brussels, Bruylant, 2007, p. 401.

74. Actually, at first glance, EMU seems to be more closed than enhanced cooperation. Indeed, whereas enhanced cooperation, at its inception, is open to any state wanting to be part of it, given that no state can be excluded on the grounds of its economic political or social conditions, access to EMU is subject to a Council decision, whose purpose is to ensure that the member states meet certain requirements set out in Art. 140 TFEU. While this is true, it should not be forgotten, however, that the initial identification of the line-up of states that would participate in the single currency from the outset was undoubtedly politically motivated, with the result that, basically, the only states excluded were the ones that had actually expressed a desire to that effect. Indeed, even though the transition to the third phase of EMU should be (providing the specified conditions are met) automatic, the United Kingdom and Denmark managed to negotiate with the other member states their exclusion from that stage. Moreover, Sweden was permitted to hide behind its failure to meet certain legal requirements in order to conceal its unwillingness to take part in the single currency. Finally, countries like Italy were included among the states without a derogation despite failing to comply with the parameter relating to indebtedness. In short, the distinction between participating states and non-participating states was therefore determined primarily by the will of the states themselves, and not their actual ability to take part in the monetary union. On this point, see J.-V. Louis, *The Economic and Monetary Union, Law and Institutions*, *Common Market Law Review*, 41 (2004), p. 575 ff., esp. p. 604 ff. On the role of will and capacity in the forms of differentiated integration, see C. Deubner, *Flexibilität und Entwicklung der Europäischen Integration*, in *Der rechtliche Rahmen*, op. cit., p. 117 ff., esp. p. 119 ff.
75. In this sense, see F. Pocar, *Brevi note sulle operazioni rafforzate e il diritto internazionale privato europeo*, *Riv. dir. int. priv. proc.*, 37 (2001), p. 297 ff., esp. p. 298.
76. On this point, see J.-V. Louis, *EMU*, op. cit., p. 307, who, referring to the time of the Maastricht Treaty, notes that "in a way there was an implicit idea that participation in the EC would necessarily include, in the medium run, the adoption of the euro ... because of the far-reaching effects of the Monetary Union on other policies. In political terms, many believed that it was impossible for a member State not participating in monetary union to play a significant role in the EC/EU and, in the long run, to remain a member of it."
77. On the view that the existence of different degrees of integration between the member states plays a rather exceptional and temporary role, see O. Feraci, *L'attuazione*, op. cit., p. 959.
78. There also exist differences between the states inside and outside the eurozone with regard to the capital of the ECB. Indeed, only the former are required to pay the entire subscribed capital. On this point, see S. Marciali, *La flexibilité*, op. cit., p. 417 ff. As noted by C. Zilioli, M. Selmayr, *La Banca*, op. cit., p. 290, "la regola alla base del processo decisionale differenziato all'interno della BCE è semplice: le banche centrali nazionali la cui sovranità monetaria non è stata trasferita alla BCE non votano né partecipano alla definizione e all'attuazione delle decisioni di politica monetaria della BCE". (English translation: The rule underlying the differentiated decision-making process within the ECB is simple: the national central banks whose monetary sovereignty has not been transferred to the ECB neither vote nor participate in the definition and implementation of monetary policy decisions of the ECB).
79. In this sense, see F. Tuytschaever, *EMU and the Catch-22 of EU Constitution-Making*, in *Constitutional Change*, op. cit., p. 173 ff., esp. p. 185; J.-V. Louis, *EMU*, op. cit., p. 306. The only body of the ECB in which all 28 member states are represented is the General Council, whose role is to coordinate between the eurozone countries and the member states outside the eurozone, but it has no real decision-making powers. On this point, see J.-V. Louis, *Differentiation*, op. cit., p. 47; S. Marciali, *La flexibilité*, op. cit., p. 414.
80. According to Art. 1 of Protocol (n. 14) on the eurogroup, "The Ministers of the Member States whose currency is the euro shall meet informally. Such meetings shall take place, when necessary, to discuss questions related to the specific responsibilities they share with regard to the single currency. The Commission shall take part in the meetings. The European Central Bank shall be invited to take part in such meetings, which shall be prepared by the representatives of the Ministers with responsibility for finance of the Member States whose currency is the euro and of the Commission". According to Art. 2 of the same Protocol, the ministers in question shall then, by a majority, elect a president for two and a half years.
81. Moreover, there is widespread agreement on the need to transform the Eurogroup into a true institution, with decision-making powers for the eurozone, a transformation that, according to some, should pave the way for variable geometry functioning of the Commission and European Parliament. On this point, see C.D. Ehlermann, *Différenciation*, op. cit., p. 216; J.-V. Louis, *Quelques réflexions*, op. cit., p. 40; C. Guillard, *L'intégration*, op. cit., p. 149; O. Clerc, *La gouvernance*, op. cit., p. 508. On the impossibility of carrying out such a transformation through the mechanism of enhanced cooperation, see P. Vigneron, *Instaurer une coopération renforcée pour l'Eurogroupe?*, in *Mélanges en hommage à Jean-Victor Louis*, op. cit., p. 377 ff., esp. p. 388 ff.; J.-V. Louis, *EMU*, op. cit., p. 316. Moreover, Art. 12 of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, cit., has the effect of institutionalising the Eurosummits, too, i.e. the meetings of the heads of state or government of the EU member states whose currency is the euro. These meetings, convened twice a year, are attended by the President of the Commission, and the President of the European Central Bank is invited to them. The Eurosummit members appoint a president by simple majority. The president has a two-and-a-half year term, coinciding with the term of office President of the European Council.
82. F. Tuytschaever, *EMU*, op. cit., p. 185, quoting C. Timmermans, defines the principle of institutional unity within EMU as a *trompe-l'oeil*.
83. Communication from the Commission, *A blueprint for a deep and genuine economic and monetary union, Launching a European Debate*, COM(2012) 777 final.
84. In particular, the implementation of reforms should be facilitated by contractual agreements between individual eurozone member states and the Commission, after being discussed in the Eurogroup.
85. As stated in point 3.2.2. of the Communication from the Commission, "Building on the experience of systematic ex-ante coordination of major structural reforms and the CCI, a dedicated fiscal capacity for the euro area should be established. It should be autonomous in the sense that its revenues would rely solely on own resources, and it could eventually resort to borrowing. It should be effective and provide sufficient resources to support important structural reforms in a large economy under distress".
86. As well as representing a departure from the principle of institutional unity, EMU also resulted in a violation of the principle of non-discrimination, and thus in a further barrier to the establishment of enhanced cooperation. Indeed, Denmark and the United Kingdom were permitted to refrain from taking part in the third phase of EMU even though both these countries possessed all the requirements necessary for participation. This has resulted in two different problems. First of all, this possibility is not granted to states that will join the single currency in the future or to those that joined it after 1 January 1999, the date set by the Treaties for the start of the third phase of EMU. Second, EU law reserves exactly the same treatment both for these two countries that have refused to participate in the monetary union and for the states that, instead, cannot be part of it because they lack certain requirements: in other words, it applies the same treatment in two different situations (lacking the will and lacking the capability are, after all, two different things). On this point, see F. Tuytschaever, *EMU*, op. cit., p. 180. Such uniformity of treatment might be justifiable were all the member states ultimately destined to join the single currency; however, given that it is now clear that the United Kingdom and Denmark have no intention of relinquishing their monetary sovereignty, some (in this sense, see C.D. Ehlermann, *Différenciation*, op. cit., p. 215; J.-V. Louis, *Quelques réflexions*, op. cit., pp. 40 and 43) have proposed the introduction of different treatments for states that do not want to join the monetary union and those that do not yet possess the necessary requisites. In particular, while the former would be excluded from participating in the discussions and votes in the Council (and eventually, in the future, in all the political institutions) when the decisions to be taken are relevant only to the states participating in the third stage, the latter would have to refrain from voting but could nevertheless participate in the discussion. In this way, different situations would correspond to different treatments for the two groups of states, in line with the principle of non-discrimination.

87. European Parliament resolution of 12 December 2013 on constitutional problems of a multitier governance in the European Union (2012/2078(INI)).
88. See Communication from the Commission to the European Parliament and the Council, Towards a Deep and Genuine Economic and Monetary Union, The introduction of a Convergence and Competitiveness Instrument, COM(2013) 0165 final.
89. European Council – 13/14 December 2012 – Conclusions, EUCO 205/12.
90. Through application of the simplified revision procedure provided for by Art. 48(6) TEU, and following a decision of the European Council decision on 25 March 2011, a paragraph was added to Art. 136 stating that “The Member States whose currency is the euro may establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole. The granting of any required financial assistance under the mechanism will be made subject to strict conditionality”.
91. On the view that the many requirements imposed by the Treaties for the implementation of enhanced cooperation are likely to encourage the member states to make use of forms of flexibility outside the institutional framework of the EU, see G. Gaja, *La cooperazione*, op. cit., p. 75; J.-V. Louis, *EMU*, op. cit., p. 324.
92. Part of the literature proposes the introduction of an enhanced cooperation clause specifically “predefined” for the eurozone (H. Bribosia, *Les coopérations*, op. cit., p. 164) or a flexibility clause similar to the one provided for by Art. 352 TFEU, but specifically for the eurozone (T. Beukers, *Constitutionalisation*, op. cit., p. 1 ff.).

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ABOUT THE UEF

The Union of European Federalists (UEF) is a pan-European, non-governmental political organisation dedicated to the promotion of European political unity. Throughout the past 70 years it has been a leading voice in the promotion of European unity and an early campaigner for key milestones in the development of the European Communities and the European Union.

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