1 Unity and Flexibility in the future of the European Union: the challenge of enhanced cooperation

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Foreword

The entry into force of the Lisbon Treaty poses anew the question of whether, from now on, it will be more likely for the European Union to use this mechanism, or, conversely, the new institutional, jurisdictional and decision-making framework may act as a containment of favourable trends in the development of variable integration formulas.

In reality, flexible or differentiated integration instruments, within or outside of the framework of the EU, alongside strictly intergovernmental cooperation between certain EU countries, have existed since the beginning of Community integration.

The difference in the pace of the integration process between Member States already underlies certain provisions of the EU Treaties, such as the transitional periods established in each process of accession of new Member States. Subsequently, the two most typical examples of this enhanced cooperation that have sometimes been defined as "predetermined" in the Treaties were the Eurozone and the Schengen area. In both cases, certain shared goals and criteria were established that had to be met by the participating States in order to be admitted, while the door was left open to other Member States, within a strategy of various speeds.

The mechanisms of cooperation and flexibility between the Member States at the margins of the Community process have included, for example, external cooperation in research projects and technological development (such as Airbus, Ariane, ESA or Eureka), or in the field of security and defence (through the Eurocorps, Eurofor, Euromafor or, more recently, the Eurogendfor, arising from the declaration of intent signed by the Defence Ministers of the five Member States with a military style police force - Spain, France, Italy, the Netherlands and Portugal - in 2004). The Schengen Agreements themselves, from 1985 to 1990, born at the margin of the Treaties with the initial participation of four States, were integrated into the Community system through the Treaty of Amsterdam of 1997. Also European Political Cooperation, born in the Hague Summit of 1969 as a fledgling exchange of information between European diplomatic services, was integrated into the Treaties as a result of the Single European Act, becoming the embryo of the current Common Foreign and Security Policy.

Flexible or differentiated cooperation has therefore been a constant feature of Community development, the effects of which have played heavily in favour of integration. The rhetoric of the threat of its use more systematically if the Lisbon Treaty did not eventually enter into force did not for that reason seem particularly convincing. It was difficult to determine which groups of countries and in which areas one might envisage new actions and policies of the EU between certain Member States wishing to move faster than others in the Community dynamics, and that would make use of either the enhanced cooperation mechanism already existing in the Treaty since Amsterdam or of intergovernmental cooperation outside of the Community sphere.

A "coalition of the willing" in this sense is particularly challenging to articulate because what this deals with in reality is the question of leadership or leaderships within the EU. The current asymmetry between foreign, security and defence policies, where Britain necessarily plays an inescapable role, and other possible "gravitational cores" of the EU, such as the Eurozone or cooperation in matters relating to the area of security, freedom and justice, has been present in nascent form after any attempt to implement enhanced cooperation that would apply the existing clauses in the Treaty. Experience shows that in fact the possibility of using the enhanced cooperation mechanism has only been used as leverage in negotiating issues requiring unanimity, rather than as a way to develop a specific policy under the Community method and jurisdiction. For example, the negotiations on the framework decision for the establishment of the European Arrest Warrant were blocked

for a long period of time by Italy, and the other Member States used the threat of introducing enhanced cooperation in this matter to ensure that eventually this country decided to adopt the proposed legislation.

Also the example of the Prüm Treaty, signed in 2005 between seven Member States (France, Germany, Netherlands, Belgium, Luxembourg, Spain and Austria), and which aimed at closer cooperation in combating terrorism, cross-border crime and illegal immigration, shows that although these materials could have been the specific subject-matter of a "formal" enhanced cooperation, the participating States preferred to implement this outside of the framework of the Treaties, because of the difficulties in achieving the minimum quorum of countries required, the opinion required from the Commission on the possible impact of the proposed cooperation on existing Community policies, as well as the complications of the established authorization procedure.

One of the objectives of the Lisbon Treaty in this area was indeed to obtain a more operational mechanism. The structure of the EU now without pillars that the Lisbon Treaty has introduced leads to enhanced cooperation also without pillars that has been regulated in two different parts of the new Treaty. The general provisions and those relating to principles are contained in the new renumbering in Article 20 of the TEU, while the implementing and procedural provisions are found in the new renumbering in Articles 326 to 334 TFEU. In the Treaty of Lisbon, the explicit aim of closer cooperation is to "further the objectives of the Union, protect its interests and reinforce its integration process". A consequence of this pro-integration principle is that the enhanced cooperation that can be established will be open to all Member States wishing to participate at the time of commencement, and that it will remain open so that "at any time", more States can participate in it. In fact, it is established that both the Commission and the Member States participating in enhanced cooperation shall endeavour to encourage the widest possible participation of Member States. Another basic principle is that enhanced cooperation is configured as a last resort, when the conclusion has been reached that the objectives of such cooperation cannot be attained within a reasonable time frame by the EU as a whole.

Along with the strict conditions established for the launch of enhanced cooperation, and that in some respects represent a simplification in comparison to that envisaged in the Treaties of Amsterdam and Nice, the Treaty of Lisbon, following the Draft Constitutional Treaty, introduces the possibility of specific cooperation - "structured cooperation" - on defence.

This present work, carried out within the framework of the research project awarded by the European Commission to the Institute of European Studies at the CEU San Pablo, aims to examine the state of affairs regarding the instrument of enhanced cooperation after the entry into force of the Lisbon Treaty, in order to analyze the potential of the new system in a number of areas where there is some question as to the development of this mechanism in the medium to long term. Thus, after examining the evolution of the legal form of enhanced cooperation clauses in the Treaties and detailing the specific innovations of Lisbon, we study the possible development of enhanced cooperation in the areas of energy, foreign policy, security and defence, and from a broader perspective, enhanced cooperation and differentiated integration formulas in the areas of economic governance, social policy and the area of freedom, security and justice.

The fresco obtained after this analysis of possible developments of Community policies is thus an image full of light and shadow, and with it questions are raised of enormous importance to the future of the dynamics of integration.

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1

The regulation of enhanced cooperation and its reform in Lisbon: Towards a model of differentiation that is closer to the community method

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1. First steps: differentiation in the history of european integration

Flexibility in European integration is not a novel phenomenon of the nineties. Quite the contrary, the European construct since its inception was characterised by an idea of progression, a successive gradual achievement of objectives, which could also be considered in a sense an expression of flexibility, and that in any event would not prove incompatible with some degree of differentiation. In this connection, it is appropriate to recall the famous Schuman Declaration, under which "Europe will not be made all at once, or according to a single plan: It will be built through concrete achievements." Thus, in a gradual integration, the existence of some flexibility would not be unusual and could even be considered *inseparable* from the community system[1].

Indeed, if we mean by flexibility a differential treatment of the Member States within the Union, we can note the existence of many different and early cases in Community law, both primary and secondary law. Certainly, since their original drafts, the Treaties contained clauses with safeguards and which allowed for authorization of provisional exceptions. Also, the enlargement processes have developed progressively through transitional periods that have allowed temporarily easing of entry conditions for the new Member States. Another example of flexibility is that of the directives, which can contemplate different periods of implementation for individual Member States, thus introducing a new element of temporal differentiation.

Alongside these and other community forms of differentiation, which have been present for years in the community arena, we must note the existence of what some have called *old flexibility*[2]: extra-EU agreements signed by some Member States on those occasions on which they have not wanted or have not been able to have recourse to the EU framework. Thus there has been implementation in the past of projects such as Airbus, ESA, Ariane, JET and Eureka, in the field of research, or the WEU, Eurocorps, Eurogroup, Eurofor and Euromafor, in the field of security and defence[3]. But perhaps the most outstanding example are the Schengen Agreements of 1985 and 1990, extra-community agreements that were originally signed by four Member States, but which ended up being integrated into the acquis communautaire on the occasion of the Amsterdam Treaty.

From these classical forms of differentiation, in the early nineties, when European integration began to move towards the achievement of political objectives, in an attempt to overcome a purely economic perspective, the debate and the expressions of differentiation multiplied. The signing of the Maastricht Treaty in 1992 was a major qualitative change in this area. Both the Social Protocol, the signing of which was initially rejected by the UK, and the asymmetrical design of the Economic and Monetary Union, introduced clearer and more relevant indications of differentiation to the EU scene, which far exceeded all previous manifestations.

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1 PONS RAFOLS, X.: "Las potencialidades de las cooperaciones reforzadas en la Unión", in MARTÍN Y PÉREZ DE NANCLARES J. (coord.): *El Tratado de Lisboa, la salida de la crisis constitucional*, Iustel, AEPDIRI, 2008, p. 628. Also, MANGAS MARTÍN, A.:"La cooperación reforzada en el Tratado de Ámsterdam", *Comunidad Europea Aranzadi*, no. 10, October 1998, p. 27.

2 DE WITTE, B.: "International Agreements between member states of the EU", DE BURCA G. and SCOTT, J. (eds.): *Constitutional change in the European Union*, Hart, 2000, p. 31-58.

3 For a more detailed analysis of cases of differentiation, see EHLERMAN C.D.: "Differentiation, flexibility, closer cooperation: the new provisions of the Amsterdam Treaty", *European Law Journal*, Vol. 4, No. 3, September 1998, p. 247.

Thus, cases of differentiation prior to the regulation of enhanced cooperation in the Treaty of Amsterdam are many and varied. There have been various attempts at categorization in academic doctrine, distinguishing especially between those cases in which differentiation affects variable speed from those which affect variable substance[4].

Indeed, in a whole series of cases differentiation affects only the *speed*, i.e. the *time* variable, so that all Member States share the goals to be achieved, but some are not yet able to do so. This is the case for example of the transitional periods in the accession procedures of the directives with various implementation dates for different Member States, or the Economic and Monetary Union in connection with those States that do not yet meet the criteria laid down.

It is generally considered that this model reflects the idea of a multi-speed Europe in which all States share and accept the same goal.

In other cases, however, Member States do not share the final goal, and the difference affects the *substance*. There is therefore a political differentiation: some states reject some goals. This is the case of the former British opt-out from the social chapter, or the opt-outs of the UK and Denmark from the EMU. Other cases that show a differentiation that affect targets beyond the time factor are the Protocols of the Treaties which set out different arrangements or directives which provide for a different treatment for different Member States. It is generally considered that these cases are a closer manifestation of the idea of a *variable geometry Europe*, which allows some degree of differentiation, or even a step further, a *Europe à la carte*, an idea that emphasizes the liberty of Member States to choose freely which commitments they *want* to take on board.

2. Amsterdam: the constitutionalisation of enhanced cooperation

Against this background, during the mid-nineties, at a stage in which the European Union faced the challenge of advancing with political integration and at the same time completing an enlargement towards Central and Eastern Europe of an unprecedented scale, enhanced cooperation ranked primordial for the first time at the heart of European debate.

Of course, the first contributions to this debate were much older, dating back to the seventies, when WILLY BRANDT and LEO TINDEMANS saw flexibility as a way to respond to the economic differences between Member States - that is, an expression of the idea of *multi-speed Europe* - but it was the publication in 1994 of the report of two prominent German politicians, WOLFGANG LAMERS and KART SCHÄUBLE, which moved the debate into the realm of politics, unleashing a storm by proposing the creation of a hard nucleus for Europe, a core Europe, that would include only five Member States: France, Germany and the three Benelux countries.

The idea of differentiation was positively received by French and German politicians in the nineties, although they sought to show a more inclusive character than Lamers-Schäuble, not discounting the involvement of non-founder Member States. For them, with the prospect of enlargement and after the experience of the opt outs from the UK and Denmark in Maastricht, progress by all towards a policy of federal integration would not be possible. The standoff produced by the reluctance of some States could only be overcome by a *centre of gravity*, a *pioneering group* of States that would want to move further or faster than the others[5]. Thus, flexibility could be the answer to the old dilemma of deepening versus widening[6], given the magnitude of the new expansion planned and the risk of dilution that could result from the increasing heterogeneity of its Member States.

In the UK, for its part, the idea of flexibility was met with interest as it was interpreted according to its image of a *Europe à la carte*, a vision that emphasizes the freedom of states to determine their level of participation in European projects[7]. However, the United Kingdom, which had recently torn from the Member States its opt-

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4 EHLERMAN C.D.: "Differentiation, flexibility, closer cooperation…" op. cit., p. 248. On the categorization of differentiated integration, please also see STUBB, A.: "A categorisation of Differentiated Integration", *Journal of Common Market Studies* 34, 1996, p. 283 et seq.

5 See the joint letter of HELMUT KOHL and JACQUES CHIRAC of 6 December 1995. Subsequently, the discourse of JOSCHKA FISHER in the Universidad Humboldt of Berlin of 12 May 2000 and the response of JACQUES CHIRAC in the Bundestag of 27 June 2000 were especially relevant.

6 WEATHERILL, S.: "Flexibility or Fragmentation: Trends in European Integration", in USHER, J. (ed.): *The States of the European Union. Structure, Enlargement and Economic Union*, ed. Longman, London 2000, p. 10.

7 See the speech of JOHN MAJOR at the University of Leiden on 7 September 1994, which can be consulted in *Agence Europe*, no. 3372, of 10 September 1994.

out in the Maastricht reform, aware of the dynamism of European integration and its contagious effects on the reticent, was circumspect in the Nice negotiations, demanding unanimity, as we will see, for the establishment of enhanced cooperation.

Some other non-founder States, including Spain, were also cautious, fearing that a general clause on enhanced cooperation would allow for the exclusion of some, and consolidate a stable core, as had been openly proposed by Lamers-Schäuble.

These considerations and reservations explain in a large measure the result of the reform of Amsterdam, which would eventually enshrine, cautiously, a general clause on enhanced cooperation. Thus, it was finally possible for a majority of Member States to undertake a project within the framework of the European Union, but without the participation of all.

Without doubt, the substantive and procedural safeguards established by the Treaty were many, so many that it has been observed that to a large extent this new instrument seemed designed to avoid being workable[8]; but the inclusion of this mechanism was in itself a significant and probably irreversible step towards the recognition and generalization of differentiation. As many advised then[9], if the conditions subsequently proved too rigid, there would be time to soften them in the next IGC.

The introduction of the general clause on enhanced cooperation was perhaps the most significant innovation of the reform of Amsterdam. This meant a fundamental change in relation to previous forms of differentiation. Before this, cases of differential treatment were rare, and were expressly provided for in the Treaties, which guaranteed that they had been agreed by all Member States. Amsterdam led to the constitutionalisation[10] of enhanced cooperation, which was disciplined[11], regulated in detail in the Treaties, and it gave the possibility of its generalization, as the door was now open to establishing cooperation that had not previously been specified in the Treaties, on various issues and for various Member States.

As DANIEL THYM[12] has explained, the new enhanced cooperation mechanism differs fundamentally from most previous cases of flexibility. From a legal perspective the majority of the examples of flexibility mentioned above have one thing in common: the legal instruments in question are in principle applicable to all, their legal effects being merely suspended or modified with respect to certain Member States. Think for example of the case of directives which provide different treatment for different Member States, or of the transitional periods themselves, which suspend the application of Community law in the new Member States for a period, after which Community law is automatically applied. In these cases the laws are adopted by all States and apply to everyone, but their content introduces some differentiation.

Instead, as THYM goes on to say, the new enhanced cooperation follows a different pattern: the differentiated legal effects do not derive from the content of the legal rule in question, but are the direct result of its failure to be applied to some States. There is thus, firstly, a limited geographical scope, and secondly, a suspension of voting rights for those States not participating in the enhanced cooperation. This new template had already been introduced differently in the European scenario with the opt-out of the UK and Denmark in monetary union, and then, with the differential development of the area of freedom, security and justice in Amsterdam. The general mechanism of enhanced cooperation generalizes this method of differentiation, allowing the adoption of rules that are characterized (1) by their limited geographical scope and (2) by the corresponding suspension of the voting rights of non-participants. Ultimately, some States may participate in the adoption of laws which apply only to them.

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8 MANGAS MARTÍN, A.: "La cooperación reforzada en el Tratado de Ámsterdam" op. cit., p. 38.

9 ELHERMANN C.D.: "Differentiation, flexibility, closer cooperation…", op. cit., p. 269.

10 As SHAW, J. has explained, "Amsterdam may be a key constitutional moment in the history of flexible integration in the EU with its formal acceptance of differentiation into the core of the constitutional order and with its attempt to systematise constitutional principles of closer cooperation", see "Relating Constitutionalism and Flexibility in the European Union" in DE BURCA, G. and SCOTT, J. (eds.): *Constitutional change in the European Union*, op. cit., p. 352. Amsterdam has also been referred to as the moment of *constitutionalisation* of enhanced cooperation by other authors such as CHALTIEL, F.: "Le Traité d'Amsterdam et la cooperation renforcée", *Revue du Marché Commun et de l'Union Européenne*, no. 418, May 1998, p. 289., SHAW J.: "Relating Constitutionalism and Flexibility in the European Union" in DE BURCA G. and SCOTT J.: *Constitutional change…* op. cit., p. 352 or URREA CORRES M.: La cooperación reforzada en la Unión Europea, Colex, Madrid, 2002.

11 MANGAS MARTÍN, A.: "La cooperación reforzada en el Tratado de Ámsterdam" October 1998, p.29.

12 THYM D.: "Europa a varias velocidades: las cooperaciones reforzadas" in BENEYTO J.M. (dir.) MAILLO J. Y BECERRIL B. (coords.) *Tratado de Derecho y Políticas de la Unión*, Aranzadi, 2009, p.582. Also, THYM D.: "United in diversity- the integration of Enhanced Cooperation into the European Constitutional Order", *German Law Journal*, vol. 06, no. 11, 2005, p. 1732 and 1733.

This distinction may seem irrelevant from a policy perspective, from which what is essential is the asymmetrical treatment of the Member States, namely the implementation of projects in which not all of them have to participate. But from a legal perspective this difference is crucial and is also a manifestation of the quantum leap that has occurred in regard to the possibilities of differentiation in the European Union. Undoubtedly, Amsterdam marked a major step forward in differentiation.

3. Nice: in search of a more flexible model of flexibility

Although the mechanism of enhanced cooperation had not been used, or rather precisely because of this, the provisions of the Treaty that regulated it were changed during the Nice reform. The aim of this reform was to facilitate its implementation, to design a more flexible model of flexibility, responding to the criticisms of many commentators on the initial design of the distrusted model.

In Amsterdam, the discussion had focused on two issues: first, the consensus needed to launch enhanced cooperation and secondly, the areas in which this mechanism could be used[13]. The reluctance shown by some States, and also initially by the Commission and European Parliament, necessitated the adoption of numerous precautions to prevent this mechanism resulting in a hard, stable and exchiding core. Therefore, the final model recognized the possibility that a single State could veto its lauching, demanding the participation of a majority of Member States and carefully limiting the areas where closer cooperation could begin.

In Nice, these limitations and caveats, which many considered too rigid and to which were attributed - at least in part - the fact that the enhanced cooperation mechanism had not been used, were relaxed[14].

First, as commentators had demanded[15], the right of veto enjoyed by Member States regarding the implementation of enhanced cooperation was removed, except for the area of foreign policy. This was made necessary because it did not seem reasonable that precisely the State or States which had prevented the undertaking of a project with the participation of all Member States could then prevent its supporters from moving towards it through enhanced cooperation.

However, it included an *emergency brake*, which envisaged the possibility that a Member State could raise the matter - namely, the authorization of the enhanced cooperation – at the European Council. Finally, once the issue had been addressed by the European Council, the Council could decide by majority vote, so that there would only be a delay, but certainly this referral might hinder the implementation of the enhanced cooperation.

Secondly, the number of States required to initiate an enhanced cooperation went from a majority up to 8, regardless of the number of EU Member States. With the prospect of enlargement to 25 and then to 27, this change meant a very significant reduction in the number of States required to initiate an enhanced cooperation.

Thirdly, the possibility of using enhanced cooperation was extended to the formerly-excluded area of the Common Foreign and Security Policy, except for anything that had military implications or in the ambit of defence.

Moreover, the Nice Treaty clarified the regulatory principles and conditions in certain horizontal provisions applicable to the three pillars, to which must be added some specific provisions for the first pillar, for the Common Foreign and Security Policy and for police and judicial cooperation in criminal matters.

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13 On the Amsterdam negotiation see DE AREILZA J.M. and DASTIS A.: "Flexibilidad y cooperaciones reforzadas ¿Nuevos métodos para una Europa nueva?", in *Revista de Derecho Comunitario Europeo*, 1997-1, p. 9-28 et seq. Also DE AREILZA, J.M., "The Reform of Enhanced Co-operation Rules: Towards Less Flexibility?" Intersentia, p. 28– 29.

14 For an evaluation of the Nice reform in relation to the enhanced cooperation mechanism, see PONS RAFOLS, R.: "Las cooperaciones reforzadas en el Tratado de Niza",*Revista de Derecho Comunitario Europeo*, 2001, p.149-196; MANGAS MARTÍN, A.: "Las cooperaciones reforzadas en el Tratado de Niza" in MOREIRO C. (coord.) *Tratado de Niza, Análisis, Comentarios y texto*, Colex, Madrid 2002, p.67-82; MARTÍN Y PÉREZ DE NANCLARES, J.: "La cláusula de cooperación reforzada a la luz del Tratado de Niza: Crónica de una modificación necesaria", *Noticias de la Unión Europea*, n.218, 2003, p. 95-109.

15 This is a widely shared opinion, a good indication of which is the title of JANNING *Flexibilty in a straightjacket,* JANNING J.:"Dynamik in der Zwangsjacke: Flëxibilität in der Europäischen Union nach Ámsterdam" *Integration* 1997, 285., cited by THYM D.: "Europa a varias velocidades…" op. cit., p. 596. Along the same lines, GAJA, G.: "How flexible is flexibility under the Amsterdam Treaty?", *Common Market Law Review*, n.35, 1998, p. 855-870.

These provisions modify and qualify the conditions and requirements that were originally established[16]. Noteworthy among these innovations is the reference to the requirement for enhanced cooperation to strengthen the integration process. This indication, which might not be considered particularly important, seems to us however very significant. If one thinks of the various manifestations of differentiation in the history of integration, from the cases mentioned in the original Treaties to the enhanced cooperation contained in Nice, it appears that none of the models proposed by academic or political commentators has been implemented in its entirety. The community differentiation model (from the transitional periods for new accessions, through the Maastricht opt-outs, and even including the general mechanisms of enhanced cooperation) does not fit fully within *multi-speed Europe*, nor *Europe à la carte*, nor the 'hard core', but seems more a result of various particular commitments, agreements which resolved the specific challenges that were raised. As so often in the history of integration, the end result - with all its sharp edges and ambiguities - does not match a predefined model, but rather is probably the only compromise that Member States could reach. The effort in Nice is therefore significant in trying to clarify the model of differentiation envisaged in the Treaties, linking it to a strengthening of the integration process. In doing so, progress is made in the definition of a particular model by which differentiation is permitted if it is done for the strengthening of the integration process. We will return later to this issue.

4. Regulation up to Lisbon: horizontal provisions

The Nice Treaty facilitated the implementation of enhanced cooperation, softening the rigid substantive and procedural requirements introduced in Amsterdam. Moreover, it clarified and systematized the provisions on enhanced cooperation, providing for certain horizontal provisions applicable to the three pillars (Articles 43 to 45 TEU), in addition to specific provisions for the first pillar (Article 11 and 11a TEC), for the Common Foreign and Security Policy (Articles 27 to 27e TEU) and police and judicial cooperation in criminal matters (Articles 40, 40a and 40b TEU).

Noteworthy among the general principles applicable to the three pillars are[17]:

Reinforcement of integration - Firstly, in terms of objectives, enhanced cooperation must aim to "further the objectives of the Union, protect its interests and reinforce its integration process" (Art. 43a TEU). As already mentioned, the enhanced cooperation mechanism was envisaged as an instrument of integration, not disintegration.

Threshold of participants - In regard to the participation of Member States, the Treaty establishes that enhanced cooperation must have at least eight Member States (Article 43.g TEU).

Non-participants - Concerning non-participating States, the Treaty establishes that enhanced cooperation must be open to all States (Art. 43.j TEU), not only when established, but at any time, subject to compliance with the initial decision and the decisions taken within such framework. The Commission and the participating Member States must also seek to encourage the widest possible participation of Member States (Article 43 B TEU). In any case, enhanced cooperation must respect the responsibilities, rights and obligations of Member States not participating in it (43.h TEU). The Treaty of Nice qualified and softened this requirement which in the previous version required that the enhanced cooperation "would not *affect* the powers, rights, obligations and interests of non-participants". The term *interests* also disappeared from the Nice version, because it could have become an instrument to prevent the implementation of almost any enhanced cooperation.

Last resort - It is also important to note that enhanced cooperation can be initiated only as a *last resort*, i.e. if it has been established within the Council that the objectives assigned to it cannot be attained within a reasonable time, by applying the relevant provisions of the Treaties (Art. 43 TEU). Cooperation is therefore the

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16 For a detailed analysis of the innovations of Nice in the enhanced cooperation mechanism, see the second chapter of URREA CORRES M.: *La cooperación reforzada en la Unión Europea*, op. cit., Madrid, 2002.

17 Various proposals exist for systematising these general provisions, which some have called *the ten commandments of enhanced cooperation*, BRADLEY K.: "Institutional design of the Treaty of Nice", *Common Market Law Review* 38, 2001, 1095 – 1124, cited by THYM D.: "Europa a varias velocidades" op. cit., p. 590. ARACELI MANGAS distinguishes between general principles and material limits. MANGAS MARTÍN A. and LIÑÁN NOGUERAS D.: *Instituciones y Derecho de la Unión Europea*, ed.Tecnos, 5, Madrid, 2005, p.80-81. CONSTANTINESCO distinguishes between the conditions affecting the States and those that affect the background, CONSTANTINESCO, V.: *Les clauses de la coopération renforcée: le protocol sur l'application des principes de la subsidirité et de la proportionalité, Revue Trimmestrielle de Droit Europeén*, 1997, p. 751-767.

last option, once the impossibility of acting within the general framework is proven. It could be argued that its implementation recognizes the existence of a serious dispute or even a failure[18]. As noted by commentators, it will not be easy to tell when such impossibility is proven, since it does not require the formal failure of the legislative process.

Noteworthy in relation to the material limits to the use of enhanced cooperation are:

Compliance with the Treaties and the acquis - First of all, enhanced cooperation must "respect the Treaties and the single institutional framework of the Union" (Art. 43 b TEU). The Treaties must be respected in their entirety, not only in their principles (as was clear from the version prior to Nice). The single institutional framework shall also be respected, which does not prevent voting rights of non-participants being limited in the Council.

Enhanced cooperation must also respect "the acquis communautaire and the measures adopted under the other provisions of the Treaties" (Art. 43 c TEU). This reference to the acquis is significant because it reinforces the interpretation of the enhanced cooperation mechanism as an instrument for strengthening the integration process (as highlighted by Art. 43.a TEU), without affecting the achievements of the past, but permitting new projects to be undertaken which could not be implemented by all States.

Compliance with the allocation of competencies - Enhanced cooperation must remain within the limits of the competencies of the Union or the Community and therefore shall not serve to obtain new competencies that are not established in the Treaties. Nor may it relate to the areas which are the exclusive competence of the Community (Art. 43.d TEU), for all Member States must participate in such areas.

Other material limits – It must not undermine the internal market, or economic and social cohesion (Article 43 e TEU), or constitute a barrier to or discrimination in trade between Member States nor distort competition between them (Art. 43 f TEU). Nor must it affect the provisions of the Protocol integrating the Schengen acquis within the framework of the European Union (Art. 43 i TEU).

As noted by the doctrine, many of the substantive requirements contained in Article 43 are truisms, often redundant[19], or simply declaratory confirmations of general principles of Community law. The obligation to promote the objectives of the Union and protect its interests, to comply with the Treaties and the acquis, or the condition of remaining within the limits of Union competences are obvious features of European legislation that are familiar to any lawyer specializing in EU Law; what is different is the case of the limits contained in Article 43 TEU e and f, because this could indeed restrict the possibility of initiating enhanced cooperation in certain policy areas such as social, tax or environmental which have a clear economic dimension[20].

The Treaty also refers to the decision-making process and its funding:

Decision-making - within the framework of enhanced cooperation, while all States may participate in the deliberations, only the participants will take part in decision-making. A qualified majority will be defined as the same proportion of the weighted votes as those provided for in the Treaties and unanimity shall be imposed only for the States concerned for the cooperation.

The rules and decisions adopted within the enhanced cooperation framework will not be part of the acquis of the Union and shall be binding on - and where appropriate, directly applicable to - only the participating Member States. However, the Treaty also states (Article 44.2. TEU) that Member States not participating in such enhanced cooperation shall not impede its implementation by the participating Member States.

Financing - In principle the costs of the implementation of enhanced cooperation - other than administrative costs entailed for the institutions - will be borne by the participating Member States, unless the Council unanimously decides otherwise after consulting the European Parliament (Art. 44 TEU).

Consistency - Finally, the Council and the Commission must ensure the consistency of the enhanced cooperation and the consistency of such activities with the policies of the Union (Art.45 TEU). Cooperation must be used coherently and in a coordinated manner. As noted by Professor MANGAS MARTÍN it must not result in inconsistent and cluttered initiatives by groups of different States[21].

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18 MANGAS MARTÍN A. and LIÑÁN NOGUERAS D.: *Instituciones y Derecho de la Unión Europea*, op. cit., p. 80.

19 PONS RAFOLS, R.: "Las potencialidades de las cooperaciones reforzadas…" op. cit., p. 646 and 647.

20 THYM D.: "Europa a varias velocidades…" op. cit., p. 592.

21 MANGAS MARTÍN, A. and LIÑÁN NOGUERAS, D.: *Instituciones y Derecho de la Unión Europea*, op. cit., p. 81. Along the same lines, the Professor MANGAS MARTÍN cons

5. Regulation up to Lisbon: specific provisions

Any enhanced cooperation must meet all the conditions described above, but there are also specific provisions applicable to the Community pillar, to the Common Foreign and Security Policy and Police and Judicial Cooperation. This is because the authorization procedures for enhanced cooperation and eventual accession of new states differ depending on the subject.

Articles 11 and 11A set out the procedure for authorization to proceed with enhanced cooperation in the first pillar. States that wish to establish enhanced cooperation – we assume, once the attempt to do so in the general framework of the Treaty has failed – shall address their request to the Commission which may submit a proposal to that effect to the Council. One should highlight here the decisive role of the Commission, which ensures that enhanced cooperation is directed towards the Community interest. The Commission, which in this case acts at the behest of the States promoting the cooperation, may examine whether the substantive requirements are met and evaluate the initiative with a wide margin of discretion, because if it decides in the end not to submit any proposal, the Treaty simply requires communication of the reasons to the States concerned.

Authorisation is granted by the Council by qualified majority, after consulting the European Parliament, except where it concerns an area of co-decision in which case - since the Nice reform – it will require the assent of the European Parliament.

As noted above, the Nice Treaty eliminated the right of veto originally planned in Amsterdam, because it did not seem reasonable that the State or States that had prevented the undertaking of a project with the participation of all Member States could then prevent the supporters of moving it forward through enhanced cooperation. However, Nice provided for a final brake that could delay the process by allowing any Member State to request that the matter be referred to the European Council. Once the matter is raised before the European Council, the Council may decide by majority vote. Thus, referral to the European Council may have a political impact and no doubt cause delay to the process, but ultimately may not prevent the authorization of the cooperation if it has the support of a sufficient majority in the Council.

Article 11 A contains the participation process applicable where a Member State wants to join in with enhanced cooperation that has already started. One should remember that the Treaty establishes an *essential principle of openness*[22] of enhanced cooperation, under which such is open to all Member States at any time provided they comply with the initial decision and the decisions taken within such framework. A State wishing to participate shall notify its intention to the Council and Commission, to which is confers a decisive role, since it presupposes a favourable attitude and is also required to encourage the widest possible participation of Member States (43 B TEU). The Commission may also decide on specific arrangements as it deems necessary.

The specific provisions on police and judicial cooperation in criminal matters are contained in Articles 40, 40 A and 40 B TEU and are very similar to those of the first pillar. Initially the particular purpose of any cooperation undertaken in this matter is specified: "to enable the Union to develop more rapidly into an area of freedom, security and justice" (Art. 40.1 TUE).

For its implementation, the Member States concerned shall forward a request to the Commission, which may submit a proposal to that effect. If it does not do so, the Commission must communicate the reasons to the States concerned. So, unlike the first pillar, the States concerned themselves may request the Council to authorize enhanced cooperation (Art. 40 A).

Permission is granted by the Council by qualified majority after consulting the European Parliament. As with the first pillar, any State may request that the matter be referred to the European Council, but ultimately the Council may decide by majority vote. The previous unanimity here has also been suppressed[23].

Very different are the procedures provided for in the specific provisions for the Common Foreign and Security Policy (Articles 27 to 27e TEU), an area hitherto closed to enhanced cooperation.

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22 MANGAS MARTÍN, A. and LIÑÁN NOGUERAS, D.: *Instituciones y Derecho de la Unión Europea*, op. cit., p.81. Along the same lines, the Professor MANGAS MARTÍN cons

23 The participation process provided for subsequent accession of Member States is contained in the Art. 40 B TEU. The Member State concerned shall notify its intention to the Council and to the Commission, which shall submit to the Council within three months from the date of receipt of the notification, an opinion accompanied, where appropriate, by a recommendation concerning any particular provisions it may deem necessary. The Council shall rule on the request within four months from the date of receipt of the notification. The decision shall be deemed approved unless the Council, by qualified majority and in that same period, decides to hold it in abeyance, in which case the Council shall state the reasons for its decision and set a deadline for re-examination of it.

Interestingly, the particular purpose which any enhanced cooperation must have in the ambit of the CFSP is to "safeguard the values and serve the interests of the Union as a whole by underlining its identity as a coherent force in the international arena". To this particular purpose is also added a very special emphasis on consistency with all Union policies, a guarantee of coherence which had already been sought under Article 45 TEU, but that figures prominently in the special provisions of the CFSP (Art. 27a TEU).

Enhanced cooperation in this field may be established to implement a joint action or common position but in no event may relate to matters having military or defence repercussions. Therefore this does not allow definition of principles and general guidelines for the CFSP, nor common strategies.

For its implementation, the States concerned shall send a request to the Council, not the Commission. The Council shall forward it to the Commission which shall give its opinion, particularly on consistency of the enhanced cooperation with EU policies. It shall also transfer it, for information purposes only, to the European Parliament. The Parliament's role is thus more limited than in the Community pillar (consultation or assent) and the criminal police and judicial pillar (consultation). Authorisation is granted by the Council, and a State opposing it may refer the proposal to the European Council for a decision by unanimity. The veto that was eliminated during the Nice reform from the other pillars persists therefore in the CFSP.

For its part, the obligation to ensure that the European Parliament and all Council members are fully informed is borne by the High Representative for Common Foreign and Security Policy[24].

6. Lisbon: the enhanced cooperation model moves closer to the community method

The European Convention that drafted the Constitutional Treaty introduced significant changes to the enhanced cooperation arrangements that would later be incorporated into the Reform Treaty, signed in Lisbon in December 2007[25]. It should be noted that this was modifying for the second time a mechanism for enhanced cooperation that had never been used. Once more it could be said that despite not having been implemented, or perhaps precisely because of it, a new review of its regulation took place.

The structure and realignment of the provisions on enhanced cooperation require a preliminary comment. The new Lisbon provisions are basically the same as those of the Constitutional Treaty, which contained a general article on enhanced cooperation in Part I (I-44) and detailed technical regulations in Part III (Articles III 416 to 423). In a single constitutional Treaty, there was no sense in including a general provision in Part I, more understandable to citizens, and then a long list of technical provisions in Part III. The Lisbon Treaty took up this approach and established a general article in the TEU (Art. 20 TEU), and more detailed regulations in the Treaty on the Functioning of the European Union (Arts. 326 to 334 TFU).

While the reason for this new structure is understandable, the truth is that the reading of the new provisions of the Treaty is more confusing than the previous version, with its clear division between general limits and principles in the TEU and specific requirements and procedures in the corresponding provisions of the three pillars. As explained by RAFAEL PONS[26], one cannot understand why certain provisions are in the TEU and others in the TFEU. Indeed, the general principles and substantive limits for commencing enhanced cooperation are now divided between the two Treaties (TEU and TFEU).

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[24] Article 27 E establishes the procedure for participation, applicable in the event that a Member State wants to join a partnership in this area. The State will notify its intention to the Council and will report to the Commission. The Commission will provide the Council with an opinion within three months from the date of receipt of the notification. Within four months from the date of receipt of the notification, the Council shall decide on the application, as well as on any specific provisions it may deem necessary. The decision shall be deemed approved unless the Council by qualified majority and within that same period decides to hold it in abeyance, in which case the Council shall state the reasons for its decision and set a deadline for re-examination of it.

[25] On the innovations of the Treaty of Lisbon in relation to enhanced cooperation, please see PONS RAFOLS, X.: "Las potencialidades de las cooperaciones reforzadas…", op. cit. p. 641, URREA CORRES M.: "La efectividad del derecho de retirada, el sistema de reforma y las cooperaciones reforzadas: una incógnita que condiciona el proceso de integración de la Unión", in MARTÍN Y PÉREZ DE NANCLARES (coord.), *El Tratado de Lisboa: la salida de la crisis constitucional*, Iustel, Madrid, 2008, p. 687-703 and ALCOCEBA GALLEGO A.: "La integración diferenciada en el Tratado de Lisboa o la ampliación de la Europa a la Carta" in FERNÁNDEZ LIESA, C and DIAZ BARRADO, C. (dirs.): *El Tratado de Lisboa, análisis y perspectivas*, Dykinson, 2008, p. 313.

[26] PONS RAFOLS, X.: "Las potencialidades de las cooperaciones reforzadas…", op. cit. p.641. Likewise, ALCOCEBA GALLEGO A.: "La integración diferenciada en el Tratado de Lisboa… ", op. cit. p. 313; and URREA CORRES M.: "Mecanismos de integración y (des) integración diferenciada en la Unión Europea a la luz del Tratado de Lisboa", *Cuadernos Europeos de Deusto*, no. 39, 2008, p. 178.

Another consequence of the new structure of the Treaties and of the removal of the pillars has been the exclusion of particular provisions which referred to the purpose of enhanced cooperation in judicial and police cooperation and in the CFSP. Indeed, the purpose of any enhanced cooperation will remain "to further the objectives of the Union, protect its interests and reinforce its integration process", as is defined by the new Article 20 TEU, but with a loss of precision in relation to two important matters[27].

As regards substantive changes, the Lisbon Treaty introduces several innovations.

Firstly, it changed the threshold necessary for commencement of enhanced cooperation by establishing the condition that at least nine States would have to participate in it. This is the only substantive change to the general system of reinforced cooperation introduced by the Treaty of Lisbon, since in the previous version resulting from Nice, the number is only eight. The Constitutional Treaty had envisaged the establishment of a relative threshold, one third of Member States - which in an EU of twenty-seven States would be nine States - but the Lisbon version opted for an objective minimum of nine. With the prospect of further enlargement in the future, the fixed threshold of nine will be easier to achieve than that of one third. However, it is noted that at present the threshold is eight, so this change cannot be considered to facilitate the implementation of enhanced cooperation.

Secondly, the Lisbon Treaty removes the possibility for a Member State to request that the authorization of enhanced cooperation shall be referred to the European Council. While such a referral could not ultimately hinder the approval if the cooperation had the support of a sufficient majority in the Council, the process is simplified by eliminating an obstacle that could have a political impact and that in any case delayed approval.

Thirdly, it increases the participation of the European Parliament by requiring that the implementation of enhanced cooperation requires its consent, except for the CFSP. Before this, Parliament was only consulted (except in cases in which the co-decision procedure applies where - even today - its consent is required).

Fourthly, the Treaty of Lisbon facilitates as much as possible the participation procedure, because it seems that under Article 331 TFEU, once notified by a Member State of its intention to participate in enhanced cooperation already under way, the Commission can do no more than ascertain whether the conditions for participation are complied with, without having any political discretion. In the previous version, the scope for the Commission seems greater, Article 11a TEC stating that, once the participation by a Member State is requested, the Commission "shall decide". Finally, if the Commission considers that the conditions are not met, and after reconsideration deem that they still remain unfulfilled, it shall report to the Council, which would therefore have an essential role in the participation process.

Fifthly, the Lisbon Treaty enables a 'bridge', which will have to permit States of the enhanced cooperation to introduce majority voting in an area where unanimity was specified. Indeed, Article 333 TFEU states that when a provision of the Treaties which may be applied within the framework of enhanced cooperation stipulates that the Council must act unanimously, the Council may unanimously adopt a decision stipulating that it will decide by qualified majority. This possibility could have a very significant potential for promoting greater cooperation. Those States in favour of advancing in an area where unanimity is envisaged not only may do so through enhanced cooperation, without reluctant States being able to veto their progress, but can then continue to move forward by qualified majority. Similarly, another bridge provides for the passage from a special legislative procedure to the ordinary legislative procedure. None of these bridges, however, will apply to decisions having military or defence repercussions.

The Lisbon Treaty also substantially alters the provisions applicable to the Common Foreign and Security Policy and Police and Judicial Cooperation. Very briefly - since these matters are dealt with separately in other chapters of this book - we can note, first, that much of the third pillar is incorporated in the new Title V of the TFEU implying a shift towards the ordinary legislative procedure and application of qualified majority, and second, that the ban on using enhanced cooperation in matters having military or defence repercussions is gone, with a new permanent cooperation structure in this matter being regulated.

Does this again mean a more flexible approach to flexibility? Probably, the innovations in the arrangements applicable to the Common Foreign and Security Policy and Judicial and Police Cooperation have the effect of facilitating enhanced cooperation in these areas, where the possibilities - for example on defence - are significant.

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27 PONS RAFOLS laments the disappearance of such references which he considers *relevant*: "Las potencialidades de las cooperaciones reforzadas..", op. cit.., p. 641

With regard to the general regime, leaving aside the amendment relating to the threshold, two major changes are foreseen in the authorization procedure: elimination of the transfer of the authorization of enhanced cooperation to the European Council and request the consent of the European Parliament. While it seems clear that the procedure is facilitated by avoiding referral to the European Council, one cannot consider that the greater involvement of the European Parliament will necesarily facilitate the implementation of enhanced cooperation, since it may well be that Parliament thinks that a particular proposal, for example, does not serve the aim of deepening the integration process. In reality this is a new filter to pass through[28]. However, both eliminating the referral to the European Council and Parliament's involvement are signs of movement towards the Community method, towards the clasical Community's institutional balance itself. This communitarisation of enhanced cooperation is further strengthened by communitarising the arrangements applicable to Police and Judicial Cooperation and therefore deserves, in our view, a positive assessment.

Thus, the process carried out to domesticate or discipline[29] the differentiation is consolidated, bringing the overall enhanced cooperation mechanism closer to the Community method. This reinforces the idea that the enhanced cooperation model enshrined in the Treaties is guided by the idea of integration. It has been rightly said that it would have been more appropriate to call the enhanced integration *reinforced cooperation*[30] or that it is a *supranational differentiation*[31] model which does not contradict the orthodoxy of the Community method. As already mentioned, Nice took a step forward in clarifying the differentiation model, in saying that enhanced cooperation must strengthen the integration process. Lisbon is a further step in the communitarisation of differentiation.

However, one cannot reflect on the regulation of enhanced cooperation in the Lisbon Treaty without at least indicating that this reform also has includes other forms of differentiation, such as differentiation through protocols. The most striking case is the introduction of a case of differentiated integration in relation to the Charter of Fundamental Rights, in respect to which the UK and Poland will have a special legal position[32]. Once again we see how the enhanced cooperation mechanism does not prevent the development of other forms of differentiation that may be less consistent with the Community method and spirit.

7. Final thoughts: an integration mechanism that is necessary and better than the alternatives

The efficacy of the enhanced cooperation mechanism is unknown. Today, more than a decade after its inclusion in the Treaty, despite the passionate political and legal debate, and the successive reforms of the statute, the fact is that the enhanced cooperation mechanism has not yet been used.

Its inclusion in the Treaty in the mid-nineties unleashed a storm. Many highlighted the risk that this new mechanism posed to cohesion and to the principle of unity in a Community in which, except in very rare cases, the same law, the same rules, were applicable to all. Some argued that this mechanism could only lead to disintegration, to the division of the Union into two groups[33]. For others, a flexible Europe meant the bankend of solidarity: with this mechanism a group of States could, without the necessary qualified majority, *do their own thing*, under the promise to those left behind that they might join - in later[34]. Others indicated that flexibility meant complexity, just at a time when the EU was constantly seeking to simplify and reach out to citizens. In short, for many, enhanced cooperation would be an obstacle to the advancement of all, which would have less pressure to move if supporters could engage in their own enhanced cooperation.

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28 This was indicated by JULIO BAQUERO CRUZ in the seminar *El futuro de la cooperación reforzada* which took place in the European Studies Institute of the CEU San Pablo University on 29 April 2009.

29 URREA CORRES uses the term *discipline* in URREA CORRES, M.: "Mecanismos de integración y (des)integración…" op. cit., p.172.

30 A. MANGAS MARTÍN, "La cooperación reforzada en el Tratado de Ámsterdam", op. cit., p. 29, and J. MARTÍN PÉREZ DE NANCLARES, "La flexibilidad en el Tratado de Ámsterdam...", op. cit., p. 231.

31 THYM, D.: "Europa a varias velocidades…" op. cit., p. 572.

32 A. ALCOCEBA, "La integración diferenciada en el Tratado de Lisboa...", p. 317.

33 DE AREILZA, J.: "The reform of enhanced co-operation rules: Towards less flexibility?", op. cit., p.38.

34 WEILER, J.H.H.: "Ámsterdam, vuelva usted mañana", *El País* newspaper, 2 October 1997.

Today, criticism of the enhanced cooperation mechanism is more nuanced and the general assessment by commentators seems to us more positive, or at least more resigned. For most, this mechanism is essential[35] in an enlarged, more heterogeneous EU, in which the linear model of integration appears to be exhausted and at the limit of its possibilities[36].

Enhanced cooperation may be a way forward, an alternative to avoid the paralysis that can be caused by the veto in an extensive and diverse EU, in which several Member States do not share the desire to deepen the integration process. Thus, this mechanism may allow the deepening to continue, at least in some areas, and overcome the veto of the reticent, allowing progress for those States wishing to do so. This is perhaps the greatest virtue, the great promise of flexibility.

But there are other reasons that may tilt the balance in favour of the enhanced cooperation mechanism. First, commentators have indicated - and facts have proven - that the mere existence of enhanced cooperation may in itself be a driving force for integration. Indeed, the possibility that some States may begin enhanced cooperation may encourage reluctant States to join, if the alternative is that others take the journey in their absence. Experience so far shows that States seem inhibited by the idea of opting out[37].

Moreover, even if this momentum is not enough, and some States are left behind, the previous experiences of differentiation show that sometimes the vanguard may end up attracting the reluctant and allowing progress of all in integration. The UK opt-in to the social protocol or the Schengen Treaty – the communitarisation of which would be achieved later - shows that enhanced cooperation could be a mechanism for advancing the vanguard, and could end up producing a general strengthening of the integration process.

Enhanced cooperation may also be a better option than the alternatives. Indeed, many argue that *if it is not done inside, it will be done outside*[38], i.e., if recourse to the enhanced cooperation mechanism provided by the Treaties is not possible, the States in favour of acting would find other extra-EU routes in order to move forward. The risk of using differentiation outside of the enhanced cooperation mechanism is that all the precautions and limitations provided for in detail under the Treaties simply would not apply. Nor would the participation of the European Parliament and the Commission be assured, which would respectively guarantee democratic control and defence of the common European interest. So much so that it has been suggested[39], when evaluating the enhanced cooperation mechanism introduced by Amsterdam, that if Schengen is considered the model of differentiation outside of the Treaties, with its deeply undemocratic processes, then sacrificing some aspects of the principle of unity may be worth it in order to improve democracy.

The example of the Prüm Treaty, signed in 2005 by seven Member States to intensify cross border cooperation in the fight against terrorism, transnational crime and illegal immigration, showed that Member States may still be tempted to sign a non-EU Treaty instead of initiating enhanced cooperation. This would enable them to avoid the strict requirements set out in the Treaty, without ruling out that later - following the trail blazed by Schengen – the commitments made may be incorporated into the Community framework (as were some of its elements through the Council's decision in 2007).

Another method of differentiation, namely the use of specific Protocols to establish specific policies for certain States, could prove more damaging to the Community method and spirit. As AMPARO ALCOCEBA has explained, this type of differentiated integration, using the Protocols as an instrument of authorization, goes beyond any objective considerations of effects on the integration process and is the result of the balance of power, capacity of negotiation and political pressure exerted by the State concerned, which is threatening to veto the current revision of the Treaty in force[40]. The temptation that this mode of differentiation represents for Member States, closer to the idea of *Europe à la carte*, has become apparent in recent years, since it was first

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35 This is the view, for example, of URREA CORRES, M.: *La cooperación reforzada en la Unión Europea*, Colex, Madrid, 2002. It also tends to be classified as *inevitable* or *necessary*, for example, FERNÉNDEZ LIESA C. and ALCOCEBA GALLEGO, A.: "La cooperación reforzada en la Constitución Europea" in ÁLVAREZ CONDE, E., and GARRIDO MAYOL, V.: *Comentarios a la Constitución Europea, Tirant Lo Blanch, Conseil Juridic Consultiu de la Comunitat Valenciana*, p. 490.

36 MARTÍN Y PÉREZ DE NANCLARES "La flexibilidad en el Tratado de Ámsterdam..", op. cit.. p. 208". Likewise, for FERNANDO MARIÑO it constitutes an alternative to a linear unitary notion of integration: MARIÑO FERNÁNDEZ, F.: "La integración diferenciada. La cooperación reforzada", in OREJA AGUIRRE, M. (dir.), *El Tratado de Ámsterdam: análisis y comentarios*, Madrid, 1998.

37 THYM, D.: "Europa a varias velocidades…" op. cit., p. 589.

38 EHLERMAN C.D.: "Differentiation, flexibility, closer cooperation…", op. cit. p. 250.

39 SHAW J.: "The Treaty of Amsterdam: challenges of flexibility and legitimacy" en *European Law Journal*, Vol. 4, no. 1, 1998, p. 84.

40 ALCOCEBA GALLEGO, G.: "La integración diferenciada en el Tratado de Lisboa…" op. cit., p. 315.

used on the occasion of the Maastricht Treaty. The Lisbon Treaty, once again, resorts to the Protocols, this time in connection with such sensitive matters as fundamental rights. Again, enhanced cooperation seems a better alternative, for which reason some have suggested that the future of the Union could lie in increasing the use of enhanced cooperation and gradually reducing the areas of this *Europe à la carte* which allow self-exclusion and which it has been necessary to tolerate in the past in order to move forward, whether in monetary union, social policy, or now, in fundamental rights[41].

In our opinion, enhanced cooperation is a necessary tool, which can contribute to the dynamism of the European Union, enabling those who want to move forward to act, and exerting a force of attraction on the rest, at a time when the reluctance of several States hinders the advancement of all.

In its current configuration, because of its multiple safeguards and requirements, enhanced cooperation has become consolidated as an *integration* mechanism, compatible with the Community method and spirit – even more so, after the Lisbon reform -, which ensures the participation of the supranational institutions that express interest and is open to non-participants who wish to join later. It is no wonder that instead of enhanced cooperation it has been said it could be called *differentiated integration*[42] or even *supranational differentiation*[43].

Although it is true that differentiation mechanisms are not without serious risks, because the unity of objectives is broken, and the legal situation of the various Member States will be different, we can consider that in its current configuration, it is unlikely that the enhanced cooperation mechanism could become an instrument to consolidate a, stable and exclusive 'hard core', in the manner suggested in the nineties by Lamers and Schäuble. On the contrary, the experience of these years and careful legal regulation suggests that its expected use will be residual, pragmatically and specifically limited to those cases in which a vanguard that wants to act in a new area does not obtain the required consensus[44]. Probably it is a better alternative to non-EU Treaties or the opt-out Protocols that have been tolerated in the past.

In conclusion, we note that the study of the provisions on enhanced cooperation gives grounds for a degree of contained optimism, within the difficult political circumstances that the EU finds itself. The enhanced cooperation model enshrined in the Treaty has established itself as an instrument geared towards strengthening the integration process, which ensures the participation of the institutions that represent supranational interests. It is likely that enhanced cooperation will not be the key to dealing with all the challenges that the enlarged, complex and vacillating European Union faces in the twenty-first century, but it can be a tool to regain momentum in certain areas and allow those States that want to deepen integration to promote new projects.

Enhanced cooperation may be a key part of the future of the Union, a part that contributes - along with others - to defining its future. As MARIOLA URREA[45] noted, any reflection on flexibility cannot be separated from another two key issues: the regulation of the possibility of withdrawal from the EU by its Member States and the possible modification of the rules for revising the Treaties towards a system based on the majority. The combination of these pieces suggests a different future and allows us to imagine a new balance in the relationship between the States and the EU within the framework of which the least integrationist States have - through the right of withdrawal - the option of not pursuing progress in integration, but lack the power that they enjoy today to veto the progress of others in any review of the Treaties. Enhanced cooperation would, in this context, be a pragmatic tool to allow a certain degree of differentiation within the Treaties, compatible with the spirit and method of the integration process. However, this is another complex issue that without doubt requires a ... different ... handling.

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41 BROTONS REMIRO, A.: "Las suicidas cláusulas finales de los Tratados Europeos" in FERNÁNDEZ LIESA, C and DIAZ BARRADO, C. (dirs.): *El Tratado de Lisboa, análisis y perspectivas*, Dykinson, 2008, p. 355.

42 MANGAS MARTÍN, A.: "La cooperación reforzada en el Tratado de Amsterdam" op. cit., p. 29, and MARTÍN Y PÉREZ DE NANCLARES, J.: "La flexibilidad en el Tratado de Ámsterdam…" op. cit., p.231.

43 THYM, D.: "Europa a varias velocidades…" op. cit., p. 572.

44 As suggested by, for example, Král David, *Multi speed Europe and the Lisbon Treaty-Threat or opportunity?*, Institut pro Evropskou Politoku, Europeum, 2008, p. 7.

45 URREA CORRES M.: "Mecanismos de integración y (des)integración diferenciada en la Unión Europea a la luz del Tratado de Lisboa", *Cuadernos Europeos de Deusto*, no. 39, 2008, p. 169-190. See also URREA CORRES M.: "La efectividad del derecho de retirada, el sistema de reforma y las cooperaciones reforzadas: una incógnita que condiciona el proceso de integración de la Unión", in MARTÍN Y PÉREZ DE NANCLARES (coord.), *El Tratado de Lisboa: la salida de la crisis constitucional*, Iustel, Madrid, 2008, p. 687-703.

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Enhanced cooperation and energy(*)

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1. Background

The Treaty of Amsterdam established the procedure of Enhanced Cooperation, incorporating its legal regime from the angle of both the TEU and the TEC. Neither the Single Act nor the Treaty of Maastricht makes reference to Enhanced Cooperation.[46]

This political/institutional strategy is classified under extensive doctrine as "differentiated integration"[47]. It is integration defined as leaving open to Member States the possibility of activating procedures and mechanisms, and providing a regulatory system applicable only to those Member States who so decide[48], although in its final arrangement open to all those states who may subsequently decide to join to the said procedure and specific measures.

The flexibility denotes the desire of the EU, in its integrationist ambitions, not to disregard the particular circumstances and needs of certain Member States, although without losing sight of the Community interest. Some of the measures reflecting that approach are the asymmetric timetables for the implementation of certain policies, the special derogations, and the financial support during periods of transition towards the membership of some Member States.[49]

The measures adopted within the framework of Enhanced Cooperation do not form part of the acquis of the European Union and the obligations deriving from those measures may only be required of the Member States participating in that mechanism[50].

(*) My thanks to José Sierra for the very valuable reflection on this subject, and to Martha Gómez Jaramillo for her contribution to this work.

46 The Treaty of Rome of 1957 included a provision known as the "Benelux Clause" which would open the door to differentiated formulas of integration in a specified matter, in this case political order and economic and commercial objectives.
"*The provisions of this Treaty shall not impede the existence and perfectioning of the regional unions between Belgium and Luxembourg, as well as between Belgium, Luxembourg and the Netherlands to the extent that the objectives of the said regional unions may not be achieved by the application of this Treaty.*" (Art. 306, TEC, 25th March 1957).

47 Grant, Charles. "Can variable geometry save EU enlargement?" in CER Bulletin, n. 44. October – November 2005. Available online at http://www.cer.org.uk/articles/44_grant.html.

48 Good examples of the said differentiated integration are the process of constitution of the Monetary Economic Union or the adoption of the Schengen Agreement.

49 CREMONA Marise. "Flexibility Models: External Policy and the European Economic Constitution". In the book: Constitutional Change in the EU. Hart Publishing. 2000 ISBN 1 84113-103-2.

50 Enhanced Cooperation did not form part of the initial mandate of the Intergovernmental Conference (IGC), preliminary to the Treaty of Nice, and it was the European Council of Feria of 20th June 2000 which formally incorporated it as part of its deliberations and work.

In accordance with Grainmé Burca, the intention when analysing articles 42 (2), 94 and 95 of Treaty of the European Union is to consider what type of differentiation has been permitted over the years, recognising the different needs and individual demands of the Member States[51].

2. Energy and Enhanced Cooperation

Energy is present in the founding European agreement. It is a central issue in two of the three founding treaties. The ideas of overcoming "age-old rivalries" and of "creating a de facto solidarity" contained in the Schuman Declaration[52] also refer to overcoming historical conflicts over the coal, iron and steel resources of the Ruhr, Saarland and Alsace, giving rise to a specific regulatory framework on the signing of the Treaty establishing the European Steel and Coal Community[53]. Article 6 of the Treaty incorporates an important legal innovation in conventional international law as it explicitly attributes internal and international legal personality to an international organisation –and the founder of a transnational community– when it states, *"the Community shall enjoy the juridical capacity necessary for the exercise of its functions and to attain its objectives"*, the new text classifying itself as "the start of a new international praxis".

Within a short space of time the ECSC Treaty produced notable economic and commercial results, allowing the signatory countries to extend the thrust of the initial understanding to other areas of economic and social activity. The concrete result was the signing, a few years later, of two treaties, one of general character for the creation of a European common market (the Treaty establishing the European Economic Community), and the other, clearly concerning energy, the EURATOM Treaty, by which it was sought to advance the peaceful development of nuclear energy in the continent of Europe. The industry was still incipient but was demonstrating noteworthy development capacities in the service of economic life in the countries most advanced in that respect, particularly the United States, that had launched an important initiative in the field, receiving a clear political impulse with the programme *"Atoms for Peace"* presented by General Eisenhower to the United Nations in 1953, and which brought about new atomic legislation in August 1954. The EURATOM Treaty established a common European policy for the supply of uranium, as well as a common market in that area, with strict compliance with the very demanding security rules of that technological field. Also, the regulatory conditions were established for the creation of joint undertakings, an extensive Research and Development Programme and dissemination of technological knowledge, and the European Agency for nuclear supply (EURATOM Agency) was created for the aforesaid purposes.

The principal aims of the EURATOM Treaty can be readily deduced from a reading of its preamble, and they acquire greater dimension when read retrospectively: *"to contribute, through the establishment of the necessary conditions for the creation and rapid growth of nuclear industries, to the elevation of living standards in the Member States and the development of exchanges with other countries"*. A central aspect of the EURATOM Treaty, from the perspective of legal and international co-operation, is article 2h which authorises the new

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51 From the notion of differentiation it can be gathered that "*different cases require different treatment.*" This principle which in some way legitimises discrimination of treatment within the EU must be subject to specified limits of time and scope, as will be seen in the development of the concept of Enhanced Cooperation in the Treaties signed until now. BÚRCA DE Gráinne. *"Differentiation within the core? The case of the Internal Market"* In the book: Constitutional Change in the EU. Hart Publishing. 2000 ISBN 1 84113-103-2.

52 Extract from the declaration of the proposal launched by Robert Schuman, French Foreign Minister, which gave rise to the creation of the European Economic Community: "*The French Government proposes that Franco-German production of coal and steel as a whole be placed under a common High Authority, within the framework of an organisation open to the participation of the other countries of Europe. The pooling of coal and steel production should immediately provide for the setting up of common foundations for economic development as a first step in the federation of Europe, and will change the destinies of those regions which have long been devoted to the manufacture of munitions of war, of which they have been the most constant victims.The solidarity in production thus established will make it plain that any war between France and Germany becomes not merely unthinkable, but materially impossible. The setting up of this powerful productive unit, open to all countries willing to take part and bound ultimately to provide all the member countries with the basic elements of industrial production on the same terms, will lay a true foundation for their economic unification. This production will be offered to the world as a whole without distinction or exception, with the aim of contributing to raising living standards and to promoting peaceful achievements. With increased resources Europe will be able to pursue the achievement of one of its essential tasks, namely, the development of the African continent. In this way, there will be realised simply and speedily that fusion of interest which is indispensable to the establishment of a common economic system; it may be the leaven from which may grow a wider and deeper community between countries long opposed to one another by sanguinary divisions.*"

53 The ECSC Treaty, signed in Paris in 1951, joins France, Germany, Italy and the Benelux Countries in a Community that has as its object the creation of a common market and to guarantee the freedom of movement of coal and steel and free access to the sources of production. In addition, it creates a common High Authority with faculties for the supervision of the aforesaid market, respect for the rules of competition and transparency of prices.

Community to establish the appropriate relationships with other countries and international organisations, and Chapter X of the Second Title on "External Relations".

Thus, at the first stage of Community founding premise we encounter two foundational treaties that in detailed fashion deal with two energy sectors of particular importance. Sectors that correspond to two essential primary sources: coal and nuclear energy. To a large extent, the ECSC Treaty, further to other essential considerations of a historical nature such as its material, specific and concrete contribution to peace and economic stability in the continent, provided for the regulation of a common market of coal, iron and steel, and the development of an energy "of the present" central to the economic development in the Fifties and Sixties in the last century of the signatory states to the agreement. If the ECSC Treaty regulated the "energy of the present" and the established coal and steel bases "sub specie" of an incipient Community industry policy, the EURATOM Treaty looked to provide the basis for the creation and supervision of the "energy of the future."

Apart from a detailed common policy for the supply of uranium, base material for electricity production by way of nuclear reactor, it is clear that there was not articulated –which in my judgement would have been a necessary and coherent corollary of the above– in the TEC a common energy policy. And neither did such a policy prosper on the occasion of the Single European Act nor in the subsequent reforms of an institutional character.

For all those reasons, there still has not exist, until the Treaty of Lisbon signature[54] in its currently drafted terms, a common energy policy in Europe. The regulation of that matter, with the stated exceptions, has been constructed on the measures and actions of subsidiary law: Regulations, Directives, Decisions and, from the perspective of *"soft law"*, by other non-binding acts such as Communications, Declarations, and Green Papers.

Even so, for the purposes of clarifying this analysis, we understand that from the point of view of Community law there is a distinction between two areas in relation to energy:

i) energy-related policy, measures and acts; and

ii) the internal energy market.

The Treaty of Lisbon establishes a new energy competence scheme and with it, the scope, extent, procedures and actions necessary for its exercise. Further, and essential for the purposes of that work, it institutes a new energy policy of which the internal market, security of supply, promotion of renewable energies and the development of networks are its principal pillars.

The Treaty of Lisbon delimits, in article 4 of the Treaty on the Functioning of the European Union (consolidated version),[55] the matters over which the Union shall have shared competences with the Member States[56].

The shared competences of the Union and the Member States shall be applied to specified principal areas –as described in article 4 of the Treaty on the Functioning of the European Union (consolidated version)– including energy. In accordance with the said article, the possibility of use of the instrument of Enhanced Cooperation is further opened up in the areas of the environment, trans-European networks and also, in our opinion, the internal market, provided that it serves to reinforce, or to enforce proper compliance with, its principal objectives, that is, to "ensure its operation and realisation," which constitutes de jure the connection between the Community energy policy and the aims of the internal market.

The Treaty of Lisbon[57] includes the concept of Enhanced Cooperation in Heading IV article 20 of the consolidated version of the Treaty of European Union[58]. Of the amendments that this regime observes in the new Treaty, it is emphasised that:

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54 Treaty of Lisbon, 13th December 2007.

55 Treaty on the Functioning of the European Union, consolidated version. Official Journal of the European Union, 9.5.2008. C 115/50.

56 All that in agreement with article 2 part 2 of the same Treaty in which "*the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised its competence.*"

57 Treaty of Lisbon, which amended the Treaty of European Union and the Treaty establishing the European Union, signed in Lisbon on 13th December 2007. Amendments of the Treaty of European Union and the Treaty establishing the European Union await their process of ratification and final adoption.

58 We recall that article 1 part 2 of the Treaty on the Functioning of the European Union establishes that the said Treaty, together with the Treaty of European Union, constitute the treaties on which the Union is founded. Those two Treaties, that have the same legal value, shall be assigned in its text with the expression "the Treaties". Artícle 20 of the Treaty of European Union (consolidated version) replaces articles 27A to 27E, 40 to 40B and 43 to 45 TEU and the old 11 and 11A TEC.

1. Enhanced Cooperation is a mechanism applicable in the area of the non-exclusive competences of the Union, that is, capable of being sought provided it concerns defined matters, like shared competences of Member States and the Union, as defined in article 4 of the Treaty on the Functioning of the European Union (consolidated version).

2. In order to initiate the procedure, the application must be presented by a minimum of nine Member States, that is, a greater number of States than under the preceding system.

3. In the application, it must be justified that by means of the Enhanced Cooperation sought:

   a) The objectives of the Union are being promoted.

   b) The general Community interests are being promoted.

   c) The process of integration is reinforced.

   d) That the European Council has concluded, prior to its adoption, that this mechanism is absolutely necessary in order to achieve an objective that it has not been able to secure through ordinary means. In other words, that it is a "last resort" given that the objective pursued cannot be achieved within a reasonable period by the Union as a whole[59].

We consider that the amendments contemplated in the Treaty of Lisbon[60] are thus substantial and strengthen the nature, content, objectives and possible use of this concept and procedure.

In effect, the extension of the application of Enhanced Cooperation to matters residing within the shared competences of the States and the Union makes it possible to extend that arrangement to areas that were previously vetoed from its application. Such may be the case of certain measures pertaining to the internal market in determined cases or its necessary connection with certain policies. The subject represents a theme central to the development of freedom of movement and the block of regulatory development extraordinarily relevant from the perspective of secondary or subsidiary law, particularly, for the purposes of our analysis, the public economic scope.

In the case of the Community regulations and the construction of its legal system regarding energy, this fact is not at all banal.

On the other hand, the need to justify in the application the above-mentioned requirements, especially the idea of materially reinforcing the process of integration, is an essential aspect[61].

Articles 326 to 334 of the Treaty on the Functioning of the European Union establish certain criteria and lay down the mechanism of application of Enhanced Cooperation. Thus it is established that Enhanced Cooperation shall not prejudice the internal market, shall not impede exchanges between Member States or produce any type of discrimination.

Articles 329 to 333 on the Treaty on the Functioning of the European Union establish the procedure that the interested Member States must follow before the Community institutions for such purposes.

On establishing the scope of application of Enhanced Cooperation in the Treaty of Lisbon, it is necessary to analyse various articles of the new text and compare their content with the replaced articles in order to establish the scope of the said amendments.

First, the Treaty of Lisbon, at article 1, sets out the amendments **to the Treaty of the European Union, in which number 22 incorporates the following text:**

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59 This idea was clearly already present at the start of the construction process of the concept in the Treaty of Amsterdam, in the sense that as that instrument concerns at least the majority of the Member States, it does not affect the competences, rights, obligations and interests of the States that do not participate in it and may be opened permanently to the participation of all the Member States so long as they comply with the base decision and those taken within the specific framework of cooperation.

60 Treaty of Lisbon, 13th December 2007.

61 In accordance with Título I *Article 2* of the Treaty on the Functioning of the European Union called "CATEGORIES AND AREAS OF UNION COMPETENCE", *"when the treaties confer on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts."*
The same article provides that *"when the Treaties confer on the Union a competence shared with the States…, the Member States may legislate and adopt legally binding acts in that area."* However the article specifies that *"The Member States shall exercise their competence to the extent that the Union has not exercised its competence"* in a clear reference to the principle of subsidiarity.

"ENHANCED COOPERATION

«Article 10

1. Member States that wish 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, subject to the limits and in accordance with the detailed arrangements laid down in this Article and in Articles 280 A to 280 I of the Treaty on the Functioning of the European Union."

This article leads to two conclusions in respect of the delimitation of the scope of application of Enhanced Cooperation. First, the said article expressly replaces articles 27 A to 27 E, 40 to 40 B and 43 to 45, as well as articles 11 and 11 A of the Treaty establishing the European Community, included by the Treaty of Nice, with the implications that the said amendment engenders and which are specified below. Second, the article, in somewhat unfortunate wording in our opinion, fixes a rather ambiguous scope of application as article 10 establishes that "*Member States which wish 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…"*

From the above text it is possible to conclude, under systematic interpretation criteria, that Enhanced Cooperation may not take place in competences exclusive to the Union, which would lead us to conclude that they are applicable to those matters contained in the Treaty itself as *"shared competences"*.

By that understanding, in the shared competences, as the name itself indicates, both the States and the Union enjoy powers to legislate to the extent that the Union has not exercised its own or when the Union has decided not to exercise its own.

Being clear on the above point, article 2C of the consolidated version of the Treaty on the Functioning of the Union provides, in express and precise fashion, what are the shared competences of the Union and the Member States, as follows:

"Shared competences of the Union and the Member States shall apply in the following principal areas:

a) internal market;
b) social policy, for the aspects defined in this Treaty;
c) economic, social and territorial cohesion;
d) agriculture and fisheries, excluding the conservation of marine biological resources;

e) environment;
f) consumer protection;
g) transport;

h) trans-European networks;

i) energy;
j) area of freedom, security and justice;
k) common safety concerns in public health matters, for the aspects defined in this Treaty."

Within the shared competences of the Union and the Member States we find the internal market, the environment, trans-European networks and energy, all those aspects being directly connected with the energy policy set out in the new article of the Treaty of Lisbon on energy.

In relation to the specific scope of the internal market, it must be pointed out additionally that articles 27 A to 27 E, 40 to 40 B and 43 to 45 TEU and 11 and 11 A TEC were substituted by the Treaty of Lisbon. The new Article 326 of the Treaty on the Functioning of the European Union indicates:

"The Enhanced Cooperation will respect the Treaties and the Laws of the Union. ***Enhanced Cooperation will not undermine the internal market or economic, social and territorial cohesion.*** *It shall not constitute a barrier or discrimination in trade between Member States, nor shall it distort competition between them."*

This article, especially the underlined part, brings up a possible conflict in the interpretation of internal market. If until this point of the analysis we had reached the conclusion that the internal market formed part of the scope of application of Enhanced Cooperation, as this was the first of the shared competences set out in the above transcribed Article 2 A, how should we understand the provision set out in Article 326 of the Consolidated

Version of the Treaty on the Functioning of the European Union – Treaty of Lisbon when it indicates that such Cooperation shall not undermine the internal market?

In this respect we would apply an exegetic approach to the term *undermine*, which should be construed according to its exact meaning as *"to cause material or moral detriment"*. From this meaning it is not possible to deduce that Article 326 is expressly prohibiting the application of Enhanced Cooperation in the internal market, but that it is taking precautions against the use of that concept in circumstances that might have a direct and negative effect on the internal market.

Another possible way to interpret it could be to refer to the wording of the previous articles on Enhanced Cooperation included in the Treaty of Nice and that were expressly substituted by the articles of the current Treaty of Lisbon.

We should recall that section 2 of Article 14 provided that *"The internal market shall imply a space without interior frontiers in which the free circulation of goods, persons, services and capital shall be guaranteed under the provisions of the present Treaty."*

As such, the panorama for the application of Enhanced Cooperation in any case changes the scope of the Treaty of Nice to that of the Treaty of Lisbon. The latter establishes the internal market as one of the issues to which it would be possible to apply Enhanced Cooperation providing that by doing so it is not undermined in the terms explained above, and all of this without prejudice to respecting the legal acquis of the community of which part of the regulations registered in the internal energy market form part.

2.1. Enhanced Cooperation and the Internal Energy Market

The Single European Act, as an original piece of Community legislation destined to guarantee the transition from a common market to an internal market, by affirming the disappearance of all internal frontiers and the unleashing of a vast process that would facilitate the convergence and approximation of regulations in numerous economic sectors on its way to opening up competitiveness, did not include the energy sector.

Thus, the energy issue was not contemplated "nominally" or "expressly" neither in the Single European Act itself, or in the Delors White Paper that set out the principles and bases for the development of the programme for liberalisation, although it was not a long wait until the community legislator became aware of the significance in form and expression of this gap and the simultaneous significance of the energy sector for the "effective creation of the internal market". With this intention of integrating energy into the "concept of the single internal market", the Communication of 1988[62] was approved, the objective of which was to identify the physical, legal and technical obstacles that had to be overcome in order to create the internal energy market and proceed with the designing of a set of coordinating community laws that, through the Directives, would bring the legislation of Member States closer together, with the purpose of constructing a market that is open to competitiveness in the electricity sector and in the field of natural gas. This path also responded to a progressive and to a certain extent, "varying" effort on the application of the national regulations for development, although "de iure", all the States had to meet the objective for results set out in the liberalising directives of the energy sector.

The first directives were adopted during the nineties[63], and the second, in the middle of the present decade.

— ***Internal market and liberalisation of competition***

The aims pursued with the creation of the electricity and gas markets are clearly identified in the first Recital of the new directives approved in 2009[64].

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62 Internal market and industrial cooperation – Statute for the European Company – Internal Market White Paper, point 137 (memorandum from the Commission to Parliament, to the Council and to Management and Labour) COM(88) 320, June 1988.

63 Directive 96/92/EC, OJEC L-27, of 30th January 1997, on the internal market of the electricity sector, and Directive 98/30/EC, OJEC L-204, of 21st July 1998, on liberalisation of the gas market.

64 Directive 2009/72/EC of the European Parliament and of the Council, of 13th July 2009, concerning common rules for the internal electricity market and repealing Directive 2003/54/EC; and Directive 2009/73/EC of the European Parliament and of the Council, of 13th July 2009, concerning common rules for the internal natural gas market and repealing Directive 2003/55/EC. OJEU L-211, of 14th August 2009.

In effect, *"the improvement of efficiency, competitive prices, increased quality of service, greater competitiveness and a contribution to the security of supply and sustainability"*, are the objectives that are hoped to be reached by the effective achievement of the internal energy market, together with the paradigm associated with the liberalisation process in offering *"a real possibility of choice for all consumers within the European Union, to create new trade opportunities and to promote cross-border trade"*.

Directive 2003/54/EC identifies in particular three central spheres for ensuring the "creation of a market that is fully operative and competitive", which are "access to the network, price-setting and the various degrees of opening the markets between the Member States", and the real degree of application and compliance with competitive budgets[65]. Adding that *"for competition to function, network access must be non-discriminatory, transparent and fairly priced"*, and that *"in order to complete the internal electricity market, non-discriminatory access to the network of the transmission or the distribution systemoperator is of paramount importance"*.

The new Directive admits that *"the internal electricity* [and natural gas] *market has gradually been implemented throughout the whole Community"*, although there continue to be *"obstacles to the sale of electricity in conditions of equality"*, delimiting the evaluation criteria to two specific aspects: a) access to the network, indicating emphatically that *"there is still no non-discriminatory access"*; and b) in supervisory regulations, in respect of which the Directive underlines that there is no *"effectively equal level"* in each Member State.

Article 1 of the legal text specifies the purpose of the community legislator in "establishing common rules" in this economic sector, *"with the aim of improving and integrating competitive markets in electricity within the Community"*. With this objective, the rules are defined relating to the organisation and functioning of the electricity sector, access to the market, the obligations of universal service and the operation of networks, amongst other main issues.

In their very nature, the Directives are rules that pursue the coordination or approximation of legislation, but in this specific case, this legal nature is emphasised by endorsing the Community Directives as "common rules", which means we can say that the basic material content of the rule referred to above must be projected uniformly in each of the legal codes of the Member States. This would require an equal, or at least equivalent, rate in the process of incorporating or inclusion of the European law into national legislation. The "graduality" of the transition process to the competence or liberalisation of the electricity sector must be matched with a similar rhythm in the Member States, without prejudice, to accommodating the conditions established in the last enlargement of the EC, in accordance with the previsions of the corresponding treaties for the membership of the last states associated with the European process. However, experience demonstrates that this legislative proposal has not been properly dealt with in the reality of the current conformation of the electricity and gas markets, given that there are still imbalances, asymmetry and insufficiencies in important aspects such as access and regulatory supervision.

This situation implies an unquestionable prejudice to the desired liberalization process, as it partially fails to meet the objectives pursued by the previous Directives, and thus slows down or unbalances the necessary competitive integration of markets. For this we would have to ask ourselves if it would be possible to activate other legal instruments that would enable some countries to advance at a faster pace in order to achieve the purposes of the integration of the energy field.

For which reason, if the electricity energy market had developed uniformly and competitively over the past fifteen years, it would be unnecessary or irrelevant to put forward integrationist reforms in favour of competition based on principles and formulas of differentiation. At the same time, as is evident, the coordination of legislation admits varying degrees providing that the result foreseen in the rule is achieved and its objectives and basic content are respected. And within that basic content are some of the above indicated headings, which both the Community authorities and the very Rulings and Resolutions issued by the national regulators have stressed in their stage reports, in accordance with their legislation and internal interpretation. In particular, I feel that in the formation of organised markets, the strengthening of networks, the regulation of the new "energy solidarity" foreseen in Lisbon and intended for guaranteeing the security of energy supplies coming from outside of the Union, and in the measures promoting clean energy options as a point of interconnection

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65 See, amongst other, Communications, Declarations and Rulings of Jurisprudence: COM(2006) 851, Communication from the Commission "Sectorial Inquiry pursuant to Article 17 of the Regulation 1/2003 relating to the application of the rules on competition as laid down in Articles 81 and 82 of the Treaty".

between the new energy policy and environmental policy, there could be spaces conditioned, from the aspect of rules and regulations, for advancing differentiated mechanisms of integration in the energy sector.

It is true, on the other hand, as we pointed out earlier, that the technique of differentiated integration that enables the figure of Enhanced Cooperation does not contemplate within its scope of application the rules that are found on the perimeter of the body of community law, although it is also expressed that Enhanced Cooperation should not be regulated "against the objectives of the internal market".

On the other hand, while the principal element on which the reform of Directive 2009/72/EC is structure on the methods offered to the Member States[66] for opting for a model of the separation of accounts for electricity or gas activities or another less specific with regard to the intensity and scope of the separation of activities, but that, in any case, must guarantee the independent arrangements for transport, thus confirming a kind of differentiated integration within the "legislative approximation" established by the Directive, by making it possible for one group of States to organise a fundamental chapter of their market and electricity and gas structure in one way, and others to do so in a different way, we cannot, strictly speaking, talk here of assumptions that fit within the legal perimeter of Enhanced Cooperation.

However, other points in the reform of the electricity and gas sectors point at methods of international and inter-state cooperation within the internal energy market.

From the perspective of international cooperation, emphasis is put on the aspect of the security of supply.

Thus the Recital no. 25 of the Directive, after acknowledging *"the security of the energy supply constitutes an essential component of public security"*, states that *"additional safeguards are necessary regarding the preservation of the security of supply of energy to the Community to avoid any threats to public order and public security in the Community and the welfare of the citizens of the Union"*.

And therefore an assessment is required of the independence of operation of the infrastructures for electricity and gas, as well as the energy dependence of both the Community as a whole and of each of its Member States with regard to the energy supply from third countries and, together with this, to assess and consider *"the treatment of both domestic and foreign trade and investment in energy in a particular third country"*. In the light of this, the Directive indicates that, in certain circumstances, the Commission should submit recommendations to negotiate relevant agreements with third countries *"addressing the security of supply of energy to the Community or to include the necessary issues in other negotiations with those third countries"*.

It must not be forgotten that on several occasions, the Commission, Parliament and the Council have formulated and attempted to develop an energy policy that makes it possible to ensure the supply of those assets within the European scope. The strategy of security of supply oriented to provide an effective solution to the problem or at least to achieving a limitation of this risk, is still being developed and requires the necessary Community consensus.

On the other hand, while it is true that supply has to be guaranteed in the Union as a whole, due to the dependency on energy from the outside, this fact is neither uniform or homogenous because in some cases, dependency will exist and in others there will even be vulnerability in the supplies coming from countries outside of the Union.

Limiting ourselves to the issue of security of supply, this could be defined as "*the guarantee of the continuous, physical availability of energy products on the market at a price that is affordable for consumers*".[67]

The Green Book on security of energy supply from 2000[68], already reflected a paradoxical situation, since although in the European Union we found an interior market which was developing, but in legal and commercial terms it was the world's largest, this was not accompanied by a coordination of the necessary measures to ensure the security of external supplies, whether for oil or natural gas, and even to accurately determine the

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66 See, amongst other aspects, the Recitals 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 21, 23, 24, 26 and 29 of Directive 2009/72/EC, of the European Parliament and of the Council, of 13th July 2009.

67 Commission Green Paper. *"Towards a European strategy for the security of energy supply."* COM (2000) 769 final, and more recently, 8.3.2006, Green Paper *"A European Strategy for Sustainable, Competitive and Secure Energy"*.

68 29.11.2000 Green Book of the Commission "Towards a European strategy for security of energy supply". COM (2000) 769 final- not published in the Official Journal.

strategy for securing and maintaining inventories of oil, and it is also revealed in the field of trans-European networks by the inadequacy of traffic capacity in many areas of the interior perimeter of the Union.

The aforementioned Green Book on energy policy from 2000 highlighted the structural weaknesses of the external energy supply of the European Union and its geopolitical, economic and social vulnerabilities. The energy on which the European economy is based comes mainly from fossil fuels, which account for 4/5 of its total consumption, with 2/3 of them being imported. This vulnerability will become more pronounced in the future, with energy imports that could rise up to 70% of global needs 30 years from now, or even up to 90% in the case of oil, unless appropriate measures are taken to curb, alleviate or redirect this trend[69].

As evidenced, the European Commission reveals its awareness of the disparities that exist between government policies of the Member States in this regard, and underlines the difficulties that this situation can generate both for the construction of a common inner energy market, and for the safeguarding of security of supply[70].

For all these reasons, the security of energy supply is expressed as one of the main issues of energy in Europe. Without autochthonous resources or the possibility of importing the energy products needed to meet demand requirements within the Union, we shall find a serious problem of internal dependence.

Therefore, as we have seen, legislators have been concerned in recent years, according to the analysis of the subject, with adopting certain rules limiting the risks in the medium and long term in this area. A sufficiently revealing, practical example of this situation is expressed by the crises in gas supply contracts between Russia and some European Union countries, either through transit fees by neighbouring countries to suppliers or in the Russian Federation itself, as in Ukraine, Georgia and Belarus. In these cases, Europe has normally acted by addressing the specific concerns of certain Member States, without having its own legal policy in this area, or arbitrating sufficient energy coordination measures, except in certainly exceptional situations, given the seriousness of the conflict and its duration. Therefore, it could be thought that this area is not only sensitive to the Union as a whole, but capable of triggering the mechanism of Enhanced Cooperation, by a group of countries, especially those adjacent territorially which are sufficiently integrated from the perspective of their networks or their strategic and commercial energy interests, and always from the perspective of promoting or safeguarding the community objectives of integration, in order to facilitate the functioning of markets and sectors in the face of risks to their safety, when they took notice that the actions of the European institutions in this area were insufficient to meet their most vital or urgent energy needs. For example, in cases of supply crises like the aforementioned, severe disruptions of supply which require the activation of mechanisms of "energy solidarity", or lack of security of supply in the medium to long term.

Of course, the difficulty of developing this subject was evident in the context prior to the signing of the Treaty of Lisbon, in the absence of a common energy policy in the European Union. And although it is true that within the system of community sources, issues relating to the treatment of security of supply have, in the last few years, earned the attention of legislators through their development into norms of secondary

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69 This issue has been addressed in the regulatory area of secondary legislation among other provisions through Directive 2004/67/EC of the Council, concerning measures to safeguard security of natural gas supply. In the Recitals of the Directive it is stressed that "*the Community gas market is being liberalized. Therefore, in regard to security of supply, any difficulty having the effect of reducing gas supply could cause serious disturbances in the economic activity of the Community; ... In view of the growth of the gas market in the Community, it is important to preserve the security of gas supply, especially for household customers*". The legal basis for the Directive is Article 100 of the Constituent Treaty of the European Union.
The Commission subsequently promulgated Directive 2005/89/EC of the European Parliament and Council, concerning measures to safeguard security of electricity supply and infrastructure investment (text with EEE relevance), where it is provided that "*ensuring a high degree of security of electricity supply is a key objective for the proper functioning of the interior market (...) A competitive single market for electricity in the European Union (EU) requires policies on security of electricity supply which are transparent, non-discriminatory as well as compatible with the requirements of this market. The absence of such policies in various member States or the existence of significant differences between their policies would lead to distortions of competition*". The legal basis of this Directive is Article 95 of the Constituent Treaty of the European Union.

70 Following this same trend, Directive 2006/67/EC was published in 2006 by the Council, which required Member States to maintain minimum stocks of crude oil and/or petroleum products. Regarding cooperation between Member States in this respect, the Directive states that "*in principle, oil reserves can be established anywhere in the Community, so it is appropriate to facilitate the establishment of stocks outside national territory. In the case of stocks held at the disposal of another company or another organization/entity, more detailed rules are required in order to ensure availability and accessibility in the event of oil supply difficulties. (...) Since the objective of the proposed action, namely, maintaining a high level of security of oil supply in the Community through reliable and transparent mechanisms based on solidarity between Member States, meeting at the same time, internal market and competition rules, can be better achieved at a Community level, the Community may adopt measures, in accordance with the principle of subsidiarity contained in Article 5 of the Treaty*". The legal basis for the Directive is Article 100 of the Constituent Treaty of the European Union.

legislation, sufficient progress was not possible in others due to the absence of formal legal remedies. With the adoption of the Treaty of Lisbon, which recognizes the security of supply, the guarantee of provisions and the strengthening of networks as main objectives and core content material of the new energy policy, this area was thus formally summoned and empowered to, satisfying the requirements of the procedure, be activated as Enhanced Cooperation. The call in the body of the enabling article itself of a European energy policy to energy "solidarity", specifically designed to seek mechanisms which ensure security of supply or to avoid putting them at risk, reinforces, in our view, this interpretation.

The legal basis for carrying out a request for Enhanced Cooperation in this matter should be supported, in our judgement, by Articles 4.1 a), c) and f) as well as Article 194.1 b) of the Treaty of Lisbon (Treaty on the Functioning of the Union).

In any case we see how forecasts provided in a key norm for the construction of the internal energy market, such as Directive 2009 of the electricity sector, converge with the need to articulate core contents of a common energy policy, in its external dimension, such as the safety record of supply. We noted earlier that the Directive required the Commission to submit recommendations to negotiate this issue with third countries. One might wonder: what if only one group of States accepted the recommendations of the Commission under the legal umbrella of an interior market rules? Would it be possible to readdress the same legal approach, under the instrument of Enhanced Cooperation, in the context of the title of energy policy? We understand that, in principle, not many doubts should arise to house a positive answer to this question.

Another area where the imperatives of cooperation clearly emerge is that of the establishment and proper functioning of regional markets as a necessary intermediate step, due to the successful integration of networks and their regulation, of the internal energy market. The 2009 Directives mark this problem by linking the objectives of the market, the regulation of infrastructure, and the missions assigned to the regulatory authorities, "*they must be one of the main tasks of regulatory authorities, in close cooperation with the Agency when appropriate*". Again the question arises when considering whether the way to the interior market does not allow the mobilizing of a sufficient degree of agreement or consensus between countries to enforce both the necessary – and balanced – development of regional markets, and its drive and supervision by national regulatory Authorities and the European Agency for Energy Cooperation. It would be interesting to once again expose the extent to which we would not find the legitimacy necessary to promote the same process in another way, such as that of the development of one of the objectives of European energy policy, namely the realization of the internal market, understanding that the momentum, at least by a certain number of community States, of regional markets is, in some cases, a positive and essential step to ensure real energy integration and, thus, the effective European energy space.

Indeed, in the last decade, certain energy regional geographical areas have taken shape within the European Union, understanding the word spaces in this case as both transnational areas comprising two or more countries or as intermediate markets between national markets and the internal energy market and, in principle, complementary to the objectives of the latter.

In this regard, on November 14th, 2001 the "*Protocol of cooperation between the Spanish and Portuguese Authorities for the creation of the Iberian electricity market"* was signed. Its second article established that the "*Iberian Market will ensure all agents established in both countries access to the Iberian Market Operator and interconnections with third countries, in terms of equality, freedom and bilateral contracting*".

The international Agreement on the establishment of an Iberian power market between Spain and Portugal was published by the Ministry of Foreign Affairs and Cooperation on May 22nd, 2006 in the Official State Bulletin in its issue 121. The preamble states that the creation of the Iberian Market is one more step in the creation of the internal energy market as follows:

> "*Convinced that the creation of an Iberian Electricity Market will be a milestone in the construction of the Interior Energy Market in the European Union and that it will accelerate the practical application of the provisions contained in the Directive*"

Another good example is the creation of so-called Nord Pool (Nordic Power Exchange) –common electricity market between Norway, Denmark, Sweden and Finland–, established in 1996 initially by Norway and Sweden with the aim of providing a space for electricity trade in the Nordic area as well as financial clearing

services. In 1998 it was joined by Denmark and Finland, and is currently a common space for exchange of electricity between the listed countries, which also supports the negotiation of emission certificates. The aim of concluding the Agreement that led to this market was to provide the above mentioned countries with the possibility of being assisted in the event of a demand for additional electricity above their own capacity, optimizing the use of electrical resources available, reducing local deficits, and maximizing costs[71], among other topics. A regional electricity Market has also been constituted in Northern Ireland.

From the regulatory perspective, in the late nineties the works of cooperation between independent national Authorities with powers of regulation and supervision of energy markets also began to take institutional shape. Thus, ERGEG (European Regulator Group of Electricity and Gas) was constituted, which subsequently raised a progressive path towards integration of regional markets, promoting the establishment of seven regional electric markets and three regional gas markets. Each will have a regulator leader who will be responsible for its organization and development.

In the electrical sector, priorities were identified in areas such as the regulation of traffic congestion, interconnection of networks, or optimizing the capacity of the existing interconnections. In relation to gas markets priority issues included interoperability and interconnections.

On the other hand, Directives 2003/54/EC and 2003/55/EC require Member States to designate one or more agencies, in order to develop regulatory powers as Authorities independent from operators and, it could also be interpreted, from political forces and the Government. This continues the scheme and deepens into the forecasts made in this area by the first package of liberalization of gas and electricity. These agencies will be responsible in particular for the application of the rules of the new regulatory framework after its incorporation into national Law, especially monitoring of the market[72].

The European Commission, in order to confer upon the regulatory cooperation and coordination with national Authorities an increased institutional status which facilitates the realization of the internal energy market, issued its Decision of November 11th, 2003 by means of which the European Regulator Group of Electricity and Gas (ERGEG) was established as its advisory body.

ERGEG encouraged, as was indicated before, the electricity and gas regional initiative in the spring of 2006, creating seven electric and three gas regions in Europe. In its Report of March 2007, ERGEG proceeds to verify the progress made on the initiative noting that it is necessary to consolidate regional markets, and in support of this initiative proposes the creation of ERI and GRI (Electricity Regional Initiative and Gas Regional Initiative). The creation of these markets must be coordinated according to the body, as a step towards the effective implementation of the common market.

The European Parliament in its Resolution on the perspectives for the internal gas and electricity market, July 10th, 2007, called for strengthening cooperation between national regulators at EU level, through an EU agency. The Commission welcomed this approach and concluded that it was necessary to establish an independent body which could make proposals to the Institutions and, in particular, the Commission, in relation to substantive decisions, and adopt regulatory measures on specific cases which were binding for third parties on detailed technical issues which were delegated on them.

Through the Third Package of Proposals of Energy Directives, the Commission raised the proposal of creating a Regulatory Agency to coordinate at the European level some basic aspects of the tasks which they develop nationally. Specifically, the proposal attributes powers to the Agency in four areas:

a) Creating a framework for cooperation among national regulators.
b) Monitoring the regulation on cooperation between transport networks operators.
c) Resolving and arbitrating in cross-border problems or specific technical files.
d) General advisory function.

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71 The energy laws of each of these countries and those of the securities markets (Exchange Acts and Securities Trading Acts) allowed the consolidation of that market, controlled by the Norwegian Financial Supervisory Authority under the Exchange Act and Regulation 18/1997.

72 In the year 2000 the European regulatory authorities existing at the time (United Kingdom, Ireland, Sweden, Finland, Holland, Belgium, Italy, Spain, Portugal and Norway) decided to create the Council of European Energy Regulators (CEER).

2.2. Enhanced Cooperation: Energy Policy and the Environment

One of the objectives of the enrgy Policy is the compatibility of its measures on the defence or protection of the environment, asserted among other legal goods, in the contents of the recognition of "sustainable development" as "value" and "principle" of the Union, to which other objectives, policies and actions must be subordinated.

It should be recalled that the Kyoto Protocol was signed by the European Union in April 1998 and approved by Council Decision 2002/358/EC of April 25th, 2002[73] *relative to the approval, on behalf of the European Community, of the Kyoto Protocol of the United Nations Framework Convention on Climate Change and the joint fulfilment of commitments made therein.*

With its signature and approval, the European Union committed to reducing its aggregate anthropogenic emissions of greenhouse effect gases by 8% with respect to 1990 levels, a reduction that would occur over a period of 4 years: 2008-2012. Thus, the entire European Union, emitting source of 24.4% of greenhouse gases in the planet established a sharing of internal burdens[74] which distinguished between those countries whose emissions, calculated in tonnes of CO2 per capita, were above European Union average, and those which met the environmental requirements.

The establishment of the Sixth Community Action Program on the Environment[75] defines Climate Change as a priority, and provides for the establishment of a system for the trading of greenhouse gas emissions covering the period from July 22nd, 2001 to July 21st, 2012.

Directive 2003/87/EC[76] establishes a system of tradable quotas. The system allocates "quotas" of greenhouse gas emissions to companies that will "contaminate" having as a maximum limit the level of rights granted. If they had surplus quota, that is, if their gas emissions did not reach the maximum level allotted, then the "clean" company could pass over the excess to another company. The right of emission is designed as a subjective right of financial content[77]. The National Allocation Plans[78] will determine the number of subjective rights to be issued in each time period.

Therefore, here we identify another issue of great importance for the development of the European energy sector in its relation to environmental protection. While the legal basis of this legislation block is part of the development of environmental policy, its specific implementation initiatives reach the energy sector and in particular the electricity sector. The emission trading mechanism is a normative reality in many Member States, to the point that some have internalized it as a cost in the economic transactions of their wholesale electricity markets[79].

Another good example in this regard is presented by Joanne Scott[80] in relation to so-called "*Directives for integrated environmental authorization*". These Directives[81] submit certain industrial and agricultural activities which have a high pollution potential to environmental authorization. Under these conditions, such approval

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73 Council Decision 2002/358/EC of April 25th, 2002 on the approval, on behalf of the European Community of the Kyoto Protocol of the United Nations Framework Convention on Climate Change and the joint fulfilment of commitments made therein. Official Journal L 130, 15/05/2002 p. 0001 to 0003.

74 Council of Environment Ministers of the EU, held in Luxembourg in June 1998.

75 Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions on the Sixth Environmental Action Program of the European Community 'Environment 2010: the future is in our hands' - VI Environmental Action Program COM/2001/0031 final.

76 Directive 2003/87/EC of the European Parliament and Council, of October 13th, 2003 establishing a scheme for the trading of greenhouse gas emissions within the Community and amending Council Directive 96/61/EC.

77 Directive 2003/87/EC: in art. 20, 1º says: "*The right of emission is designed as a subjective right to emit one equivalent tonne of carbon dioxide from a plant included in the scope of this Royal Decree-Law*".

78 National Allocation Plan for Emission Rights 2008-2012. Proposal of July 12th, 2006.

79 The Communication from the Commission to the European Council and Parliament on prospects for the internal gas and electricity market, COM(2006) 841 final, clearly points out that "*price increases are due to very diverse causes, including elevated costs of primary fuel, the current need for investment and the expansion of environmental obligations, including the Community framework for emissions trading*". Similarly, the Commission Communication of December 7th, 2005, COM/2005/0627 final.

80 SCOTT Joanne. "Flexibility 'proceduralization' and Environmental Governance" in the book Constitutional Change in the EU. Pg 259 to 280. Hart Publishing.

81 Directive 2008/1/EC of the European Parliament and Council of January 15th, 2008 concerning integrated pollution prevention and control. This rule amended Directive 96/61/EC of September 24th, 1996 on integrated pollution prevention and control *DO L 257 of 10.10.199.* The legal basis of the Directive is paragraph 1 of Article 175 of the Constituent Treaty of the European Union.

may be granted only upon meeting certain environmental requirements. These measures are intended to make business assume, in that context, efforts to prevent and reduce pollution for themselves[82].

To be able to receive a permit, industrial or agricultural facilities must meet certain requirements regarding the implementation of appropriate measures for controlling and preventing pollution in some areas such as waste; efficient use of energy; prevention of environmental accidents –according to environmental principles contained in the European Treaty since the Single Act– and the limitation of their consequences; the adoption of measures so that, upon cessation of activities at the site in question, it is returned to a satisfactory state, i.e. the realization of the principle of "compensation for environmental damage at the source" (art. 174 of the ECT).

The emission limit or its equivalent established under the Directives mentioned is based on the principle of Best Available Techniques (BAT) without prescribing the use of any specific technique or technology, but taking into account their characteristics, geographical location and the environmental conditions of the location where the facility is established. According to Joanne Scott, this principle of best practices leaves a wide scope for Member States to discretionally determine how best to implement the Directive.

The concept of best practices allows substantial flexibility regarding the interpretation of its essential terms and content, which directly affects the implementation -also flexible- of the norms contained in the Directives. Therefore it could also be estimated to what extent –as in the trading of emissions- this field could be susceptible to incardination of the mechanism of Enhanced Cooperation, not in isolation, but in a new climate-energy legislative framework in which certain measures would be adopted by the EU, complementary and grouped by the Community objective of ensuring greater environmental protection from the industrial level, while at the same time promoting tools that combine market freedom, operating flexibility and environmental compatibility.

In this sense one can refer to promotion of energy efficiency and renewable and clean energy sources. This is an energy chapter which, as was stressed before, is one of the central pillars of EU energy policy following the Treaty of Lisbon.

The European Council of March 2007, in its Action Plan on energy, urged the establishment of a global coherent framework for renewable energy, on the basis of a proposal from the Commission in 2007 relative to a new comprehensive Directive on the use of renewable energy sources.

This Council proposal is summarized in the following conclusions:

- The determination of the overall national objectives of Member States in this subject matter.
- The design and approval of national action plans containing sectorial targets and the necessary measures to meet them; and
- The criteria and provisions established to ensure sustainable production and use of bio energy and to avoid conflicts between different uses of biomass (...)

In accordance with the above, in December 2008 the Commission approved the Directive on Renewable Energy on December 17th, 2008[83], under which it seeks the promotion of alternative energy sources to help reduce climate change effects, and from this perspective, also aims to reduce the accused energy dependence which the European Union suffers[84].

The new directive defines the goal that 20% of European electricity should be produced from renewable sources by 2020. Furthermore, Community legislation requires Member States to complete the previous target reducing emissions of carbon dioxide (CO2) by 20%; and increasing energy efficiency by 20%. In addition this

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82 Integrated pollution prevention and control are related to industrial and agricultural activities as defined in Annex I of Directive 2008/1/EC (industries of energy activities, production and processing of metals, mineral industry, chemical industry, waste management, farming, etc.).

83 Directive 2009/28/CE of the European Parliament and Council of April 23rd, 2009 on the promotion of the use of energy from renewable sources which amends and repeals Directives 2001/77/EC and 2003/30/EC (DOUE L-140, 5.6.2009). The legal basis of this Directive is the first paragraph of Article 175 of the Constituent Treaty of the European Union.

84 Previously, among numerous other provisions, the European Commission adopted the Communication "Energy for the future: renewable energy sources". This Communication was an expression of a White Book on the Community strategy and action plan. This text proposed a significant increase of the quota of renewable energy in gross inland energy consumption in the EU, marking the indicative target of 12%. In this same direction, Directive 2001/77/EC of September 27th, 2001 on the promotion of electricity produced from renewable energy sources on the electricity consumption of the European Union in 2010, setting a target of 22.1% at Community level.

Directive also sets action plans for a range of technologies, including bio energy (bio fuels and biomass) and solar energy, thermal and photovoltaic; mini-hydraulic, oceanic and wind energies. And it expresses the need to support the R&D actions of in this field[85].

The new Directive states that in June 2010 each Member State should have a new National Allocation Plan (NAP) which details the methodologies to be followed in this field. The European Commission will evaluate these plans as well as the biannual progress reports that States should develop.

A key aspect of the Directive which provides flexibility and differentiation pathways in its implementation among Member States would be to determine precisely what should be the criterion for distribution of the 20% commitment assumed by the standard among Member States, stressing that "*different methods are currently evaluated, including modelling of the resource potential of each Member State, applying a flat-rate increase for all Member States, and modulating results in terms of GDP, in the interest of equity and cohesion. The conclusion is that an approach based on a uniform rate, modulated by GDP is the most appropriate, as it implies an common increase, which is fair and simple for all Member States. The result, being weighted by GDP, reflects the richness of the various Member States, and being modulated to take into account the rapid progress in the development of renewable energy, recognizes the role of «pioneers» as leaders in terms of development of renewable energy in Europe and also reflects an overall cap on the quota of renewable energies to be reached in 2020 by each Member State*".

For all these reasons, this chapter also contains the possibility of contemplating a mechanism for voluntary cooperation among States to advance in the promotion of renewable energy development, taking into account the previous performance parameters defined in Community legislation, the objectives defined for 2020 and the admitted flexible possibilities for achieving them. Naturally, this raises quite a few legal uncertainties and practical difficulties such as how best to measure, in all areas, the environmental effort of each country, within a framework of coordination between various Member States, but it might be possible to regulate it, from a Community perspective.

2.3. Enhanced Cooperation in the Nuclear Field, and International Cooperation

In our original considerations we highlighted that the EURATOM Treaty is part of the foundations of the European Community. However, it is true that there is not a single assessment, shared by all Member States on the extent of the use of this type of energy technology in Europe, or of its level of policy and economic formulation or social acceptance.

Despite this, in recent years a number of industrialized countries are taking measures conducive to extending the service or design life of nuclear plants or to the preparation and proposal of a new program to build nuclear power plants. A recent Agreement signed between different States of the Union on this matter and sufficiently representative, is that adopted between France and Italy. One country with a clear implementation of this energy generation technology and another in a state of moratorium during recent decades.

Indeed, on February 24th, 2009 the Italian Republic and the French Republic concluded an Agreement on cooperation in the energy field, mainly for the development of various aspects, from research and development, and security of facilities, to the eventual contribution to the operational development of nuclear technology.

Both nations recognize that electricity produced by nuclear plants is a non-polluting source since it does not generate greenhouse gases, reduces dependence upon imported fossil fuels, and ensures electricity production at a competitive price and stable in the long term.

Additionally, the Agreement states the advantage of sharing reciprocal experiences especially from those government and private agencies from both nations responsible for the operation and control of nuclear power generation facilities.

This text states the desire to strengthen energy relations in the field of nuclear energy between the two countries in the institutional, industrial and commercial aspects, promoting the development of a real and

[85] For example, in the case of geothermal energy, they recommend studies to improve drilling technologies and systems which operate at a lower temperature, while in photovoltaic energy they suggest focusing on reducing costs of solar cells and increasing their efficiency and useful life.

effective opening for the development of industrial cooperation and trade and with respect for Community rules and national legislation of each order.

Thus, the parties agree to make a mutual and reciprocal opening of their energy markets within the European Union, with the aim of improving conditions of climate change and increasing the energy efficiency of both nations. The Agreement even provides for the possibility of adopting a formal commitment to undertake, in certain cases, a common position regarding the issue of nuclear energy in the European Union.

Even though in this case the mechanism of Enhanced Cooperation can obviously not be used due to lack of substantiation –let us imagine that there were nine signatory countries–, it is a clear example of cooperation between Member States in the field of energy, which is of utmost importance and deserves to be taken, in our opinion, in special consideration, more so when addressing the enforcement of some or several of the objectives that comprise the new EU energy policy instituted by the Treaty of Lisbon. Such may be the case that in order to be able to ensure security of supply, some countries may decide to use the procedure of Enhanced Cooperation, once the necessary means of consensus with the other European Union countries were exhausted, and with the required number of countries according to their current energy structure and their plans for future configuration.

Regarding the international cooperation mechanisms existing in the energy field so far, we consider it necessary to mention two of them in this work, for their special significance. On the one hand, the Treaty of the Energy Charter, which projects an attempt to create a meta-European energy policy, with no direct relation to the common stock; on the other, the creation of the European Energy Community in some of the Eastern countries, which does raise the material extrapolation of the common stock.

The Treaty of the Energy Charter seeks the creation, among other objectives, of a meta-European energy space, a kind of energy policy that goes beyond the limits of the Union, although the authors of the Charter do note that it is not their intention to establish such kind of policy scenarios. The truth, however, is that the European Community inspired the creation of this Agreement. It was proposed in its Ministry Council[86]. The text was drafted and was then discussed, analysed and approved by the other signatories.

Thus nominated for the purpose of creating a legal framework governing international energy relations in the areas described above[87], the Treaty also aims to strengthen industrial and technological relations and ensure security of supply among the countries involved.

The underlying Agreement is the search for a suitable trade-off between the infrastructure and energy resources found in some countries (former Soviet Union States)[88], and the capabilities for technology and technical, regulatory and financial assistance –in addition to the political support corresponding to a context of political stability and economic prosperity– of European Union countries[89]. A sort of swap between security of supply and technological capacity which obviously needs to respect international legal order, the protection of investors and access to capitals, and an appropriate institutional framework.

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86 The European Council celebrated in Dublin in 1990 proposed this international initiative. The Energy Charter was signed in December 1991 and the Treaty of the Charter, by 49 States, in December 2004.

87 The Preamble of the Treaty of the Charter states that the basic concept of the Charter initiative is to catalyze economic growth through measures to liberalize investment and trade in energy.

88 Since then, several initiatives and important Agreements have taken place between Russia and the European Union in the energy field. In this regard, among other documents and statements, the following are included:

- March 2009 EU-Russia Common Spaces. Progress Report 2008.
- 05/11/2008 Communication from the Commission to the Council. Review of EU-Russia relations. Brussels.
- March 2008 EU-Russia Common Spaces. Progress Report 2007.
- 2007-2013 Cross Border Cooperation Programmes.
- 11/05/2005 15th EU-Russia Summit. Moscow. Road Maps.
- 27/04/2004 Joint Statement on EU Enlargement and EU-Russia Relations.
- 27/04/2004 Protocol to the Partnership & Cooperation Agreement.
- 21/05/2003 National Indicative Programme. Russian Federation. 2004-2006.
- 18.09.2002 Commission Communication to the Council. Kaliningrad: Transit. Brussels.
- 17.01.2001 Commission Communication to the Council. The EU and Kaliningrad. Brussels.
- 27/12/2001 Country Strategy Paper 2002-2006. National Indicative Programme 2002-2003. Russian Federation.
- 28/11/1997 Collaboration and Cooperation Agreement of the European Communities and the Russian Federation.

89 **Article 2 - Objective of the Treaty**
This Treaty establishes a legal framework to promote long-term cooperation in the energy field, based on achieving complementarities and mutual benefits, in accordance with the objectives and principles expressed in the Charter.

Article 2 very succinctly describes the purpose of the Treaty as a "*legal framework to promote long-term cooperation in the field of energy*". Therefore, perhaps the most notable element is the concern for the permanence and stability of cooperation that will provide adequate legal and financial certainty to the agreements and investments that take place in the area.

Among other important aspects, environmental defence and protection are linked to measures for energy conservation and efficiency, the principles of "the polluter pays" and prevention are laid down and the internalization of environmental costs are promoted.

The contracting parties shall promote cooperation with relevant entities to:

a) modernize the energy transport infrastructures necessary for the transit of energy materials and products,

b) develop and exploit energy transport infrastructures that are located in the territory of more than one contracting party,

c) adopt measures to reduce the effects of the supply disruption of energy materials and products,

d) facilitate the interconnection of energy transport infrastructures.

The Treaty also provides for increasing access by the signatory countries which are least developed in terms of energy technologies according to commercial and non-discriminatory criteria, always respecting the protection of intellectual property rights. Technology transfer and access to new technologies are some of the most important aspects of the international Agreement, since the adequate development of energy activities (production, exploration, operation, etc.) requires sufficient technological knowledge to make those same activities more efficient, economically profitable and less environmentally damaging.

Furthermore, access to capital for the financing of trade in energy materials and products, and the investment in economic activities in the energy sector are being regulated in the multilateral Agreement. In this regard, a series of measures are established which are destined to protect the investment of both public and private Entities in any of the signatory States, so that such investments are not at the expense of political, legislative or other changes of similar nature. The Treaty does not affect national sovereignty of the signatory parties over energy resources.

The Treaty of the Energy Charter is an important effort in the field of international energy cooperation, in which the participation of community institutions, through the three Communities and the Member States, reveals itself as essential. As in other areas of application of these mechanisms of international energy cooperation, the chapters of security of supply, global defence of environmental protection in the geographic reference frameworks and the extension of the principles and techniques of the European energy market to other geographical areas, all stand out.

It should also be mentioned that this multilateral Agreement, the nature and objectives of which have been described above, has not yet been ratified by the Russian Federation and that the "static" scope of the estimates maintained by the articles of the Treaty and its Protocols for development, has been weighed, on several occasions by the doctrine, regarding Community legislation on the internal market which, nevertheless, has evolved through other legal instruments (the Second and Third Legislative Packages on the electricity and gas internal market), so that there could currently be a significant "regulatory asymmetry" or a need to adapt rules of certain chapters of the Charter Treaty with respect to the EU legislation on which, in many cases, it was based. On this issue we consider of particular interest the work of Andrey Konoplyanik, pointing out the imbalance existing between the *acquis communautaire* and certain parts of the contents of the Treaty, in its current version[90].

90 See "*A Common Russia-EU Energy Space: The New EU-Russia Partnership Agreement. Acquis Communautaire and the Energy Charter*". Journal of Energy & Natural Resources Law. Vol. 27, nº 2, May 2009. Andrey Konoplyanik.

The same approach could be used in the analysis of the so-called "Treaty on the Energy Community", of smaller geographic scope and legislative ambition, but following a similar pattern in order to establish mechanisms for international energy cooperation between the EU and its Member States and third countries, affecting very important regulatory changes and specific designs of regional markets[91].

91 The European Council in Thessaloniki in June 2003 endorsed the Thessaloniki Agenda for the Western Balkans, with the objective of strengthening the privileged relations of the EU and the countries of this region. One of the objectives in that agenda was to extend the energy market of the European Union (hereinafter EU) to Southeast Europe.

Subsequently, through the Athens process, and the agreement protocols of Athens 2002 and 2003, the idea of integration of the regional energy market in this area was consolidated, under the design of a wider Internal Energy Market.

Similarly, the European Council at Copenhagen on December 2002 confirmed the European position regarding the Republic of Albania, Bosnia and Herzegovina, Serbia and Montenegro, as potential candidate States for EU membership. European Council at Thessaloniki on June 2003 approved the «Thessaloniki Agenda for the Western Balkans: moving towards European integration», oriented to further strengthen the privileged relations between the parties in various fields including that of energy.

The Treaty of the Energy Community created between the EU and some non-member countries in the region, an internal energy market, with mutual assistance, pointing out the interest of formulating a common foreign policy with respect to energy trade. The Treaty provides for the application of the common stock in the subjects of energy, environment, competition and renewable energies for some of the non-member countries in the region.

The parties which celebrated the Treaty are: the European Community (currently EU), the Republic of Albania, the Republic of Bulgaria, Bosnia and Herzegovina, the Republic of Croatia, the Former Yugoslav Republic of Macedonia, The Republic of Montenegro, Romania, the Republic of Serbia, the Interim Administration Mission of the United Nations in Kosovo, in accordance with Resolution 1244 of the Security Council of the United Nations. All of the above referred to as "*the Parties adhering*" to the text of the Treaty. As noted earlier the Treaty was signed on October 25th, 2005 within the framework of the so-called Athens Process, which currently comprises nine States in Southeast Europe (Romania, Bulgaria, Bosnia-Herzegovina, Croatia, Former Yugoslav Republic of Macedonia, Montenegro, Serbia, Albania and Kosovo. Turkey finally decided not to sign the Treaty, which came into effect on July 1st, 2006. Under this scenario, Norway, Moldova, Ukraine and Turkey itself (on the latter, the opposition of Cyprus exists due to reciprocation) participate as observers. Georgia also has manifested its interest in participating as an observer. The EU is represented by the Commission.

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Forms of flexibility in the social policy of the European Union

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1. Introduction

Among its various objectives, the European Union pursues aims with a social purpose. In the preamble to the Treaty on European Union, the Member States confirm their "attachment to fundamental social rights as defined in the European Social Charter [...] and in the 1989 Community Charter of the Fundamental Social Rights of Workers", and refers to the desire to "deepen the solidarity between their peoples", as well as promoting "economic and social progress for their peoples". Article 2 reiterates the objective "to promote economic and social progress" and also "a high level of employment" and "strengthening of economic and social cohesion". The Treaty establishing the European Community reiterates and develops these objectives through a whole series of more detailed provisions. The unborn Treaty which sought to establish a Constitution for Europe and the Treaty of Lisbon incorporate these values, principles and provisions, evoking the "social market economy" model (Article 3, paragraph 3 of the Treaty on European Union as amended by the Treaty of Lisbon).

The objective of solidarity within the European Union has two main dimensions: solidarity between the Member States, which seeks to reduce disparities between these States, and solidarity within the Member States, which seeks to reduce material inequalities between persons or groups of people. Both dimensions are linked through Treaty provisions that define policies with the usual instruments: institutions, competences and procedures. Social policy is highly *political* and less *legal* than other Union policies. Directly applicable provisions in the Treaty with a social dimension are few: the free movement of workers and freedom to provide services can have a social dimension; also the provisions on equal pay between men and women; the provision on services of general economic interest also shows an important social dimension; the citizenship provisions, in relation to the principle of non discrimination on grounds of nationality, have had major impacts in the social sphere; finally, it is worth recalling the various instruments of fundamental social rights: the European Social Charter of 1961, the Community Charter of Fundamental Social Rights of Workers of 1989, and the Charter of Fundamental Rights of the European Union, whose Title IV, under the heading "Solidarity", contains a whole series of social rights. The rest is legislative policy, administrative and executive action, and more informal action within the framework of the open method of coordination (OMC).

The question I ask myself in this study is whether the limitations of the social policy model of the European Union can be addressed in some way in any of its fields, using formal or informal mechanisms for flexibility such as enhanced cooperation and others. But before turning to this question we must remember what the main limitations of the Union's social policy are.

I will do so by referring to my latest work on this issue[92]. There I concluded that, contrary to what is stated by Fritz Scharpf[93], there is no obvious bias in favour of the market and against social values as far as the provisions of the Treaty are concerned, as these are generally interpreted by the Court of Justice. Nor does it seem that the limitations of the competences of the European Union in the social sphere must necessarily

(*) All opinions included in this chapter are purely personal.

92 "The Socioeconomic Model of the European Union: Stuck with the Status Quo?", in G. Amato, H. Bribosia and B. de Witte (eds.), *Genèse et destinée de la Constitution européenne* (Bruylant, Bruselas, 2007), pages 1105-1128. See also my article "Los valores económicos de la Unión Europea: pasado, presente y futuro", *Boletín europeo de la Universidad de La Rioja*, nº 14-15, 2005, pages 2-8.

93 "The European Social Model: Coping with the Challenges of Diversity", *Journal of Common Market Studies*, 2002, p. 645.

lead to a European legislation with a weak social content. There are areas in which Union institutions cannot act or can only act in a very limited way, but this does not mean that their decisions will undermine the social policies of the Member States. In general, European Union measures concerning the internal market must take into account other general interests, of an environmental, health, social etc nature, that may even prevail over the interests of the market. Where there might be a neo-liberal bias, and Scharpf could be right here, is in the field of Economic and Monetary Union. If these rules were applied strictly, which has not always been, or will be, the case, both before and after the crisis, they could indeed have a negative effect on social policies in relation to provision of welfare in the Member States. In any case, they have the effect of restraining public expenditure, which can contribute to the reduction of certain social policies. Finally, Scharpf's thesis also could be more convincing if we look at the decision-making process: in some cases, one can see a kind of neoliberal inertia due to the constraints and limitations of the European political process. In other words, the democratic deficit often could translate into a social deficit. Unanimity, which still operates in many important areas of social policy, such as social security, protection of unemployed workers, or working conditions for nationals of third party countries, leads to inaction or to the adoption of standards of a low intensity, at the lowest common social denominator. Qualified majority, wherever applicable and when the European Parliament fails to define a clear position, can also become trapped in a logic of consensus and of the social lowest common denominator. To all of this one must add the existence within the Union of several different versions of the welfare state and of various very different cultures in relation to social policy.

Finally, in the conclusion of that previous work I pointed out that this socio-economic model, which is problematic in itself as far as it imposes structural constraints on the development of European social policies which at the same time represents a limit - light and flexible but real - on the social policies of the Member States, did not change essentially in the Treaty which sought to establish a Constitution for Europe, in spite of which the popular perception is that the European Union in general is a neoliberal project and that its policies have a social deficit, had a significant bearing on the reasons for the "no" vote, at least in the case of France. Nor has this model changed in the Treaty of Lisbon. Hence the recent reform of the Treaty does not affect my previous position. I also pointed out there that the application of the Lisbon strategy and the OMC in social matters did not seem to have borne any fruit that could alleviate the social deficit. All of this is of some significance, since the reform or the search for a "European social model", although no more than a "model of models", in a socioeconomic context that is undergoing major changes, is crucial for the development and sustainability of integration and of European societies[94], and this reform or search can only succeed if we have the necessary means and operate in an environment conducive to its realization. However, those means are limited, and the context does not always allow one to be very optimistic.

Overall I keep to that position. One now has to examine, from this starting-point, something that I did not then take into account, and that one usually tends to ignore: the possibility that through enhanced cooperation or other informal methods of making more flexible or of differentiation of social policies of the European Union, one can make progress in this area, and somehow correct the social deficit of the Union. I think this question depends largely on the outcome of the Lisbon strategy in the social field. If it is shown, as is possible, that the Lisbon strategy, at its ten-year review, has not had the results predicted, there could be a movement in favour of a second review of the strategy or a movement in favour of establishment or strengthening more traditional and orthodox community policies from a legal standpoint. If this second movement is not supported by various Member States, which is also something one cannot rule out, the possibility could arise of establishing closer cooperation in certain social areas, with the political risks that this involves.

2. Experiences of flexibility: constitutional differentiation

Social policy is one of the areas where there have already been experiences of flexibility, both at the constitutional and legislative level.

At the first level, we have the United Kingdom's opt-out from certain social policy instruments. This Member State, in fact, did not sign the European Social Charter of 1989, and in Maastricht obtained an opt-out from the Agreement on Social Policy. The Protocol on Social Policy annexed to the Maastricht Treaty allowed 11 of the then 12 Member States (from 1995, 14 of 15) to implement the agreement. The United Kingdom was

[94] See, for an analysis of the problems and some interesting proposals, A. Giddens, *Europe in the Global Age*, Polity, Cambridge, 2007.

excluded from the negotiations in this area, and the acts adopted therein would not affect it nor have financial implications for this State. This is a clear case of variable geometry, in that it did not anticipate the possibility of a subsequent incorporation of the United Kingdom (opt-in). From the entry into force of the Maastricht Treaty (1 November 1993) until the entry into force of the Treaty of Amsterdam (1 May 1999), social policy had two simultaneous frames of reference: the social provisions of the Treaty and the Agreement on social policy. The first applied to the 12 Member States and the second to 11 of them. The Commission, in this situation, said it would examine which framework to use on a case-by-case basis, preferring the inclusion of the 12, especially in the case of proposals on health and safety at work (areas in which the UK wanted to participate) and leaving the exceptional framework of 11 States for the cases where it was not possible to move forward together[95]. This is what we can call the problem of duplicity: in some cases differentiated integration within the framework of the Agreement on Social Policy established legal bases that did not correspond to legal bases specified in the Treaty, i.e. it seemed to extend the competences (at least express competences) of the Community; for example, it envisaged the possibility of adopting directives on information and consultation of workers, an area which was not expressly provided for by the then Article 118 EC. In other cases, the possibility arose of taking decisions applicable to 11 Member States in matters that were also covered by the Treaty, creating two different frames of reference.

The mechanics of the Social Policy Agreement were complex but all in all manageable. While they were functioning, four directives were adopted within this framework, all of some significance: the European Works Council Directive 94/95 EC[96], the Parental Leave Directive 96/34[97], Directive 97/80 on the burden of proof in cases of discrimination based on sex[98], and the Part-time Work Directive 97/81[99]. With the Labour Party coming to power in 1997, the United Kingdom decided to join the social chapter. There were some technical difficulties, but finally everything was resolved with the Treaty of Amsterdam: the United Kingdom signed it and ratified it, ending the exclusion and the dual framework of the EU's social policy. As for the directives issued in the interregnum, it was decided to readopt them on the basis of Article 100 EC (now Article 94 EC) in order to extend their application to the UK[100]. This Member State incorporated them into its laws and in some cases other States also had to re-align their legislation (in the case of the European Works Council Directive, in order to take into account the inclusion of a new Member State).

Can it be said that four directives in five and half years are not so many? They do not seem a lot, and this may be because the Agreement on Social Policy kept unanimity in the Council for many social issues. But these are very important directives that probably would not have been adopted between the twelve Member States.

According to Catherine Barnard[101], the British opt-out had advantages and disadvantages. The experience left us three main lessons: first, the institutional consequences of a practical nature are complex and affect all Member States, both those involved and those who do not participate; second, States that want to move faster may end up not doing so, preferring to use other instruments to avoid creating divisions or to prevent Member States which are outside taking advantage of competitive advantages in the labour market; finally, in a globalized market, the measures taken by the core can ultimately affect all the Member States through legal or economic externalities. The example to be given is the European Works Councils Directive, which are required to be established by enterprises with over 1000 employees that have more than 150 employees in two or more Member States: various British companies with presence on the continent ended up having to create them before the end of the opt-out, although the UK was unable to have a say on the provisions of the directive. Some foreign companies established works councils in the UK without being obliged to do so, following the practice

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95 *Communication concerning the application of the Agreement on social policy,* COM(93)600 at end.

96 Council Directive 94/45/EC on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees (OJ L 254, 30.9.1994, p. 64–72).

97 Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC (OJ L 145, 19.6.1996 p. 4-9).

98 Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex (OJ L 014, 20/01/1998 P. 6-8).

99 Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC (OJ L 014, 20/1/1998, p. 9-14).

100 Council Directive 97/74/EC of 15 December 1997 (OJ L 10, 16.1.1998, p. 22-23), Directive 97/75/EC of 15 December 1997 (OJ L 10 of 16.1 .1998, p. 24) Council Directive 98/52/EC of 13 July 1998 (OJ L 205, 22.7.1998, p. 66) and Council Directive 98/23/EC of 7 April 1998 (OJ L 131, 5.5.1998, p. 10).

101 "Flexibility and Social Policy", in G. de Búrca and J. Scott (coordinators), *Constitutional Change in the EU: From Uniformity to Flexibility?*, Hart, Oxford, 2000, pp. 197-217, p. 203.

in other venues. At least in the case of this directive, the British opt-out was eroded by the interdependence and porosity of contemporary markets[102].

Van Raepenbusch and Hanf, clearly positive in their assessment, stress that the experience with the social policy agreement showed that even a differentiation formally enshrined at the constitutional level need not be "eternal"; that the institutions can manage the duplication situation effectively; and that the Protocol on Social Policy eventually became the model for the provisions on enhanced cooperation due to the Amsterdam Treaty[103].

It is not easy to reach a conclusion on this issue. On the one hand, viewed in retrospect, these five and half years could be seen as wasted time. On the other hand, it was surely an indispensable experience in order for the United Kingdom, with its habitual caution, to end up coming into line with the other Member States.

3. Experiences of flexibility: legislation

Barnard refers to another type of informal flexibility, at the legislative level ("soft flexibility"), a form of differentiation that cannot be ignored. In fact, differentiation can occur not only at the constitutional level: the legislative measures themselves and 'soft law' decisions can often establish differences, whether permanent or provisional, among Member States, and such differentiation may be preferable to that enshrined at the constitutional level. According to Barnard, this second type of flexibility has been essential in order to accommodate the different models of social legislation, labour relations and State presence in the labour market. She refers, following the by-now classic division of Esping-Andersen[104], to the Romano-Germanic model (France, Germany, Italy), in which the State has a fundamental role in labour relations and in which there is complex and comprehensive legislation on these issues; and opposing it, the Nordic model, based primarily on collective agreements and in which the State would have a limited role in this field. The Anglo-Irish model would be the third, with little regulation and little State presence. To accommodate these differences, flexibility strategies at different levels would be developed, without in any case imposing uniformity or legislative unification: in the choice of legislative instruments (directives setting minimums rather than regulations; the possibility that Member States can adopt higher levels of protection, as provided for in Article 137, paragraph 4, second indent: "[t]he provisions adopted pursuant to this Article shall not prevent any Member State from maintaining or introducing more stringent protective measures compatible with this Treaty"); preference for 'soft law' measures (for example, in employment policy and in the fight against exclusion, prefiguring the generalization in the social sphere of what has been called the open method of coordination), recommendations, etc..; at the heart of the action taken: the harmonisation is only partial, with frequent references to the law and the practices of Member States; sometimes allowing collective agreements in the field to still be applied or that the directive is incorporated into domestic law through collective agreements; at other times allowing some Member States to enjoy a longer period for transposing a directive.

There are numerous examples of differentiation in legislation: Van Raepenbusch and Hanf refer to various provisions of numerous regulations and directives[105]. Often these exceptions are drafted in general and abstract terms, but they may be genuine opt-outs included, so that other Member States may take advantage of them.

The most prominent case of this kind of flexibility at the legislative level is the working time Directive (now, after several amendments, Directive 2003/88)[106]. The directive was adopted by qualified majority, on the basis of Article 137, paragraph 2. The United Kingdom challenged it before the Court of Justice, considering that the appropriate legal basis was either Article 94 or Article 308, which provide for unanimity. The Court rejected the application for annulment, considering that the legal basis was correct[107]. However, during the negotiations, the United Kingdom had managed to achieve introduction of an undefined possibility for opt-

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102 S. Hargreaves, "Social Europe after Maastricht: Has the United Kingdom Really Opted-Out", *Journal of Social Welfare and Family Law*, 1997, vol. 19, p. 1.

103 S. Van Raepenbusch and D. Hanf, "Flexibility in Social Policy", in B. de Witte, D. Hanf and E. Vos (coordinators), *The Many Faces of Differentiation in EU Law*, Intersentia, Amberes, 2001, p. 65-81, In p. 67.

104 G. Esping-Andersen, *The Three Worlds of Welfare Capitalism*, Polity, Cambridge, 1990.

105 Article cited, p. 69-70.

106 On this directive, see Philippa Watson, *EU Social and Employment Law: Policy and Practice in an Enlarged Europe*, Oxford University Press, Oxford, 2009, p. 299-327.

107 Case C-84/94, United Kingdom/Council, Rec. 1996, p. I-5755.

out, under certain conditions, from the application of Article 6 (48 hour-week maximum working time). There was also the possibility of delaying the transposition of Article 7 (four weeks paid annual leave) for three years. The possibility of undefined opt-out, drafted in general terms, was only used generally by the UK until in May 2004 Cyprus and Malta also resorted to it in general terms. Meanwhile, at least Spain and France have also resorted to the opt-out in some sectors such as health and hospital services.

Recently, as part of the proposal for a reform of this directive, Parliament has proposed to eliminate the exception, but in the negotiations of March and April 2009 there was no agreement on excluding the possibility of opt-out and the proposed reform of the directive, which has been on the table for five years. After five years of negotiations, one is given the impression that the British position has now spread somewhat and has become entrenched. This is one of the risks of including an opt-out clause drafted in general terms in legislation, despite the fact that originally only one Member State had any intention of using it. The Commission must decide what to do now, but it will not be easy to initiate a new reform proposal along the same lines[108].

Another interesting example of flexibility at the legislative level is Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work[109]. Recitals 16 and 17 of its preamble inform us that "In order to cope in a flexible way with the diversity of labour markets and industrial relations, Member States may allow the social partners to define working and employment conditions, provided that the overall level of protection for temporary agency workers is respected", and that "in certain limited circumstances, Member States should, on the basis of an agreement concluded by the social partners at national level, be able to derogate within limits from the principle of equal treatment, so long as an adequate level of protection is provided". These opportunities for exceptions are detailed in the articles of the Directive (Article 5). They are, to a certain extent, opt-out possibilities, and the limits and conditions for using them are very vague. What is the "general level"? What are the "limits" of the divergence allowed in the application of the principle of equal treatment? What is the "adequate level of protection"? The directive is somewhat ambiguous on these points. The impression given is that it conceals a substantive disagreement about the level of protection, perhaps partly contradicting its main objective (Article 1: "to ensure the protection of temporary agency workers"). It is normal to be allowed to establish a higher level of protection, to the extent that Community legislation merely establishes a minimum. This is a *positive* sort of flexibility. But in this case what we have is a *negative* flexibility, the possibility of reducing the level of protection and circumventing the principle of equality. There is a price to pay for trying to turn this disagreement into a legal rule: the price of legal insecurity for workers of temporary employment agencies.

4. Enhanced cooperation?

Is it possible to use the provisions on enhanced cooperation within the social field? The analysis should have two stages: a legal stage, asking if formally there is any obstacle; and another, a political moment, asking, on final reflection, whether it is appropriate to resort to differentiated integration in this field.

For the first question, Van Raepenbusch and Hanf already provide an analysis concerning the provisions on enhanced cooperation as presented in the Treaty of Amsterdam, without the later reforms. Despite this limitation, given that conditions have not changed dramatically, their reflection is useful for the present analysis.

The first substantive condition is that established by Article 43 EU d): cooperation must remain "within the limits of the competences of the Union or of the Community". This is the most important limit to this possibility, as it would be of much greater use if they could also use it to do things that cannot be done within the framework of the Treaty. This condition, moreover, can be played with, interpreting more or less extensively "the limits of the competences of the Union or of the Community", to the extent that the exclusion of certain Member States can facilitate a broader interpretation among a smaller group of States. But given that, as we have seen, Community social legislation often contains differentiated integration trends over time and sometimes even opens up possibilities of variable geometry of an indefinite duration, it is understandable that the formal mechanism of enhanced cooperation has not been used. Within the social sphere, it is often maintained that the limits of Union competences are too narrow and are part of the cause of the social deficit of the Union. Enhanced cooperation cannot not be used to remedy this limitation.

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[108] E. Vucheva, "Talks to Revise EU Working Time Bill Fail", EUobserver.com, 28 April 2009.

[109] OJ L 327, 5 December 2008, p. 9-14.

On the other hand, the same section d) of Article 43 EU precludes resorting to enhanced cooperation in areas of exclusive competence of the Union. This is obviously not the case regarding the reduced community competences in social policy, which are usually shared competences with the Member States, or merely support and coordination competences.

The authors also analyze the possible impact on the principle of non-discrimination between nationals of Member States, a condition deleted by the Treaty of Nice. The deletion is not the end of the matter, however, since the establishment of enhanced cooperation must respect the Treaty (Article 43 EU, b) and Article 280 A, first paragraph, of the wording given by the Treaty of Lisbon), and one of the key provisions of the Treaty is Article 12 EC, which prohibits any discrimination on grounds of nationality. For Van Raepenbusch and Hanf, the condition implies that the rules agreed by the Member States participating in enhanced cooperation must be applied without discrimination to all Union citizens in their territories. Likewise, they affirm, non-participating Member States must apply their own legislation on a non-discriminatory basis to nationals of all Member States[110]. This is a formal approach, purely legal, to discrimination, and it ignores the substance of the non-discrimination rule. The fact is that the establishment of enhanced cooperation necessarily results in a difference in treatment between nationals of Member States and those of the Member States who do not participate. Rather, the argument that would have to be used to save it is that the Treaty itself authorises this differential treatment, by allowing the establishment of enhanced cooperation. Since Article 43 EU is at the same hierarchical level as Article 12 EC, it can be argued that the first constitutional provision implicitly allows an exception to the second.

Another requirement is that enhanced cooperation shall not constitute "a barrier to or discrimination in trade between Member States" and shall not "distort competition between them" (now Article 43 EU, letter f); Article 280 A, paragraph 2, in the wording of the Treaty of Lisbon). According to Van Raepenbusch and Hanf, it is difficult to demonstrate, in economic terms, that social policy disparities distort competition or constitute a barrier to free movement. Political institutions have a large measure of discretion in this matter, and as in the field of application of the legal basis of Article 95, the Court of Justice would limit itself to reviewing manifest errors of assessment[111].

Their conclusion, which I share, is that there are not many legal barriers to the use of enhanced cooperation; the barriers and the lack of incentives, especially in the social field, are above all *political*, i.e. a reluctance to create distortions of competition, the possibility of flexibility in the Treaty itself, the possibility of introducing flexibility in legislation, and above all the reluctance of Member States to lose, reduce or restrict excessively the exercise of their social policy competences.

5. Final reflections

The possibility of establishing "enhanced cooperation" among a group of Member States reveals the fragile and incomplete nature of the common constitutional framework of the Union. For some States, this framework is seen as something insufficient and temporary. For others it is a permanent, perhaps even too ambitious framework. Within the social field, the possibility of resorting to enhanced cooperation highlights the weakness of the constitutional framework within which the EU's social policy is developed, and the partial dissatisfaction with its socio-economic model. In general, this possibility should be viewed as a fracture (real or potential) in the basic federal pact of the EU. Past experience should warn us not to fall back into this fracture, which may at one time have been indispensible for a Member State, but which should not be repeated. However, the British and Polish Protocol on the Charter of Fundamental Rights of the European Union, whose deleterious effects can be reduced through interpretation[112], once again raises the possibility of a fracture, especially as regards the Charter's social provisions.

It seems to me to be crucial to take into account the importance acquired by the open method of coordination (OMC) in the social and employment fields since 2000, with the Lisbon Strategy (OMC in the field of social protection and social inclusion, etc.), a strategy which has its origin specifically in the European

110 Article cited, p. 78

111 Article cited, p. 79-80.

112 As I have argued in my article, "What's Left of the Charter? Reflections on Law and Political Mythology", *Maastricht Journal of European and Comparative Law*, 2008, Vol. 15, nº 1, p. 65-77.

Employment Strategy, and which has to do with initial social provisions of the Treaty of Rome, which encouraged the Commission specifically to promote cooperation among States in this area (Article 117 of the Treaty of Rome in its 1957 version). Indeed, the Lisbon Strategy could be rather more sophisticated in its presentation, but in terms of means and ends, it does not go much beyond that flexible framework, without legal obligations, and with no transfer of competences or financial powers to the Community[113]. The preponderance of the OMC has led to a certain flight from law and the community method, which flight is also present today in other areas of activity of the EU[114].

If the Lisbon Strategy, revised after the critical report of the Kok Committee of 2004, does not quite achieve its objectives[115], despite the improvements introduced, there could be a new review of it (in 2010) or else abandonment, which could lead to an attempt to employ the traditional community instruments in this field, or to the establishment of enhanced cooperation of a social nature by Member States dissatisfied with the status quo. However, it seems that there is loyalty to the "renewed" Lisbon strategy, even though it does not seem to be giving the expected results. The conclusions of the Presidency of the European Council of 19 and 20 March 2009 are clear on this point: "In the current crisis, the renewed Lisbon Strategy, including the current Integrated Guidelines, remains the effective framework for fostering sustainable growth and employment". The European Council also states that it "looks forward to the proposals on the post-2010 Lisbon Strategy the Commission will present during the second half of this year". 2010, therefore, is the date on which the future of the Lisbon strategy will be decided, although everything suggests it will be maintained, perhaps with some modifications. On the other hand, the political context does not seem very conducive to the establishment of enhanced cooperation in the social field.

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113 Ph. Watson, op cit, p. 60

114 J.-V. Louis, "Community Law Fifty Years On", in J. Baquero Cruz and C. Closa (coordinators), *European Integration from Rome to Berlin: 1957-2007: History, Law and Politics,* P.I.E.-Peter Lang, Brussels, 2009, p. 65-90.

115 See the Kok Report (*Facing the Challenge: The Lisbon Strategy for Growth and Employment*) of 3 November 2004 and the Commission's reaction, proposing the revised Strategy: *Working together for growth and jobs – A new start for the Lisbon Strategy,* COM(2005)24 at the end. On the Lisbon Strategy in the social area, see M. Heidenreich and G. Bischoff, "The Open Method of Co-ordination: A Way to the Europeanization of Social and Employment Policies", *Journal of Common Market Studies*, 2008, vol. 46, nº 3, p. 497-532; J. Zeitlin and Ph. Pochet (coordinators), *The Open Method of Coordination in Action: The European Employment and Social Inclusion Strategies,* P.I.E.-Peter Lang, Brussels, 2005.

4

Economic Governance in Europe: between Unity and Flexibility

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1. Introduction

The European Union has been a story of cooperation and success. Through the previous decades, increased cooperation, the creation of the common market, and finally the European Economic and Currency Union have led to unprecedented levels of economic wealth, political stability, and peace among European nations. This success was possible due to deepened integration of an expanding Union. The process of European integration, however, is a transfer of national competencies to common (deliberative) bodies, like the Council, Commission, and Parliament. This transfer entails the fact that governments remain the principals of European integration, including the possibility of disintegration and fragility if governments do not react properly to common challenges.

On its 10th anniversary, the European Economic and Currency Union, the first endeavour of its kind in history, has slid into turmoil, recession, and crisis. A sharp downturn in financial stability, production, and trade, accompanied by growing unemployment, bodes of unforeseeable consequences for the European Union's cohesion and its institutions. This downturn is interdependent with different productivity levels and policy capabilities of the member states, their exposure to the crisis, and the impacts of the crisis throughout Europe. Extenuating existing differences in productivity and competitiveness, the possibilities of diverging policy responses, especially protectionism, undermine and erode the common European fabric and basis of stability, especially in an enlarged EU.

In order to provide shelter against the crisis and provide measures for structural stabilization, coordinated fiscal stimulation in the short term and improved regulation in the long term appear imperative, implying deeper levels of cooperation than before. This paper finds that the option of employing the Instrument of Enhanced Cooperation, as well as other possibilities for deepened integration and enlargement, is a necessary consequence of the challenges Europe is faced with. Since the long-term consequences of failing European unity are graver for European decision-makers than consequences of a flexibility policy, especially centripetal designs of deepened integration are vital.

2. Governance and Challenges

2.1. The State of European Integration: Achievements and Fragility

In its preamble, the signatories to the Treaty of Rome declared that they are "determined to lay the foundations of an ever closer union among the peoples of Europe" (EEC). Though the actual reasons for such a daring commitment are various, some facts stay the same while others lead to different degrees of commitment. The process of European integration is a transfer of national competencies to common bodies,

like the Council and Commission. This transfer entails two major difficulties, as cooperation by transferring power is costly. (1) There is no guarantee that other nations will commit themselves via resources and compliance symmetrically.

The very simplistic nature of European integration, based on a negotiated framework, is that of overcoming such a prisoner's dilemma by materializing the benefits of sustainable cooperation. (2) Even if cooperation is instituted, the benefits of working together are distributed asymmetrically or realized only in the long-term. Governments might abstain from cooperation, not because of distrust, but because of a lack of positive incentive. Both difficulties extend to the way European integration has been promulgated.

Since 1957, the face of the European Community/Union has changed dramatically. A period of almost continuous widening and deepening, especially in the last 25 years, has affected the EU's institutional mechanisms. Today, the European Union's political structure is "highly decentralized and atomized, it is based on voluntary commitment of the member states and its citizens", and it relies on nation states to administer state power (Hix 2005). Especially after phases of enlargement, not all member states have been equally committed to integration processes, creating a wider but weaker Europe, with institutions unable to function under the weight of participant numbers. The future of economic governance in the EU will be and already has been shaped by its ability to cope with growing conflicts due to different national policy objectives, economic structures and potentials, financial constraints, and societal preferences (Ahrens, Hoen and Ohr 2005). From this point of view, fostering European integration is a matter of creating institutional capability for overcoming a prisoner's dilemma and/or opening windows of opportunity of future steps of the delegation of power.

The term "governance" seems to dominate modern political science in many areas (Heise 2005). In his presidential address, delivered at the one hundred twenty-first meeting of the American Economic Association, Avinahs Dixit defines economic governance as follows (Dixit 2009: 5):

> "*By economic governance I mean the structure and functioning of the legal and social institutions that support economic activity and economic transactions by protecting property rights, enforcing contracts, and taking collective action to provide physical and organizational infrastructure.*"

This paper considers economic governance and how it can develop in an EU that is facing major challenges in all relevant economic fields, both structural and short-term (Andersen and Sitter 2006; Dempsey and Brennhold 2005; Eijffinger 2008). There are three kinds of challenges. (1) Structural ones like the real exchange-rate imbalances within the Euro-zone as a result of an incompletely liberalized common market. (2) The robustness of the EU against exogenous symmetrical shocks, especially against the financial crisis and the accompanying consequences for unemployment and financial markets. (3) Do these challenges lead to closer and united cooperation among all member states? Will groups of member states lose their patience with Europe's inflexible unity and create a myriad of smaller "clubs within the club"? Or would some countries even chose exit options like those granted by the Treaty of the European Constitution and leave the EU completely?

2.2. Challenges ahead

2.2.1. Different Economic Capabilities and Enlargement

Looking to the structural challenges, the Euro area is often discussed as the stable core of European integration, providing shelter against economic storms. However, since the economic recovery of 2003, regional business cycles have become asynchronous, differing in the amplitude of growth and inflationary stability (Dullien and Schwarzer 2005). On the one side, there have been countries like Germany, the Netherlands, and Belgium, with low inflation rates but also low economic growth. On the other side, there are countries like Spain and Ireland with high growth rates but also high inflation. Under a regime of common nominal interest rates set by the ECB, resulting real interest rates vary a great deal. For Germany, the real interest rate is estimated to be to high, smoothing and partially hampering investment with further deflationary consequences. In the cases of Spain and Ireland, real interest rates are too low, further igniting economic growth above the structural optimum set by productivity and capital.

Literature has focused on the viability of adjustment[116] within the common market, relying on criteria of optimal currency areas, for which the perfect mobility of goods, services, labour, and capital is essential. However, if for instance the banking sector is domestically organized, weak growth creates credit defaults and in turn less credit creation, further deepening the differences between Euro area States. The same logic is applicable to the eastern European states, where nominal exchange rates are fixed to the Euro and central banks try to maintain a peg, deprecating their currency in real terms (Dullien and Schwarzer 2005).

The consequences are large structural current account deficits in eastern Europe. Structural deficits create, both within the Euro area and between the Euro area and Eastern Europe, liabilities of the booming debtor countries toward the surplus ones. This is not problematic as long as the debtor countries are able to repay their loans. However, in a situation of imperfect markets, "repayment" is a very slow process, as described above, creating social costs in terms of unemployment and low wages or inflation in the medium-term. The challenge for the EU in this respect is the institutional inflexibility of the Stability and Growth Pact (SGP), which does not allow for the extensive fiscal stabilization necessary to create synchronous business cycles. The other alternative, fiscal transfers between the high-growth and the low-growth countries, has been impossible up to date, due to the problem of incentives for the high-performing countries (Arvai e al. 2009; Dullien and Schwarzer 2005).

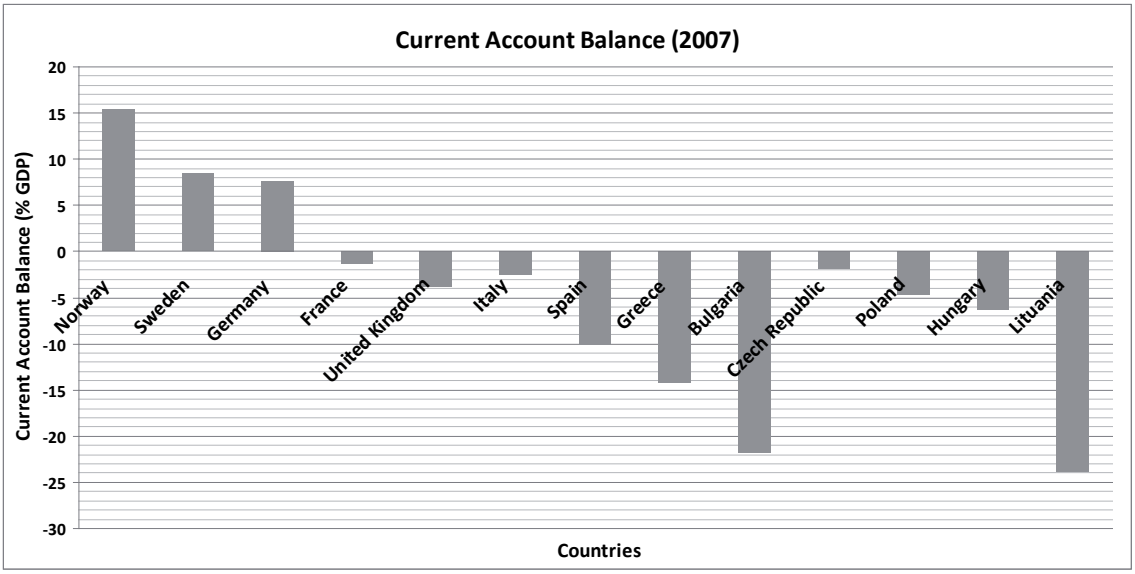

Fig. 1 Current Account Balance 2007, Source: IWD 2009

A special situation is the case of the emerging eastern European countries. The emerging countries of the southern and Eastern realms of the European Union tried to speed up their economic catch-up process. Bein as domestic saving rates are too low to sustain double digit or comparably high growth rates, these countries were dependent on foreign investment flows to bridge the gap between needed investments and the domestic capital base. The subsequent capital inflows to finance the trade balance deficit are needed to stabilize the exchange rate. Maintaining the high structural current account deficits can be interpreted as continued demand for and use of foreign savings (Bolle and Pamp 2006).

However, especially because most eastern European economies are rather small compared to the capital inflows they received, systemic risks were entailed in terms of monetary and financial as well as macroeconomic stability. Entering the EU has helped to stabilize capital inflows and currency movements, both in real and nominal terms through currency pegging. In times of the crisis though, capital inflows are gravely endangered.

[116] Given the mutually fixed nominal exchange rates, adjustment is only possible through increases or descreaes of domestic competitiveness. For example, due to the deflationary pressure on wages and prices, German companies gain a better position in trade with the former overheating countries like Spain and Ireland, accruing to a net current account surplus. The same logic applies to Spanish exports, as prices are higher in relation to productivity than German goods creating current account deficits and according capital imports. According to the standard assumption of a perfect market goods are perfect mobile and real interest rates would converge.

Eastern Europeans' governments might be tempted and/or forced to devaluate their currencies, further reducing the pace of domestic growth. As a result, these economies will run fiscal deficits far beyond the limits of trust in their fiscal reliability. If the wealthier states, possibly of the Union, do not come to the rescue of the new ones, a vicious downward spiral would encompass large parts of eastern Europe, with unforeseeable consequences for political stability.

2.2.2 Exogenous Shocks

The global economic crisis has subjected Europe to roughly the same symmetrical shock of tightening credit markets, falling stock markets, and collapsing demand (Boskin 2008). The effects of this shock have varied from country to country, however. The medium-term challenge has turned into a short-term one due to the impact of the financial crisis and the following inability of the former high growth countries to actually repay their deficites, creating almost catastrophic consequences for these countries. Though economic circumstances are comparable, the very existences of membership within the Euro area makes a difference in in the implication for future economic governance European Commission (2009d).

Growth has slown down all over the Euro-zone, and turned into recession for the major countries of the zone, third and fourth quarter 2008, as Figure 2 shows.

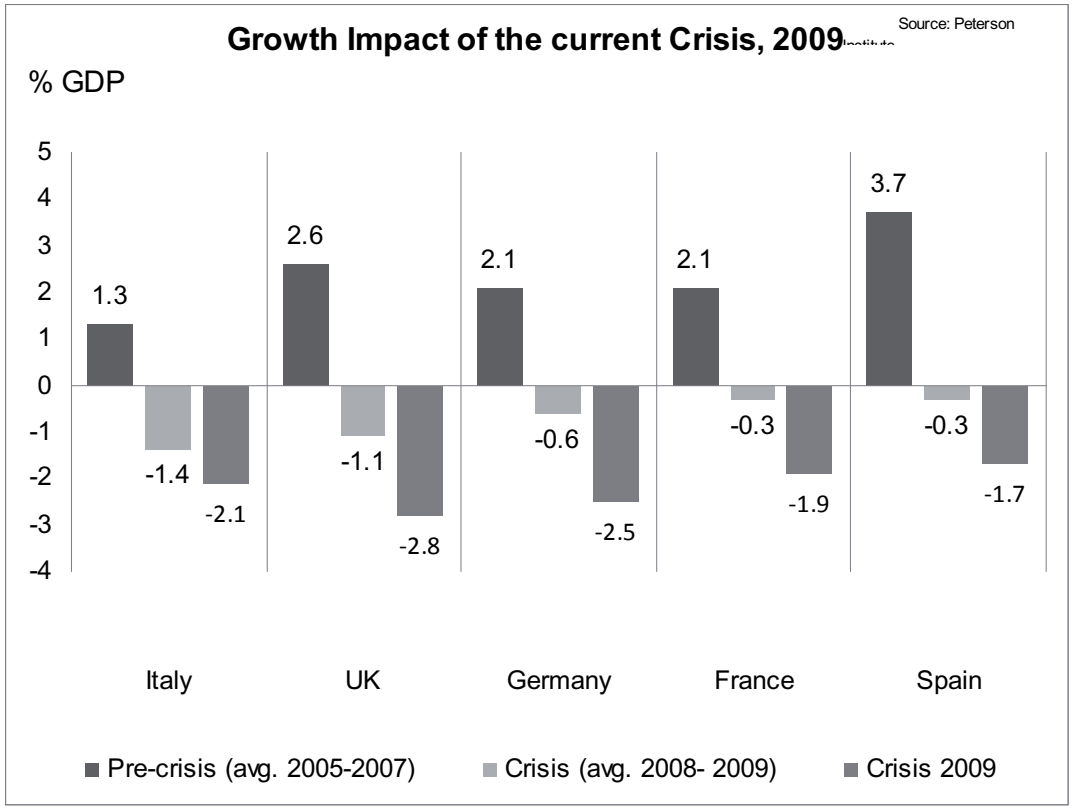

Fig. 2 Growth Impact of the current crisis, Source: Bergsten 2009

Actual downturn numbers tend to worsen for all of 2009, with IMF and OECD projecting a modest upswing in 2010. Though indications of an average output downturn of about 3-4% of GDP seem still manageable, the recession has asymmetrical consequences. Civil servants, medical professionals, and other basic services are at first relatively stable; the key impact of the downturn is made within the producing sector, accounting in some countries up to 40% of lost orders in industrial business like in Germany. Currently, European industrial production has dropped by an average of 18,4 % of previous levels last years.

Output growth differs among the major European states. Output mainly relies on aggregate demand. Germany is thus heavily hit, as large parts of the German economy rely on international trade, with a high share

of manufacturing. By the same token, consumption in Germany is structurally weak. Thirdly, the government is fiscally conservative, which does not ease the situation. The United Kingdom has been widely hit by the crisis, including falling housing prices and weakening foreign demand. On the other side, the government is able and willing to take counteractive steps, such as the currency depreciation of the Pound Sterling. France is in a middle position between both extremes. Demand is structural stronger than in Germany, and the government is more statist and keen to intervene.

Depending on the level, the very first consequence of such a steep sectorial downturn is rising unemployment. Prognosis by the Peterson Institute (Bergsten 2009) shows that especially Ireland, Spain, and the small Baltic countries will be heavily hit by soaring unemployment rates.

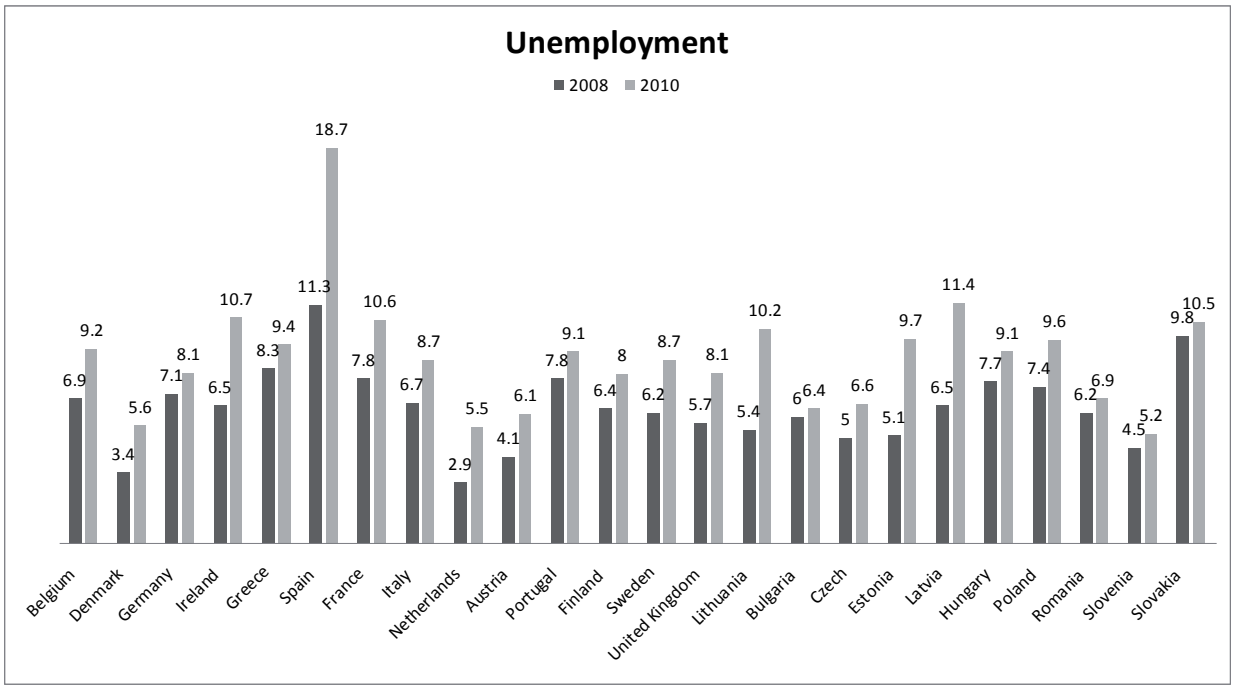

Fig 3. Unemployment Rate, Prognosis 2010, Source: Bergsten 2009

With unemployment on the rise, state fiscal balance is also under strain through increased social spending and the loss of tax and social security revenues. To stabilize social peace and to ensure re-election, governments tend to increase social spending, mixed up with productive investments in infrastructure and education (Boschat e al. 2008).

2.2.3. Fiscal Sustainability and Public Debt

The actual approach economic governance takes depends ultimately on the policy possibilities of the governments involved, i.e. preferences under the constraints of resources to commit to a policy. National policy interests diverge widely; policy preferences of governments are determined by structural and disposal factors. Under the structural ones, the general policy "philosophies" have to be considered, like different welfare state regimes. Disposal factors are acute demands from the electorate, and broader participatory moves of civil society actors. This is not an exclusionary distinction, as structural factors partially move due to disposal factors (Heise 2005).

Starting on the side of resources, the indebtedness of the nation as a whole, particularly of private and governmental actors, is a crucial factor. Most states were not prepared for the sharp economic downturn of the crisis. Well before the crisis, most European states commissioned more expenses for social welfare than sustainable in the long term. The long-term aging of Europe's population calls the stability of public finances into question across the continent. These costs contribute to "hidden" net national debt levels and continue to

grow, being as the average age is raising in most countries of the European Union. Higher spending on health care and pensions will put enormous strain on budgets in several generations' time, meaning that today's spending must be balanced and the burden of debt reduced. These hidden levels are highest for the UK, followed by France and Germany, and lowest for Spain. Markets have recently begun to respond to these worrying trends in the current credit crisis, pricing government bonds higher in the countries with the shakiest public finances. The credit rating agency Standard & Poor's summed it up in another way, suggesting that French, German, and British debt could be rated at junk status in the following 10-15 years (Economist 23.3.2005).

In the short term, policy responses to challenges differ across Europe in terms of spending and creating national debt levels. Adding hidden and visible debt levels, sustainability gaps can be calculated, with Britain taking the lead by 570% debt as a percent of current GDP, followed by France and Germany with almost 350%. Only Spain is in better shape, with about 80% of sustainability debt. Taking into account the challenge of a short downturn, these countries have to adjust their revenues by dues and taxes. Here, especially Germany and Britain have to increase state revenues. Simply spending without raising the levels of taxes and repaying debt throughout Europe would be unsustainable, with extensive spillover effects. The free range of national policies would be infringed upon (IWD 2009).

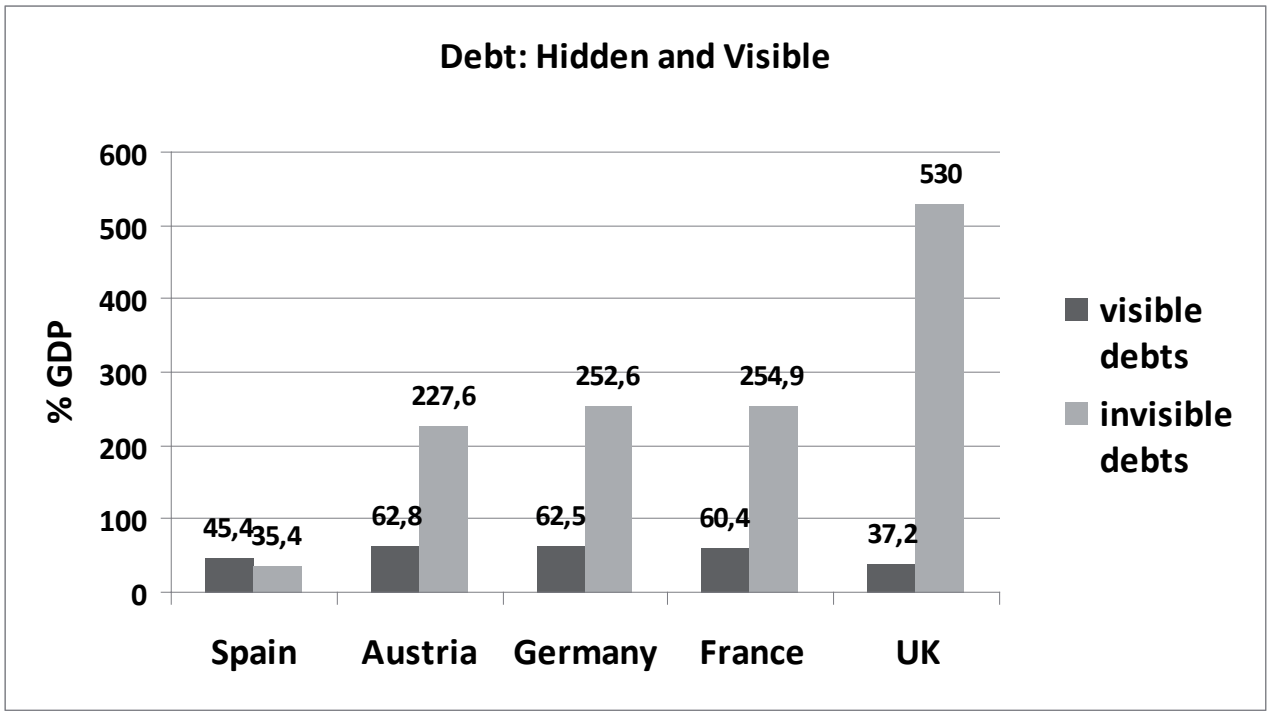

Fig. 4 Sustainability of debt (%GDP), Source IWD 2009

The systemic challenges the European Union is faced with indicate that a more coordinated European response would be desirable. However, recent studies imply that a reform process of the specific types of economic models is difficult to undertake on the national level; therefore, more pronounced integration policies are needed at the European level (Bosch et al 2007; Heise 2005). Approaches of governance might take a soft form, like the mechanisms of the Stability and Growth Pact, or be more pro-active through common spending mechanisms (Gros and Micossi 2008).

2.2.4. Protectionism

As pressure from the voter groups who believe that protectionism saves local jobs and helps struggling domestic industries rises, governments are often in a dilemma between introducing protectionist policies and cooperating intergovernmentally to contain the negative economic effects. In case of introducing protectionist

policies, governments can expect a gain in domestic support and short-time boosts to their economies, if other countries do not retaliate. But when other countries retaliate and introduce protectionist policies of their own, overall welfare declines and protectionism turns into a negative- sum game. Today, scholars draw parallels to the great depression of 1930 when they warn of the introduction of protectionist policies (Krugman 2009; WTO 2009).

The protectionism that Europe faces today is not based on tariffs like in the 1930s, but rather has a more creeping nature. Non-tariff protectionism in the EU is on the rise. The most present protectionist policies in the EU are the bail-outs of banks and the rescue packages for the automotive industries. While EU member states bail out domestic banks, they refused to bail out banks of other EU-member countries, creating a disadvantage for the concerned banks and their respective economies. Due to the fierce pressure from the wealthier member states, the European Commission softened its conditions for approving measures to rescue the financial sector which made way for massive capital injections to domestic banks (EUBusiness 2008). In the past, such financial boosts to banks were considered competition distorting. On the other hand, the heads of states declined the Hungarian proposal to provide the Eastern European banks with liquidity (Walker and Cohen 2009). Such policies threaten to create cleavages in the European Union and promote the formation of blocks of poorer and wealthier countries (Hartenstein 2009).

Another form of non-tariff protectionism currently pursued in Europe are subsidies to the various industries. While agricultural subsidies were a core component in the EU over the last decades, new forms of subsidies have emerged recently in the time of economic decline. The automotive industries received the lion's share of the subsidies issued in the last months. The global subsidies for automobile industries sum up to 48 billion USD so far (Gamberoni and Newfarmer 2009). Mature market economies account for 42,7 billion of this sum. Because automobile industries are a sensitive part of European economies, governments are willing to protect them. In a controversial move, the French President Nicolas Sarkozy proposed that the two major French car manufacturers shut down production facilities in the Czech Republic in order to maintain employment in France as part of its 6 billion Euro rescue package. As European governments and media raised major concerns against this proposal, the French government retreated, ensuring that the subsidies will be linked to conditions regarding the closure of foreign production facilities. Still, the demanded commitments – not to relocate the operating French plants – are raising concerns among European neighbours (Bouzou 2009). Correspondingly, the Italian Prime Minister Silvio Berlusconi announced a two billion Euro rescue package which also required keeping production facilities at home. Likewise, the Swedish government provided a 2,6 billion Euro package to help its major car manufacturer with the condition that a new model will be exclusively developed in Sweden. As a result, the car manufacturer stopped preparation for production in Belgium (Schultz 2009).

Such politicized lending undermines the efficient allocation of capital throughout the EU by protecting inefficient companies and reducing available funds for more competitive firms. Furthermore, these actions have disintegrative effects as Member States are tempted to look inwards than towards a pan-European solution to the decline.

3. Modes of Cooperation and the Capacity to Act

3.1. When Economic Flexibility becomes Crucial – Perspectives from Club Theory

For the given challenges, costs of non-action are far higher for Europe than costs of acting. If Europe cannot muster a common collective response, then the economic realities of the current crisis could lead to serious consequences for outreach and integrity of the Union. Russia, still wealthy from years of high energy prices, would be eager to regain influence in Eastern Europe and could conceivably use its petro-dollars to buy it, extending lines of credit at attractive rates to the former East Block countries as it has already considered doing with Iceland. Within the the core of Europe, the countries of the Euro area might pull the Common Market, their greatest accomplishment, apart by falling prey to protectionist sentiments (Economist 11.21.2008).

The general question of who provides economic governance does not necessarily lead to the answer "the government". It is possible to organize governance in private hands, or in bi- or multilateral settings. In this paper, multilateral settings are discussed due to the very nature of external effects and common goods problems posed by the challenges for European countries. Here, mechanisms of deepened integration and differentiation are of special interest (Acemoglou e al 2008).

In order to understand the driving forces behind feasible forms of closer cooperation, one must explain the EU's complicated decision making process first. Who are the central actors and what are the major institutions? In the past few decades, scholars have discussed whether EU decision making processes are dominated by intergovernmental institutions like the European Council (Moravcsik 1997) or supranational agents like the European Commission and the ECJ (Stone Sweet and Sandholtz 1997). Moravcsik and others have argued that member states retain control in the EU polity and supranational actors merely exist because contracts between states are incomplete and commitment must be facilitated. Neo-functionalists, on the other hand, see rising numbers of cross-border transactions and transaction costs as drivers for societal demand for supranational rules. The relationship between these two theories is best described by issues of delegation, agency , and accountability.

Rational choice institutionalism (RCI) has developed into the main approach in research on executive politics of the EU (Tallberg 2007). RCI is characterized by three essential elements: "*methodological individualism, goal-seeking or utility maximization and the existence of various institutional or strategic constraints on individual choice*" (Pollack 2007: 3).

RCI and Principal-Agent analysis provide an appropriate framework for these issues. On the basis of Rational Choice Institutionalism, P-A theory deals with delegation of authority by "principals" to "agents" (Pollack 2007). This means that voters, the legislative, or the government can play the role of principals inside a given polity, delegating specific tasks to agents such as the executive, independent regulatory agencies, and courts. The P-A approach therefore combines both intergovernmentalist and neofunctionalist claims. Seminal works by Majone (1996, 2002) and Pollack (1997; 2007) apply theories to Europe's political system that were previously developed on the interaction of US Congress with non majoritarian regulation agencies (McCubbins e al. 1984). This more subtle attempt (Kassim and Menon 2003) to "transcend the intergovernmentalist-neofunctionalist debate" states that the autonomy of different actors within the complex EU political system varies over time and issue-area (Pollack 1997). Minimization of transaction costs, monitoring compliance, filling in incomplete contracts, and agents' expert and credible regulation are all included in this approach (Pollack 2007). Following Rational Choice Institutionalism in our analysis of European economic governance, we must therefore identify how the relevant actors are affected by recent economic challenges and what options they have for closer cooperation.

The original six member states began cooperating in three European Communities, the European Coal and Steel Community (ECSC), the European Economic Community (EEC), and Euratom. Today, supranationalization is strongest in the first pillar of the EU polity. However, this strong movement toward the community method within the EC pillar is set against a dominance of cooperation at a government-to-government level in the other two pillars, as well as being confronted with the fact that some member states do not participate in cooperation at all in some areas. The current heterogeneity of member states' interests has lead to a slowdown in the integration process (Schäfer 2007). Discussions about the Convention on the Future of Europe have demonstrated the difficulty in reforming the EU or even establishing new areas of common governance. The question is whether groups of member states will lose their patience with Europe's inflexible unity and create (even more) clubs within the club? The following diagram gives an overview over policy areas and EU involvement.

Community Method	**Shared authority - EU and MS**	**Limited EU authority**	**No EU authority**
Market regulation and internal market	Regional policies	Health	Human and civil Rights
Monetary Union (not all MS)	Competition policies	Education	Fight against domestic crime
Foreign Trade	Industrial Policies	Defence	Housing policy
Customs Union	Environmental Policies	Fighting cross-border crime	
Agriculture	Working Conditions	Social Policy	
Fishing	Consumer Protection		
	Transport Policy		
	Monetary Policy		
	Foreign Policy		

Tab. 1 European Club goods: Different level of EU involvement

Club theory provides a good approach of how to predict a possible multi-speed Europe. At present, EU member states participate in all common policies except the European Monetary Union and the Schengen agreement. However, a club is defined as a voluntary association of actors which jointly produce a common good and share the benefits of this excludable good. These characteristics lead to problems of optimal club size. "The costs of production of integration goods are not independent of the number and the degree of homogeneity or heterogeneity of EU members" (Ahrens, Hoen and Ohr, 2005). The probability of limitations of the number of countries participating in further integration steps has increased with the last enlargement rounds and growing heterogeneity.

3.2. The Instrument of enhanced Cooperation: Mechanism and Implications for Economic Governance

A broader use of differentiated integration mechanisms was initially discussed as a theoretical possibility after the first enlargement (Emmanouilidis 2007). The Treaty of Maastricht allowed for the first time the non-participation of some member states in policies that form part of the European Community, foremost in the areas of social policy, defence, and monetary union (EMU). This was called "pre-determined flexibility". With the Treaty of Amsterdam (1997), the accommodation of "enabling flexibility", which allows a sub-group of member states to integrate a number of policies in the first (EC) and the third (Justice and Home Affairs) pillars without involving all 15 member states, was incorporated. This "enhanced cooperation" had to be approved by a unanimous vote from the European Council, which allowed a veto-right for every single country. As it had not been used, the Treaty of Nice (2000) modified the provisions, extending the scope of this instrument to the second pillar, foreign policy matters (CFSP – Common Foreign and Security Policy), while facilitating the application for its exertion. Enhanced cooperation can occur between 8 countries if approved by qualified majority, except for areas that fall under exclusive EU competencies and for defence and military issues.

The overall aim of a final unified regulation for all EU members becomes apparent when regarding the criteria that have to be met to introduce enhanced cooperation via Articles 43-45 TEU (Ahrens and Zeddies 2006; Bordignon and Brusco 2003). Enhanced cooperation may not extend or revise existing EU legislation). It may not regulate areas of exclusive EU competency (e. g. monetary policy, trade policy). The instrument of enhanced cooperation can be introduced as a last resort when the Council, acting on a proposal of the Commission, has concluded with at least a qualified majority (in some areas unanimity is required) that unified action of all member states is not possible. A minimum number of eight willing member states is necessary to start the process. They have to ensure that other member states can join them. The instrument of closer cooperation is heavily guarded against attempts to create a "Europe á la carte", which would restrain a multi-speed Europe more than allowing it. The only initiative to use Enhanced Cooperation known to the authors is an attempt to harmonize the divorce law on the EU level because of the diverging interests of EU member states and the lack of progress on the matter. Even here, a proposal has not yet been made to the Council to harmonize the divorce laws because the number of countries involved is not considered as large enough to meet the Council's majority requirements.

In the case of economic governance, the high hurdles for closer cooperation have specific consequences, tending to dampen rather than encourage closer cooperation because of the redistributional effects that economic policy making implies.. The problem is not to create a new "club of like-minded governments", but to include those with different interest in the short-term, but common ones in the long-term. In this respect, the solution might be in the middle, allowing like-minded governments to form a new club, but under certain provisions. It maintains that enhanced cooperation of a few member states is efficient, or in political terms, leads to outcomes that tend to find acceptance in national electorates. The additional requirement of the club is to ensure learning and adaptation capability of the club, i.e. flexibility to encompass changes in preferences of its members, offering voice and exit options as well as offering openness towards new members. General openness towards new members, the ability to exit, and the right to have "voice" for all members of the new club should be basic principles. In such an environment, deepened integration by a part of European member states yields success in the future (Ahrens, Ohr and Zeddies 2006).

One has to consider however, that enhanced cooperation, following the idea of a "Europe á la carte", will produce resistance from EU institutions as well as, most likely, from all member states which are not involved in the short-term. Hence, closer cooperation at least on the basis of existing EU institutions seems inevitable, with

the ability to include as many members as possible (Emmanouilidis 2007). Analysis of deepened integration in the broader sense is therefore recommended, including given European frameworks of economic governance on a case by case basis, being as they exist now and could be developed in the future, including answers to the challenges ahead (Hungdah 2005). Viable institutional responses, especially enhanced cooperation and possible solutions using enhanced cooperation or deepened integration, are still untried for European Monetary and Economic Union and subfields of capital market regulation and labour market regulation, creating a kind of "experimental laboratory" (see Appendix). As medium-term structural adjustments to the Internal Market are insufficient to solve the current economic problems, economic governance within EMU, in terms of creating fiscal coordination, seems to be most suitable solution for the European Union's economic challenges and the dangers for the Union's integrity the possess.

4. Enhanced Cooperation: Proposals and the need for Revision of Coordination

4.1. Managing EMU

4.1.1. The SGP and Eurogroup: A strong Case for Enhanced Cooperation

To guarantee cohesion within the EMU, certain basic principles of economic policy should be kept and developed on the European level (Becker 2008b). Among these are the soundness of monetary policy, the independence of the ECB, budgetary discipline, and sustainability. Budgetary discipline is of special importance because the very effectiveness of the European mix of economic policies depends on sound fiscal stances. Over-reached and possibly unsustainable fiscal deficits create immense spillover effects onto interest rates and, secondly, higher inflationary pressures, which the ECB would have to face. The current Stability and Growth Pact remains the central coordination mechanism applied to provisions of sustainable debt management and fiscal restraint (Begg 2008).

Within the EMU, the credibility of the SGP has been troubled from its very introduction, however (Becker 2008a). The accession of Italy, Belgium, and Greece to the Euro area, despite their sizable national debts, immediately called the Pact into question. A more significant challenge arose in the early 2000's, as the major Euro area economies Germany and France passed the 3% deficit hurdle for 3 years in a row. The deficit-spending duo ultimately responded, not with fiscal prudence, but with a loosening of the Pact in 2005. The exceptions for budget deficits were expanded, permitting them during the slightest of recessions or even periods of slow growth, as well as for spending on education, research, foreign aid, and anything contributing to the „unification of Europe" (Economist 23.3.2005). At the same time, the international monitoring process was strengthened with an „early warning system" to help members avoid deviations from their medium-term budget goals. The ECB expressed serious concern regarding these developments and hinted at the necessity of raising interest rates if government profligacy led to inflationary pressure (Schwarzer 2009).

The calls for more flexibility in the SWP led to the reform of 2005. In the period of relatively good economic growth that followed, all Euro area members were able to push their budget deficits below the 3% hurdle, and some were able to pay down the balance of their debt. Now, in times of crisis, it remains to be seen how well the countries respond to the short-term difficulties with strategies that do not hinder their long-term economic growth (Begg 2008). In general, the need for individual nations to formulate flexible economic policies to address their individual needs is valid. Ultimately, though, all members of the Euro area are subject to the same long-term challenges of aging populations and the need to restrain free riding on the common currency. Especially to combat the free-rider problem, the Euro area needs effective and enforceable rules like the Stability and Growth Pact. The reform of the pact in 2005 did address these issues, focusing on sustainability and demographic challenges, but at the same time allowing expenses for structural reform measures supposedly fostering future growth. The major problem of the pact is that decisions are made in the ECOFIN council by the very same principals affected by contingent sanctions. This problem has not been solved. A further problem lies within the long-term capabilities of governments to repay their debts, an obligation which the Pact is not able to achieve (Becker 2008b). The Pact should be reformed again, following the current economic crisis, to require the consolidation of budgets in good times. The consolidation of budget has thus far been the weak link in economic policy within the Euro area, and this threatens the currency's long-term stability.

Under the circumstances of the crisis, further coordination is a vital measure, not manageable by the SGP alone (Eijffinger 2008). The often-criticized leverage and broad room to maneuver in terms of expenditure in cases of exceptional circumstances seems to be a useful devise now (Bergsten 2009; Boschat e al 2008). But even if the SGP offers increased discretion for national governments to spend money, enhanced cooperation comes to play on how to spend it and where to raise it. (1) Looking into the "how" to spend it, coordination is necessary. This is due to the fact that large spending programs create external effects over all of Europe, being as European economies are highly interlinked with each other (Arvai and Sitter 2006), creating free-riding problems and in turn lowering the net effect of public spending by absorption or beggar thy neighbor policies, respectively. There are other, technical aspects, pertaining to the question of fostering consumers by lowering taxes and/or giving consumption vouchers, or, on the other hand, spending on investments with quick net effects on the real economy. These technical aspects have political consequences, as attempts to increase consumption often lead to more savings in times of crisis, or to dubious schemes like the German "Abwrack-Prämie", offering a credit of 2500 Euros toward the purchase of a new car in exchange for scrapping an old one, coincidentally coinciding with an election year. Common European spending policies could decrease the influence of political business cycles, channeling funds into sound public investments. Hence, both the level and the mode of spending need European coordination in order to shelter against the crisis. (2) Moreover, going into the "where" to raise it, coordination on a European level is also entailed by the high levels of debt states have, on account of the systemic risk of mutual debt default and the fiscal constraints and rules by SGP (Begg 2008).

The level and mode of additional fiscal expenditures by European governments are intrinsically connected with the political base of raising the expenses. Given the grave challenges of the crisis in contexts of structural divergence but with the need for coordination, the answers to three questions are vital: (1) how to design a mechanism that allows for fiscal discretion while ensuring budgetary sustainability? (2) how to avoid spillovers, external effects, and reap the benefits of coordinated fiscal stimuli? (3) How to account for different political and economic speeds, capacities, and approaches, creating European fiscal stimulation and long-term sustainability?

Governance options entail two solutions: strengthening genuine supranational institutions, the Commission and Council, or creating, deepening, and continuing intergovernmental mechanisms for policy coordination. The informal forum of the Eurogroup seems to be a natural candidate for the application of deepened integration (Begg 2008; Heise 2005). The institutional capacities for Euro area governance are currently strongly dispersed; competencies are divided between ECB, Commission, and ECOFIN, each body entails different views on the policy mix. The Eurogroup, comprised of the ministers of the national ECOFIN ministers responsible for financial affairs, has become the most important forum for coordination among Eurozone member states. Here, identity is divided between those governments who are affected by long-term budgetary sustainability and broad fiscal discretion in times of crisis on the one hand, and the common monetary policy on the other hand, respectively (Begg 2008). The activity of the Euro group is in so far mainly debate and discourse among members as well as management of the SGP. With reform to the SGP, however, there has been a creeping development of the group towards becoming the central (informal) body deciding over breaches of the Pact (Heinen 2008).

In the realm of enhanced cooperation, the Lisbon treaty adds a new chapter 3a, including options for enhanced governance among Euro zone members. The Eurogroup is also institutionalized for the first time, analogous to Art. 99 of the Maastricht treaty. Furthermore, the Eurogroup gains exclusive decision making powers, for example nominating ECB Executive Board members and joint representation in international financial bodies. As described before, the instrument of enhanced cooperation has been precluded from deepening competencies for the Eurogroup because all member states were able to find compromises regarding the special rights for Eurozone members. It is nonetheless noticeable that the provisions of Lisbon do not include explicit decision-making powers of the Eurogroup concerning the economic governance of the Eurozone.

Further development of the Eurogroup within the realm of enhanced coordination would entail both widening of competencies of Eurogroup members and allocation of decision- making about new and old competencies regarding the Eurozone on the level of the group. It is clear that some of the Eurozone member states, especially Italy, Spain, Ireland, and Greece would favor common Eurozone decision-making rule for further fiscal coordination and even possibly joint issuance of public debt, i.e. „European bonds". These bonds would be backed by all of the EU's economies, thus allowing weaker member states to borrow at lower rates than they can currently find on the market. It is therefore questionable if such ideas would find a qualified

majority among EU members and, by the same token, within the Eurogroup for setting up a process of deepened integration. This is because the difference in budget deficits and trade balances has sparked an unprecedented widening of spreads in Eurozone national bonds since the start of the credit crisis in 2008: Greece currently pays nearly 3% more for new bonds than Germany (Schwarzer 2009). The German finance minister, Peer Steinbrück, has suggested instead the "normal policy mix" of reducing budget deficits and improving competitiveness to cure the East's ills (Economist 2.26.2009). The realization is growing, though, that conventional long-term economic policies might not be enough to prevent an economic melt-down in the short term (Rodrik 2009).

These trends are threatening the stability of the Eurozone and require a coordinated policy response from the member states including those who are unwilling now, like Germany. As a compromise between full-fledged fiscal coordination and mere budgetary restraint and loose informality, one possibility would be the empowerment of the Eurogroup with sanctioning mechanisms to enforce the execution of the Integrated Guidelines for Growth and Jobs. Another possibility would be the expansion of the powers of the Council to include provisions for mandatory guidelines in the fields of fiscal, employment, and economic policy. In any case, a majority of the Euro members in favor of such a solution is not readily apparent, not just because of the different consequences of the crisis. France, along with Spain and Italy, is a natural proponent of such a scheme, allowing it to regain some of the statist influence that it was forced to give up following the introduction of the Single Market and the Euro. The smaller Euro states are likely to oppose such a plan, fearing the influence of the larger states in their internal affairs. These opponents would have an ally in Germany, who sees the state's role in Ordungspolitik, or non-interventive regulatory policy, and not in statist governance. Should the Euro area members find an acceptable compromise, however, the instrument of enhanced cooperation or other, future forms of governance could be used to legally bind them to specific goals. The acceptance of these goals would then become part of the Amsterdam criteria for accession to the Eurozone.

4.1.2. Enlargement and Promotion of Economic Stability

As a result of several rounds of enlargement, the European Unions has grown beyond the core group of large, established industrialized countries and now contains many member states of various sizes and in various phases of economic development. In particular, the former East Block states stand out because of their large catch-up potential. In order to fulfill this potential and realize high growth rates, these eastern European economies require either high savings rates or large influxes of foreign capital. As a group, they have generally chosen the latter path, running current account deficits to support capital investment and domestic consumption at the same time (Bolle and Pamp 2006). In the years before the financial crisis, this model worked well. Currency pegs caused exchange rate risk to appear to vanish, economic growth boomed, and higher standards of living via increased consumption assured domestic and political stability.

The credit crisis has dramatically altered this situation and poses a significant challenge for the eastern European states and the stability of the EU as a whole. The crisis has upset the capital flows to the East and caused the system of exchange rate pegs to falter. In the case of Latvia , the IMF has to support the country' s currency with a 7.5 billion loan. Should any country have to abandon its peg and devaluate its currency, the lower exchange rate would badly hurt the economy by forcing debtors to repay their foreign loans in much higher terms denominated in the local currency. Furthermore, devaluation could easily frighten investors and lead to full-scale capital flight, plunging Eastern Europe into a crisis similar to the Asian fiasco of 1997.

One obvious solution to this risk would be membership in the Euro zone, which protects its members from exchange rate risk. With the exception of Slovenia, the eastern European countries have put off the reforms needed to gain entry to the common currency, however (Bolle and Pamp 2006). Furthermore, membership in the Euro zone demands great fiscal discipline or effectively centralized wage negotiations to maintain economic competitiveness, for the freedom of monetary policy is relinquished to the ECB and SGP. Since both fiscal and wage restraint are unpopular, the Eastern European countries are unlikely to join the Euro in the near-term.

Instead of Euro membership, another solution is needed to stabilize the currency flows and current accounts of Eastern Europe. The long-term success of the eastward enlargement depends on the eastern European countries being able to build their capital stocks, sustain high growth rates, and gradually approach the standards of living enjoyed by their EU counterparts. To this end, the EU must seek to stabilize their currencies in the short-term.

Capital flight is a very real risk that could cause devastating harm to the eastern European economies and in turn, lead to mutual defaults in many Eurozone countries and destabilization of various member states. In the medium-term, the EU should encourage higher savings rates and an expansion of the export base to close the current account deficits. In the long-term, the former Eastern block must start down the path to Euro membership by fulfilling the Maastricht criteria. Only by joining the Euro can the eastern European states be safe from exchange rate risk and capital flight that threatens their continued economic prosperity.

Being as these states remain hesitant about joining the Euro, enhanced cooperation between those member states in the East and West highly affected by mutual default could form a club for providing emergency funds. Countries such as Latvia and Hungary, whose economies had borrowed heavily in Euro loans, have required bail-outs coordinated by the IMF and European Commission to prevent their currency from collapsing and to avoid massive defaults on their Euro debts. The other countries of Eastern Europe, although in less dire straights, are facing similar problems. This has led to calls for the EU to organize a bailout of its new members to help their still fragile economies weather the financial storm. In particular, Austria, Greece, Italy, Finland, Sweden, and Belgium are interested in such a deal, since many big banks in those countries made the loans in the East that are currently looking very wobbly. France, too, has expressed interest in such a scheme as part of a general strategy of strengthening economic governance in Europe.

Germany has clearly opposed any such notions, though, rejecting plans for a 180 billion rescue fund for east and central Europe at an EU summit on March 1, 2009. The German Chancellor's government fears that Germany, as the biggest contributor to the EU, would have to pay for most of the rescue, and is loath to abandon her goal of a balanced budget by 2011 in this election year. Other European leaders, especially those from the relatively healthy economies of Poland and the Czech Republic, also found consensus in opposing the plan, based on the consideration that talk of a 'rescue' sends a dangerous signal to credit markets, since not all of the former Soviet countries are facing such significant problems.

If it comes to governance, a full-blown Commission lending scheme, along the lines of an IMF bailout, could be set up and might even serve to advance European integration, since the conditions for the loans could be used to prepare the recipient countries for entry to the Euro zone. As such, a collective rescue scheme might find strong opposition by Germany, but also Poland and Czech Republic; the other, more affected countries could form a core of deepened cooperation regarding mutual bailouts. A bailout scheme would only be possible for the non-Euro countries, however, since the rules of the common currency preclude the rescue of any Euro member state. Credit market commentators have noted this discrepancy and openly called the viability of the non-bail-out provision into question, rightly pointing out that is unlikely that the economic core of the Union would help the periphery but turn their backs on one of their own. Here again, it is exemplified that the necessary consequence by which enhanced cooperation emerges is anchoring future deepened cooperation in many, or perhaps in all member states of the Eurozone. Outcomes could range from emergency bailout schemes for the East all the way to including the whole Union.

4.1.3. Re-imagining the Supply Side: multi-faceted Approaches

Assistance to the East could come instead from the Union's existing institutions, such as the Structural, Cohesion, and Social Funds. Although the current levels of funding are not sufficient for a large-scale bailout, they could be raised. The existing structure and expertise of the Funds are obvious advantages for tackling the considerable challenges at hand. Further assistance, for European banks as well as governments, could be coordinated through the European Central Bank, European Bank for Reconstruction and Development, and the European Investment Bank. These institutions also possess the necessary expertise to make effective loans, and being internationally governed, they are less likely to be influenced by protectionist sentiments, coddle national champions, or pursue pet projects. For governance, supranational coordination is deemed best, as common structural spending policies are already matters of the whole community. In context of enhanced cooperation within the realms of budgetary sustainability, fiscal coordination, investment stimuli coordination, and mutual bail-out guarantees, repercussions for existing policies of the Union like structural and agricultural polices should be considered.

Examining already existing spending and structural adjustment mechanisms, the common agricultural policy and structural funds are the most important ones. The common agricultural policy and the cohesion policy are the most important areas of cooperation in the current European Union. Together, these policy fields

account for 70 per cent of the EU's budgetary spending in 2009 (European Commission 2009d). The Common Agricultural Policy (CAP) hast two pillars. The first pillar is financed by the European Agricultural Guarantee Fund (EAGF), which pays the expenditure on refunds for the intervention measures to regulate agricultural markets, direct payments to farmers, aid for diversification, and other forms of direct funding. In 2008, the EAGF payments summed up to 42,5 billion Euro, 88 per cent of which constituted direct aid to farmers. The second pillar is the "Rural Development Policy". The European Agricultural Fund finances Rural Development (EAFRD). In 2008, its budget consisted of 12,5 billion Euro (European commission 2009d). The other structural spending instrument is cohesion policy, made up of two approaches: first, the traditional one, which is supposed to support the convergence of the least developed regions; and the second one, which is supposed to modernize the entire EU (Lisbon treaty). The less-developed countries are not always pleased with the application of the policy. Spain and Ireland, who were formally recipients themselves, are now being asked to contribute to the cohesion funds for the new member states.

There is no necessary need for deepened integration to change the ways money is spent on structural polices, as political rationales enabling cooperation within the Union dominate patterns of spending. But there is a place for deepened integration in raising revenues, as it pertains to stability of the EMU. The introduction of a union-wide corporate tax would raise revenues beside government spending, levying the expenses of companies across the Union according to individual economic capability. This would create the benefit that distortions due to different productivities would be accounted for on a common European level, in fact offering opportunity to companies in weaker regions. A common tax base for the Union would also entail levying for short-term fiscal transfers between countries, as it comes to distribution, adding a further dimension both to structural adjustment and bail-out. Such a governance mechanism would strongly depend on the EMU's general governance institutions. Coordination between the Commission as executive and a new Eurogroup with legislative power seems necessary in such an environment.

Such a deepened European tax base also would weaken incentives for protectionism, in turn fostering competition. The creation of the Internal Market is clearly the greatest achievement of the Union, and competition policy is strongly cemented therein, leaving little doubt of its effectiveness. The Internal Market is not complete, however. In particular, the liberalisation in the trade of services has not nearly reached the level of free trade in the European goods market. The Bolkenstein Directive on Services (2006/123/EC) is set to enter into force in December 2009. The Directive has been considerably weakened from its original version, however; among other provisions, the „country of origin" principle was removed, thus subjecting the entry of a firm into a new market to that market's national bureaucracy. Furthermore, protectionist and nationalistic provisions in recent rescue and stimulation packages as a result of the financial crisis have placed the Union's competition regime under significant pressure. A common European corporate tax would be a partial provision against building "national champions".

Since a common tax is very difficult to implement, and even if it existed, it would be insufficient to fully protect against protectionism, it would be better if the current allowances for statist intervention were either further tightened in order to preclude their market distorting effects, or flexibilized to allow for approval on a case-by-case basis (Dullien and Schwarzer 2005). The liberalization for the service market is a vital step for Europe to gain the benefits of increased employment and lower prices that the Single Market promises. Unfortunately, Germany and France have in the past proved their opposition to the Services Directive. Without the support of these major economies, such liberalization across the entire Union is impossible. The possibility of a 'service free trade zone' is conceivable, however, using the instrument of enhanced cooperation. The liberal market economies of Ireland and Great Britain would likely find willing partners in the economically open eastern European states. The accession of the Union's hesitant coordinated market economies could then follow at a later date.

4.2. Regulation of Financial Markets

The efforts to stabilize Europe's troubled periphery have not yet begun to address a further problem plaguing the continent, namely the region's struggling banks. Unlike the $700 billion Troubled Asset Relief Program in the United States, Europe has not created a coordinated response to the issue of under-capitalized and non-lending banks (ECB 2008b; ECB 2009). In October 2008, Germany's finance minister dismissed a French-backed plan for a common fund to rescue banks. This has since led to a smattering of national bank rescue plans. A few so which, such as the British and Greek schemes, also carry a distinct scent of protectionism

in the form of ‚lend domestic' expectations. A coordinated effort to refinance Europe's bank could accomplish two goals at once: aiding economic recovery by returning liquidity to credit markets and preventing a surge of protectionism, which fundamentally contradicts the principle of the Common Market (Speyer and Walter 2007; Trichet 2004). The need for a response is certainly clear, as Robert Zoellick, president of the World Bank, estimates that eastern European banks alone need 120 billion of fresh capital (Economist 2.26.2009). Following that huge sum in the short-term, the long-term challenge is to prevent a new crisis by improved regulation. For enhanced regulation in the field of financial markets, various field come into perspective.

Field of Reform	Description
Securitization	Securitizations have played a major role in the financial crisis because they make it more complicate to identify the existing risk and they separate the decision to issue a loan from the responsibility for the risk. Therefore, financial institutions should be constrained to bear at least 20 per cent of the risk themselves, leaving 80 per cent of the risk for securitization.
Shadow banking / off balance	Another problem shown by the financial crisis is the shadow banking system, which allowed banks to use special purpose vehicles off their balance sheets. In the future, those special purpose vehicles should be included in the balance sheet, enhancing transparency and the calculation of the individual and systemic risk.
Financial products and innovations (register)	To enhance transparency and to avoid new financial products that cause systemic risks, a European registration office for financial innovations should be introduced. This registration office would be in charge of standardization and simplification of financial products and limit the fashioning of financial products. It should serve as a first step to an international registration office.
Rating agencies	Improving transparency is also a task of the rating agencies. However, the rating agencies have contributed to the crisis due the misguiding ratings of some complex financial products like securitizations. Another problem is the combination of rating and consultation of those agencies, causing conflicts of interest and leading to neglecting the core task of rating. Those tasks should be clearly divided and a European agency to register and control rating agencies has to be established. Furthermore, the ratings should follow principles of sustainable management, which should replace the fair value principle, mark-to-market rules and the reporting of uncertain future returns in the balance sheet.
Hedge funds and private equity funds	Moreover, a lack of transparency is present at hedge funds and private equity funds because their data on business models, ongoing transactions, and ownership structures are in most cases not clear. Another problem is that they operate mainly with borrowed capital, so that they do not have an adequate capital base. To solve those problems, hedge fund management companies could be required to register before they can operate in the EU and a minimum capital ratio of target companies could be introduced.
Capital requirements	The capital requirements directives like Basel II consider too much the short-term principle and are inadequate in measuring the systemic risks caused by complex financial products. Therefore, these capital requirements should be reformed by introducing a limitation of bank leverage, minimum capital ratios for all credit risks and higher capital ratios for risky products as well as new financial products. Moreover, the off-balance vehicles should be limited, the period transformations should be better regulated, and the debtor of mortgage loans should be handled more strictly, e.g. requiring 20 per cent equity position of the debtor and a check of income and assets. To enhance the orientation towards long-term principles the bonus schemes for managers should be changed to a period of at least three years.
Offshore financial centers	Further challenges are the tax havens and the more or less regulation- and law-free offshore financial centers, which offer possibilities for financial institutions to elude regulation and foster tax flight and tax evasion. To put an end to those practices, joint action is required on EU-Level as well as on an international level.

Tab. 2 Financial Markets: Elements of Reform (FES 2009)

In November 2008 the European Commission set up a High Level Group chaired by Jacques de Larosière that was to work out recommendations for a reform of the European financial system.

According to the Larosière Group, there are several problems for banking regulation shown by the financial crisis. The first problem is a lack of adequate macro-prudential supervision, which criticizes that the EU supervisory arrangements emphasizes too much the supervision of individual firms. Secondly, there was no mechanism to translate identified macro-prudential risks into action, resulting in ineffective early warning mechanisms. Furthermore, the report identifies problems of competences shown by the mistakes made by supervisory bodies in the cases of Northern Rock, IKB, and Fortis. Failure to challenge supervisory practices on a cross-border basis is related to the problem of home supervisors' decisions affecting host supervision. Moreover, information flows are criticized because of a lack of frankness and cooperation between supervisors. Further, problems are caused by unequal power of national supervisory bodies related to their ways of supervision and to the possible enforcement actions, such that there is a lack of consistent supervisory powers across member states. Concerning the common decision-making at the level 3 committees, the report disapproves a lack of resources in the level 3 committees and that there are no means for supervisors to make common decisions, which results in an ineffective mechanism for enhancing and strengthening cooperation between the national supervisory authorities (Larosière Report 2009: 39-42).

To strengthen the macro-prudential supervision, the Larosière Report recommends a new institution called European Systemic Risk Council (ESRC), which should pool and analyze relevant information for financial stability and about macro-economic conditions and developments. This new body should be chaired by the ECB President and should be composed of members of the general Council of the ECB, the chairpersons of CEBS, CEIOPS, and CESR, as well as one representative of the European Commission. Related to the ESRC and to the Economic and Financial Committee (EFC), an effective early warning system should be developed with a direct line to the relevant competent authorities in the EU (Larosière Report 2009: 46).

Pertaining to the micro-supervision, the proposal suggests putting a European System of Financial Supervisors (ESFS) into place akin to the European System of Central Banks. This two-stage approach ensures that supervision would be close to the financial markets and institutions by leaving the most parts of day-to-day supervision at the decentralized national level. Further, the supervision of major cross-border institutions should be assigned to colleges of supervisors.

At a central European level, the level 3 committees should be transformed into three European Authorities: a European Banking Authority, a European Insurance Authority, and a European Securities Authority. Those new bodies composed of the chairs of the national supervisory authorities should be strengthened in comparison to the current level 3 committees. Furthermore, they should be independent of political authorities, but accountable to them. Among other things, their tasks should be a) legally binding mediation between national supervisors, b) adoption of binding supervisory standards, c) the oversight and coordination of colleges of supervisors, and d) licensing and supervision of specific EU-wide institutions like Credit Rating Agencies, and post-trading infrastructures. As a result, there should be a common high supervisory standard, a strong cooperation between the different supervisory bodies and similar rules, powers, and sanctions of national supervisors. However, it is not a goal to fully harmonize all national supervisory structures (Larosière Report 2009: 44-56).

A counterproposal would be to establish only two institutions: One for supervision and one for market conduct (Goodhart 2009: Masciandro and Quintyn 2009). Furthermore, a single new institution could be established, a European Financial Authority (EFA), leading to a twin peak structure of ECB and EFA monitoring a two-level system, comprising a federal level and a state level (Masciandaro 2009). Moreover, an effective European crisis management would only be possible with a fiscal back-up. Otherwise, every attempt at European crisis management could be subverted by national bodies, resulting in financial protectionism (Goodhart 2009; for further discussion see Buiter 2009).

5. Outlook

5.1. Persistent Challenges

Since the 16 Euro members have given up their monetary policy to the ECB and limited their freedom of fiscal policy under the SGP, diverging trends of macroeconomic performance have emerged. Whereas the Germany economy managed to reduce its wage units costs since the introduction of the Euro, Italy, Spain, and France have seen an increase of 15-20% (Schwarzer 2009: 19). This has led to the accusation of German „beggar thy neighbor" policies and political tensions between these major Euro zone economies (Becker 2008a). This kind of tensions is likely to increase. Before the introduction of 12 new members into the EU since 2004, the monetary policy of the Euro area was in the competent hands of the ECB and there was less of a need for an executive governance body, since 12 of the EU's 15 members at that time were Euro countries. Matters of economic governance could be addressed relatively effectively by the European Council and the Economic and Financial Affairs Council (ECOFIN). This has since changed since the expansion, leaving the Euro zone without either an official forum for economic policy or a dominating majority within the EU's institutions.

Further concerning the Euro, the dramatic movements of the common currency against the yen and dollar, downwards following its introduction in 1999 and strongly upwards from 2005-2008, have caused difficulties for the economies of the Euro area. Unlike other nation-states, the EU does not have a clearly defined exchange rate policy, not does it have an effective mechanism for implementing one. Concerning an exchange rate regime for the Euro, it would be possible to modify the current governance structure of the ECB allow it to intervene in financial markets on the Euro's behalf, acting on a decision from the Council.

The incompleteness of the Internal Market is a further hurdle for effective economic governance in Europe. The groundwork is in place in EU law for the Commission and the ECJ to combat the protectionist tendencies of the member states. It would be better, however, if the current allowances for statist intervention were either tightened further in order to preclude their market distorting effects, or flexibilized to allow for approval on a case-by-case basis. Furthermore, the liberalization for the service market is a vital step for Europe to gain the benefits of increased employment and lower prices that the Single Market promises. Unfortunately, Germany and France have in the past proved their opposition to the Services Directive. Without the support of these major economies, such liberalization across the entire Union is impossible. The possibility of a 'service free trade zone' is conceivable, however, using the Instrument of Enhanced Cooperation. The liberal market economies of Ireland and Great Britain would likely find willing partners in the economically open Eastern European states. The accession of the Union's hesitant coordinated market economies could then follow at a later date.

The future of economic governance in Europe must address these issues, especially in these current times of economic hardship. If the EU does not muster an effective policy response, the Union will literally drift apart along national lines and could ultimately disintegrate. More important, however, are the possibilities of coordinating a more effective response to the crisis internationally than any single country could produce alone.

5.2. Future Faces of the European Polity

There are different conceivable possibilities for an economic government to define the relationship between state and market (Boeri 2002; Mathieu and Sterdyniak 2008). As diverse economic models and hence different political approaches to comparable problem areas prevail in Europe, the most influential states might finally shape the orientation of a future economic government according to their own models and preferences. The literature offers diverging views on whether a certain path dependence results from the distinct structure of a national economy (Berger; Dore 1996; Sapir 2005) or whether, on the contrary, the different models are bound to converge in the long run. In general, two streams judging these European differences can be identified. The first focuses on the evaluation of economic competitiveness and of the institutional structures for economic growth and employment. Hall and Soskice (2001) classify liberal and coordinated market economies. The second stream seeks a better understanding of different welfare regimes. Here Esping-Andersen (1990) established the typology of liberal, social-democratic, and conservative (continental) welfare regimes in Europe. Both approaches analyze the influence of institutional arrangements and of the degree of state intervention on

economic performance and redistribution mechanisms in the sub-systems of the national economies. As a result, a tension between meritocratic-hierarchical principles and egalitarian-humanistic principles (Wilensky 2002) can be recognized as driving market development and defining political action.

Previous analysis has shown that closer cooperation is necessary to cope with the concurrent challenges of the economic downturn, different capabilities and productivites within the the currency union, and possibly diverging policy responses in the form of protectionism. Given the need of an European economic government, or at least increased economic governance among member states, the old question of what to do with this is raised anew. From the considerations above, three distinct scenarios can be drawn: (1) Ordoliberal Europe, (2) Social Market Democracy, (3) Socialist European Democracy.

Probably the oldest market theories is that of the free market economy (c.f. Hayek 1960; Friedman 1962). The free market is characterized by an almost complete absence of governmental intervention since it is controlled by the "invisible hand", which Adam Smith had already described in 1776. Production and consumption of the basic entities, companies and households, develops along the fundamental principles of supply and demand. The only task of the state is to assure the principle of ownership and to guarantee working market regulation, for example maintaining free competition and contractual rights. In the scenario of Ordoliberal Europe, the European Union maintains its role as strong regulator and market supervisor, but retains from drawing fiscal measure and transfers within the Union. This mode of economic governance entails a prolongation of status quo policies and abstains from the idea of a common economic government with redistributive capabilities. Decision making entails a high degree of sustainability.

The scenario of Social Market democracy creates the basic need for a central European redistributive agency, possibly with the power to raise its own taxes and distinctive fiscal transfer mechanisms. The role of this agency would be to stabilize the markets and ensure its welfare effects for all Europeans, as in the conservative welfare states on the European continent. Here, the basic unit of society is still the family and to a lesser extent the individual. Therefore, conservative welfare states provide fewer comprehensive social rights linked to employment on the one hand. On the other hand, it offers a higher level of protection against class, life-course, and intergenerational risk.

The opposite of a free market economy is a relatively strongly regulated system with a big welfare state. Here, the government undertakes many measures for enhancing the social welfare of its citizens and for providing the highest possibly living standard. Therefore, the state intervenes directly in the economy, aiming to establish an economy which serves the community and establishes "social justice" and "equality". Not only the level of regulation but also the real paid benefits are high in welfare states. In these countries, the public spending ratio is over 50 percent (Deutsche Bank Research 2006: 13). In this scenario of European Socialist Democracy, central coordination would be enatiled, as well as state intervention in the markets for the sake of societal goals like full employment, income equality, and social justice in general. This last form of economic governance demands the highest degree, of not only economic but also of political integration.

6. Conclusions

Analysis has shown that deepened integration and enlargement demand increased cooperation among the European member states. This is due to the fact that, in the face of imminent challenges on the one hand and domestic strains on the other hand, European coordination would create benefits for all, especially in an enlarging Union. The mode of governance employed for deepened cooperation varies between supranational, intergovernmental, and flexible forms of cooperation, depending on the sort of challenge, existing institutional frameworks, and the capability to be enhanced. The specific instrument of enhanced cooperation seems unfit in most cases, due to the high restrictions for application of this policy tool. Nonetheless, broader forms of deepened integration on an informal base seem best fitted to cope with economic demands and political constraints as well as diverging national interests. They envision centripetal forces of front-runnership, inducing new members towards future membership, and deepened integration.

In the long run, the challenges of uncoordinated fiscal policy in Europe become more numerous and more complicated. In simple terms, the spending decisions of member states have effects on their the gradual economic development. Over time, this can lead to comparative disadvantages, which in turn decreases European consolidation and increases political as well as economic tensions. For example, deficit spending

increases government debt and eventually constrains the country's ability to respond to future challenges. Particularly in light of shrinking and aging populations, indebted countries will face increasingly unpleasant options to meet their obligations, such as cutting pensions, increasing taxes, or reducing debt burdens via inflation or default. In a further regard, current spending decisions also effect the long-term growth potential of a country. The more a government invests in the future, such as education or research and development spending, the greater the growth potential of the country becomes. This fact has long been recognized in Europe, for example leading to the Lisbon Strategy goal of spending 3% of national GDP on research and development. Unfortunately, this goal has never been reached. Governments generally struggle to gain public support for spending programs that promise results only in the future. In these regards, Europe could again benefit from a coordination of fiscal policies. In particular, binding mechanisms to require governments to consolidate their finances in good times and to invest in long-term growth potential would contribute greatly to European economic and political integration.

Enhanced cooperation on a broader scale is only a first step. Growing economic divergences and political conflict within the Union might still endanger future European integration. A fundamental solution for a global European system of economic governance, covering short, medium, and long-term policy tasks is still out of reach. However, there are core areas and institutions whose build-up in times of crisis and pressuring challenges might offer the beginning of such a fundamental solution.

7. Appendix

7.1. European Economic Governance – State of the Art

As in any economic system, European economic governance comprises institutions for monetary, fiscal, and structural policies. Regarding economic coordination, the legal foundations have been laid by the treaty of Maastricht, with changes in the treaty of Lisbon. For governing the EMU, there are two major instruments: the Stability and Growth Pact (SGP) and the Lisbon Agenda, including the Broad Economic Policy Guidelines.

The creation of the Euro area within the European Union (EU) certainly would not have been possible without the support of the traditional motor of European integration, Germany and France. It is surprising to note, therefore, that the institutionalization of the new currency followed a clearly recognizable German pattern, with little European or even French influence. The European Central Bank (ECB) was fashioned after the German Bundesbank, including complete political autonomy and a single mandate to control inflation. The SGP was adopted in 1997 following German insistence, as its low-inflation policy was seen as having contributed to Germany's strong economic performance in the post-war period. The SGP's requirements for budget deficits of no more than 3% of national GDP and national debt of no more than 60% of GDP were intended to prevent the possibility of lax economic policies 'free riding' on the common currency and raising inflationary pressure, even for fiscally conservative members. Exceptions to the criteria were only allowed for natural disasters or an economic crisis in which national GDP recedes by at least 0.75%. Consistent breaches of the criteria were to lead to sanctions from the Commission, the proceeds of which were to be distributed to the other member states to at least partially compensate them for the macroeconomic costs of the malefactor state's impropriety.

This Teutonic flavor certainly resulted from the Bundesbank's historical success at constraining inflation, as well as the other European countries' lack of credibility following decades of mediocre fiscal performance (Strassel 2009). Nonetheless, France has never ceased to desire further instruments of economic governance for the Euro area. One the one hand, this represents a French desire to counterbalance the ECB, and on the other, a continuation of typical French statist guidance of market forces. The SGP has often been criticized for its inflexibility and has been reformed in 2005, introducing more political discretion, other rules for "a steep fall in GDP" (Begg 2008), and other comparable measures.

Before the introduction of 12 new members into the EU since 2004, the monetary policy of the Euro area was in the competent hands of the ECB and there was less of a need for an executive governance body, since 12 of the EU's 15 members at that time were Euro countries. Matters of economic governance could be addressed relatively effectively by the European Council and the Economic and Financial Affairs Council (ECOFIN). This has since changed since the expansion, leaving the Euro area without either an official forum for economic policy or a dominating majority within the EU's institutions.

The need for economic governance in the Euro area has lead to the creation of the Eurogroup in 1998, an informal but influential forum consisting of the economic and finance ministers of the 11 Euro countries at the time, as well as representatives from the European Commission and ECB. The Eurogroup generally meets directly before the official ECOFIN sessions to coordinate a unified position for the Euro countries. Since 2005, the group has elected a president for two and a half year terms to represent the group publicly. The Treaty of Lisbon, if ratified, would recognize the Europgroup and its president officially, calling it the Euro-ECOFIN-Commission. The group would maintain its informal nature, however, and have no power to enforce any of its decisions.

In 2003, the Council began issuing Broad Economic Policy Guidelines (BEPG) as a link in coordinating the Member States' economic policies. Under Article 99 of the EC Treaty, the Council can accept recommendations from the Commission, draft a report, and present it to the European Council. The European Council, acting on this report with qualified majority voting, adopts a set of guidelines for a three-year period (Europa 2009). The BEPGs have no legal force, but serve to „name and shame" the undesirable practices of the EU's member states, seeking to achieve macroeconomic coordination through „peer pressure (Becker 2008a:34). In 2005, the BEPG were combined with the Employment Policy Guidelines to produce the Integrated Guidelines for Growth and Jobs. The Integrated Guidelines are formulated in the same way as the BEPG and are currently available for the period 2008-2010. In general, the Guidelines have had little effect, though, as the „peer pressure" mechanism has proven to be a „dull weapon"(Becker 2008a:34)

The competition policy of the European Union, enforced by the Commission and the European Court of Justice (ECJ) represents a final institution of economic governance within the EU. The creation of the Internal Market is clearly the greatest achievement of the Union, and competition policy is strongly cemented therein, leaving little doubt of its effectiveness. The Internal Market is not complete, however. In particular, the liberalisation in the trade of services has not nearly reached the level of free trade in the European goods market. The Bolkestein Directive on Services (2006/123/EC) is set to enter into force in December, 2009. The Directive has been considerably weakened from its original version, however; among other provisions, the „country of origin" principle was removed, thus subjecting the entry of a firm into a new market to that market's national bureaucracy. Furthermore, protectionist and nationalistic provisions in recent rescue and stimulation packages as a result of the financial crisis have placed the Union's competition regime under significant pressure.

The need for more flexibility was first realized by relevant EU actors since the treaty of Maastricht (EMU). Subsequently, two strains of thought have dominated. First, ideas of enabling smaller groups of states to cooperate within the institutional framework of the European Union are canvassed particularly by France and Germany. On the other hand, countries such as Great Britain favour an à la carte flexibility, whereby smaller groups of member states should be allowed to engage in cooperation in specific fields of common interest outside the main EU institutional framework. Until now, the Franco-German way has prevailed and all existing forms of closer cooperation are encapsulated within the existing EU framework. However, the conditions for Enhanced Cooperation introduced by the Amsterdam Treaty were so rigid that almost no initiatives have developed.

There exists furthermore a link to the existing EU aims of the Lisbon strategy which demands an increase of R&D expenditures and to the current anti-cyclical economic stimulus plans on national and EU level which provide measures for the advancement of education (European Commission 2009d; Federal Government of Germany 2009). The social partners in Europe have also often expressed common interest for the promotion of qualification, training, and education for workers (European Trade Union Confederation, 2007 & European Association of craft, small and medium-sized enterprises, 2007). Especially trade unions have remarked in this context, that in addition to flexicurity measures, actions have to be undertaken which enhance economic growth (id.).

Human capital investments not only consist of expenditures that are made by the state or the European Union. In some cases they comprise investments made by the private economy. This has to be considered for certain areas of professional qualification, research and development, as well as for financial aid for advanced training and education in the tertiary sector (OECD, 2008). State and EU authorities have thereby the task to formulate guidelines for the market by giving for instance legal and financial incentives.

7.2. Employment and Labor Relations

The treaty of Amsterdam [1997] amended the treaty establishing the European Community by Articles (125-130) which provide a "coordinated strategy for employment" as a goal of member states of the Community (Streinz 2008). Employment policy is not an explicit EU competence; however coordination in this area without

regulations was expressed by the EU since the treaty of Maastricht and the subsequent currency union. The provisions of Art. 125 ECT can be seen as a practical case of the "open method of coordination" which concentrates since 2005 on employment policy.

The open method of coordination is in use in other European policy fields which are often closely related to employment policies [e. g. entrepreneurial policy or policies promoting research and development] (Hodson and Maher 2001). A broader approach is also favored by the proposals of the European Commission concerning the decisions of the European Council on the broad economic policy guidelines in connection with the European employment policy for 2008-2010 (European Commission: 2007a).

The open method of coordination is used as a term for those policy areas which are not affected by EU legislation (cf. consolidated version of the treaty establishing the European Community: Art. 129). In the area of employment policy, the existing EU-competence ranges from the formally granted freedom of movement for workers to regulations in certain areas of occupational safety and health, social protection, and anti-discrimination. The de jure far-reaching provisions of the treaties have not been utilized completely (Streinz, Rudolf, 2008: para. 940, 1091-1104). Nevertheless, certain directives concerning the harmonization of the freedom of services or the equal payment for women and men are of importance. The clause of Art. 137 para. 5 ECT excludes the areas of the right of association, the right to strike, the right to impose lock-outs, and any regulation concerning the collective payment of workers from all forms of coordination in the European Union.

Besides the special provisions for employment policy, several broader economic and social coordination methods exist in the European Union. Art. 99 TEU has introduced the periodical broad economic policy guidelines of the Commission, which address areas that are not affected by the common market and the monetary union (Streinz 2008). Since the decisions of the European Council of Lisbon in 2000, the open method of coordination is also implemented in the intermediate-term social policy [Lisbon strategy]. The "macroeconomic dialogue", which was introduced in 1999 between EU-Institutions, national governments, trade unions, and employers' organizations has merely consultative functions. It has not led to any important initiatives so far (Niechoj 2004). The reforms of the treaty of Lisbon, which has not been ratified until now, will not result in any significant institutional changes concerning the regulations on a European employment policy (Streinz 2008).

The open method of coordination, which consists of political convergence aims, timetables, benchmarking, promotion of best-practice-models, and the recommendation of national action plans is not legally binding (Hodson and Maher 2001). The procedure is embedded in the framework of the EU, whereas in most cases the European Council decides on a draft of the European Commission. Art. 125-130 ECT provides detailed procedural arrangements concerning a coordinated strategy for employment. Direct financial aid is furthermore possible for economically underdeveloped states and regions by means of the European social fund which is part of the EU budget. Via Art. 139 ECT, the social partners [trade unions and employers' organizations], which have been recognized on the European level, have the additional opportunity to negotiate framework agreements which can be implemented in the national collective bargaining systems of the member states (Fuchs and Marhold 2006).

Reviewing the experience so far in the sectors of the Lisbon social agenda and its specific employment strategy, certain aspects of the European employment policy that are related to its "flexicurity" aims can only be improved in small steps implemented with the instrument of the open method of coordination (Sapir 2006). In this context, the term flexicurity is described by the Commission as a concept that on the one hand is composed of flexibility for labour markets by deregulation of employment protection legislation and that on the other hand is composed of security by the means of labour market integration, especially by training for workers and other supportive measures in the case of unemployment (European Commission 2007b). In particular, a harmonization of national security regulations in the sectors of employment protection legislation and of unemployment benefits would create considerable political opposition by the member states and by social partners in the EU (Keller and Seifert 2008). In the context of different welfare state traditions and different social models, many trade unions and employers' organizations defend their national privileges in the area of labour market institutions. Additionally, it has to be seen that fiscal instruments for the labour market mostly remain a national competence (Sapir 2006).

These considerations are not refuted by the experiences since 2008. The far-reaching implications of the global financial crisis on the social and the labour market systems became apparent during the second half of 2008. The European Trade Union Confederation [ETUC] took action on this political field (European Trade Union Confederation 2009a). ETUC points of criticism and suggestions for improvement, citing i. a. the demand "to save capitalism from the speculators" by preventing layoffs, by guaranteeing social protection, and by annexing

a “Social Progress Protocol” to the European Treaties. They also called for a “New Social Deal in Europe” as well as for “greater transparency and better regulations of the markets”. In the actual crisis, ETUC sees “risks inherent to financial capitalism”. To counter “recession” in the view of ETUC, “coordinated actions and leadership” on the EU level is required. Corresponding proposals are included in the ETUC Declaration of 18 March 2009, directed to the European Spring Summit of March 2009 (European Trade Union Confederation 2009b). On the national German level, the “Konjunktur- und Wachstumsprogramm” (economic stimulus program) of the DGB [German Confederation of Trade Unions] pursues a similar policy (German Confederation of Trade Unions, 2008).

The various systems of welfare state cooperation of the member states are nevertheless important factors in some conflicts concerning the expansion of EU competence or certain proposals made by the EU commission. Great Britain, for example, has shown in the early 1990’s resistance to an enlargement of EU legislation in the area of social policy. Tensions also became apparent in the recent criticism of social partners concerning recommendations of the Commission on common principles of the flexicurity concept. The European Trade Union Confederation [EUTC] has criticized these proposals for being too oriented towards the Danish model, with its extensive flexibility regulations for employment contracts, while neglecting other Scandinavian models which offer more security regulations. Furthermore, the ETUC has demanded improvements for the concept that include qualification measures for workers by “lifelong learning” (European Trade Union Confederation 2007). The corresponding proposals of some employers’ organizations emphasize the necessity of independent national systems. However, they come to similar conclusions and demands concerning the qualification of workers (European Association of craft, small and medium-sized enterprises 2007).

A greater chance for a successful coordination could exist in areas which are closely related to a European employment policy. Coordination is accepted in the existing EU competence for product and capital markets or monetary policy. A consensus for a coordinated enlargement of the share of human capital investments in the areas of education, science, research, and development via the open method of coordination may also be possible. The positive effects of these measures for economic growth are broadly recognized by national states and stakeholders.

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5

Enhanced Cooperation and the European Foreign and Security and Defence Policy

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1. Introduction

The aim of the project as a whole is the study of the enhanced cooperation mechanism in the framework of the Lisbon Treaty. This contribution will focus on the Common Foreign and Security Policy (CFSP) and the Common Security and Defence Policy (CSDP).[117]

The concept of enhanced cooperation was introduced into the EU Treaty structure by the Treaty of Amsterdam, although this innovation is generally seen as an institutionalisation of previous ad hoc experiments in flexibility agreed within the Treaty framework at Maastricht with respect to Economic and Monetary Union, social policy and defence; as well as the Schengen Agreement, initially outside the EU Treaty system and brought into its structures also by the Amsterdam Treaty.[118] Initially, however, the CFSP was excluded from the scope of the provisions on enhanced cooperation. The Treaty of Nice extended a limited possibility of enhanced cooperation to the CFSP, while still excluding from its scope all 'matters having military or defence implications' (Article 27b TEU). The Treaty of Lisbon, as well as expanding the Treaty provision on the EU's Security and Defence Policy (currently Article 17 TEU), extending both its aims and its tasks and including a commitment to enhance its operational capacity, envisages a transformation of the ESDP into a *Common* Security and Defence Policy. It might seem paradoxical for the Treaty of Lisbon, at the same time as emphasising solidarity and the building of a common policy, to accept the extension of enhanced cooperation and flexibility into the defence sphere.

Indeed, one of the objects of this paper, as well as outlining the ways in which enhanced cooperation has applied to the CFSP (section II) and the ways in which this will be affected by the Treaty of Lisbon (section III), is to examine the extent to which foreign policy, security and defence lend themselves to enhanced cooperation and other forms of flexibility (section IV). The conclusion (section V) is that there is a need to distinguish between foreign policy and defence; the development of an active and credible EU foreign policy cannot readily accommodate differentiated integration as it depends for its force not primarily on either legally binding instruments or coercion but on political weight.[119] On the other hand, military and defence capacities and initiatives are perhaps inherently differentiated. In order to explore these issues further we need to start by considering the rationale for enhanced cooperation more generally, and its application to the CFSP.

As one of the leading scholars of enhanced cooperation has pointed out,[120] there is a certain ambiguity in the rationales underlying the provisions on enhanced cooperation. On the one hand it is seen as a form

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[117] For a study of the possibilities of differentiated integration in EC external relations, and the impact of internal differentiated integration on EC external policy, not covered by this paper, see E. De Smijter, 'The External Relations of a Differentiated European Community' in B. De Witte, D. Hanf, E. Vos (eds.) *The Many Faces of Differentiation in EU Law* (Intersentia, 2001).

[118] See generally D. Thym, 'The Political Character of Supranational Differentiation', (2006) 31 *European Law Review* 781; D. Král, 'Multi–speed Europe and the Lisbon Treaty - threat or opportunity?', Europeum, (http://www.europeum.org/doc/pdf/895.pdf)

[119] As Daniel Thym has put it, 'foreign policy is not primarily about statutory regulation, but about expressing political support, opposition, and pressure. The added value of European foreign policy stems from the combination of political clout and the strength inherent in united action' D. Thym, 'Reforming Europe's Common Foreign and Security Policy' (2004) 10 *European Law Journal* 5, at p.12.

[120] H. Bribosia, 'Les Coopération Renforcées' in G. Amato, H. Bribosia and B. de Witte (eds.), *Genèse et Destinée de la Constitution Européenne: Commentaire du traité établissant une Constitution pour l'Europe à la lumière des travaux préparatoires et perspectives d' avenir*, Editions Bruylant, 2007.

of institutionalised differentiated integration, accommodating (as with Schengen and the EMU opt-outs) the desire of some Member States to pursue integration at a faster pace than others, or to extend integration into new areas. On the other hand it is seen as a way to unblock decision-making *impasses*, especially in areas where unanimity is required, such as tax harmonisation, aspects of the movement of people, or perhaps foreign policy. This ambiguity is reflected in the conditions and procedures governing its use, for example the extent to which it is regarded as a measure of last resort; the degree to which the policy objectives of the initiative must be defined in advance; the degree of 'openness' to other Member States and the conditions, if any, under which subsequent participation is allowed. Enhanced cooperation within the CFSP/CSDP reflects this ambiguity, with perhaps a current bias towards the second of these functions – facilitating decision-making. The changes to the provisions in the Lisbon Treaty may be argued to have shifted the balance somewhat towards the first – the accommodation of differentiated integration.

2. Enhanced cooperation and the CFSP under the Treaty of Nice

Under the framework established by Treaty of Nice, enhanced cooperation in the CFSP is dealt with in two sets of provisions: Articles 43-45 TEU establish the general framework, applicable to all three pillars, and Articles 27a-27e TEU establish the specific provisions on enhanced cooperation in the CFSP. We need to examine the following issues: the scope of enhanced cooperation in the CFSP; its aims and substantive conditions; the procedures for establishing it; the procedures for admission of later-joining Member States; the status of measures adopted under the procedures. Since the provisions on enhanced cooperation have not yet been used, we do not have any practice to examine and our analysis will depend on the Treaty provisions themselves.

2.1. Scope of enhanced cooperation in CFSP

According to Article 27b TEU,

> Enhanced cooperation pursuant to this title shall relate to implementation of a joint action or a common position. It shall not relate to matters having military or defence implications.

The phrasing of the first sentence recalls that of Article 23(2), second indent, which establishes one of the situations in which qualified majority voting (QMV) is possible. Like QMV in the CFSP, therefore, enhanced cooperation is not intended to launch new policy initiatives but rather to enable a specific implementation of already-determined policies by a group of Member States. This gives it rather restricted scope, in addition to the exclusion of matters with military or defence implications (incidentally also excluded from QMV), particularly if we bear in mind that common positions and joint actions are binding instruments and that all Member States will therefore be under an obligation to give them effect.[121] Thus, enhanced cooperation seems to envisage that some Member States may wish to go beyond others in the degree or intensity of their implementation of policies already formulated.[122] The CFSP, it must be remembered, is not a pre-emptive competence of the Union. Even where a CFSP action has been taken, it is possible for Member States to continue to act unilaterally as long as they do not act in contravention of the CFSP measure; enhanced cooperation therefore amounts to a form of collective further implementing action by a group of Member States. It may be (although this has not yet happened, at least formally) that unanimous agreement to a specific joint action or common position is made possible if it is understood that its implementation will be by way of enhanced cooperation by a group of Member States.

A key general limitation to enhanced cooperation is that it must 'remain within the limits of the powers of the Union' (Article 43(d) TEU). In this it is unlike forms of cooperation 'external' to the EU, such as the Schengen Agreement, which do provide a way of going beyond existing Treaty powers. Given the emphasis on inclusivity (as many Member States as possible are to be encouraged to take part) this limit ensures that enhanced

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[121] Under Article 14 TEU joint actions 'shall commit the Member States in the positions they adopt and in the conduct of their activity'; under Article 15 TEU 'Member States shall ensure that their national policies confirm to the common positions'.

[122] I. Pernice and D. Thym, 'A New Institutional Balance for European Foreign Policy?' (2002) 7 *European Foreign Affairs Review* 369 at p.382-3. Pernice and Thym argue that this is a necessary limitation on enhanced cooperation in the CFSP given the need for unity in the presentation of a credible common foreign policy; see also Thym at note 3 *supra*.

cooperation does not become a form of *de facto* Treaty amendment. However CFSP powers, at least in terms of substantive scope, are in fact extensive: under Article 11(1) TEU the Union's CFSP covers 'all areas of foreign and security policy'. Since the exercise of enhanced cooperation must respect the Treaties, both the EC Treaty and the TEU (Article 43(b) TEU), it should not infringe Article 47 TEU by encroaching upon Community powers.[123]

The competence limitation may be more significant in terms of available instruments: CFSP powers are exercised through general guidelines, common strategies, joint actions, common positions, decisions and international agreements.[124] Could these be extended through enhanced cooperation to include, for example, Community-style regulations or directives, assuming that this would be, as required, in the implementation of a joint action or common position? Or would the adoption of a Community-style regulation fall outside the limits of the Union's powers?[125] In support of this latter view is the fact that Article 43 TEU authorises the use of 'the institutions, procedures and mechanisms laid down by this Treaty' for the purposes of enhanced cooperation, which suggests that both the range of instruments and the institutional balance should be respected.[126] Also in support is the provision in Article 27a(2) TEU that Articles 11 to 27 TEU shall apply to enhanced cooperation – thus including the provisions on instruments, institutions and decision-making procedures.

Among the available instruments, the international agreement is perhaps the most problematic from the perspective of enhanced cooperation. The agreement, under Article 24 TEU, would be concluded in the name of the Union and will be binding on the institutions under Article 24(6) TEU. However it would not bind those Member States who were not participating in the enhanced cooperation (Article 44(2) TEU).[127] Although this might pose difficulties in terms of international responsibility, it should be remembered that the agreement would – at present – be concluded in implementation of a previously agreed common position or joint action to which all Member States subscribed.

As already mentioned, enhanced cooperation may not be used for 'matters having military or defence implications'. Arguably this should not exclude all security matters under Article 17 TEU, since (for example) civilian crisis management missions or humanitarian and rescue tasks may not involve military action; on the other hand some might see the whole of Article 17 as having defence implications and thus excluded.

2.2. Aims and substantive conditions

In general terms, enhanced cooperation should be aimed at 'furthering the objectives of the Union and of the Community, at protecting and serving their interests and at reinforcing their process of integration'.[128] To this Article 27a(1) TEU – reflecting CFSP objectives as set out in Article 11 TEU – adds:

> Enhanced cooperation [within the CFSP] shall 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.

Enhanced cooperation is thus about using Union institutions and mechanisms to achieve Union objectives. Both these provisions, with their references to integration, coherence and identity, demonstrate a concern that enhanced cooperation should not be used to establish separate autonomous groupings of Member States – something that is perhaps especially important in the context of the CFSP where the Union's ability to speak with one voice is crucial to its success.

Articles 43 and 27a TEU also set out a number of substantive general and CFSP-specific conditions. These are concerned to ensure first, respect for the Community and Union/CFSP acquis and second, consistency

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123 Under Article 27a(1) TEU, enhanced cooperation within CFSP must respect the powers of the Community. C.f. case C-91/05 *Commission v Council* (ECOWAS) [2008] ECR I-0000.

124 Articles 12, 13(3) and 24 TEU.

125 Although adopting a regulation is within Community powers, Article 43(d) requires the measure to remain 'within the limits of the powers of the Union or of the Community', not the Union *and* the Community.

126 It may also be noted that under the Lisbon Treaty special provision is made for the use of enhanced cooperation in order to modify voting and decision-making requirements: Article 333 TFEU; see further discussion below; the implication is that, *a contrario,* enhanced cooperation cannot at present be used for these purposes.

127 T. Jaeger, 'Enhanced Cooperation in the Treaty of Nice and Flexibility in the Common Foreign and Security Policy' (2002)7 *European Foreign Affairs Review* 297 at p.303-5, also questioning the extent to which the Union *per se* could be bound by the agreement in such a case..

128 Article 43(a) TEU.

between all the Union's policies and external activities. Thus Article 27a provides that enhanced cooperation shall 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 activities.

The ongoing maintenance of this consistency is the responsibility of the Council and Commission (Article 45 TEU, c.f. Article 3 TEU).

2.3. Procedures for establishing enhanced cooperation in the CFSP

A minimum of eight Member States are required to initiate enhanced cooperation, approximately one third of the envisaged Member States at the time of the Treaty of Nice. Under Article 43a TEU enhanced cooperation is to 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 Treaty.' This condition implies a failure of normal decision-making processes and thus the use of enhanced cooperation in a subsidiary role with the effect of mitigating the rigours of unanimous voting. At the same time it is to be open to all Member States, so cannot be used to form a closed exclusionary club.

The participating Member States are to address the request to the Council and the request is then forwarded to the European Parliament and the Commission. As far as the European Parliament is concerned, this is for information only;[129] the Commission is to give an opinion, 'particularly on whether the enhanced cooperation proposed is consistent with Union policies,'[130] since as we have seen it should be consistent not only with CFSP objectives and policies but also with Community and other Union policies. There is at present no guidance in the Treaty as to how much detail needs to be given to the Council, or Commission, by the proposing Member States as to the objectives and scope of the proposed action, whether it needs to amount in effect to a draft instrument or merely to consist of a project for acting on a particular matter. Here again absence of practice makes it difficult to assess the level of detail needed to make the process work satisfactorily.

Authorisation is granted by the Council, acting in accordance with the second and third subparagraphs of Article 23(2) TEU. This means that the Council acts by QMV, with votes allocated according to Article 205(2) EC, 255 votes in favour being required, representing at least two-thirds of the Member States.[131] The two-thirds rule means that in addition to the one-third of Member States needed to launch an enhanced cooperation initiative, at least another third of Member States need to be in agreement.

Once enhanced cooperation is established, decisions are taken according to the normal decision-making procedures, with the requirements for QMV adjusted proportionately to those taking part. The High Representative is to keep the European Parliament and non-participating Member States informed, 'without prejudice to the powers of the Presidency and of the Commission'. Expenditure, except for the administrative costs of the institutions, is for the participating Member States only. It is notable that all Member States are entitled to take part in discussion of proposed measures under enhanced cooperation, although only participating Member States will vote or be included for the adoption of unanimous decisions. This again suggests a vision of enhanced cooperation that is primarily concerned with unblocking decision-making failures rather than new more deeply integrative policy departures.

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[129] In contrast, enhanced cooperation under the EC Treaty requires consultation of the European Parliament and in some cases its assent: Article 11(2) EC.

[130] Article 27c TEU.

[131] Two separate 'brakes' are included in the Article 23(2) procedure: a Member State may request verification that the qualified majority represents at least 62% of the total population of the Union as a condition for adopting the decision. A Member State may also, under this procedure, oppose the adoption of a decision by QMV 'for important and stated reasons of national policy'; in such a case the Council may refer the issue to the European Council for adoption by unanimity.

2.4. Procedures for admitting later-joining Member States

Just as enhanced cooperation must be open to all Member States initially, it must also be possible for non-participating Member States to join at a later stage and the Commission and participating Member States are charged with encouraging further participation of 'as many Member States as possible' (Article 43b TEU). At this point, however, those wishing to join must be prepared to comply with the 'enhanced cooperation acquis' in the form of the initial decision and any further decisions. From this perspective the right of non-participating States to take part in discussion leading to the adoption of decisions taken under enhanced cooperation is important. Article 27e provides:

> Any Member State which wishes to participate in enhanced cooperation established in accordance with Article 27c shall notify its intention to the Council and inform the Commission. The Commission shall give an opinion to the Council within three months of the date of receipt of that notification. Within four months of the date of receipt of that notification, the Council shall take a decision on the request and on such specific arrangements as it may deem necessary. The decision shall be deemed to be taken unless the Council, acting by a qualified majority within the same period, decides to hold it in abeyance; in that case, the Council shall state the reasons for its decision and set a deadline for re-examining it. For the purposes of this Article, the Council shall act by a qualified majority…

It is perhaps significant that the Member State wishing to participate 'notifies its intention' to the Council rather than, for example, 'addressing a request' as the initial participants do.[132] Although the Council has the power to refuse, the process is weighted in favour of inclusion: the Council, after receiving an opinion from the Commission, decides by qualified majority. A negative decision requires a blocking qualified majority and even then it is only a decision to 'hold it in abeyance' with a date set for re-examination; a definitive refusal is thus not contemplated.

2.5. The status of measures adopted under enhanced cooperation procedures

The status of measures adopted under enhanced cooperation is clearly of great importance. They are binding only on participating Member States although non-participating Member States are not to impede their implementation (Article 44(2) TEU). Further, Article 44(1) TEU provides that they 'shall not form part of the Union acquis'. The implications of this are unclear, but are probably of more consequence for enhanced cooperation within the framework of the Community, with its doctrines of primacy and direct effect, than for the CFSP. Unlike the negotiated opt-outs from EMU, defence and the 'Communiterisation' of Schengen, newly acceding States are not bound to accept enhanced cooperation. It also seems clear that the Union would not be prevented by enhanced cooperation from itself adopting, as part of the normal CFSP, measures in the field covered by enhanced cooperation, subject to the requirement of consistency already mentioned.

Since acts under enhanced cooperation would be adopted under the general CFSP provisions they would likewise be excluded from the jurisdiction of the Court of Justice (with respect to judicial review, for example). Nor is the Court given jurisdiction over the Treaty provisions on enhanced cooperation themselves insofar as they concern the CFSP.[133]

3. Enhanced cooperation in the CFSP under the Treaty of Lisbon

3.1. The nature of CFSP competence

The Treaty of Lisbon is essentially an amending Treaty; it amends the existing Treaty on European Union and EC Treaty, renaming the latter as the Treaty on the Functioning of the EU (TFEU).[134] These amendments are major ones and include the replacement of the EC by the EU. Nevertheless, we do not see, as the Constitutional Treaty (CT) proposed, a complete replacement of the previous treaties with a new legal instrument. These

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[132] Compare Article 27e with 27c TEU.

[133] Under Article 46 TEU, Articles 27a – 27e are excluded as part of Title V TEU, and the Title VII provisions on closer cooperation only fall within the jurisdiction of the Court to the extent that they are concerned with its operation to the Community and to Title VI.

[134] For consolidated versions of both treaties as amended by the Treaty of Lisbon, see OJ 2008 C 115.

two Treaties provide for a single Union with legal personality on which competences are conferred (Article 1(1) TEU-revised) and which will 'replace and succeed' the EC (Article 1(3) TEU-revised). The two Treaties are bound more closely together than the TEU and EC Treaty are at present.[135] In a clever piece of drafting, the TEU and TFEU refer to 'these treaties' throughout. There is much inter-Treaty cross-referencing and the Treaties are linked in other ways. A single set of objectives is applicable to both Treaties and all policies. Article 2 TEU-revised establishes the Union's values and Article 3 its overall objectives. The separate tasks and activities set out currently in Articles 3 and 4 EC will disappear. A single set of legal acts applies across both treaties and all policy areas (although some acts – legislative acts – are excluded from the CFSP). The only substantive area of activity that is spread between the two Treaties – external action – has a set of 'general principles and objectives' (Articles 21 (1) & (2) TEU-revised) which are explicitly stated to apply both to the CFSP Chapter in the TEU and to Part Five of the TFEU and both of these refer back to these general principles and objectives (Article 23 TEU-revised; Article 205 TFEU).[136] The consistency provision in the TFEU refers to all policies, activities and to all objectives (which are defined in the TEU).

The clearest example of the still somewhat awkward division between the two Treaties is the decision to retain the CFSP provisions in the TEU rather than placing them with the other substantive provisions on external action in the TFEU. This may seem to be anomalous, and in a sense it is, as apart from the Neighbourhood Policy the CFSP is only substantive policy competence established in the revised TEU. However, it is not only a historical and anomalous legacy of the existing treaty structure. It results in – and was presumably intended to achieve – an increase in transparency concerning the separation of CFSP competence from other competences – something which was obviously intended in the Constitutional Treaty but which its provisions did not make fully clear.[137]

Other factors in the Lisbon Treaty achieve a clearer demarcation of CFSP competence from other Union competences.

(i) Article 24(1) TEU-revised emphasises that 'specific rules and procedures' apply to the CFSP; this includes some specificity in the provision for enhanced cooperation.

(ii) With two exceptions (Articles 40 TEU and 275 TFEU) the jurisdiction of the European Court of Justice is excluded from all CFSP provisions.

(iii) Article 252 TFEU (former Article 308 EC) does not apply to the CFSP.[138]

(iv) CFSP decision-making procedures differ from those applicable to other Union policies, especially in terms of the roles of the Commission and the European Parliament.

(v) Legislative acts may not be adopted in the area of CFSP.[139]

(vi) The provision on primacy in Article I-6 of the Constitutional Treaty has been removed; it reappears as Declaration 17 which purports to affirm the application of the principle to 'the Treaties', although the 'well settled case law' to which it refers does not affirm the primacy of TEU (as opposed to Community) law. Nevertheless given the unified legal order there are good arguments for holding that primacy should apply to the whole of Union law, including the CFSP, although primacy in the strong sense in which it applies to Community law is closely directly linked to the direct effect of that law.[140]

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135 At present although there are references to the EC Treaty in the TEU, notably in the Common Provisions, there are rather few references to the TEU in the EC Treaty (e.g. Art 11 EC on closer cooperation referring to Arts 3 and 4 TEU; Art 61(a) & (e) on AFSJ referring to the third pillar; Art 125 on employment refers to the objectives established in Art 2 of the TEU as well as Art 2 of the ECT; Art 268 on the budget referring to CFSP administrative expenditure; Art 300 referring to procedures for amendment set out in Art 48 TEU; Art 301 on economic sanctions; Art 309 referring to the procedure established in Art 7 TEU). In addition, the procedures for accession and amendment are established by the TEU and apply to the Union as a whole and to all the founding Treaties.

136 The provision on relations with neighbouring countries is an anomaly here: it is placed in Article 8 TEU-revised, which falls outside the scope of Article 21(3) requiring respect for these general principles. Still, the wording of Article 21 (1) and (2) is sufficiently general to allow for their application to Article 8.

137 See further M Cremona, 'The Union's External Action : Constitutional Perspectives' in G. Amato, H. Bribosia and B. de Witte (eds.), op.cit. note 4.

138 See also Declaration 41.

139 Articles 24(1) and 31(1) TEU-revised and Declaration 41.

140 Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA.* [*1978] ECR 00629.*

(vii) The Lisbon Treaty is silent on direct effect. It is thus, as before, an attribute conferred by the interpretation of the Court of Justice. However since the Court has very limited jurisdiction over the CFSP, it will have limited opportunity to declare a CFSP act directly effective. The difficulty remains, however, that there is nothing to prevent CFSP measures from being raised, directly or indirectly, in national courts, which may then have to resolve conflicts between national law and CFSP acts. It is hard to see how national courts would deal with such a question without being able to refer to the Court of Justice for a ruling.

The CFSP is treated as a *sui generis* competence in the TFEU,[141] but by refusing to characterise the CFSP as either exclusive, shared (whether pre-emptive or non-pre-emptive), supporting, coordinating or supplementary, the Treaties leave undefined the important question of the relationship between Union and Member State powers in this field. To take one example: it is not clear from the text whether the provision on exclusive competence to conclude international agreements in Article 3(2) TFEU applies to the CFSP.[142] Declarations 13 & 14 affirm that the CFSP will not affect the responsibilities of the Member States for the formulation and conduct of their foreign policy, a statement which is designed to reinforce the presumption (as it is not explicit) that pre-emption will not apply to the CFSP.[143]

Overall, then, the Lisbon Treaty helps to underline the distinctive nature of the CFSP. However the 'specific rules and procedures' applied to the CFSP do not put into question the single legal order; the chapter on the CFSP is included in the same Title as, and is subject to, the general principles governing the Union's external action: it is part of that external action and part of the same legal system, albeit with a different institutional balance and decision-making procedure. Under the pre-Lisbon regime, in contrast, the Court of Justice referred to a 'coexistence of the Union and the Community as integrated but separate legal orders', supported by the 'constitutional architecture of the pillars',[144] including Article 47 TEU which establishes a Community priority.[145] This relationship between EC law and the TEU will fundamentally change. Under the Lisbon Treaty, the same rules will apply throughout and across both treaties unless a specific exception is made, as it is in relation to the CFSP. The relationship between the two Treaties is established in Art 1 TEU-revised and Art 1 TFEU, which provides that both Treaties shall have the same legal value, thereby removing Community priority.[146]

Alongside this equal value provision is the non-affect clause, which is taken over from the Constitutional Treaty and which is fundamentally different from the Article 47 TEU as interpreted by the Court of Justice. Article 40 TEU-revised looks both ways and the separation is not, as now, between Treaties, but between policy sectors:

> The implementation of the common foreign and security policy shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences referred to in Articles 3 to 6 of the Treaty on the Functioning of the European Union [exclusive competence, shared competence, economic coordination and supporting action].

Similarly, the implementation of the policies listed in those Articles shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences under this Chapter.[147]

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141 Article 2(4) TFEU.

142 In practical terms, the conditions set here for exclusive competence are unlikely to apply to the CFSP: legislative acts are not permitted within the CFSP; a CFSP agreement is unlikely to be necessary in order for the Union to exercise an internal competence (the CFSP is entirely external); its conclusion is unlikely to affect 'common rules', as the nature of CFSP instruments, at least thus far, is not to establish common rules.

143 The formulation of their foreign policy by the Member States is of course 'affected' by the CFSP in the sense that they are bound by decisions taken and by the loyalty clause (Arts 4(3) and 24(3) TEU-revised); presumably what is meant here is that they retain full competence to act.

144 Joined Cases C-402/05 P and C-415/05 P, Kadi and *Al Barakaat International Foundation v Council*, judgment of 3 September 2008, para 202.

145 The Court has held that 'a measure having legal effects adopted under Title V of the EU Treaty affects the provisions of the EC Treaty within the meaning of Article 47 EU whenever it could have been adopted on the basis of the EC Treaty, it being unnecessary to examine whether the measure prevents or limits the exercise by the Community of its competences.' Case C-91/05 *Commission v Council* (ECOWAS), judgment of 20 May 2008, para 60.

146 Note also that the reference to supplementing the European Communities in the current Article 1(3) TEU disappears, and the Union is founded on both treaties rather than on the European Communities as now. The reference to maintaining and building on the Community acquis in current Art 2 TEU also disappears – in fact all references to the acquis communautaire per se disappear. It is rather ironic that the term *acquis communautaire* disappears, while other uses of *acquis* that have developed out of its original use in relation to the Community legal order, remain, including Article 20(4) TEU-revised which refers to the accession *acquis* in the context of enhanced cooperation.

147 Article 40 TEU as amended by the Treaty of Lisbon.

The unity of the legal order together with the specificities of CFSP competence established by the Lisbon Treaty, are reflected in the provisions on enhanced cooperation. On the one hand, those provisions cover enhanced cooperation in all policy fields: there is no longer a separate set of rules in the CFSP chapter. On the other hand, CFSP is differentiated from other Union policies in some of the provisions relating to enhanced cooperation.

3.2. Enhanced cooperation in the Lisbon Treaty

Enhanced cooperation is introduced in Article 20 TEU-revised, which establishes the basic principles. It is then elaborated in Article 326 – 334 TFEU. In what follows, in order to avoid repetition, the emphasis will be on the changes introduced by the Lisbon Treaty. What we find is that the barrier to establishing enhanced cooperation in the CFSP has been raised, in that it will be subject to a unanimous vote in the Council, but in other ways its use is less restricted.

3.2.1. Scope of enhanced cooperation in CFSP

Enhanced cooperation may be established 'within the framework of the Union's non-exclusive competences' and in so doing the Member States may use the Union's institutions and 'exercise those competences'.[148] As now, therefore, enhanced cooperation may not be used to extend Union competence. The possibility of using enhanced cooperation as a method of simplified substantive Treaty amendment or substantive *passerelle* has been rejected.[149] The important restriction of enhanced cooperation in the CFSP to the implementation of a joint action or common position has disappeared, giving greater flexibility in its use. It is difficult to know what difference this might make in practice; as we shall see, the procedure for authorising enhanced cooperation has been tightened and this might off-set the change.[150] Nevertheless the change signals that enhanced cooperation could be used to establish a new line of policy in CFSP, not merely an implementation of already defined goals. It therefore supports the idea of enhanced cooperation as differentiated integration.

The exception for military and defence matters has also been removed and enhanced cooperation may operate throughout the CFSP and CSDP. That raises the question of the position of Denmark. Could Denmark, while not participating in the Union's defence policy, decide to join a specific enhanced cooperation initiative in this area? Under Article 6 of the Protocol on the position of Denmark, 'Denmark does not participate in the elaboration and the implementation of decisions and actions of the Union which have defence implications'. Since enhanced cooperation uses Union institutions and instruments and exercises Union competences, it should be regarded as 'action of the Union' even if not, as we shall see, fully part of the Union's *acquis*, and the phrasing of the Danish defence opt-out is wide enough to cover all defence-related action not only that taken under the 'mainstream' CSDP. The conclusion is therefore that Denmark would not have the option of joining enhanced cooperation in defence while its opt-out remains in force.[151]

3.2.2. Aims and substantive conditions

The aims and conditions for the establishment of enhanced cooperation have not substantively changed. It must 'aim to further the objectives of the Union, protect its interests and reinforce its integration process.'[152] It must comply with the Treaties and Union law,[153] be consistent with Union policies[154] and respect the competences,

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148 Article 20 TEU-revised.

149 H. Bribisia, op.cit. note 4, p.629.

150 D. Thym, 'Reforming Europe's Common Foreign and Security Policy' (2004) 10 *European Law Journal* 5, at p.12.

151 The Protocol allows Denmark to decide at any time to discard the opt-out, but this cannot be done on a selective case-by-case basis.

152 Article 20(1) TEU-revised.

153 Article 326 TFEU.

154 Article 334 TFEU.

rights and obligations of non-participating Member States.[155] As we have seen there are no longer separate CFSP objectives and thus no special provision is needed in that regard. If we see enhanced cooperation as supporting differentiated integration, and not merely about unblocking decision-making processes, these provisions are important in underlining the basic orientation of enhanced cooperation towards Union objectives and that the enhanced integration of a few must not be at the expense of its overall integration process.

3.2.3. Procedures for establishing enhanced cooperation in the CFSP

The Lisbon Treaty maintains the principle that one-third of Member States is required as a minimum for enhanced cooperation to proceed; thus with 27 Member States the minimum number is nine. There is no explicit provision to raise the number following future enlargements, but of course this minimum can always be raised together with other enlargement-related amendments. The Treaty also maintains the 'last resort' principle, although it is clearer that this is to be determined by the Council as part of its authorisation procedure.[156] In a significant change, the decision of the Council to authorise enhanced cooperation must be taken unanimously, instead of, as now, by QMV,[157] and it will be possible for the authorising decision to lay down conditions of participation.[158] For other (non-CFSP) areas of enhanced cooperation, the Lisbon Treaty will require the requesting Member States to specify the objectives and scope of the proposed enhanced cooperation;[159] however this change does not extend to the CFSP which retains the existing simple request. In addition to the Commission, which is to give an opinion on the consistency of the proposal with other Union policies, the High Representative for Foreign Affairs and Security Policy will give an opinion on its consistency with the CFSP. The European Parliament is, as now, informed. These procedural and substantive conditions reflect the ambivalence in the rationale for enhanced cooperation referred to earlier.

The rules as to ongoing decision-making within enhanced cooperation are unchanged, with one possibly significant exception. Enhanced cooperation may be used as a kind of procedural *passerelle*, to enhance cooperation in the procedural as well as the substantive sense. Where a Treaty provision used in the context of enhanced cooperation requires the Council to act unanimously, the Council may, acting unanimously in its enhanced cooperation formation, decide to act by QMV; and where the Treaty provides for a special legislative procedure the Council may decide, in the context of enhanced cooperation, to act by the ordinary legislative procedure (co-decision).[160] These procedural *passerelles* cannot be used for matters having military or defence implications; in addition legislative acts cannot be adopted under the CFSP so only the first of the two *passerelles*, that referring to QMV, will apply. As Bribosia points out, such a decision will bind those Member States who decide later to join the enhanced cooperation.[161] From this point of view the fact that the Council authorisation of enhanced cooperation, including the establishment of conditions, must be taken unanimously is important. If this possibility were to be widely used as a rationale in itself for engaging in enhanced cooperation, it could contribute to the fragmentation of Union law, given that such decisions would not be binding on non-participating Member States.

3.2.4. Procedures for admitting later-joining Member States

Although the Lisbon Treaty continues to emphasise the principle of openness, it has made two changes that will in fact raise the barrier to entry – as well as the provision just discussed which might itself discourage some Member States from joining if, while accepting the substantive policy initiative, they do not wish to be subject to QMV. The first is that the decision to admit a 'new' Member State must be taken unanimously by the Council (in its enhanced cooperation formation).[162] The second is that joining Member States will not only have

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155 Article 327 TFEU.

156 Article 20(2) TEU-revised. See H Bribosia, op.cit. note 4, p.632. This provision is linked to the conception of enhanced cooperation as a method of unblocking decision-making.

157 Article 329 TFEU.

158 Article 328(1) TFEU.

159 Article 329(1) TFEU.

160 Article 333 TFEU.

161 See H Bribosia, op.cit. note 4, p.636-7.

162 Article 331(2) TFEU.

to accept the '*acquis*' of the enhanced cooperation, but also any conditions that may have been imposed at the outset on participating Member States. If these conditions are not fulfilled, the Council may indicate what arrangements are necessary to fulfil them and set a deadline for the re-examination of the application to join. Transitional arrangements may be established for the application of the enhanced cooperation *acquis* by the newly participating Members.

3.2.5. The status of measures adopted under enhanced cooperation procedures

As now, acts adopted within the framework of enhanced cooperation bind only the participating Member States,[163] although non-participating Member States are under an obligation not to obstruct their implementation and this obligation may in fact prove to have significant effects in restraining autonomous action by the non-participating Member States in the field covered by enhanced cooperation.[164]

It will be remembered that the pre-Lisbon Treaty states that decisions adopted under enhanced cooperation do not form part of the Union *acquis*. The Lisbon Treaty clarifies this expression somewhat: acts adopted under enhanced cooperation are not to be regarded 'as part of the *acquis* which has to be accepted by candidate States for accession to the Union'.[165] If they are not part of the accession *acquis*, they may *a contrario* be regarded as part of the Union *acquis* in other ways, for example in falling within the scope of the loyalty obligation (of participating Member States) established by Article 4(3) TEU-revised, or as forming part of Union law for the purposes of the operation of the Court's case law on fundamental rights.[166]

4. Flexibility in the CFSP and CSDP

It is rather striking that although enhanced cooperation has never been used in the CFSP, and before the Treaty of Lisbon was not possible for military and defence matters, other forms of flexibility are available, have been used and will be formalised and extended by the Treaty of Lisbon; moreover these forms of flexibility operate precisely within the military and defence sphere. These developments suggest that flexibility may be inherent in the development of a common security and defence policy, for two reasons. First, the differences between the Member States in relation to their international defence commitments, what the current Treaty calls 'the specific character of the security and defence policy of certain Member States' (Article 17(1) TEU). Second, the requirement that a fully-fledged CSDP imposes in terms of significant commitments as regards operational capacity.

The first of these is reflected in the current Treaty requirements that the Member States' security and defence policy will not be prejudiced, that their obligations under NATO are to be respected, and more specifically that

> "The provisions of this Article shall not prevent the development of closer cooperation between two or more Member States on a bilateral level, in the framework of the Western European Union (WEU) and NATO, provided such cooperation does not run counter to or impede that provided for in this title." (Article 17(4) TEU)

This provision has been removed by the Lisbon Treaty along with all references to the WEU,[167] although the Treaty does affirm that those Member States that 'together establish multilateral forces' may make them available to the Union, thereby recognising and impliedly approving the possibility of this form of deeper integration outside the Union framework.[168]

The Lisbon Treaty does however continue to recognise both the specific character of some Member States' security and defence policies, and the requirements of NATO obligations, particularly in framing the

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163 Article 20(4) TEU-revised.

164 Article 327 TFEU; c.f. the interpretation given by the Court of Justice to Article 10 EC.

165 Article 20(4) TEU-revised.

166 See for example Case C-159/90 *Society for the Protection of Unborn Children Ireland* [1991] ECR I-4685; Case C-299/95 *Friedrich Kremzow v Republik Österreich* **[***1997] ECR I-02629***.**

167 Note Article 42(7) TEU-revised which includes the obligation of aid and assistance towards a Member States that is a victim of armed aggression, reflecting Article V of the WEU Brussels Convention.

168 Article 42(3) TEU-revised.

objective not only of a common Union defence policy but also a 'common defence'.[169] Of symbolic significance is the alteration of 'might' to 'will' and 'should' to 'when' in the revised Treaty provisions on a 'common defence', although the Treaty does not remove the need for individual States to accept the concept of a common defence in accordance with their respective constitutional requirements.

> The common security and defence policy shall include the progressive framing of a common Union defence policy. This will lead to a common defence, when the European Council, acting unanimously, so decides. It shall in that case recommend to the Member States the adoption of such a decision in accordance with their respective constitutional requirements.
>
> The policy of the Union in accordance with this Section shall not prejudice the specific character of the security and defence policy of certain Member States and shall respect the obligations of certain Member States, which see their common defence realised in the North Atlantic Treaty Organisation (NATO), under the North Atlantic Treaty and be compatible with the common security and defence policy established within that framework.[170]

We can see here an increased level of ambition for the CSDP while expressing the determination to act within and in a complementary way to existing multilateral structures and therefore to reflect the different obligations of Member States in those structures, including not only NATO but also the UN Security Council.[171]

The second factor determining the inherent character of flexibility in the CSDP is operational capacity, and this is relevant in a number of ways. Underlying them all is the principle that the CSDP will use the capabilities provided by the Member States, and an overall commitment of the Member States to both make civilian and military capabilities available to the Union for its CSDP, and to improve their military capabilities. These commitments underpin the flexibility that then operates within the framework they establish. We can identify three examples of this type of operational flexibility: (i) the European Defence Agency; (ii) entrusting implementation of CFSP tasks to specific Member States; and (iii) permanent structured cooperation.[172]

(i) The European Defence Agency (EDA) is one element of the strengthened CSDP which has not had to await the coming into force of the Lisbon Treaty; it was implemented already in 2004 via a Council Joint Action.[173] The Agency's remit is the development of defence capabilities and it is a response to a perceived need to complement the building up of the CSDP with a greater degree of cooperation and integration in the commercial aspects of defence.[174] It is taking initiatives in the fields of Research and Technology[175] and Defence Procurement.[176] Participation in the European Defence Agency (EDA) is optional[177] but all Member States except Denmark are participating. It is also envisaged that groups may be set up within the Agency bringing together Member States engaged in joint projects.

(ii) The Lisbon Treaty formalises the existing practice of delegating specific operations to one or more Member States.[178] Under Article 42(5) and 44 TEU-revised, the Council may entrust the implementation of a CSDP initiative to a small group of willing and able Member States, 'in order to protect the Union's values and serve its interests'. It is thus made clear that the Union's interests are given priority; this is not a matter of 'borrowing' Union support for an essentially national endeavour. The tasks in issue are those specified in Article 43 TEU-revised – the expanded 'Petersberg tasks', including

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169 Article 42(2) and (7) TEU-revised.

170 Article 42(2) TEU-revised.

171 C.f. Article 34 TEU-revised.

172 ee H. Bribosia, 'Les Nouvelles Formes de Flexibilité en Matière de Défense' in G. Amato, H. Bribosia and B. de Witte (eds.), *Genèse et Destinée de la Constitution Européenne: Commentaire du traité établissant une Constitution pour l'Europe à la lumière des travaux préparatoires et perspectives d' avenir*, Editions Bruylant, 2007.

173 Council Joint Action 2004/551/CFSP of 12 July 2004 on the establishment of the European Defence Agency, OJ L245/17 of 12 July 2004.

174 Commission Communication of 12 November 1997 on an EU strategy for defence related industries COM(97) 583 final; Commission Communication of 11 March 2003 'Towards an EU Defence Equipment Policy' COM (2003) 113.

175 See European Defence Research and Technology Strategy, endorsed by the EDA Board, 10 November 2008.

176 A voluntary Code of Conduct on Defence Procurement was agreed 21 November 2005, available at http://www.eda.europa.eu./. Together with a Code of Best Practice in the Supply Chain, the regime came into force from 1 July 2006. At present all Member States except Denmark and Romania participate.

177 Article 45(2) TEU-revised.

178 In particular through the Framework Nation Concept; see Council doc 11278/1/02. For example, the EU military mission in the Democratic Republic of Congo (DRC/Artemis) designated France as the Framework Nation: Council Joint Action 2003/423/CFSP of 5 June 2003 on the European Union military operation in the Democratic Republic of Congo OJ 2003 L 143/50; Council Decision 2003/432/CFSP of 12 June 2003 on the launching of the European Union military operation in the Democratic Republic of Congo OJ 2003 L 147/42.

> "joint disarmament operations, humanitarian and rescue tasks, military advice and assistance tasks, conflict prevention and peace-keeping tasks, tasks of combat forces in crisis management, including peace-making and post-conflict stabilisation".

In such cases of delegation, the participating Member States will agree on the management of the task with the High Representative and will keep the Council informed. Any amendment of the scope, objectives or conditions must be adopted by the Council. This type of flexibility in implementing ESDP decisions is likely to remain an important characteristic of the CSDP.[179]

(iii) Most significantly, in addition to this ad hoc flexibility, the Lisbon Treaty introduces the possibility of permanent structured cooperation in defence (PSCD) allowing some Member States to integrate security and defence more fully 'within the Union framework'.[180]

> Those Member States whose military capabilities fulfil higher criteria and which have made more binding commitments to one another in this area with a view to the most demanding missions shall establish permanent structured cooperation within the Union framework.

Permanent structured cooperation represent a certain ambiguity between on the one hand the idea of a small group of States deciding to engage in a deeper form of integration in defence, the creation of a so-called 'defence eurozone',[181] and on the other a matter of certain Member States being prepared to take the lead and commit resources to ensuring that the Union 'is capable of fully assuming its responsibilities within the international community.' These responsibilities include, as Article 42(1) TEU-revised points out, 'strengthening international security in accordance with the principles of the United Nations Charter'. Permanent structured cooperation will involve those Member States whose military capabilities fulfil higher criteria, who have made more binding commitments with a view to more demanding missions.[182] Certainly there will be closer integration in the sense of 'pooling and where appropriate specialising their defence means and capabilities', interoperability and development of common objectives in commitment of forces, alongside greater commitment to defence spending, research and work within the framework of the EDA on defence equipment programmes. However exactly how these higher criteria will be determined and at what level is still unclear. French proposals for a minimum membership of six key Member States (France, Germany, Italy, UK, Spain, Poland) committed to a minimum level of defence spending at 2% of GDP,[183] are seen by some as too exclusive, especially with respect to the smaller Member States.[184] PSCD is one more stage in the ongoing attempt to increase European defence efficiency and to balance the demands of solidarity and inclusiveness on the one hand with efficiency and commitment on the other.[185] Biscop emphasises the need to be flexible in envisaging different ways in which Member States may participate in PSCD in terms of contribution, timeframe and capacities.[186]

Procedurally, in a number of ways permanent structured cooperation resembles enhanced cooperation, but agreed in advance by way of a specific Protocol. Initial and subsequent participation is to be determined by the Council, acting by QMV, and here we should note that the Lisbon Treaty requires the Council to act unanimously when authorising enhanced cooperation. In its decision-making *within* structured cooperation the Council will act unanimously.[187] One of its key features is the establishment not only of entry conditions

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179 C. Törö, 'The Latest Example of Enhanced Co-operation in the Constitutional Treaty: The Benefits of Flexibility and Differentiation in European Security and Defence Policy Decisions and their Implementation' (2005) 11 *European Law Journal* 641, at p.648.

180 Article 42(6) TEU-revised. See generally S. Biscop, 'Permanent Structured Cooperation and the Future of ESDP' Egmont Paper 20, 2008.

181 Initial negotiations during the process of the Constitutional Convention envisaged a form of cooperation more separated from Union structures and perhaps closer to the 'Schengen' model of differentiated integration; see further H. Bribosia, op.cit. note 56, p.840-1; S. Biscop, op. cit. note 64, p.5.

182 Article 42(6) and 46 TEU-revised, together with the Protocol on permanent structured cooperation.

183 P. Lellouche, '8 propositions pour donner à l'Union une défense commune', *Le Figaro*, 31/12/2008, http://www.lefigaro.fr/debats/2008/01/31/01005-20080131ARTFIG00515--propositions-pour-donner-a-l-union-une-defense-commune.php; W. F. Van Eekelen and S. Kurpas, 'The Evolution of Flexible Integration in European Defence Policy: Is Permanent Structured Cooperation a Leap Forward for the Common Security and Defence Policy?' *CEPS Working Document No. 295/June 2008*, p.12.

184 S. Biscop, op. cit. note 64, pp.5-6.

185 'The forthcoming debate on Permanent Structured Cooperation in Defence faces the difficult task of squaring the circle between effectiveness and solidarity, which is bound to be divisive. But it is worth conducting nevertheless.' W. F. Van Eekelen and S. Kurpas, op.cit. note 67, p.15.

186 S. Biscop, op. cit. note 64, p.19.

187 Article 46(6) TEU-revised.

with respect to military capabilities but also the possibility of suspension if a Member State no longer fulfils the entry criteria; a decision to withdraw is also possible. Unlike enhanced cooperation it will not be tied in advance to a specific initiative but will exist permanently to be called upon for 'the most demanding missions'.

Flexibility in the sense explored here, which relates less to the purpose or objectives of action and more to the mechanisms used to achieve those objectives, will allow the CDSP to grow incrementally, building on the different strengths – and willingness – of the Member States to achieve the common purpose. In this respect, as in others, the Treaty of Lisbon was designed to reflect existing realities and institutionalise existing powers.

5. Conclusion

The fact that enhanced cooperation has not yet been used in the CFSP, any more than in the other fields of Union policy, may suggest either that it is not filling an unmet need or that the preconditions and limitations on its use are too strict. It is striking, on the other hand, that flexibility is already a feature of the Union's security and defence policy and that the Lisbon Treaty formalises some pre-existing practices as well as introducing new possibilities.

One form of flexibility not yet mentioned offers a less dramatic solution than enhanced cooperation within the CFSP: the possibility of constructive or qualified abstention under Article 23(1) TEU, which is retained in the Lisbon Treaty.[188] The provision allows a Member State to qualify an abstention to a vote in Council, the effect of which will be that while the Member State accepts that the decision in question will commit the Union, it will not bind that State. Mutual solidarity requires the other Member States to respect this position, while the abstaining State must refrain from action likely to conflict with or impede the Union's action. This compromise solution allows a Member State to withdraw from a policy decision without impeding the formation of a consensus, while attempting to ensure – most important for the CFSP – that the dissenting Member State will not actively seek to undermine the Union's position. However, if at least one third of Member States qualify their abstention in this way, the Council decision cannot be taken; the same proportion of Member States may act as a 'blocking minority' in these cases and to the authorisation of enhanced cooperation.

Constructive abstention was used by Cyprus in February 2008 in relation to the adoption of the EU Joint Action establishing Eulex Kosovo.[189] As the first example of this practice it is worth citing the Cypriot declaration:

> "1. Cyprus recognises the European Union's responsibility to contribute to and, to the extent possible, ensure the stability of the Western Balkans. Cyprus also respects the wish of its partners for an active engagement of the European Union in Kosovo.
>
> 2. In line with its commitment to the role of the UN Security Council and the latter's primary responsibility for the maintenance of international peace and security, Cyprus has consistently argued for an explicit decision of the UN Security Council for the EU mission in Kosovo.
>
> 3. Notwithstanding its firm views, especially on the question of the legal basis for the involvement of the European Union in Kosovo, and any possible future implications in terms of international law, Cyprus has decided not to hinder the decision of the Council to adopt the Joint Action on the EU Rule of Law Mission in Kosovo.
>
> 4. In a constructive spirit of loyalty and mutual solidarity, the Government of Cyprus has arrived at the above decision which is without prejudice to any future decisions on EU action in similar matters and without prejudice to the status of Kosovo.
>
> 5. The Government of the Republic of Cyprus would therefore like to inform partners that for the above reasons, it has decided to invoke the provisions of the first subparagraph of paragraph 1 of Article 23 TEU.'[190]

The existence of this form of flexibility is in reality probably sufficient to prevent the type of decision-making *impasse* in the CFSP that enhanced cooperation seems designed to avoid. Although there is no good

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[188] Article 31(1) TEU-revised. On constructive abstention see further I. Pernice and D. Thym, 'A New Institutional Balance for European Foreign Policy?' (2002) 7 *European Foreign Affairs Review* 369 at p.380-382.

[189] W. F. Van Eekelen and S. Kurpas, 'The Evolution of Flexible Integration in European Defence Policy: Is Permanent Structured Cooperation a Leap Forward for the Common Security and Defence Policy?' *CEPS Working Document No. 295/June 2008,* p.10. Council Joint Action 2008/124/CFSP of 4 February 2008 on the European Union Rule of Law Mission in Kosovo, EULEX KOSOVO, *OJ L 42/92.*

[190] Council doc. No. CM 448/08, 4 February 2008.

reason to exclude the CFSP from the possibility of enhanced cooperation it is perhaps unlikely to be used in practice, at least for this purpose.[191]

What about the use of enhanced cooperation to establish deeper integration or new policy initiatives within the framework of Union objectives and competences? Under the pre-Lisbon Treaties, as we have seen, the scope for this was very limited since enhanced cooperation was only possible in the implementation of already agreed joint actions or common positions, and was not possible at all in the military or defence fields. The Lisbon Treaty will make it easier, although perhaps not more likely. Within the context of the development of foreign policy, a new policy initiative by a limited number of Member States will lose the impact of a Union policy. It also poses difficulties in that the Union's foreign policy positions with respect to countries, regions or serious issues such as non-proliferation or terrorism inform not only CFSP activity (such as the position to be taken in international fora, for example) but also Community policies. A common position adopted under enhanced cooperation by a limited number of Member States would not have that effect. The Union's foreign policy derives such strength as it has from the process of consensus building rather than reaching a decision at any cost.

On the other hand, the difficulty that the Union has had over the years in establishing any kind of commitment to a 'common defence' illustrates the very different positions of the Member States with respect to defence: permanent members of the UN Security Council, members of NATO, nuclear and non-nuclear powers, neutral States. Any common security and defence policy will have to respect and accommodate those differences, as the Danish defence opt-out recognises. The kinds of operational flexibility already developed in EU security and defence policy, and enhanced by the Lisbon Treaty, are highly practical. Deeper integration with respect to armaments will be managed incrementally and differentially through the EDA. Civilian and military missions require the involvement of Member State capacities and assets and inevitably not all Member States will take place in every mission. Permanent structured cooperation will take this further by establishing in advance a coalition of willing and able Member States who will be ready to take on missions, for example at the request of the United Nations Security Council.[192]

It is also worth noting that the CFSP and CSDP lend themselves more readily than the EC Treaty to accommodating the involvement of non-Member States. A number of candidate and neighbouring States are regularly invited to align themselves to CFSP common positions. A number of non-Member States have regularly been involved in ESDP civilian and military missions.[193] This is an inclusive flexibility which is an important part of the EU's neighbourhood policy.

These forms of practical and operational flexibility do not threaten the unity of the Union's CFSP or CSDP. The provisions on enhanced cooperation, particularly those that bind it into the Union's institutional framework and which limit its scope to the Union's competences, are not likely to pose a serious threat to unity either. But they may not be as effective – in terms of taking forward integration and policy-making at different speeds and reflecting different capacities – as the alternative forms of flexibility examined here.

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191 Jaeger argues that enhanced cooperation is 'less negative' than constructive abstention: T. Jaeger, 'Enhanced Cooperation in the Treaty of Nice and Flexibility in the Common Foreign and Security Policy' (2002)7 *European Foreign Affairs Review* 297 at p.302.

192 The Preamble to the Protocol on permanent structured cooperation recognizes that 'the United Nations Organisation may request the Union's assistance for the urgent implementation of missions undertaken under Chapters VI and VII of the United Nations Charter'.

193 For example, Ukraine; see Council Decision 2005/495/CFSP concerning the conclusion of the Agreement between the European Union and Ukraine establishing a framework for the participation of the Ukraine in the European Union crisis management operations, OJ [2005] L182/28.

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Differentiation in the European Area of Freedom, Security and Justice

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1. Introduction

In the European Union of the twenty-first century, already composed of nearly thirty Member States with a remarkable degree of heterogeneity, the possibilities for progress, for extension or increase of integration into new areas, require greater flexibility. Since not all states always want to move forward together or at the same speed, it has become imperative to formulate mechanisms to allow a significant group of them, under certain conditions, to advance if they wish. Those countries that are outside ("out" countries) are not involved in the progression but do not block it; those countries that do participate in the advance ("in" countries or the vanguard) enhance or extend their degree of integration, leaving the door open to future incorporation of the "out" countries. With a wide variety of formulas - all subsumed under the category of differentiation, multi-speed Europe or differentiated integration - these techniques have become a characteristic feature of the European Union, especially in recent decades, and are seen as being key to its future development. The recognition of this importance and the interest in controlling its development has led to its institutionalization in the Treaties through the so-called enhanced cooperation clauses. Incorporated for the first time in the Treaty of Amsterdam, they have been substantially amended by the Nice Treaty and the Treaty of Lisbon. To understand current and future leeway for differentiated integration will require us to mainly analyze in depth these clauses and their evolution, not forgetting any other experiences or techniques inside or outside the EU framework that may be relevant.

The area of freedom, security and justice (AFSJ) has been a particularly favourable field for differentiated integration. The affected areas (immigration, terrorism, police, judicial, penal cooperation etc), closely linked to national sovereignty and therefore very sensitive, have in the past given rise to some of the most striking and successful cases of differentiation, with the Schengen area being the most significant example. The complexity of the AFSJ, with areas that traditionally belonged not only to the Community pillar but also to the intergovernmental pillar, and the peculiarities arising from the Schengen communitarisation led to an equally complex institutionalization of the possibilities of enhanced cooperation in Amsterdam and the subsequent Treaties. Added to the general enhanced cooperation clauses of the first and third pillars were the privileged and predetermined enhanced cooperation clauses of Schengen and the protocols with special rules for the UK, Ireland and Denmark; multiple doorways to a differentiated integration that had already been revealed as essential and useful in this area. This is a particularly rich and interesting landscape to explore, as it includes cooperation outside the EU framework (the initial Schengen cooperation) and within it (enhanced cooperation clauses of the Treaties), at the EU level (first pillar) and intergovernmental level (third pillar), enhanced cooperation leaving out only one or two States (opt-out clauses of the United Kingdom and Ireland or of Denmark) and others that would allow a much more limited group of states to move forward, including less than ten (general provisions for enhanced cooperation), enhanced and authorized in advance cooperation (privileged enhanced cooperation clause of Schengen) and others that require prior authorization (general enhanced cooperation clauses). Effective application and usefulness, complexity and richness of formulas and models of differentiated integration are the key features of differentiated integration in the AFSJ, features that inevitably increase the interest and potential of this study.

We will look at this area from a historical perspective because in this case, as in many others, it is necessary to consider the past in order to properly understand the current regulations and their potential future application. We will, however, pay particular attention to the regulation of Lisbon, to its current design and its developments related to Nice, to the real possibilities of using the various integration methods provided for in the AFSJ, their advantages and possible risks. We will finish by drawing some overall conclusions about the differentiation in the AFSJ, past, present and future.

2. A historical perspective

As THYM[194] states, the AFSJ is probably the area that most clearly demonstrates that "supranational differentiation is not simply an abstract concept but a political reality." It is therefore very important to focus on the historical analysis, to see how it worked and ultimately assess its results.

This study of the historical evolution has been divided into two periods: in the first, the pre-Nice period is analysed, which will pay special attention to the Schengen experience and the first institutionalization of mechanisms for enhanced cooperation in this area by the Amsterdam Treaty; in the second, primarily the innovations that led to the Nice Treaty and its implementation will be studied.

2.1. Pre-Nice differentiation

2.1.1. Experience acquired up to Amsterdam, especially Schengen

Many of the areas included in the AFSJ have traditionally been subject to bilateral or multilateral international cooperation between European states, especially between neighbouring states. Significant, for example, is the cooperation on the movement of people and border control in Benelux, the Nordic countries (Nordic Passport Union) or Anglo-Saxon Europe (British-Irish Common Travel Area).

In the same area, and also in its infancy outside of the EU framework, one of the most important and successful examples of cooperation emerged: the creation of the Schengen area. Based on an initial 1985 agreement signed only by France, Germany and the Benelux countries, it was subsequently firmed up and expanded by the same States in the early 90s. Unlike previous examples of cooperation and despite being in these early days purely intergovernmental, Schengen was born with close ties to the European integration process and to the achievement of one of its new objectives given form in the '80s: a Europe without internal borders. Thus it was born from the outset with a clear vocation to open itself to other Member States and to be communitarized. It was born intergovernmentally, outside of the EU Treaties and among few states, given the impossibility of any other more ambitious way, but with the aim of serving as successful field testing and thus convince the other Member States of the European Union to join the project and incorporate to the acquis communautaire as soon as possible[195]. Over the years, both aspirations have been met: on the one hand, the rest of the Member States of the European Union (except the UK and Ireland) have been gradually joining; and on the other hand, since Amsterdam, the Schengen acquis began to incorporate the EU Treaties.

Thus, Schengen has become a clear example of the success of differentiated integration. A partnership initiated by only 5 States and with an intergovernmental nature has ended up communitarised and covering virtually all of the States of the Union. It has enabled leading countries to progress, demonstrating the benefits of integration in this field and the control of risks, thus serving a very useful role for the European project.

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194 THYM, D.: "Europa a varias velocidades: las cooperaciones reforzadas", in BENEYTO, J.M (Dir.), MAILLO, J. and BECERRIL, B. (Coords.), *Tratado de Derecho y Políticas de la Unión Europea, Tomo I (Desarrollo histórico y caracteres básicos de la Unión Europea. Naturaleza, valores, principios y competencias),* Aranzadi Thomson Reuters, Navarra, 2009, p. 571-633, and particularly p. 602.

195 The failure was not a legal one because intergovernmental cooperation would have been possible within the framework of the then so-called "political cooperation". In fact, the States had begun to work on issues of justice and home affairs from 1975 and the Single European Act – SEA - institutionalized such mechanisms of cooperation and put on record the intention of the Member States to work together in this field. See in particular the Declaration of the Governments of Member States concerning the free movement of persons, the final act of the SEA, OJ L 169, 1987, p. 26. The Maastricht Treaty gave new opportunities from 1993 onwards to include in primary law a third pillar dedicated to cooperation in justice and home affairs. However, Schengen continued outside of the Treaties until the mid 90's when in Amsterdam it was incorporated into the EU framework.

Although less relevant to our study that the Schengen experience, one can also mention other forms of differentiation in the material areas currently framed within the AFSJ, either based on certain provisions of the post-Maastricht Treaties or on secondary legislation: this includes, for example, differentiations relating to the jurisdiction of the ECJ to interpret and adjudicate on matters relating to the Conventions of the third pillar[196], to the open possibility of some of these conventions of overcoming the commonly agreed minimum harmonization agreed on a bilateral or multilateral basis by some of the participating States, or of entry into force of the conventions only for some of the signatory states or even differentiation in their obligations as a result of individual reservations[197].

2.1.2. The institutionalization of enhanced cooperation in Amsterdam

The entry into force of the Treaty of Amsterdam led to two very significant changes compared to the previous situation: on the one hand, it involved the constitutionalization of enhanced cooperation mechanisms in the field of the AFSJ; on the other hand, it increased the complexity of differentiated integration when providing for a "multi-channel" design for initiating or developing closer cooperation in this field.

Indeed, the Treaty of Amsterdam included in primary law the following enhanced cooperation mechanisms applicable to a greater or lesser extent to the AFSJ:

- Firstly, a general clause on enhanced cooperation for Community pillar affairs (applicable, in relation to the case in hand, to Title IV of this first pillar dedicated to "visas, asylum, immigration and other policies related to free movement of persons")[198];

- Secondly, an enhanced cooperation clause specific to third pillar issues, in particular Title VI on police and judicial cooperation[199]. Naturally, this mechanism was much more intergovernmental than the first pillar, giving a greater role to Member States and the Council and a purely residual role to the Commission and European Parliament[200];

- Thirdly, the Schengen mechanism of enhanced cooperation, a special and privileged mechanism inasmuch as the enhanced cooperation was already authorized in advance. It allowed the establishment or development, now within the framework of the European Union, of closer cooperation in all matters relating to the Schengen acquis[201];

- Fourthly, the concession of an opt-out to Britain and Ireland which allowed these countries to not participate in the adoption thereof and to not be bound if they still wanted, either by measures adopted on the basis of Title IV or by those relating to the Schengen acquis. It reveals an objection in principle and in practice of the United Kingdom to cooperation and the sharing of sovereignty in this field[202];

- Fifthly, the granting of an opt-out to Denmark seeking primarily to maintain the intergovernmental nature of its obligations in the field of the AFSJ. Unlike the previous opt-out, it applies not so much to the content of the obligation or the desire to cooperate but the form and nature of the rule that reflects the agreement reached[203].

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196 See also the then Art. K.3 (2) c of the EU Treaty.

197 For a detailed analysis of these differentiations see PAPAGIANNI, G.: "Flexibility in Justice and Home Affairs: An Old Phenomenon taking new forms", en DE WITTE,B.; HONF, D. & VOS, E. (eds), *The Many Faces of Differentiation in European Union Law*, Intersentia, Antwerpen-Oxford-New York, 2001.

198 See Articles 43-45 of the EU Treaty and Article 11 of the EC Treaty in their post-Amsterdam versions.

199 See again Articles 43-45 of the EU Treaty and Article 40 of the same Treaty.

200 Not only did the authorization decision rest with the Council and was adopted unanimously (emergency veto of a single State), but the initiative, the application for approval, also rested with the governments and not the Commission. The European Parliament, meanwhile, was simply informed. Both data mark the differences with the approval procedure in the first pillar in which the Commission had the initiative and the European Parliament had to be consulted in advance. See Articles 40.2 TEU and 11.2 TEC.

201 See the Protocol integrating the Schengen acquis into the framework of the European Union, annexed to the Amsterdam Treaty.

202 See the following Protocols annexed to the Amsterdam Treaty: the Protocol on the position of the United Kingdom and Ireland, the Protocol on the application of certain aspects of Article 14 EC Treaty to the United Kingdom and Ireland and Articles 4 and 5 of the Protocol integrating the Schengen acquis into the framework of the European Union.

203 See the Protocol on the position of Denmark and Article 3 of the Protocol integrating the Schengen acquis within the European Union framework, both annexed to the Amsterdam Treaty.

This complex multi-channel articulation of enhanced cooperation in this field is the reflection of the complexity and richness of the AFSJ, a space in construction falling somewhere between intergovernmental and supranational, as well as the difficult political compromises required to move the already-existing Schengen route into the EU construct.

On one hand, this involves a further clear recognition of the need for differentiated integration in the area and a first attempt to establish, at a primary law level, mechanisms for enhanced cooperation applicable throughout the AFSJ. It also involves a commitment to consolidate cooperation already under way (mainly Schengen) and channel it through procedures and institutions. It is domesticated and channelled but without hampering its continuity and development: in fact, the Schengen cooperation has a privileged status and is deemed agreed beforehand[204]. Additionally, a new boost is given and there is a speeding up due to the possibility of using the legal and institutional framework of the EU in the future. At the same time the greatest possible unity is sought: on incorporating the Schengen to the EU acquis, this obliges countries acceding subsequently to accept the existing position as another part of the acquis communautaire[205].

Moreover, one can perceive the latent distrust and caution with regard to some of the innovations and certain tradeoffs to pay for progress. Thus one has to understand, for example, the granting of opt-outs to Britain and Ireland and to a lesser extent also to Denmark. It was not conceivable to pass Schengen to the EU and boost the activities of the AFSJ of the Community pillar without at the same time agreeing to a UK opt-out allowing it to avoid any obligation under Schengen (or the areas of the AFSJ of the first pillar) not voluntarily and individually accepted. The initial beginnings of an indefinite differentiation over time are therefore accepted as a small price to pay. Also as an indication of mistrust, one has to explain the enormous obstacles that were originally imposed in relation to use of the general enhanced cooperation clauses of the first and third pillar: the strict conditions laid down, mainly the need for a majority of States to want to participate in enhanced cooperation, and the possibility of an emergency veto by a single State, made the use of these clauses very difficult in practice.

If we also bear in mind that the scope of application of both general clauses was residual in relation to the special Schengen mechanism[206], it is not surprising that no such general clauses were used. In practice, therefore, differentiated integration in the AFSJ in this pre-Nice period was a continuation of previous Schengen cooperation outside the EU framework, and was based mainly on the Schengen incorporation Protocol and the specific exceptions for UK, Ireland and Denmark. It is therefore a model of differentiated integration in which the vast majority are moving together and just 2 or 3 states slip through. In this model, two new dilemmas make their appearance: if the "out" countries communicate their willingness to participate in some of the measures proposed or already taken, we must consider, first, how to decide whether such specific participation is possible and when to refuse consent for it, due to it breaking the coherence of the system and, second, how to avoid undue delays or obstructions in the adoption of Schengen developments caused by these "out" countries (without in addition having secured their participation in the end). It is clear that cooperation should remain open to "out" countries and it is desirable to encourage them to join the process in the future, but it is also desirable to be able to avoid unfair behaviour of the "out" countries and excessive privileges. We will have an opportunity to discuss these challenges later. It is enough for now to note their appearance.

2.2. The post-Nice scenario

The Nice Treaty did not alter the complex AFSJ-related multi-channel structuring of enhanced cooperation: the two general enhanced cooperation clauses for the first and third pillar, the specific Schengen mechanism and the opt-outs of Denmark, United Kingdom and Ireland remained available. Yet there were, however, substantial changes in regulation and approval procedures for the two general enhanced cooperation clauses. In addition to a more systematic approach and improved drafting of general and specific requirements, three substantive changes deserve to be highlighted:

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[204] See Article 1 of the Protocol integrating the Schengen acquis into the framework of the European Union. The Schengen countries are authorized by the Protocol itself to initiate cooperation in all matters relating to the Schengen acquis. The very restrictive conditions of the other general provisions for enhanced cooperation do not operate here.

[205] See in this respect the clarity of Article 8 of the Protocol integrating the Schengen acquis within the framework of the European Union. Thus, the Schengen cooperation of 13 of 15 established the basis for cooperation between 25 of 27 with the following accessions.

[206] See Article 43.1 (i) of the EU Treaty.

- Firstly, the reduction to 8 Member States of the minimum number of States required to establish enhanced cooperation[207]. This reduction was very significant taking into account that the EU enlargement to 25 (and then, 27 States) was close. In this new context, the new minimum was supposed to substantially lower the bar: more than half the States to less than a third. It made life much easier with regard to the possibility of enabling new enhanced cooperation;

- Secondly, the abolition of the emergency veto and its replacement by a mere delay or emergency brake. Both in the first and third pillar, authorizations for enhanced cooperation are adopted by qualified majority in the Council without the possibility - as occurred in the Amsterdam version - of a State vetoing such approval. Now all that is envisaged is that a State may refer the matter to the European Council for consideration, after which it will return to the Council which will take the final decision by qualified majority[208]. There is no veto but rather a delay in authorization at the most. Again, this removed a major obstacle to the use of these clauses;

- Thirdly, the European Commission and European Parliament reinforced their roles in both mechanisms. Regarding the first pillar, the European Parliament's opinion went from mere prior consultation to assent when the enhanced cooperation referred to an area governed by the codecision procedure[209]. Regarding the third pillar, the Commission was entrusted with the authorization request but not in absolute terms since it was anticipated that, on a subsidiary basis vis-à-vis the Commission, eight States could also take it to the Council[210]. The European Parliament now had to be consulted in advance. Thus the supranational basis of the consent procedure was increased.

The first two amendments undoubtedly substantially expanded the possibilities for new enhanced cooperation relating to the AFSJ. The third meant an increase in the controls of the Commission and European Parliament regarding the same authorizations. In any event, one must not forget that both cooperation mechanisms remained residual in relation to the specific and privileged Schengen mechanism. In both cases, the Schengen mechanism offered substantial advantages in that the enhanced cooperation already had authorization beforehand. In practice, perhaps for the reasons mentioned above, the general clauses for enhanced cooperation of the first and third pillars were not used. The derived differentiated integration of Schengen and the specific opt-outs for Denmark, the UK and Ireland continued to dominate AFSJ differentiation.

It is also noteworthy that during this post-Nice period, there was once again resort to a method of differentiated integration outside of the EU framework as was done in Schengen previously. Indeed, on 27 May 2005, seven Member States signed the so-called Treaty of Prüm on deepening cross-border cooperation, particularly in combating terrorism, cross border crime and illegal migration[211]. Instead of using the enhanced cooperation mechanisms now found in the Treaty itself - and this is the big difference with Schengen - these states preferred the route of an international treaty to strengthen their cooperation in matters governed by the EU Treaties. Cooperation was always kept open to all other Member States and from the beginning it was conceived as a pilot project which ought to help to convince the others of the appropriateness of this enhanced cooperation and that it should eventually be transferred into the Community framework[212]. However, and irrespective of the substantial progress made, the chosen methodology has been severely and rightly criticized: the channels for this purpose in the Community Treaties should have been used, in accordance with their requirements and formal procedures, including the minimum threshold of States required and participation of the institutions in the implementation and development of the cooperation[213].

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207 See the new wording of Article 43.1, g) of the post-Nice TEU.

208 See the new wording of Article 11.2 EC Treaty, in respect of the community pillar clause, and 40A, 2 EU Treaty regarding that of the third pillar.

209 See Article 11.2 EC Treaty.

210 See Article 40A , 2 EU Treaty.

211 Ratified by Spain on 18 July 2006 and published in the Official State Gazette 307, of 25 December 2006, p. 45524-45534.

212 See in this regard, Article 1.2 and 1.4 of the Prüm Treaty. Indeed, this is actually redirecting towards the Community framework: see 2008/615/JAI Council Decision of 23 June 2008, on deepening cross-border cooperation, particularly in the fight against terrorism and transborder crime, OJEU L 210 of 6 August 2008, p. 1, and 2008/616/JAI Council Decision of 23 June 2008, implementing the above, OJEU L 210 of 6 August 2008, p. 12.

213 See in this regard, among others, ZILLER, J.: "Le Traite de Prüm. Une vraie-fausse coopération renforcée dans l'Espace de securité, de liberté et de justice", *EUI Working Papers, LAW Nº. 2006/32*; GUILD,E. and GEYER, F., "Getting local : Schengen, Prüm and the dancing procession of Echternach. Three paces forward and two back for EU police and judicial cooperation in criminal matters", *Journal of European Criminal Law,* 3rd issue, 2006; BALZACQ, T., *The Treaty of Prüm And the Principle of Loyalty (Art. 10 TEC),* European Parliament, DG Internal Policies of the Union, Directorate C-Citizen's Rights and Constitutional Affairs, Briefing Paper, 13 January 2006, IP/C/LIBE/FWC/2005-08; HOUSE OF LORDS-EU COMMITTEE, *Prüm: an effective weapon against terrorism and crime?,* Report with Evidence, 18th Report of Session 2006-07, especially section 22.

3. The current situation after Lisbon: more communitarisation and coexistence of old and new instruments

3.1. The new overview

The Lisbon Treaty is heir, in this as in many other issues, to the failed Constitutional Treaty[214]. If the regulation on enhanced cooperation is structured by the latter in a general provision in Part One (I-44) and detailed rules developed in Part III (Articles III-416 to 423), the Lisbon Treaty has also imposed a general provision in the new EU Treaty (Article 20) and implementing provisions in the Treaty on the Functioning of the European Union (Articles 326-334 TFEU)[215]. Although there has been criticism of the unclear separation between principle and implementing rules[216], it is an evident and commendable effort, likened to the Constitutional Treaty, to define the essence of the mechanism of differentiated integration and its conception in the basic provisions of the TEU with reference to the second level of development for other issues.

From a reading of Article 20 TEU it is clear that enhanced cooperation is conceived as:

- A pro-integration tool ("…shall aim to further the objectives of the Union, protect its interests and reinforce its integration process");

- Of last resort (to be used when "the objectives of such cooperation cannot be attained within a reasonable period by the Union as a whole");

- Useable by a sufficiently large pool of States that want to move forward ("at least nine Member States");

- Always open to new entrants from "out" countries ("shall be open at any time to all Member States"), whether they are already members of the European Union or are potential future members ("acts adopted in the framework of enhanced cooperation shall bind only participating Member States. They shall not be regarded as part of the acquis which has to be accepted by candidate States for accession to the Union");

- And operating within the legal and institutional framework of the Union ("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 ").

There are few new developments in this Article 20 TEU with regard to the basic provisions in force until the entry into force of the Lisbon Treaty (Articles 43-45 of the former Treaty). The only noteworthy aspect is the new minimum threshold of participating Member States that, as mentioned, becomes 9 States, instead of the 8 of Nice. It is therefore slightly more demanding than in Nice but will eventually be less than what was planned for the Constitutional Treaty[217]. They are not, in any case, differences that will have a strong impact.

With regard to enhanced cooperation applicable to the AFSJ, the first thing to note is that the elimination of the pillar structure operated by the Lisbon Treaty is reflected in the disappearance of the specific provision for enhanced cooperation that existed prior to the third pillar. There is now only one general clause on enhanced cooperation applicable to the AFSJ (compared to the previous two). The new general mechanism, as we shall see in a moment, shows some substantial changes with respect to the above and with regard to the AFSJ significantly enhances the communitarisation of the instrument of enhanced cooperation that had already been given impetus in Nice. However, the preestablished and privileged Schengen cooperation and the opt-outs of Denmark, United Kingdom and Ireland survive, albeit with some non-negligible modifications. Finally, to

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214 On the regulation of enhanced cooperation in the Lisbon Treaty, see FERNÁNDEZ LIESA, C. and ALCOCEBA GALLEGO, A.: "La cooperación reforzada en la Constitución Europea" in ÁLVAREZ CONDE, E. y GARRIDO MAYOL, V. (Dirs.), *Comentarios a la Constitución Europea*, Tirant lo Blanch, 2005, p. 490; URREA CORRES, M.: "La cooperación reforzada en el proyecto de Constitución Europea", *Boletín Europeo de la Universidad de la Rioja*, nº 12-13, 2004, p. 27-49.

215 On the Lisbon regulation see, among others, PONS RAFOLS, X.: "Las potencialidades de las cooperaciones reforzadas en la Unión", in MARTÍN Y PÉREZ DE NANCLARES:, J. (Coord.): *El Tratado de Lisboa. La salida de la crisis constitucional*, Iustel-AEPDIRI, Madrid, 2008, p. 627-660; ALCOCEBA GALLEGO, A.: "La integración diferenciada en el Tratado de Lisboa o la ampliación de la Europea a la Carta" in FERNÁNDEZ LIESA,C. and DIAZ BARRADO, C. (dirs.): *El Tratado de Lisboa, análisis y perspectivas*, Dykinson, Madrid, 2008, p. 313; URREA CORRES, M.: "Mecanismos de integración y (des)integración diferenciada en la Unión Europea a la luz del Tratado de Lisboa", *Cuadernos Europeos de Deusto*, nº 39, 2008, p. 178; BECERRIL ATIENZA, B.: "La regulación de la cooperación reforzada: un instrumento necesario en la Unión Europea del siglo XXI", here above.

216 See PONS RAFOLS, X.: "Las potencialidades de las cooperaciones reforzadas…", op. cit. p. 641.

217 The Constitutional Treaty had set the threshold at one third of the Member States. In the current EU of 27, the two thresholds coincide in practice but with future enlargements the figure of 9 states is more favourable.

complete this overview one must mention four newly created instruments of enhanced cooperation applicable to specific areas of the AFSJ, including the following: mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters (Article 82.3 TFEU), minimum standards regarding the definition of criminal offences and criminal sanctions in the areas that are particularly serious and have a cross border dimension (Article 83. 3 TFEU) [218], a European Public Prosecutor's Office based on Eurojust (Article 86.1 TFEU) and, finally, police cooperation, including police, customs and other law enforcement services specializing in the prevention and detection and investigation of crime (Article 87.3 TFEU). These four new instruments are characterized, as we will see below, by evasion of the general procedure for authorization of enhanced cooperation by providing for automatic approval with virtually the only requirement being the participation of at least 9 Member States. These are again new privileged mechanisms (as was Schengen) which significantly facilitate the implementation of differentiated integration. Unlike Schengen, the number of State participants may be much smaller (9 is sufficient, while in principle all participate in Schengen except the United Kingdom and Ireland), which probably boosts new paradigms of differentiated integration in the AFSJ which were hitherto merely theoretical.

As can be seen from this first approximation, the picture remains complex. It is true that the removal of the pillars has meant some simplification by removing one of the two general conditions previously applicable to the AFSJ but equally true is that the rest of the special mechanisms and opt-outs have been maintained and in some ways this has complicated regulation. The appearance of four new specific clauses makes the system more complex, a complexity that begins with the difficulty of clearly distinguishing the scope of application of these various clauses. One cannot avoid having the feeling that simplification is again an unresolved issue and again a good opportunity has been lost to deal with it seriously.

Having given this overview, I will go on to examine in detail each of the mechanisms currently provided for (highlighting the Lisbon changes where necessary), before extracting a number of general conclusions about the Lisbon innovations and the application that can be expected from current possibilities.

3.2. The general enhanced cooperation clause

Comparing the previous general regulation (with the two clauses applicable to what were matters of the first and third pillars) with the new general clause currently imposed by Lisbon, we can identify the following features of the reform: uniqueness, same design and similar field of application, further communitarisation and supranationality, a slightly easier implementation of the enhanced cooperation and of any subsequent integration of "out" countries and finally new possibilities for developing already authorized enhanced cooperation. Each of these features will be discussed below.

- *Uniqueness* in relation to the two previous general clauses give way to a single general clause applicable, in principle, and among other areas, to all matters of the AFSJ. It reflects the logic of removing the pillar structure which made a nonsense of the maintenance of the previous specific clause for matters of police and judicial cooperation.

- *Same design* inasmuch as the guiding principles for enhanced cooperation mechanism remain, as we have seen, unchanged. A pro-integration purpose, in the nature of a last resort, permanent opening to "out" countries and operating within the EU framework and under the control of its institutions; these are still the keys to understanding the model. Respect for the community framework requires, among other limitations, not to undermine the internal market nor economic, social and territorial cohesion and not to be an obstacle to or discrimination in trade between Member States or a cause of distortions in competition between them[219].

- *Similar scope of application* because, first, it is still applicable only to the scope of non-exclusive competences of the Union, and second, we understand that it will remain a residual mechanism in relation to the Schengen mechanism.

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[218] The trans-border dimension can be derived from the nature or impact of such offences or from a particular need to combat them using common criteria. According to Article 83.1, the areas of crime affected are: terrorism, human trafficking and sexual exploitation of women and children, illicit drug and arms smuggling, money laundering, corruption, counterfeiting of means of payment, computer crime and organized crime. The list could be extended by unanimous vote of the Council after approval from the European Parliament.

[219] See Article 326 of the TFEU. This reproduces the previous paragraphs e) and f) of Article 43.1 EU Treaty after Nice. It now adds an explicit reference to 'territorial' cohesion which we understand to mean not providing a substantive change given that it could be understood as implicit in the policy of economic and social cohesion in general.

Regarding the first limitation it is worth noting that the new Lisbon version uses a more open formula than the previous one of Nice. Indeed, while the former Article 43.1, d) TEU required that enhanced cooperation remain "within the limits of the powers of the Union" without referring to the areas of exclusive competence thereof, the Treaty of Lisbon appears to be drafted less rigidly in that it discusses the possibility of enhanced cooperation "in one of the areas covered by the Treaties, with the exception of fields of exclusive competence ..." [220]. In short, there is a commitment in principle to open up possibilities for enhanced cooperation provided that they promote the objectives of the Union, strengthen the integration process and respect the rest of the boundaries. In addition, the new details provided by Lisbon as regards the delimitation of Union competences and the exclusive, shared or complementary and supportive or additional[221] nature thereof, provide greater clarity regarding the areas excluded[222] and some of those included[223].

As regards the residual nature of this general mechanism as compared to the specific Schengen mechanism, the question was very clear in the wording of Nice given that Article 43 (i) required that enhanced cooperation did "not affect the provisions of the Protocol integrating the Schengen acquis into the framework of the European Union". The regulation after Lisbon removes such reference but it is our understanding, in any event, that de facto the general mechanism will continue to be residual in that the specific Schengen mechanism is privileged and does not require authorization. The general clause will be used when the material cannot rationally fit within Schengen and/or when the States involved do not coincide (participation only of some Schengen States, with or without the participation of other non-Schengen States).

The substantive scope of application will not be identical since the emergence of the new specific privileged mechanisms of Articles 82-83 and 86-87 of the TFEU will make the general mechanism even more residual, if this is possible[224].

- *Increased communitarisation and supranational nature* because, firstly, the previous general clause of the third pillar disappears and the new general clause complies with the EU model and not the intergovernmental model, and secondly, in line with the above, both the Commission and the European Parliament are seeing their role substantially increased.

The Commission now holds the monopoly of the proposal for authorisation. Member States may ask the Commission to present it, but the Commission is not required to do so, although in this case it must communicate its reasons to the States concerned[225]. This is applicable throughout the entire scope of application of the general clause; as regards what concerns us in this chapter, in principle in all areas of the space of freedom, security and justice, not just for 'visas, asylum, immigration and other policies related to free movement of persons' as in Nice[226]. The Commission also now has a fundamental role in the incorporation of an "out" country into enhanced cooperation. Indeed, the Commission is now called upon to confirm the adhesion of the requesting State and to establish the necessary transitional measures for the implementation of the acts already adopted within the framework of enhanced cooperation[227]. It is true that, unlike what was specified in Nice, if the Commission refuses, the requesting State could now end up raising it directly with the Council for the latter to take this final decision[228].

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220 See Article 329.1 of the TFEU.

221 See Articles 3-6 of the TFEU.

222 Article 3 of the TFEU mentions the Customs Union, the establishment of competition rules necessary for the functioning of the internal market, monetary policy of the Member States whose currency is the euro, the conservation of marine biological resources under the Common Fisheries Policy and the common trade policy.

223 Among the areas mentioned in Articles 4-6 of the TFEU, we would wish to highlight in this chapter those relating to freedom, security and justice - point j) of Article 4.2 TFEU - as well as civil protection and administrative cooperation - points f) and g) of Article 6 TFEU-.

224 For a more detailed analysis of these mechanisms, see *infra* section 3.3.2.

225 Article 329 of the TFEU that regulates the authorization procedure specifically provides that "the Commission may submit a proposal to the Council" , making clear that it is not obliged to do so. It is also our understanding that the Commission's reasoning may be not only legal (failure to meet certain conditions or requirements for enhanced cooperation) but also of political expediency. This provides very significant leeway to the Commission.

226 It is worth remembering that in Nice, all other parts of the area of freedom, security and justice corresponded to the third pillar and the enhanced cooperation mechanism envisaged for it constituted a joint initiative between the Commission and Member States. In particular, Article 40A EU Treaty stated that if the Commission did not present the proposal, the States could themselves propose it to the Council.

227 See Article 331 of the TFEU. In Nice, the Commission only had such power in areas of the first pillar - Article 11A EC Treaty – it being the Council that took the decision in the areas of the third pillar - Article 40B EU Treaty -.

228 This was not possible in Nice regarding the first pillar: see Article 11A of the EC Treaty.

The European Parliament, meanwhile, also significantly increases its power. After Lisbon, its prior approval is essential for the Council to authorize enhanced cooperation[229].

Thus, the two most supranational institutions, with the most European perspective, gain power and influence. This serves de facto to strengthen the pro-integration spirit of enhanced cooperation.

- Lisbon also involves a *slightly greater ease both for the implementation of enhanced cooperation and for the subsequent integration of the "out" countries.*

The implementation of enhanced cooperation will be easier because the so-called brake mechanism or emergency delay is removed. According to the wording of Nice, before the Council authorizes the enhanced cooperation by qualified majority, any Member State could request that the matter be referred to the European Council for consideration[230]. Unlike the regulation of Amsterdam, such a referral was not a block or a veto, but constituted only a delay because, after discussion of the matter in the European Council, it would be returned to the Council to be decided by qualified majority. The decision was delayed but not blocked. With Lisbon, the possibility of delay disappears[231] and this thereby makes it difficult for a single Member State or a minority of States to manoeuvre politically to oppose the implementation of enhanced cooperation. From this perspective, this facilitates approval, albeit slightly. Moreover, other aspects of the reform could be going in opposite directions: we should not forget that Lisbon raises the threshold of participating Member States to 9 compared with 8 of Nice and now the increased control of the European Parliament and the Commission has to be overcome. The latter could hinder or delay the implementation of some enhanced cooperation but also promote others that such institutions consider more in line with European interests.

Regarding subsequent accession of the "out" countries, Article 331 TFEU also introduces a modified procedure which emphasizes the desire for opening of cooperation with "out" countries. It is said that in principle the Commission "will confirm" the participation of the requesting Member State within four months and a new provision is established that if the Commission maintains its opposition, the requested State may refer the matter directly to the Council. It would ultimately be the Council of the cooperation, by qualified majority, which would have the final word[232].

- Finally, there is incorporation of *new potential for developing closer cooperation already authorized.* In effect, Article 333 of the TFEU opens two gateways that will enable the Council of the enhanced cooperation unanimously, first, to replace unanimity for subsequent decisions by qualified majority (Article 333.1 TFEU), and second, to replace, after consulting the Parliament, a special legislative procedure for the ordinary procedure (Article 333.2 TFEU). Although the European experience tells us that this type of gateway is not always used, we believe that on this occasion it presents enormous potential. It is true that unanimity to use the gateway is difficult to achieve but it is also true that, unlike previous occasions, this time it is the Council of the enhanced cooperation and not the Council that must decide. There is no need therefore for the consent of all Member States, but only those who already participate in the enhanced cooperation and logically have a greater interest in promoting results and progress.

3.3. Privileged enhanced cooperation

Added to the general mechanism for enhanced cooperation that we have discussed, in the area of freedom, security and justice, are other specific and privileged arrangements for enhanced cooperation. They have in common the fact of not being subject to the limits of the procedure for general implementation. They are privileged primarily because to a greater or lesser extent enhanced cooperation is already authorized in advance by the primary law itself. The Schengen mechanism introduced in Amsterdam and which survives with some modifications in Lisbon is the prototypical example but not the only one. Lisbon has added four new instruments with a similar format.

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229 See Article 329.1, second paragraph. In Nice, prior approval was only necessary when the enhanced cooperation referred to an ambit that was governed by the codecision procedure. In the rest of the areas, only prior consultation was required, but its opinion was not binding - see Article 11.2 EC Treaty and Article 40A.2 -.

230 See again Articles 11.2 EC Treaty and 40A.2 in their post-Nice wording.

231 See Article 329.1 of the TFEU.

232 With the regulation of Nice, this second instance was not possible in the Community pillar: the Commission had the final say under Article 11A. In the third pillar, the opposite was the case, as it was the enhanced cooperation Council that decided, on the recommendation of the Commission: under Article 40B, the accession would be deemed approved unless the Council of the cooperation opted by qualified majority to leave it in abeyance.

3.3.1. The Schengen mechanism

Since Amsterdam, this is enshrined in the Protocol integrating the Schengen acquis within the European Union. This Protocol was the basic mechanism for the Schengen cooperation, born between only five Member States and outside of the EU framework, to end up within the Union framework.

Its main difference from the general mechanism lies in not requiring the traditional authority. It is the primary law itself, specifically Article 1 of the Protocol, which directly authorises the enhanced cooperation, identifies in principle the participating countries (25 of the 27 States of the Union, all but Ireland and the UK) [233] and the scope of application consisting of the so-called "Schengen acquis"[234].

A second difference would be the provision of specific procedures of incorporation for "out" countries. Specifically, the Protocol specifies a mechanism for developing the Schengen acquis in the future, with or without the participation of one of the "out" countries (ex ante opting-in procedure), and a process of subsequent incorporation (and withdrawal or regression) of "out" countries (ex post opting-in-out).

The ex ante opting-in procedure is set out in Article 5.1 of the Protocol. It is confirmed that the enhanced cooperation is automatically authorized between the 25 countries. However, if Ireland and the UK notify of a desire to participate, the enhanced cooperation could be of 26 or even of the 27, thus returning to unity. The notification must be made by the State which wishes to use this possibility of opting-in (UK or Ireland, or both), in writing, to the President of the Council and in a reasonable time after submission to the Council of a proposal for development of the Schengen acquis. The lack of precision in the deadline could be problematic because it makes it difficult to know at what time the enhanced cooperation must be considered authorized[235]. A 'reasonable' deadline is too vague an expression that should have been replaced by a precise period in order to provide security both to the "out" countries and especially the "in" countries. For example, a three-month period as set out in Article 3 of the Protocol on the position of the United Kingdom and Ireland on the area of freedom, security and justice could have been established. In fact, the analogical application of the said period of three months could be defended since, although they are examples of different enhanced cooperation, in both cases the deadline serves the same purpose (to give a limited and reasonable opportunity to join ex ante to the "out" countries). Three months seems a reasonable time. Another possible problem could be that, after notification is made and accepted and therefore the "out" country is accepted in the decision-making process, such State could make the decision significantly more difficult or even decide to veto it (which would be possible if the decision were to be taken unanimously by the Council of cooperation). In countries could be forced either to give in and not to adopt the new measure or to reduce very substantially the progress they wanted. In some ways the "out" country could thus control the process and block the development of the Schengen acquis. The Schengen Protocol does not provide a solution to this situation, trusting in the political game coming up trumps, and in the due respect among the "in" and "out" countries. It would undoubtedly have been desirable to incorporate a provision similar to that contained in Article 3.2 of the Protocol on the position of the United Kingdom and Ireland on the area of freedom, security and justice which provided for similar situations that "if after a reasonable period of time, a measure ... cannot be adopted with the United Kingdom or Ireland taking part, the Council may adopt such measure ... without the participation of the United Kingdom or Ireland". After Lisbon, we might ask whether such Article 3.2 is applicable also in the framework of the Schengen Protocol given that the measures of development of the Schengen acquis underpin all of Title V, Part III of the TFEU (area of freedom, security and justice) and therefore the scope of application in the end coincides. Support to this position would also be given by a purposive interpretation of the rule: to facilitate and promote the participation of "out" countries if they really want to join but, if it is proved that such is not the case, to free the "in" countries so they can move forward. However, there seems to be a difficulty in this interpretation, namely the provision of Article 7 of the Protocol on the position of the United Kingdom and Ireland which insists that the above-mentioned Article 3 shall be deemed 'without prejudice' to the Schengen Protocol.

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[233] This is without prejudice to any transitional situations arising from the latest accessions: see in this regard Article 2 of the Protocol. Denmark was a Schengen signatory state but maintains a special position which enables it, in practice, to continue to be linked to Schengen but to maintain the mandatory nature of public international law: see the Protocol on the position of Denmark, and see also below section 3.4. Some non-EU Member States such as Iceland and Norway are also associated with the Schengen area: see Article 6 of the Protocol.

[234] An annex to the Protocol basically determined that it was "Schengen acquis". In the so-called "ventilation or allocation process", its content was more clearly defined: see Commission Decision 1999/435/EC of 20 May 1999, OJ L 176 of 10/07/1999, p. 1-16.

[235] In this same connection, URREA CORRES, M.; *La cooperación reforzada en la Unión Europea*, Colex, Madrid, 2002, p. 286.

On the ex post accession process, this is included in Article 4 of the Schengen Protocol that allows the UK or Ireland to request at any time to participate in all or part of the Schengen acquis. These are measures already taken by "in" countries within the framework of Schengen cooperation and without the participation of the United Kingdom and Ireland. In this case, the Council of the cooperation (plus the applicant Government representative) must decide unanimously. Any of the "in" countries could then veto the participation requested. This solution contrasts starkly with the mechanism provided for in the general mechanism[236].

Finally, it is also appropriate to discuss the main innovation of Lisbon in the Schengen Protocol, the regulation of a recall/expulsion procedure for the UK or Ireland that could end up disconnected from a measure of the Schengen acquis to which initially they had been committed (which we might call an ex post opting out or regression procedure). With a cumbersome drafting that is frankly capable of being improved, this possibility is reflected in Article 5, paragraphs 2-5 of the Schengen Protocol. The decoupling can occur only upon initiating of the process of modifying a Schengen measure that links the UK and Ireland[237]. In this case, either of these two countries may notify the Council it does not want to participate in this process. Such process will then be suspended in order to agree in advance to what extent the existing act (which bound the UK or Ireland) would cease to have effect. The decision will in principle be taken by the Council of the cooperation, at the Commission's proposal, and by qualified majority, trying to reconcile as much as possible the following criteria: first, it will seek to retain the maximum possible participation of the affected State and furthermore respect the operation in practice of the Schengen acquis and its coherence. If the Council does not reach a decision within four months, the matter could be taken to the European Council and if this also does not reach a decision at its first meeting, the suspended process of reform of the Schengen measure could be resumed[238]. When the reform comes into force, the affected State would be disconnected to the extent and with the conditions decided by the Commission. The procedure reflects well the potential complexity and conflict that could be generated by enhanced cooperation and the necessary search for an acceptable balance between the maximum opening up of cooperation to the "out" countries but within the limits of operability and coherence of the acquis. It is the "out" country that starts the process (notification that it does not want to participate in the reform) but it is the Council of the cooperation, the European Council or the Commission that will finally determine the scope of the resulting decoupling in order to preserve coherence. The "out" country is thus guaranteed a right not to continue forward (it even has in its possession a mechanism to force decoupling from prior commitments: regression in the integration), but at the same time, the "in" countries preserve their right to go ahead and to again set aside the State that does not want to go forward with them. The innovation seems realistic in that it is filling a gap and explicitly provides a solution to a latent conflict (between the "out" country having said yes to progress but that does not want to go further in reform and the "in" countries that do not want to see new possible advances blocked or harmed by the "out" country's position). This could favour the participation of the United Kingdom or Ireland in the Schengen measures because they know for sure that they are linked to a specific measure but not necessarily to subsequent reforms and advances. It ensures that enhanced cooperation can move forward without further limitations than before. It is true that it involves explicitly recognizing for the first time a return or regression mechanism (in the degree of linkage of the State concerned). But it is also true that it is recognized in order to avoid hampering the progress of enhanced cooperation and that it is the European Institutions (Council, European Council and/or Commission) which in the end control the regression, depending on the need to preserve the coherence of the system.

A third and final difference relates to the consideration of the Schengen acquis as an acquis communautaire for the purpose of further accessions. In fact, Article 7 of the Schengen Protocol is unequivocal: "... the Schengen acquis and further measures taken by the institutions within its scope shall be regarded as an acquis which must be accepted in full by all States candidates for admission." This position contrasts sharply with the general

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236 See Article 331 of the TFEU and explanations about the same above, section 3.2, 5th indent. The Protocol on the position of the United Kingdom and Ireland on the area of freedom, security and justice, in its Article 4 also forwarded the reader to the mechanism of Article 331 TFEU. On this occasion the Schengen Protocol and the Protocol on the position of the UK and Ireland have irreconcilable positions.

237 The literal wording of Article 5.2 of the Protocol is not clear about this but a comprehensive interpretation of the whole procedure (Article 5, paragraphs 2 to 5) does indeed support this interpretation. The simultaneous introduction in Lisbon of a similar mechanism in Article 4a of the Protocol on the position of the United Kingdom and Ireland, with a clearer drafting, also supports the same interpretation.

238 It does not appear essential, although it does seem likely, that it will be taken to the European Council. Article 5.4 of the Protocol provides that any State "may" take it to the European Council and Article 5.5 appears to allow reinitiation of the procedure not only if the European Council has not decided but also if the Council has not decided and no State has raised the matter with the European Council.

position under the enhanced cooperation clause of Article 20 TEU: "Acts adopted in the framework of enhanced cooperation ... shall not be regardesd as part of the acquis which has to be accepted by candidate States for accession to the Union." So once again the Schengen cooperation has a privileged regime that seeks to maintain (and enforce) the involvement of as many Member States as possible. The positive effects of this provision have already been shown with the latest two accessions in 2004 and 2007.

3.3.2. The four new specific clauses introduced by Lisbon

Lisbon provides for four newly drafted clauses on enhanced cooperation on specific matters relating to the AFSJ within the chapters of judicial cooperation in criminal matters and police cooperation. Specifically, the material scope of these clauses is: mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters (Article 82.3 TFEU), minimum standards regarding the definition of criminal offences and penalties in areas of crime that are particularly serious and that have a cross border dimension (Article 83.3 TFEU) [239], a European Public Prosecutor's Office based on Eurojust (Article 86.1 TFEU) and police cooperation, including police, customs and other law enforcement services specializing in the prevention and detection and investigation of crime (Article 87.3 TFEU).

The four new instruments are characterized by circumventing the general procedure for authorization of enhanced cooperation, by providing for automatic approval with virtually the only requirement being the participation of at least 9 States. These are therefore new privileged mechanisms (as was Schengen) which significantly facilitate the implementation of differentiated integration.

Specifically, this provides in the cases of Article 82.3 and 83.3 TFEU that when one member of the Council considers that the draft directive affects "fundamental aspects of its criminal justice system" it may request that the matter be referred to the European Council for deliberation. The legislative procedure is suspended for a maximum of 4 months. If within that time consensus is reached, the suspension is lifted and the matter is referred back to the Council for its continuation. Otherwise, a minimum of 9 Member States may establish enhanced cooperation on the project, meaning it is authorized. It is noteworthy that unity should be the rule here given that enhanced cooperation would be proposed only where a Member State – understood to be on an exceptional basis – sees "fundamental aspects of the criminal justice system" endangered, and only if the European Council has not managed to regain the necessary consensus guaranteeing if necessary the appropriate warnings to the affected State. We are aware, in any event, that if a State insists on not participating due to this 'essential interest', jurisdictional control is virtually impossible (unless the invocation is manifestly and clearly an abuse) and political control in the Council and European Council is more adequate but limited in scope. In a way, this regulation involves a possibility of ex ante opting out (before the passage of the act) open to any Member State. Probably this is the compensation required in exchange for the communitarisation of the legislative process for such judicial cooperation in criminal matters (ordinary legislative procedure, qualified majority and final act in the form of a directive). One should also highlight and welcome the establishment of a clear deadline which is also quite short, so that any block has its days numbered. Perhaps it would have been desirable also to provide for a clear time limit for the invocation of fundamental interest, since the project was first presented to the Council and unless there were substantial changes to the proposal that could affect the fundamental interest. This lack of foresight leaves open the possibility of the State (or States) participating in - and even conditioning - the discussion throughout the entire procedure with no guarantees that it will eventually be bound by the final measure.

As regards the implementation of enhanced cooperation in the case of Articles 86.1 and 87.3 of the TFEU, the procedure is very similar. The two most significant differences are: first, in both cases the European Council referral is made by at least 9 Member States wishing to advance, once there is the realization that they cannot reach the unanimity required to adopt the act. This difference is more apparent than substantive given that it is always part of an auto-exclusion of at least one of the Member States (either by invoking the fundamental interest or by voting against it on the Council); secondly, in these cases, there is no limited reason that can be invoked for this auto-exclusion. In these two cases of Articles 86.1 and 87.3 TFEU, the enhanced cooperation

[239] The cross-border dimension can be derived from the nature or impact of such offences or of a special need to combat them on a common basis. According to Article 83.1, the areas of crime affected are: terrorism, human trafficking and sexual exploitation of women and children, illicit drug and arms smuggling, money laundering, corruption, counterfeiting of means of payment, computer crime and organized crime. The list could be extended by unanimity by the Council with approval of the European Parliament.

clause seems to be articulated as the compensation required by the countries most eager to promote the maintenance of unanimity.

In these four clauses and unlike Schengen the number of participating States may be much smaller (9 is sufficient, while in principle in Schengen all participate except the United Kingdom and Ireland). This difference is very significant because it could provide new paradigms for differentiated integration in the AFSJ that were hitherto merely theoretical: multiple enhanced cooperation between a small number of countries, groups that also vary from one example of enhanced cooperation to another (not like up to now in which we only had one example of enhanced cooperation in practice, Schengen, and with a very large group of participating States - 25 of 27 – which is always uniform). In these areas there is a significant increase in the likelihood of enhanced cooperation and also the potential for highly variable and complex geometries.

Finally it is worth mentioning that the clauses do not envisaged other specialties, referring as regards the rest to general regulations. The procedure for incorporation of the "out" countries is therefore the general clause provided for in the above analysis[240]. Also, unlike Schengen, the countries that join the EU in the future would not necessarily have to consider the fruits of these four enhanced cooperation as acquis, thereby increasing the risks of fragmentation and their extension over time.

3.4. The opt-out clauses for specific States

The Lisbon Treaty has left standing - incorporating some modifications - the opt-out schemes introduced in Amsterdam. This is, firstly, the Danish case, and secondly, that of the British and the Irish. Besides the special regime enjoyed by these States with regard to Schengen which has already been discussed above[241],several annexed Protocols consolidate special arrangements for these States as regards the other measures relating to AFSJ.

3.4.1. The British and Irish opt-out

The regulation is contained mainly in the Protocol on the position of the United Kingdom and Ireland[242]. The pillars of this particular regulation can be summarized as follows:

- *In principle, neither involvement with or connection of the UK and Ireland to the measures taken on the basis of Title V of the TFEU (AFSJ)*. In fact, Article 1 of the Protocol on the position of the UK and Ireland provides that, as a general rule, both States will not participate in the adoption of such measures and Article 2 emphasizes the same idea by saying that those that do not adopt them will not be bound by them. Viewed from the opposite perspective, one assumes that as a general rule enhanced cooperation of 25 out of 27 is established;

- *regulation of a specific procedure for ex ante incorporation.* Both the UK and Ireland may indicate their desire to participate in the adoption of a measure relating to AFSJ. It is noteworthy that they have a finite and defined period to make this request in writing to the President of the Council, namely 3 months from submission of the proposal to the Council. This provision is a wise move to give greater legal certainty[243]. Also of note is that the notification within the deadline automatically opens the participation to them, without in principle the European institutions or the other Member States being able to oppose it. Article 3.1 of the Protocol is unequivocal saying in this respect that after expressing its desire to participate, "said State shall be entitled to do so." We understand, however, that to preserve the coherence of the system, the Institutions themselves may condition their participation to the requesting State committing itself to other measures inherently bound or linked together to the measure at issue[244]. An explicit provision to that effect would have been desirable. Logically, if the UK and/or Ireland take part in the adoption, they are bound by such measure (whether or not they have voted for it within the Council). Quite rightly, it is further provided that if after a reasonable time, it has not been possible to adopt the measure with the UK and/or Ireland, it may be adopted without

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240 See above section 3.2.

241 See above section 3.3.1.

242 In all matters relating to internal border controls, see the Schengen Protocol and the Protocol on the application of certain aspects of Article 26 of the TFEU to the UK and Ireland.

243 The Schengen Protocol only talks of a "reasonable period". See above section 3.3.1.

244 They base this position on a purposive interpretation and a combined reading of Article 3 and 4 of the Protocol and Article 331 of the TFEU, to which the said Article 4 forwards the reader.

their participation[245]. In the absence of a more explicit provision it is our understanding that it will be for the Council to decide if a reasonable period of time has passed and one could/should do without the participation of the United Kingdom and/or Ireland. In any case, the provision clearly facilitates enhanced cooperation and progress;

- *referral to the general procedure for ex post incorporation*. Article 4 of the Protocol refers to the procedure of Article 331.1 TFEU in order to consider the ex post applications for incorporation, which are therefore subject to the same rules as any other ex post incorporation in other areas[246];

- *as a novelty in Lisbon and similar to what happened in the Schengen mechanism, a kind of ex post opting out is included (regression or reversal in state involvement)*. This is enshrined in Article 4a of the Protocol. It is applicable only when the reform process is initiated from an act relating to the AFSJ which is already binding on the United Kingdom or Ireland, these countries do not wish to participate/adopt the reform and the Council, on receipt of a proposal from the Commission, does not see it operationally possible to maintain the pre-existing act. In this case, unless the UK or Ireland changes its opinion and decides to join the reform, the existing measure would cease to take effect[247]. Unlike the provisions of the Schengen mechanism, it is not expected that the European institutions would determine the extent to which the existing act would cease to have effect or specify the criteria that must be borne in mind. The regulation provided for in the Schengen mechanism in this respect seems more satisfactory. The innovation appears realistic in that it explicitly does nothing but expressly provide a way out of a potential conflict and may even promote the participation of the United Kingdom and/or Ireland in AFSJ-related measures while at the same time ensuring the other countries can move forward without them. It is true that it involves explicitly recognizing for the first time a regression mechanism (in the degree of linkage of the State concerned), but it is also true that it recognizes it in order not to hamper further progress. It should have been provided for, however, that the European institutions might limit the extent of the regression in light of the circumstances of the case concerned, as provided for in the Schengen mechanism[248].

In conclusion, this opting out is substantial: it involves reversing the established order and establishing, as a general rule, the exclusion of the United Kingdom and Ireland from the AFSJ. Progress to 25 becomes the rule and incorporating ex ante or ex post of one or two "out" countries is the exception. The new mechanism for opting out ex post introduced in Lisbon extends the possibilities of self-exclusion/expulsion, with a deficient regulation. In any case, opting out is still the sine qua non for communitarisation of the AFSJ, for the application of the ordinary legislative procedure and qualified majority voting in many of its fields. Without these clauses, there could hardly have been a very significant advance in the integration of this area in the Lisbon Treaty. The practical implementation of such opt-outs has so far proved less problematic than was initially expected (although one has to take care to maintain coherence and balance between obligations and rights of the various States in the AFSJ) and of course has allowed very significant advances

3.4.2. The Danish case

At the moment the Danish exception is remarkably different from the British-Irish example. In the Danish case, there is an objection not of substance but of form or nature of the obligation. Denmark has not been politically opposed to the abolition of checks at internal borders between Member States nor the taking of all additional measures required to achieve this, including those that ensure at the same time a high level of security in the internal space. Indeed, it participated in Schengen and has continued to be linked to the development efforts thereof to date. Its objections arose with the communitarisation given that it wished to maintain only an intergovernmental or international law connection and deemed it necessary to respect the commitment agreed following the Danish rejection of the Maastricht Treaty[249]. Consistent with this view, Denmark has remained with the vanguard in all aspects that generate commitments under international law

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245 See Article 3.2 of the Protocol. Such provision does not exist in other cases such as for example the Schengen mechanism: see above section 3.3.1.

246 For a discussion of this procedure and its variations in Lisbon, see above section 3.2. One must recall that the Schengen Protocol itself provided for a special and priority procedure: see in this respect Article 7 of the Protocol on the position of the UK and Ireland.

247 Either within two months from the decision of the Council, or from the date the reform enters into force, whichever is later.

248 All these arguments and this evaluation are set out in greater detail above in section 3.3.1.

249 THYM, D.: "Europa a varias velocidades…", cit.supra, p. 606.

and has not participated in communitarised areas[250] although various ways have been sought to link these measures also on an intergovernmental basis[251]. Up to now it has been more of a "methodological" rather than an "ideological" objection[252].

The new version after the Lisbon Protocol on the position of Denmark retains, for the most part and for the moment, the prior basic principles, adapting them to the new circumstances. Since all the AFSJ has been communitarised, Denmark will not participate in the adoption by the Council of measures on the AFSJ, not being in principle bound by the actions taken (general opt-out of Articles 1 and 2 of the Protocol) [253], but it may incorporate these measures into national law within 6 months from the date the act is adopted, thus creating an obligation of international law (ex post opt-in regarding the developmental measures of Schengen provided for in Article 4 of the Protocol) [254].

However, and as a novelty in comparison with the pre-Lisbon situation, it is expected that the current Danish arrangement for opt outs in the AFSJ could be replaced by a new system equivalent to that provided for in Lisbon for the United Kingdom and Ireland. In fact, Article 8 of the Protocol allows for this possibility after a Danish decision in accordance with its constitutional rules, explaining in an annex the new system that would be applicable (essentially identical to that provided for the UK and Ireland). The first consequence of such decision would be to change the nature of Denmark's obligations relating to the AFSJ: all its obligations under international law (both existing and future) would then be in the nature of European Union law. It would retain control over its participation in new commitments (generic opt-out of Articles 1 and 2 of the Annex and ex ante and ex post opt-in of Articles 3 and 4 of the annex) or the modification of previous commitments (Article 5 of the annex reproduces the possibility of regression which was already analyzed when studying the British case). In our view, it would be desirable for the Danish decision sought to be adopted. It would provide improvements on several fronts: first, it would reduce the regulatory complexity of opt outs relating to the AFSJ by practically unifying the framework applicable to the British-Irish and Danish cases; secondly, it would extend to the Danish case a more complete regime, allowing greater participation of Denmark in the AFSJ while still ensuring for the other Member States that the Danish position would not block progress; thirdly, it would standardize the nature of the link in the case of opt-in: all obligations would be of European Union law, with the benefits that would result from the standpoint of uniformity of Community Law and its effects. That the framework was essentially the same for UK, Ireland and Denmark would not in any event imply a uniformity of their opt-outs, as the exercise of those rights might vary from one State to another. As we have already seen, the increased political will on the part of Denmark would presumably continue, with a substantial difference in the degree of involvement in the AFSJ of the Danes and the British and Irish.

4. Conclusions

One.- The AFSJ has been a particularly favourable field for differentiated integration. Affected areas (immigration, terrorism, police cooperation, judicial, criminal, etc), closely linked to national sovereignty and therefore very sensitive, in the past have caused some of the most striking and successful cases of differentiation, with the Schengen area being the most significant example. Both now and in the future it will no doubt continue to be fertile ground for the implementation of enhanced cooperation.

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250 With the exception of the measures relating to a uniform visa and those that determine those third-country nationals who require visas when crossing the external border. See Article 4 of the Protocol on the position of Denmark before the Lisbon Treaty, now Article 6.

251 For example, incorporating the action taken by the Council in internal law - see in this respect Article 5 of the Protocol on the position of Denmark before Lisbon, now Article 4 -, which would imply the creation of an "international law obligation" between Denmark and the rest of the Member States concerned, or by concluding international agreements with the Community relating to some of the regulations or directives adopted by the EU institutions in areas of Community competence under the AFSJ - see for example the agreement on jurisdiction, recognition and enforcement of judgments in civil and commercial matters (OJEU 2005 L 299/61) -.

252 See HEDEMANN-ROBINSON,M., "The Area of Freedom, Security and Justice with Regard to the UK, Ireland and Denmark: The Opt-in Opt-outs under the Treaty of Amsterdam", in O'KEEFFE and TWONEY (eds.), *Legal Issues of the Maastricht Treaty*, Chancery Law Publishing, 1994, pp. 189-302, specifically p. 297.

253 The exception, however, remains of the measures relating to a uniform visa and those determining which third-country nationals require visas when crossing the external border. See Article 6 of the Protocol.

254 It is noteworthy that the opt-in is limited to Schengen measures and not more generally to all AFSJ measures as, in our view, would have been desirable.

Two.- The inherent complexity of the AFSJ and its stormy progress in communitarisation has also generated a reflected complexity in differentiated integration mechanisms in this area. It has provided a particularly rich and interesting panorama, because it includes cooperation within and outside the Community framework, at the intergovernmental and community level, enhanced cooperation which leaves out only one or two States and others that would allow advances with a much more limited group of states - even less than ten -, enhanced cooperation that requires prior authorization and others privileged insofar as they are authorized in advance. The key features of differentiated integration in the AFSJ could well be summarized as follows: effective application and usefulness, complexity and richness of forms and patterns of differentiation. It is worth noting that cooperation both within the framework of the EU and beyond it has been fruitful, and that even quite radical forms such as the opt-outs have ended up encouraging appropriate progress in integration of the AFSJ (fewer problems than initially expected, and by now fairly good risk control).

Three.- In the pre-Lisbon scenario, the evolution of enhanced cooperation in the AFSJ has been marked by the pre-eminent use of the special or privileged mechanisms and not of the general clauses of enhanced cooperation of the first and third pillar. Thus, in practice, enhanced cooperation has been imposed among the vast majority of Member States (25 of the 27 Member States in the current paradigm), always a uniform group, either via the Schengen privileged cooperation or by application of the opt-outs of the UK and Ireland. Although the general clauses of the first and third pillar also enable progress among a much smaller group of states, these possibilities have remained unexplored, even after the substantial progress of Nice in relation to Amsterdam (significant reduction of the minimum threshold of States required for implementation and elimination of the veto, together with a significant strengthening of the powers of the Commission and European Parliament).

Four.- With respect to evaluation of the Lisbon reform and the potential/likely future of differentiated integration in the AFSJ, we can conclude the following:

a) The design of enhanced cooperation in the AFSJ remains excessively complex. It is true that the removal of the pillars has meant some simplifying effect, by removing one of the two general clauses applicable prior to the AFSJ, but it is equally true that the rest of the special mechanisms and opt outs have been maintained and in some ways this has complicated their regulation. The appearance of four new kinds of specific clauses adds complexity to the system. One cannot help having the feeling that the simplification is again an unresolved issue and once again a good opportunity to deal with it seriously has been lost;

b) In connection with the new general clause on enhanced cooperation, a comparison with the previous general regulation (with the two clauses, applicable to what were matters of the first and third pillar) reveals that the features of the reform are: uniqueness, the same design and similar scope of application, greater communitarisation and supranational character, slightly greater ease both in the implementation of enhanced cooperation and in the subsequent integration of "out" countries and finally new potentiality for enhanced cooperation already authorised (the so-called gateways). The new design makes it more likely for the clause to be used and for subsequent development of authorized cooperation. However, we believe that its implementation will remain residual as opposed to the privileged and previously authorized cooperation (Schengen, the four new privileged mechanisms introduced by Lisbon and the opt-outs of the UK, Ireland and Denmark). In any case, an alternative route for enhanced cooperation of smaller groups of states is enabled.

c) As regards the Schengen privileged mechanism, the main innovation is the explicit regulation of the possibility of regression or reversal in the degree of involvement of the affected State (ex post opt-out). Although in certain circumstances this allows a step back on the part of the so-called "out" country, in our opinion it should receive a positive evaluation. The innovation seems to us to be realistic, in that it is filling a gap and explicitly provides for a solution to a latent conflict (between the "out" country saying yes to progress but not wanting to go further in the reform and the "in" countries that do not want to see new possible advances blocked or harmed by the "out" country's position). This is recognized in order to avoid hampering the progress of enhanced cooperation and it is the European institutions which will in the end control the regression, depending on the needs to preserve the coherence of the system. We also believe that the opportunity should have been taken to make other improvements to the wording and design of the mechanism (among others, to specify what is a reasonable time for the "out" country to seek its participation, or expressly regulate the possibilities of the other States to exclude it if it is the main reason for failure to adopt the act). Schengen will remain a mechanism widely used post-Lisbon. Its design and the fact that its development involves the community acquis, mandatory for candidates for the European Union, contributes greatly to an almost unitary progress of the AFSJ.

d) Regarding the four new privileged enhanced cooperation examples introduced by Lisbon, these have enormous potential and may also facilitate the emergence of a new model of differentiated integration in the AFSJ. As in Schengen, these are privileged because, in their limited material fields of application, cooperation is agreed beforehand with virtually the sole condition that nine States are willing to participate. Unlike Schengen, cooperation could be developed with only nine States. This difference is very significant because it could provide new paradigms of differentiated integration in the AFSJ that are hitherto merely theoretical: multiple examples of enhanced cooperation among a small number of countries, groups that can also vary from one example of enhanced cooperation to another (not as up to now, when we only had one type of enhanced cooperation in practice with a very large group of participating States - 25 of 27 - almost always uniform). In the affected areas, Lisbon significantly increases the likelihood of enhanced cooperation and also the potential for highly variable and complex geometries. It is certainly an interesting field of monitoring and future study.

e) As regards the opt-outs for individual States, there are various final assessments which would like to highlight: firstly, one must never forget that without these clauses, there could hardly have been such a very significant advance in the AFSJ. In fact, the practical implementation of such opt-outs has so far proved less problematic than was initially expected, although we must remain vigilant about preserving the overall coherence and balance of the AFSJ and the balance of obligations and rights of the various States. Secondly, we must distinguish the Danish case, which for now has been more of a methodological than ideological opt-out, from the British-Irish case, a more profound opt-out with higher risks involved. Thirdly, it would have been desirable to simplify the exceptional individual schemes (we have kept separate the Schengen opt outs, of the UK and Ireland, from Denmark, with different regulations, rather than taking advantage of this to create a common basic core for "out" countries throughout the AFSJ). However, Lisbon has opened up the possibility that, after the Danish decision in accordance with its constitutional requirements, the current Danish opt-out regime in the AFSJ could be replaced by a new British-Irish equivalent. This appears to us to be appropriate and should be carried out. Fourthly, the regulation of these Protocols for individual countries (especially British-Irish) seems to us to be more complete and precise that that of the Schengen Protocol, with the exception of the provisions relating to the new regression mechanism. In the latter, the regulation is deficient: in particular, it should have allowed, as provided for in the Schengen facility, for the European Institutions to be able limit the extent of the regression in light of the circumstances of the case.

f) Finally, it would be desirable for there to be no new cooperation in matters covered by the Treaties outside the Community framework as happened with the Treaty of Prüm. The multiple mechanisms for enhanced cooperation provided for in this area should be used, taking full advantage of the potential thereof: to go through other routes than those provided improperly sidesteps formal procedures and requirements, including the support of a minimum threshold of States and the participation of the European Institutions.

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