

Enhanced cooperation: A way forward for tax harmonisation in the EU?

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Enhanced Cooperation: A Way Forward for Tax Harmonisation in the EU?

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1. Introduction

The idea of unity underpins the process of European integration in its most conventional sense. Legal acts adopted at the European Union (EU) level, and their interpretation provided by the Court of Justice of the European Union (hereafter the Court or CJEU), are seen as aiming to create a system of rules, principles and values that are shared by all EU Member States. This traditional perception, however, oversimplifies the complexity of the integration process. The expansion of competences, membership and, consequently, conflicting interests, necessitated certain adjustments in the ‘one-size-fits-all’ approach. Differentiated integration provides an alternative by accommodating a growing demand for flexibility in material provisions, territorial scope and timing.¹ It takes a variety of legal forms, yet a decisive attempt to incorporate this phenomenon into the EU legal order was made by the Treaty of Amsterdam (ToA, 1997), which introduced a special procedure for deeper integration between smaller coalitions of EU Member States.² This was initially termed ‘closer cooperation’, but was subsequently renamed ‘enhanced cooperation’.

The Treaty-based legitimisation of differentiated integration had many proponents and opponents. The former argued that this step was essential for ensuring that the process of European integration would not be hampered by the lack of political agreement between the heterogeneous members of the enlarged Union, whereas the latter expressed concerns about the fragmentation of the Internal Market and the potentially adverse impact in the long term.³

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¹ See, e.g. A.C.-G. Stubb, *A Categorization of Differentiated Integration* (1996) 34:2 JCMS 283; C.-D. Ehlermann, *Increased Differentiation or Stronger Uniformity*, in J. Winter et al. (eds), *Reforming the Treaty on European Union* (The Hague: Kluwer Law International 1996); J.-E. de Neve, *The European union? How Differentiated Integration is Reshaping the EU* (2007) 29:4 Journal of European Integration 503; K. Holzinger and F. Schimmelfennig, *Differentiated Integration in the EU: Many Concepts, Sparse Theory, Few Data* (2012) 19:2 Journal of European Public Policy 292.

² The Treaty of Amsterdam [1997] OJ C340/1.

³ See, e.g. G. Gaja, *How Flexible is Flexibility under the Amsterdam Treaty?* (1998) 35 CMLRev 855; D. Kochenov and F. Amentbrink, *Towards a More Flexible Approach to Enhanced Cooperation*, in A. Ott and E. Vos (eds.), *50 Years of European Integration: Foundations and Perspectives* (Den Haag: TMC Asser Press 2009) 181.

The Treaty framework reflected this lack of unqualified support. The procedural rules were carefully constructed to favour the idea of uniformity over diversity. Closer cooperation was made available only as a last resort, and the restrictive wording that appeared in the Treaty of Amsterdam created multiple legal barriers for its practical application. Subsequently, these initial limitations were relaxed by the Treaty of Nice (ToN, 2001) and the Treaty of Lisbon (2007),⁴ which facilitated the first application of closer cooperation more than a decade after its initial introduction.

Since then, the use of enhanced cooperation has been authorised on three occasions: in relation to divorce and legal separation (2010),⁵ to allow for the creation of unitary patent protection (2011),⁶ and for the introduction of a financial transaction tax (2013).⁷ These developments can be interpreted as ‘the slow awakening’ of enhanced cooperation.⁸ It comes as no surprise that they have generated a new wave of both optimism and concerns. Reactions to such evolution vary from one policy area to another. Particularly high expectations have been raised in fields such as taxation, in which integration through more traditional legal means has been slow due to the unanimous voting requirement.⁹ Enhanced cooperation is often pictured as a way of overcoming a decision-making deadlock and reinforcing tax integration in the EU. Some academics even refer to it as ‘the last best hope’.¹⁰ More pragmatically, the success of two macro-projects on the EU tax policy agenda – the Financial Transaction Tax (FTT) and the Common Consolidated Corporate Tax Base (CCCTB) – is closely associated with enhanced cooperation.

This Chapter examines the evolution of enhanced cooperation at the legislative and judicial levels and then identifies the challenges and opportunities created by these

⁴ The Treaty of Nice [2001] OJ C80/1; The Treaty of Lisbon [2008] OJ C306/1.

⁵ Council Decision of 12 July 2010 authorising enhanced cooperation in the area of the law applicable to divorce and legal separation (2010/405/EU) [2010] OJ L189/12.

⁶ Council Decision of 10 March 2011 authorising enhanced cooperation in the area of the creation of unitary patent protection (2011/167/EU) [2011] OJ L76/53.

⁷ Council Decision of 22 January 2013 authorising enhanced cooperation in the area of financial transaction tax (2013/52/EU) [2013] OJ L22/11.

⁸ Editorial Comments, *What do we want? “Flexibility! Sort-of ...” When do we want it? “Now! Maybe ...”* (2013) 50 CMLRev 673, 675.

⁹ See, e.g. M. O’Brien, *Company Taxation, State Aid and Fundamental Freedoms: is the Next Step Enhanced Cooperation?* (2005) 30:2 ELRev 209; C.E. McLure, *Legislative, Judicial, Soft Law, and Cooperative Approaches to Harmonizing Corporate Income Taxes in the US and the EU* (2007) 14 Columbia Journal of European Law 377; E.C.C.M. Kemmeren, *CCCTB: Enhanced Speed Ahead for Improvement* (2011) 5 EC Tax Review 208; M. Schippers, *Company Tax Integration in the European Union* (2013) 5 EC Tax Review 258.

¹⁰ M. O’Brien, *Company Taxation, State Aid and Fundamental Freedoms: is the Next Step Enhanced Cooperation?* (2005) 30:2 ELRev 209, 233.

developments in the politically sensitive field of taxation. It starts by explaining how the Treaty provisions were gradually amended to simplify the application of enhanced cooperation. Following the Treaty of Lisbon, some scholars critically maintained that ‘the procedural hurdles are still fairly high’;¹¹ yet, as this contribution shows, the process of ‘liberalisation’ continued through the Court’s lenient interpretation of the Treaty provisions on enhanced cooperation. The first judgments in *Spain and Italy v Council* (Joined Cases C-274 and 295/11)¹² and *UK v Council* (Case C-209/13)¹³ demonstrate that the Court joined the Treaty makers in their attempt to make the procedure more workable. The downside of this development is that greater effectiveness has been achieved through the dilution of special safeguards envisaged by the EU Treaties with regard to the use of flexible regulatory instruments in European governance. The potential impact of these changes on the dynamics of tax integration in the EU is discussed in the final section.

2. Closer (Enhanced) Cooperation in the EU Treaties

The idea of differentiated integration goes back to the roots of the European Economic Community.¹⁴ The Treaty of Rome (1957) contained a provision allowing the existence or completion of regional unions between the Benelux states ‘in so far as the objectives of these regional unions are not achieved by application of this Treaty’.¹⁵ Then, in 1976 the Tindemans Report became one of the pioneers in proposing the institutionalisation of a ‘multi-speed’ Europe.¹⁶ Discussing the future of economic and monetary policy in the aftermath of the oil crisis, the Tindemans Report referred to differences in the economic and financial situations of Member States and concluded that ‘it is impossible [...] to submit a credible programme of action if it is deemed absolutely necessary that in every case all stages should be reached by

¹¹ E. Herlin-Karnell, *Enhanced Cooperation and Conflicting Values: Are New Forms of Governance the Same as ‘Good Governance’?*, in M. Trybus and L. Rubini (eds), *The Treaty of Lisbon and the Future of European Law and Policy*, 150; see also A. Rosas and L. Armati, *EU Constitutional Law: An Introduction* (Oxford: Hart Publishing 2010) 108.

¹² Joined Cases C-274 and 295/11 *Spain and Italy v Council*, ECLI:EU:C:2013:240.

¹³ Case C-209/13 *UK v Council*, ECLI:EU:C:2014:283.

¹⁴ For historical inquiry see, e.g. D. Hanf, *Flexibility in the Founding Treaties, from Rome to Nice*, in B. De Witte et al. (eds.), *The Many Faces of Differentiation in EU Law* (Antwerp: Intersentia 2001) 3.

¹⁵ Article 233 of the Treaty establishing the European Economic Community (1957), available at <http://aei.pitt.edu/37139/1/EEC_Treaty_1957.pdf>.

¹⁶ Bulletin of the European Communities, Supplement 1/76: The Report on the European Union by Mr Leo Tindemans, available at <<http://aei.pitt.edu/942/>>.

all the States at the same time'.¹⁷ The differential speed was seen as an essential but temporary step aiming to reinforce the process of integration.

The pressure for deeper integration grew with the advancement of the Internal Market, which was not unanimously accepted by Member States. The reliance upon qualified majority voting increased, but it did not provide a universal solution. Deadlocks in the decision-making process were solved through alternative regulatory approaches, such as entering into intergovernmental agreements between subgroups of Member States, or negotiating transitional arrangements for certain commitments with potential 'outsiders', or even allowing the most reluctant countries to 'opt out' of the cooperation.¹⁸ Several important steps towards a greater acceptance of flexibility were made by the Treaty of Maastricht (1992). The progressive realisation of the Economic and Monetary Union was referred to as 'the first comprehensive experiment on differentiated integration in the history of Community law'.¹⁹ It made the acceptance of dividing lines between Member States even more evident.

The Treaty of Amsterdam took the existing forms of flexibility a step further, institutionalising the procedure of 'variable geometry'.²⁰ This step was justified by political necessity to recognise the evolving demand for differentiated integration, whilst preserving the high-threshold requirements of 'mainstream' legislative procedures. It also provided a sensible alternative to the *ad hoc* regulatory solutions that were seen as undermining the integrity of the EU legal order. The unprecedented territorial expansion of the EU helped to create a political momentum for this development. The prospect of the ambitious 2004 enlargement raised concerns that it may become even more difficult to reach agreement on

¹⁷ Bulletin of the European Communities, Supplement 1/76: The Report on the European Union by Mr Leo Tindemans, available at <<http://aei.pitt.edu/942/>> 20.

¹⁸ For instance, the Schengen Convention (1985) provides an example of cooperation that was developed through an intergovernmental agreement. It was subsequently incorporated by the Treaty of Amsterdam and now constitutes a part of the *acquis communautaire*; Ireland and the United Kingdom (UK), however, kept their special status in this cooperation; find more in e.g. M. Dougan, *The Treaty of Lisbon 2007: Winning Minds, Not Hearts* (2008) 45 CMLRev 617; M. Fletcher, *Schengen, the European Court of Justice and Flexibility under the Lisbon Treaty: Balancing the United Kingdom's 'Ins' and 'Outs'* (2009) 5:1 European Constitutional Law Review 71.

¹⁹ C. Zilioli and M. Selmayr, *The Law of the European Central Bank* (Hart Publishing 2001) 134.

²⁰ For academic commentaries see, e.g. Editorial Comments, *The Treaty of Amsterdam: Neither a Bang nor a Whimper* (1997) 34:4 CMLRev 767; J. Shaw, *The Treaty of Amsterdam: Challenges of Flexibility and Legitimacy* (1998) 4 ELJ 63; G. Gaja, *How Flexible is Flexibility under the Amsterdam Treaty?* (1998) 35 CMLRev 855; H. Kortenbergh, *Closer Cooperation in the Treaty of Amsterdam* (1998) 35 CML Rev 833; C.D. Ehlermann, *Differentiation, Flexibility, Closer Co-operation: The New Provisions of the Amsterdam Treaty* (1998) 4 ELJ 246; A. Moravcsik and K. Nicolaidis, *Explaining the Treaty of Amsterdam* (1999) 37:1 JCMS 59; E. Philippart and G. Edwards, *The Provisions on Closer Co-Operation in the Treaty of Amsterdam: The Politics of Flexibility in the European Union* (1999) 37:1 JCMS 87; S. Weatherill, *'If I'd Wanted You to Understand I Would have Explained in Better': What is the Purpose of the Provisions on Closer Co-operation Introduced by the Treaty of Amsterdam?*, in D. O'Keefe and P. Twomey (eds), *Legal Issues of the Amsterdam Treaty* (Oxford/Portland Oregon: Hart Publishing 1999) 21.

common policies. The incorporation of closer cooperation in the Treaty of Amsterdam was driven by the idea that it may help to prevent the slowdown in the process of integration that was associated with the growing diversity of EU Member States.

Closer cooperation generated high expectations. As Bernard puts it, 'flexibility was no longer seen as an *ad hoc* pragmatic answer to the difficulty of reaching agreement on common rules, but as a central element of the institutional and constitutional architecture of the EU'.²¹ Contrary to this great ambition, however, the original design of the procedure was minimalist and replicated the diversity of Member States' political interests. One group of countries (including France and Germany) was interested in creating an 'escape route' of potential future vetoes to ensure that progress in major areas of cooperation went smoothly. Another camp, which consisted of potential 'outsiders' (including Portugal, Greece and the UK), tried to safeguard control over the process of closer cooperation.²² The remainder of this section depicts how this original balance of interests translated into the Treaty of Amsterdam, and how it has changed through the subsequent amendments that were introduced by the Treaty of Nice and the Treaty of Lisbon.

2.1. The Treaty of Amsterdam (1997)

Under the Treaty of Amsterdam, the basic rules on closer cooperation were laid down in Articles 43-45 of the Treaty on the European Union (TEU, Title VII). Further provisions were set out in Article 11 of the Treaty Establishing the European Community (EC) for the 'first pillar' (EC law) and Article 40 TEU for the 'third pillar' (police and judicial cooperation in criminal matters).

The aim of closer cooperation was defined as 'furthering the objectives of the Union and at protecting and serving its interests' (Article 43(1)(a) TEU). The uniformity of the EU legal order was preserved by several substantive requirements. Specifically, cooperation between a smaller group of Member States had to respect the principles set out in the EU Treaties and 'the single institutional framework of the Union' (Article 43(1)(b) TEU). It could not 'affect'

²¹ N. Bernard, *Flexibility in the European Single Market*, in C. Barnard and J. Scott (eds), *The Law of the Single Market: Unpacking the Premises* (Oxford: Hart Publishing 2002) 101, 101.

²² A. Moravcsik and K. Nicolaidis, *Explaining the Treaty of Amsterdam* (1999) 37:1 JCMS 59, 79-80; A. Moravcsik and K. Nicolaidis, *Federal Ideals and Constitutional Realities in the Treaty of Amsterdam* (1998) 36 JCMS 1, available at <<https://www.princeton.edu/~amoravcs/library/keynote.pdf>> 20.

the *acquis communautaire* or the measures adopted under other provisions of the Treaties (Article 43(1)(e) TEU). In relation to the 'first pillar', Article 11(1) EC required that closer cooperation should take place outside the scope of the EU's exclusive competences, respect the limits of EU powers, and not 'affect Community policies, actions or programmes'. Furthermore, such cooperation should not concern the EU citizenship, discriminate between nationals of EU Member States, 'constitute a discrimination or a restriction of trade between member states', or 'distort the conditions of competition' between them.

Further protection against the fragmentation of the Internal Market was provided through a procedural framework. Closer cooperation could only be authorised as a 'last resort' (Article 43(1)(c) TEU), and this requirement has remained in place until now. The participation threshold was set high, as the Treaty required at least a majority of Member States to be involved (Article 43(1)(d) TEU); yet, this majority requirement was below a higher threshold of the two-thirds of the Member States proposed by Greece during negotiations.²³ Under the 'first pillar', Member States intending to establish closer cooperation could request the Commission to submit a proposal to the Council to that effect (Article 11(2) EC). The European Parliament would then be consulted. However, the Commission could refuse to submit this proposal to the Council by giving reasons for doing so. Under the 'third pillar', the initiative was left to the Member States that were willing to establish closer cooperation. The Commission would be asked for its opinion and the Member States' request would be forwarded to the European Parliament (Article 40(2) TEU). The authorisation would then be granted by the Council, acting by a qualified majority (Article 11(2) EC and Article 40(2) TEU).

Finally, special provisions were put in place to secure the interests of non-participating Member States. It was envisaged that any closer cooperation could not 'affect the competences, rights, obligations and interests of those Member States which do not participate therein' (Article 43(1)(f) TEU). All Member States were allowed to take part in the deliberations even though the decisions were binding only upon participating Member States (Article 44 TEU). This requirement differentiated closer cooperation from, for instance, the Social Protocol, where the UK representative was excluded from the Council's discussions on the adoption of arrangements under the Social Policy Agreement.²⁴ The interests of non-participating countries were further protected by their veto power: any member of the

²³ G. Gaja, *How Flexible is Flexibility under the Amsterdam Treaty?* (1998) 35 CMLRev 855.

²⁴ G. Gaja, *How Flexible is Flexibility under the Amsterdam Treaty?* (1998) 35 CMLRev 855.

Council could oppose the authorisation of closer cooperation on the basis of ‘important and stated reasons of national policy’ (Article 11(2) EC and Article 40(2) TEU). If any objections were raised, the Council could, acting with a qualified majority, refer the issue to the Council, meeting in the composition of the Heads of State or Government (first pillar), or the European Council (third pillar), where a unanimous decision would be taken. In addition, the Treaty guaranteed that closer cooperation remained open to all Member States at any time (Article 43(1)(g) TEU), and laid down a special admission procedure in Articles 11(3) EC and 40(3) TEU. In return, non-participating countries should ‘not impede the implementation’ of closer cooperation (Article 43(2) TEU).

2.2. The Treaty of Nice (2001)

The Amsterdam version of closer cooperation was considered to be ‘disappointingly minimalist’.²⁵ Its practical application did not move beyond the point of preliminary consideration.²⁶ Under the pressure of criticism that the requirements were set too high, EU decision makers agreed to simplify the rules.²⁷ The Treaty of Nice replaced the term ‘closer cooperation’ with ‘enhanced cooperation’. The general provisions were kept in Articles 43-45 TEU (‘Title VII’), which accommodated the new Articles 43a, 43b and 44a TEU. Article 11a EC Treaty was added after Article 11 EC Treaty to apply to the ‘first pillar’, and Articles 40a and 40b TEU after Article 40 TEU in relation to the ‘third pillar’. The Treaty of Nice allowed the use of enhanced cooperation in the field of EU foreign policy (the ‘second pillar’) by adding Articles 27a-27e TEU.

²⁵ E. Philippart and G. Edwards, *The Provisions on Closer Co-Operation in the Treaty of Amsterdam: The Politics of Flexibility in the European Union* (1999) 37:1 JCMS 87; for further comments on the changes introduced by the Treaty of Nice, see A. Moravcsik and K. Nicolaidis, *Federal Ideals and Constitutional Realities in the Treaty of Amsterdam* (1998) 36 JCMS 13, available at <<https://www.princeton.edu/~amoravcs/library/keynote.pdf>>; D. Hanf, *Flexibility in the Founding Treaties, from Rome to Nice*, in B. De Witte et al. (eds.), *The Many Faces of Differentiation in EU Law* (Antwerp: Intersentia 2001) 3; K.St.C. Bradley, *Institutional Design in the Treaty of Nice* (2001) 38:5 CMLRev 1095; A. Stubb, *Negotiating Flexibility in the European Union: Amsterdam, Nice and Beyond* (Palgrave 2002); J.A. Usher, *Enhanced Cooperation or Flexibility in the Post-Nice Era*, in A. Arnall and D. Wincott (eds), *Accountability and Legitimacy in the European Union* (Oxford Studies in European Law, Oxford University Press 2002) 97.

²⁶ It was considered when Spain resisted to adopt a directive regulating worker participation in European companies; see J.M. de Areilza, *The Reform of Enhanced Cooperation Rules Towards Less Flexibility?*, in B. De Witte et al. (eds.), *The Many Faces of Differentiation in EU Law* (Antwerp: Intersentia 2001) 27, 33-34.

²⁷ For academic commentaries see, e.g. D.T. Murphy, *Closer or Enhanced Cooperation: Amsterdam or Nice* (2003) 31 *The Georgia Journal of International and Comparative Law* 265, available at <<http://scholarship.richmond.edu/cgi/viewcontent.cgi?article=1045&context=law-faculty-publications>>.

Similarly to the Treaty of Amsterdam, enhanced cooperation was permitted only as a 'last resort'; however, the meaning of this prohibition was defined in narrower terms to cover situations where 'such cooperation cannot be attained within a reasonable period', rather than unconditional impossibility (Article 43(a) TEU). The threshold of EU Member States that was required for initiating enhanced cooperation was set out in absolute numbers. Instead of the majority of Member States, the Treaty of Nice required a minimum of eight countries to join (Article 43(g) TEU). Although this change did not introduce any material difference at the time of the amendment (eight Member States still constituted a majority at that time), the post-2004 enlargement automatically lowered the threshold. More fundamentally, the veto power that allowed any Member State to block the authorisation of enhanced cooperation by the Council was abolished (except in the field of foreign policy); instead, a member of the Council was left only with the possibility of delaying the decision by requesting that the matter be raised before the European Council (Article 11(2) EC and Article 40(2) TEU).²⁸ Simultaneously, the role of the Parliament was enhanced in the context of the 'first pillar': in cases where the co-decision procedure would have been used, the assent of the Parliament had to be obtained (Article 11(2) EC). The basic guarantees of openness remained untouched (Article 43(i) TEU); yet, additionally, the Commission and participating countries were put under an obligation to ensure that 'as many Member States as possible are encouraged to take part' (Article 43b EC).

The provisions stipulating the objectives of enhanced cooperation (ex Articles 43(1)(a) TEU) and the obligation to respect EU law and institutional structures (ex 43(1)(b) TEU) were re-numbered into Articles 43(a) and 43(b) TEU with no amendments. Several substantive conditions, however, were modified in substance. First, the description of limitations on the use of enhanced cooperation was reorganised. The prohibition of creating 'a barrier to or discrimination in trade between the Member States' and distorting competition between them moved from ex Article 11 EC into Article 43(f) TEU, thereby obtaining general relevance. The Treaty now required that the enhanced cooperation should not 'undermine' the Internal Market or the economic or social cohesion of the EU (Article 43(e) TEU); at the same time, the condition that enhanced cooperation should not 'concern the citizenship of the Union or discriminate between nationals of Member States' was excluded. Second, the protection of non-participating countries was relaxed. Enhanced cooperation now merely had to 'respect' the *acquis communautaire* and other EU measures; this substituted the previous seemingly

²⁸ This right was not associated with a condition to refer to the reason of national policy.

stronger prohibition that it should not 'affect' them (ex Article 43(1)(e) TEU, Article 43(c) TEU).²⁹ Similarly, the prohibition 'to *affect* the competences, rights, obligations and *interests*' of non-participating countries (ex Article 43 TEU) was substituted with the requirement to '*respect* the[ir] competences, rights and obligations'; the term 'interests' was excluded from the scope of prohibited effects (Article 43(h) TEU). Finally, the emphasis was placed on the need for consistency between enhanced cooperation and other policies of the Union that should be ensured through the cooperation of the Council and the Commission (Article 45 TEU). This requirement replaced the condition that enhanced cooperation should 'not affect Community policies, actions or programmes' (ex Article 11 EC).

2.3. *The Treaty of Lisbon (2007)*

The amendments that were introduced by the Treaty of Nice did not make the procedure more effective. Whilst some proposals were debated as possible candidates for testing enhanced cooperation,³⁰ and the threat of this procedure was successfully used in negotiations,³¹ no further steps towards a critical point of authorisation were being made. The Treaty of Lisbon thus continued the experiment of creating a suitable legal framework for differentiated integration.³² Since the three-pillar structure was abolished, the reading of enhanced cooperation rules became simpler. The rules are now uniform for the areas of the Union's non-exclusive competence, with some differences remaining in relation to common foreign and security policy matters. All the provisions concerning enhanced cooperation are

²⁹ See, e.g. P. Craig, *The Lisbon Treaty - Law, Politics, and Treaty Reform* (OUP 2010) 441; K.St.C. Bradley, *Institutional Design in the Treaty of Nice* (2001) 38:5 CMLRev 1095, 1115.

³⁰ For a Council Framework decision on certain procedural rights in criminal proceedings throughout the European Union and the Prüm Convention; see S. Peers, *Divorce, European Style: The First Authorization of Enhanced Cooperation* (2010) 6:3 European Constitutional Law Review 339, 342; D. Kochenov and F. Amtenbrink, *Towards a More Flexible Approach to Enhanced Cooperation*, in A. Ott and E. Vos (eds.), *50 Years of European Integration: Foundations and Perspectives* (Den Haag: TMC Asser Press 2009), available at <http://www.researchgate.net/publication/228280867_Towards_a_More_Flexible_Approach_to_Enhanced_Cooperation> 3.

³¹ During the negotiations of the European Company Statute and the European Arrest Warrant; see F. Allemand, *The Impact of the EU Enlargement on Economic and Monetary Union: What Lessons Can Be Learnt From the Differentiated Integration Mechanisms in an Enlarged Europe?*(2005) 11:5 ELJ 586, 608; D. Hanf, *The Treaty Establishing a Constitution for Europe – A Flexible Constitution?*, in P. Demaret et al. (eds), *European Legal Dynamics* (P.I.E. Peter Lang 2007) 53, 66.

³² For an overview of the amendments see, e.g. N. Groenendijk, *Enhanced Cooperation under the Lisbon Treaty*, in S. Dosenrode (ed), *The European Union after Lisbon: Polity, Politics, Policy* (Ashgate 2012) 95; M. Dougan, *The Unfinished Business of Enhanced Cooperation: Some Institutional Questions and their Constitutional Implications*, in A. Ott and E. Vos (eds), *50 Years of European Integration: Foundations and Perspectives* (TMC Asser Press 2008).

now gathered in two places. The general framework is laid down in Article 20 TEU (Title IV) and the Treaty on the Functioning of the European Union (TFEU) elaborates these fundamental principles in Articles 326-334 (Title III).

Beyond this simplification, the most noticeable changes included the following. The number of Member States needed for enhanced cooperation was set to nine countries (Article 20(2) TEU). Proportionately, this constitutes one-third of Member States, which is significantly lower than the majority required under the Treaty of Amsterdam. The role of the Parliament was further enhanced: it must now provide its express consent for all authorisations of enhanced cooperation (Article 329(1) TFEU). The new *passerelle clause* allows the alteration of the applicable legislative procedure: where the Council should act unanimously, it can move to a qualified majority, and a special legislative procedure can be substituted by the ordinary legislative procedure (Article 333 TFEU). The Treaty of Lisbon further improved the openness of enhanced cooperation by introducing an appeal procedure in relation to the Commission's refusal of a Member State's application to join the enhanced cooperation in progress (Article 331(1) TFEU). The transparency requirement was strengthened. The Commission is now under obligation to keep the Parliament and the Council 'regularly informed regarding developments in enhanced cooperation' (Article 328(2) TFEU). This requirement only covered the Parliament in the Amsterdam version (ex Article 45 TEU). And finally, the requirement that enhanced cooperation should 'respect [...] the single institutional framework of the Union' was repealed (ex Article 43 TEU, ToA, and ex Article 43(b) TEU, ToN).

To sum up, the simplification of enhanced cooperation since its introduction in the Treaty of Amsterdam encompasses two major developments. First, the original participation rule was stricter, requiring 'at least a majority of Member States' to participate (ex Article 43(1)(d) TEU, ToA). This majoritarian principle was substituted by a fixed threshold of 'a minimum of eight Member States' for EU-15 (ex Article 43(g) TEU, ToN) and subsequently 'at least nine Member States' for EU-27 (Article 20 TEU). Second, the influence of non-participating countries has been gradually limited. Most notably, the veto power that allowed the blocking of the authorising decision of the Council 'for important and stated reasons of national policy' under the Treaty of Amsterdam (ex Article 11 EC, ToA) has been abolished. This simplification is already bearing fruits. The change in the minimum participation rule did not make any material difference to the first and second actual authorisations of enhanced cooperation, because the number of countries was sufficient to meet the higher participation threshold. However, the abolition of the veto power arguably enabled progress with respect

to the second authorisation, which could have been at risk due to the critical position of the two ‘outsiders’.³³ The prospects for the third actual authorisation of enhanced cooperation were doubtful in the light of both procedural safeguards: only 11 Member States were willing to proceed, and any of the four Member States that abstained from voting at the stage of authorisation could potentially have exercised their veto power.³⁴

The substantive conditions have been amended less drastically than those concerning the procedure. The extent to which they may still constrain the use of enhanced cooperation has remained unclear, until recently.³⁵ Therefore, the three cases in which enhanced cooperation was authorised by the Council between 2010 and 2015 have become a ‘driving test’ to illustrate if this procedure can fulfil the role it was envisaged to play by the Treaty makers. The first rulings that these examples have generated suggest that the regulatory choices made by EU legislators are unlikely to be subject to a very rigorous assessment in Luxembourg. The Court is reluctant to play a decisive role in political battles between EU political leaders. Although they are not surprising *per se*, these judgments have brought important clarification in relation to the prospective use of enhanced cooperation, and have opened up this procedure for a more proactive application. The remainder of this Chapter draws together some evidence towards this conclusion.

3. The ‘Driving Test’ for Enhanced Cooperation

The first authorisation of enhanced cooperation was given in July 2010.³⁶ It concerned the conflict-of-law rules applicable to divorce and legal separation (the ‘Rome III Regulation’). The implementing regulations were adopted as early as December of the same year.³⁷ This first application generated no evident challenge from the non-participating Member States and

³³ Italy and Spain.

³⁴ The UK, Czech Republic, Luxembourg or Malta.

³⁵ Editorial Comments, *What do we want? “Flexibility! Sort-of ...” When do we want it? “Now! Maybe ...”* (2013) 50 CMLRev 673, 676.

³⁶ Council Decision of 12 July 2010 authorising enhanced cooperation in the area of the law applicable to divorce and legal separation (2010/405/EU) [2010] OJ L 189/12; for a commentary see, e.g. S. Peers, *Divorce, European Style: The First Authorization of Enhanced Cooperation* (2010) 6:3 European Constitutional Law Review 339, 355; J.-J. Kuipers, *The Law Applicable to Divorce as a Test Ground for Enhanced Cooperation* (2012) 18:2 ELJ 201.

³⁷ Regulation (EU) No 1257/2012 of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection [2012] OJ L 361/1; Regulation (EU) No 1260/2012 of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection with regard to the applicable translation arrangements [2012] OJ L 361/89.

demonstrated that enhanced cooperation can stimulate ‘multi-speed’ integration within the EU. The cooperation was initially established between 14 Member States,³⁸ and it was subsequently joined by Lithuania³⁹ and Greece.⁴⁰ It was rightly pointed out that this area of regulation was suitable for testing enhanced cooperation due to ‘the modest scope of the Rome III Regulation, its limited economic impact, and its relative isolation from other EU and international measures’.⁴¹ At the very least, this example proved the potential of enhanced cooperation in fields that are not associated with any negative effects upon ‘outsiders’.⁴² The progress of the two subsequent authorising decisions has been less smooth, however.

The authorisation to move forward with enhanced cooperation in the creation of unitary patent protection was given by the Council in March 2011.⁴³ This decision was challenged by Italy and Spain, the only two countries that remained outside the scope of cooperation.⁴⁴ Notably, Italy and Spain were not against a unitary patent as such, but they disagreed with others over the language requirements: whilst the vast majority of EU Member States agreed upon a unitary patent protection that relies upon three official languages (English, German and French), Spain was in favour of a five-language system (including Spanish and Italian), whereas Italy proposed that English should be the only language with the possibility of adding one more official EU language that would be chosen by the patentee.⁴⁵ The judgment of the

³⁸ Belgium, Bulgaria, Germany, Spain, France, Italy, Latvia, Luxembourg, Hungary, Malta, Austria, Portugal, Romania and Slovenia.

³⁹ Commission Decision of 21 November 2012 confirming the participation of Lithuania in enhanced cooperation in the area of the law applicable to divorce and legal separation (2012/714/EU) [2012] OJ L 323/18.

⁴⁰ Commission Decision of 27 January 2014 confirming the participation of Greece in enhanced cooperation in the area of the law applicable to divorce and legal separation (2014/39/EU) [2014] OJ L 23/41.

⁴¹ S. Peers, *Divorce, European Style: The First Authorization of Enhanced Cooperation* (2010) 6:3 European Constitutional Law Review 339, 355.

⁴² This observation corresponds with an argument made earlier by Harstad: ‘flexible cooperation is better than the rigid one-size-fits-all approach if the externality is small and the heterogeneity large’; see B. Harstad, *Flexible Integration? Mandatory and Minimum Participation Rules* (2006) 108:4 Scandinavian Journal of Economics 683, 700.

⁴³ Council Decision of 10 March 2011 authorising enhanced cooperation in the area of the creation of unitary patent protection (2011/167/EU) [2011] OJ L76/53; for a commentary see, e.g. M. Lamping, *Enhanced Cooperation – A Proper Approach to Market Integration in the Field of Unitary Patent Protection?* (2011) 42:8 International Review of Intellectual Property and Competition Law 879; S. Peers, *The Constitutional Implications of the EU Patent* (2011) 7:2 European Constitutional Law Review 229; H. Ullrich, *Harmonizing Patent Law: The Untamable Union Patent*, Max Planck Institute for Intellectual Property & Competition Law Research Paper No. 12-03, available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2027920> .

⁴⁴ Joined Cases C-274 and 295/11 *Spain and Italy v Council*, ECLI:EU:C:2013:240; for a case comment see, e.g. M. Lamping, *Enhanced Cooperation in the Area of Unitary Patent Protection: Testing the Boundaries of the Rule of Law* (2013) Maastricht Journal of European and Comparative Law 20:4 589; E. Pistoia, *Enhanced Cooperation as a Tool to... Enhance Integration? Spain and Italy v. Council* (2014) 51 CMLR 247.

⁴⁵ See, e.g. E. Pistoia, *Enhanced Cooperation as a Tool to... Enhance Integration? Spain and Italy v. Council* (2014) 51 CMLR 247, 250.

Grand Chamber in *Spain and Italy v Council* (C-274 and 295/11) was delivered in April 2013. The Court refused to accept the objections of the ‘outsiders’ against the authorising decision and dismissed the action. Six weeks after this unfavourable judgment, Spain initiated a new case that challenged the implementing Regulations 1257/2012 and 1260/2012.⁴⁶ At the time of writing, these two cases – *Spain v Parliament and Council* (C-146/13) and *Spain v Council* (Case C-147/13) – were pending at the Court.⁴⁷

The Council’s decision authorising 11 Member States to proceed with the introduction of an FTT under enhanced cooperation was granted in January 2013.⁴⁸ Following the publication of the draft legislative proposal by the Commission in February 2013, the authorising decision was challenged by one of the non-participating Member States, the UK.⁴⁹ The Court’s judgment in *UK v Council* (C-209/13) was delivered without the Opinion of an Advocate-General in April 2014. It was widely accepted, including by the UK government itself, that the challenge was ‘premature’.⁵⁰ However, this ‘speculative’ case sent a clear political signal that should the FTT proposal be adopted in its current form, it would be challenged. Although further progress in relation to the FTT has been slowed down by political disagreements in the Council, the participating Member States consistently confirm their political commitment to implement this tax.⁵¹ If agreement on its design is reached and its scope remains contentious, the FTT issue is likely to be litigated further.

The lessons drawn from this limited experience can be formulated as follows. In each of the three cases the policy context of enhanced cooperation has been different; however, a common feature of these initiatives has been the unanimous voting requirement and lengthy negotiations over regulation. In two instances the ‘outsiders’ intervened and challenged the decision of the other Member States to go ahead under enhanced cooperation by appealing to

⁴⁶ Regulation (EU) No 1257/2012 of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection [2012] OJ L 361/1; Regulation (EU) No 1260/2012 of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection with regard to the applicable translation arrangements [2012] OJ L 361/89.

⁴⁷ Case C-146/13 *Spain v Parliament and Council* (pending); Case C-147/13 *Spain v Council* (pending). Note: the Court delivered its judgments on 5 May 2015 when this chapter was prepared for publication. The actions were dismissed; see Case C-146/13 *Spain v Parliament and Council*, ECLI:EU:C:2015:298; Case C-147/13 *Spain v Council*, ECLI:EU:C:2015:299.

⁴⁸ Council Decision of 22 January 2013 authorising enhanced cooperation in the area of financial transaction tax (2013/52/EU) [2013] OJ L22/11.

⁴⁹ Case C-209/13 *UK v Council*, ECLI:EU:C:2014:283.

⁵⁰ Case C-209/13 *UK v Council*, ECLI:EU:C:2014:283, para 16.

⁵¹ See, e.g. Joint Statement by ministers of Member States participating in enhanced cooperation in the area of financial transaction tax from 27 January 2015.

the Court. These legal challenges have highlighted the fact that the integration plans of the subgroup of EU Member States can cause clashes between participating and non-participating countries. This observation not only confirms long-standing concerns that the use of enhanced cooperation can endanger the interests of the 'outsiders', but it also indicates the failure of the political mechanisms that should in principle facilitate the reconciliation of such conflicting interests. With no veto power available and merely a qualified majority required for the authorisation of enhanced cooperation, non-participating Member States are likely to seek the judicial protection of their interests. This route, as explained below, may be of little help.

4. CJEU Interpretation of the Treaty Requirements

AG Trstenjak rightly captured the dilemma of enhanced cooperation by describing the procedure as 'a legal expression of the balancing exercise between making the Union wider and making it deeper'.⁵² This balancing act involves weighing the gains of the cooperation being established between a subgroup of Member States against the potential fragmentation of the Internal Market. This highly political evaluation is primarily undertaken by EU legislators. However, where political means fail, the judiciary needs to step in and tackle the conflict by applying legal concepts. Any act adopted under enhanced cooperation must comply with the Treaties and EU law (Article 326(1) TFEU). This obligation covers not only the general requirements applicable to all EU legal acts, but also to the specific substantive and procedural conditions envisaged by the EU Treaties for enhanced cooperation.

Compliance with EU law can be challenged at two stages. Actions can be brought (i) against an authorising decision of the Council and (ii) against an act that contains implementation measures. The methodology of such a judicial review was first considered by the Court in *Spain and Italy v Council* (C-274/11 and C-295/11). Following the recommendation of AG Bot,⁵³ the Court accepted that the judicial review of (i) and (ii) needed to be distinguished. With respect to an action for the annulment of a Council's authorising decision, the Court reviews whether that decision is valid in the light of, *inter alia*, Article 20 TEU and Articles 326 TFEU to 334 TFEU, which define the conditions for the granting of such

⁵² Opinion of AG Trstenjak in Case C-77/05 *United Kingdom of Great Britain and Northern Ireland v Council of the European Union*, ECLI:EU:C:2007:419, point 83.

⁵³ Opinion of AG Bot in Joined Cases C-274 and 295/11 *Spain and Italy v Council*, ECLI:EU:C:2012:782, point 137.

authorisation.⁵⁴ The acts that are subsequently adopted to give ‘concrete effect’ to the enhanced cooperation among a subgroup of Member States may be challenged on substantive grounds that might be premature at the stage of authorisation.

When an authorising decision is reviewed, the Court starts by examining whether an arrangement challenged by the applicant represents a constituent element of the contested decision. For instance, in *Spain and Italy v Council* (C-274/11 and C-295/11), the applicants challenged the language arrangements for the unitary patent. The Court dismissed this claim by finding the arguments alleging the infringement of Article 326 TFEU to be (in part) inadmissible.⁵⁵ The Court concluded that the references to the language arrangements contained in the preamble to the contested decision constituted a mere proposal made at a preparatory stage, which did not constitute a ‘component part’ of the Council’s decision.⁵⁶ Similar reasoning was relied upon in *UK v Council* (C-209/13), where the UK challenged Council Decision 2013/52/EU on the grounds that it authorised the adoption of an FTT with extraterritorial effects, which was in breach of Article 327 TFEU and contrary to customary international law.⁵⁷ This challenge was found to be ‘premature’ by the Court, as the principles of taxation that were challenged by the UK did not represent the ‘constituent elements’ of the Council’s decision.⁵⁸ The ‘counterparty principle’ was present in the 2011 FTT Proposal and was mentioned in Recital 6 of the authorisation decision, whilst the ‘issuance principle’ only appeared in the 2013 FTT Proposal.⁵⁹

Concerning the standard of judicial review, AG Bot in *Spain and Italy v Council* (C-274/11 and C-295/11) called the Court to opt for a ‘limited review’ in view of the fundamental principle of the separation of powers.⁶⁰ AG Bot asserted that the Court should not ‘substitute its own assessment of the economic situation or of the necessity or suitability of the measures adopted for those of the Council’.⁶¹ Accordingly, the Opinion suggested that the assessment of compliance with the conditions of authorisation should be limited to the consideration of

⁵⁴ Case C-209/13 *UK v Council*, ECLI:EU:C:2014:283, para 33.

⁵⁵ Joined Cases C-274 and 295/11 *Spain and Italy v Council*, ECLI:EU:C:2012:782, para 78.

⁵⁶ Joined Cases C-274 and 295/11 *Spain and Italy v Council*, ECLI:EU:C:2012:782, para 77.

⁵⁷ Case C-209/13 *UK v Council*, ECLI:EU:C:2014:283, paras 18-20.

⁵⁸ Case C-209/13 *UK v Council*, ECLI:EU:C:2014:283, para 36.

⁵⁹ Case C-209/13 *UK v Council*, ECLI:EU:C:2014:283, para 36.

⁶⁰ Opinion of AG Bot in Joined Cases C-274 and 295/11 *Spain and Italy v Council*, ECLI:EU:C:2012:782, point 27.

⁶¹ Opinion of AG Bot in Joined Cases C-274 and 295/11 *Spain and Italy v Council*, ECLI:EU:C:2012:782, point 27; see also Opinion of AG Jacobs in Joined Cases C-248/95 and C-249/95 *SAM Schiffahrt and Stapf* [1997] ECR I-4475, point 23.

‘whether, in the exercise of that freedom of choice [on the nature and scope of the measures], the EU legislature has made a manifest error or misused its powers or has manifestly exceeded the bounds of its discretion’.⁶² The Court – although less explicitly – followed this recommendation.

This analysis focuses three types of legal constraints upon enhanced cooperation that determine the flexibility of this procedure, namely (i) the limitations imposed on the Union’s right of legislative initiative, (ii) the safeguards for the interests of the Internal Market, and (iii) the guarantees provided to non-participating Member States. It illustrates that the Court has adopted a narrow reading of these restrictive provisions, which therefore opens up wider possibilities for the application of enhanced cooperation.

4.1. *Limitations of the Union’s Right of Legislative Initiative*

As with any other legislative act, a proposal under enhanced cooperation has to respect the traditional requirements of EU law, such as the principles of conferral, subsidiarity and proportionality. The principle of conferral requires the Commission to identify an appropriate legal basis for its proposals. In this respect, the Court has demonstrated its reluctance to reassess the grounds of the Union’s legislative competence in the light of enhanced cooperation. In *Spain and Italy v Council* (C-274/11 and C-295/11), the applicants submitted that Article 118 TFEU provides for the creation of European intellectual property rights that offer ‘uniform protection throughout the Union’ by means of the setting up of centralised ‘Union-wide’ arrangements.⁶³ The Court refused to accept that the Council had not been authorised to create rules that were *not* valid ‘throughout the Union’.⁶⁴ It held that such a ‘consequence necessarily follows from Article 20(4) TEU’, which states that ‘[a]cts adopted in the framework of enhanced cooperation shall bind only participating Member States’.⁶⁵ Accordingly, if a legal basis is valid for uniform legislative measures, it will equally suffice for the purpose of enhanced cooperation.

⁶² Opinion of AG Bot in Joined Cases C-274 and 295/11 *Spain and Italy v Council*, ECLI:EU:C:2012:782, point 29.

⁶³ Joined Cases C-274 and 295/11 *Spain and Italy v Council*, ECLI:EU:C:2012:782, para 64.

⁶⁴ Joined Cases C-274 and 295/11 *Spain and Italy v Council*, ECLI:EU:C:2012:782, para 69.

⁶⁵ Joined Cases C-274 and 295/11 *Spain and Italy v Council*, ECLI:EU:C:2012:782, para 68.

In addition to the above, the right of legislative initiative under enhanced cooperation is constrained by two procedural requirements contained in Article 20(1)-(2) TEU. Article 20(1) TEU stipulates that enhanced cooperation can be established in the areas of the Union's non-exclusive competence. This requirement eliminates the fields of customs union, competition rules, monetary policy for the Eurozone, the conservation of marine biological resources under the common fisheries policy and common commercial policy from the ambit of enhanced cooperation (Article 3(1) TFEU). In *Spain and Italy v Council* (C-274/11 and C-295/11), the applicants claimed that Article 118 TFEU, which was used as the legal basis for the unitary patent protection, follows under 'the competition rules necessary for the functioning of the internal market' under Article 3(1)(b) TFEU and hence belonged to an area in which the Union has exclusive competence.⁶⁶ This plea was dismissed by the Court. The principal argument was that rules on intellectual property are 'essential' for maintaining undistorted competition within the Internal Market, but do not constitute 'competition rules' for the purpose of Article 3(1)(b) TFEU.⁶⁷ The latter can be found in Part Three, Title VII, Chapter 1 TFEU, whereas Article 118 TFEU belongs to the area of the 'internal market' and falls within the competences shared between the EU and its Member States according to Article 4(2)(a) TFEU.⁶⁸ The area of the Internal Market is interpreted broadly. It covers any competence relevant for achieving the general objectives set out in Article 26(1) and 26(2) TFEU, and is not limited to the competence to adopt harmonisation measures under Articles 114 and 115 TFEU.⁶⁹

According to Article 20(2) TEU, enhanced cooperation should be used as a 'last resort' when agreement cannot be reached 'within a reasonable time' between all Member States, and at least nine Member States have expressed their willingness to participate. This requirement reflects and seeks to preserve the principles of the unity of EU law that underpins the institutional and decision-making design of the Internal Market. The EU Treaty remains silent as regards the duration of a 'reasonable period'. In *Spain and Italy v Council* (C-274/11 and C-295/11), Spain expressed concern that a short period of less than six months elapsed between the proposal for language arrangements being put forward by the Commission and the proposal for enhanced cooperation.⁷⁰ In response, the Court did not

⁶⁶ Joined Cases C-274 and 295/11 *Spain and Italy v Council*, ECLI:EU:C:2012:782, para 10.

⁶⁷ Joined Cases C-274 and 295/11 *Spain and Italy v Council*, ECLI:EU:C:2012:782, para 22.

⁶⁸ Joined Cases C-274 and 295/11 *Spain and Italy v Council*, ECLI:EU:C:2012:782, para 24.

⁶⁹ Joined Cases C-274 and 295/11 *Spain and Italy v Council*, ECLI:EU:C:2012:782, paras 20-21.

⁷⁰ Joined Cases C-274 and 295/11 *Spain and Italy v Council*, ECLI:EU:C:2012:782, para 43.

discuss a specific period that should be sufficient; instead it stated that the ‘last resort’ condition refers to situations where the adoption of legislation for the Union as a whole is not possible ‘in the foreseeable future’.⁷¹ Arguably, a legislative proposal does not even need to be rejected by a formal vote as long as ‘there is a genuine deadlock’.⁷² But how do we define the ‘genuine deadlock’? The Treaty does not set a substantive test that the Court may apply to establish the lack of political agreement. Clearly, the reluctance of EU Member States to cooperate in a particular policy area would suffice, but what if EU Member States disagree over a relatively minor issue of policy design? The Court ruled that *any* deadlock in negotiations would be satisfactory:

The impossibility [...] may be due to various causes, for example, lack of interest on the part of one or more Member States or the inability of the Member States, who have all shown themselves interested in the adoption of an arrangement at Union level, to reach agreement on the content of that arrangement.⁷³

The merits of the Council’s decision are not assessed as such. The Court agreed with AG Bot that the Council – which takes responsibility for the final step in the authorisation procedure – is ‘best placed’ to assess the willingness of the Member States to compromise.⁷⁴ Therefore, judicial scrutiny is limited to two aspects: first, whether the Council has examined the impossibility to adopt a measure for the Union as a whole ‘carefully and impartially’; and second, whether it has given adequate reasons for the conclusion reached.⁷⁵ It is the duty of the applicants to provide ‘specific evidence that could disprove the Council’s assertion’.⁷⁶ With regard to the duty to state reasons, a mere *summary* of reasons is sufficient when the measure is voted in a context with which the persons concerned are familiar.⁷⁷

Such limited assessment may raise concerns due to its potential to undermine the existing Union’s institutional balance. Enhanced cooperation can be used to put pressure on Member States that may potentially be left outside the cooperation with no risk for the

⁷¹ Joined Cases C-274 and 295/11 *Spain and Italy v Council*, ECLI:EU:C:2012:782, para 50.

⁷² Opinion of AG Bot in Joined Cases C-274 and 295/11 *Spain and Italy v Council*, ECLI:EU:C:2012:782, points 110-111.

⁷³ Joined Cases C-274 and 295/11 *Spain and Italy v Council*, ECLI:EU:C:2012:782, para 36; for a critical view see F. Fabbrini, *Enhanced Cooperation Under Scrutiny: Revisiting the Law and Practice of Multi-Speed Integration in Light of the First Involvement of the EU Judiciary* (2013) 40 *Legal Issues Economic Integration* 197.

⁷⁴ Joined Cases C-274 and 295/11 *Spain and Italy v Council*, ECLI:EU:C:2012:782, para 53.

⁷⁵ Joined Cases C-274 and 295/11 *Spain and Italy v Council*, ECLI:EU:C:2012:782, para 54.

⁷⁶ Joined Cases C-274 and 295/11 *Spain and Italy v Council*, ECLI:EU:C:2012:782, para 57.

⁷⁷ Joined Cases C-274 and 295/11 *Spain and Italy v Council*, ECLI:EU:C:2012:782, para 58.

mainstream group. Although such concerns are appealing, the political reality of the decision-making process is so complex that a more substantive examination might not be feasible. For instance, in relation to the unitary patent protection, Ullrich points out that since the language issue ‘entered the actual debate, it has been cut off relatively rapidly by threats of and then the decision to go into enhanced cooperation’.⁷⁸ Where some scholars emphasise ‘an early loss of flexibility’,⁷⁹ others more willingly accept that the proposal went through a long period of failure before finding an acceptable solution.⁸⁰ This example demonstrates that the evaluation of the ‘last resort’ criteria seems to be a matter of political judgment.⁸¹ The calls that are made for a more substantive assessment of this criterion by the Court need to be supported by a suitable solution to this challenge.

4.2. Safeguards for the Uniformity of the EU Legal Order

The Treaty imposes a general positive obligation that enhanced cooperation must ‘further the objectives of the Union, protect its interests and reinforce its integration process’ (Article 20(1) TEU). The Court accepted that it is sufficient for a legislative proposal to carry a certain advantage of ‘uniformity’ within the area covered by enhanced cooperation as compared to the status quo in order to satisfy this requirement. In *Spain and Italy v Council* (C-274/11 and C-295/11) the applicants were seeking to prove that enhanced cooperation would not achieve ‘a higher level of integration compared to the current situation’.⁸² They were arguing that since the laws of EU Member States are compatible with the provisions of the European Patent Convention, this ensures ‘a certain level of uniformity’; in contrast, the creation of a unitary patent introduces a dividing line between the participating and non-participating countries, which is ‘likely to damage that uniformity and not to improve it’.⁸³ The Council and

⁷⁸ H. Ullrich, *Harmonizing Patent Law: The Untamable Union Patent*, Max Planck Institute for Intellectual Property & Competition Law Research Paper No. 12-03 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2027920> 17.

⁷⁹ H. Ullrich, *Harmonizing Patent Law: The Untamable Union Patent*, Max Planck Institute for Intellectual Property & Competition Law Research Paper No. 12-03 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2027920> 16.

⁸⁰ Emanuela Pistoia, *Enhanced Cooperation as a Tool to... Enhance Integration?* *Spain and Italy v. Council* (2014) 51 CMLR 247, 249-250.

⁸¹ See, e.g. Editorial Comment, ‘Enhanced Cooperation: a Union à Taille Réduite or à Porte Tournante?’ (2011) 48 CMLR 317, 319.

⁸² Joined Cases C-274 and 295/11 *Spain and Italy v Council*, ECLI:EU:C:2012:782, para 60.

⁸³ Joined Cases C-274 and 295/11 *Spain and Italy v Council*, ECLI:EU:C:2012:782, para 60.

several other intervening parties opposed this argument by submitting that the existing provisions did not confer uniform protection, and that such protection would certainly be created in the territory of all the participating Member States under enhanced cooperation.⁸⁴ The Court did not engage in a substantive analysis. It simply accepted the submission that the protection conferred by the unitary patent would be ‘advantageous in terms of uniformity [...] compared to the [current] situation’.⁸⁵

The added value of enhanced cooperation is unlikely to be tested rigorously. For instance, when a case of enhanced cooperation was authorised to introduce an FTT, only three out of the 11 participating Member States (Belgium, France and Greece) levied an FTT. Other countries that maintained some form of FTT (Cyprus, Finland, Ireland, Luxembourg, Malta, Poland and the UK) did not express their intention to join the harmonisation initiative. To strengthen the argument for creating a tool eliminating the fragmentation of financial markets, the Commission referred to the levies that ‘are likely to be applied [...] if no harmonisation is undertaken’.⁸⁶ This argument echoes the CJEU jurisprudence on Article 114 TFEU, where the Court accepted that the Commission could exercise its legislative power in order to *prevent* the emergence of obstacles to the Internal Market ‘resulting from the divergent development of national laws’ (preventive harmonisation).⁸⁷ Although case law prudently suggests that ‘the emergence of such obstacles must be likely and the measure in question must be designed to prevent them’,⁸⁸ it has not been rigorously scrutinised. The CJEU has been very lenient in testing the ‘likelihood’ and usually relies upon evidence provided by the EU legislature.⁸⁹ It remains to be seen if the Court will follow the same route in relation to enhanced cooperation, but there are no obvious reasons for setting a higher threshold. On the contrary, since a non-participating Member State can join the harmonised zone at any point, this expands the potential added value of enhanced cooperation almost indefinitely and

⁸⁴ Joined Cases C-274 and 295/11 *Spain and Italy v Council*, ECLI:EU:C:2012:782, para 61.

⁸⁵ Joined Cases C-274 and 295/11 *Spain and Italy v Council*, ECLI:EU:C:2012:782, para 63.

⁸⁶ Commission Proposal for a Council Decision authorising enhanced cooperation in the area of financial transaction tax, COM(2012) 631 final, 6.

⁸⁷ Case C-58/08 *Vodafone and Others* [2010] ECR I-4999, para 33; Case C-380/03 *Germany v Parliament and Council* [2006] ECR I-11573, para 38 (and other case-law cited therein) (emphasis added).

⁸⁸ Case C-58/08 *Vodafone and Others* [2010] ECR I-4999, para 33; Case C-380/03 *Germany v Parliament and Council* [2006] ECR I-11573, para 38 (and other case-law cited therein).

⁸⁹ For instance, in Case C-350/92 *Spain v Council* [1995] ECR I-1985, paras 33-36; see, also, S. Weatherill, *The Limits of Legislative Harmonization Ten Years after Tobacco Advertising: How the Court's Case Law has Become a 'Drafting Guide'* (2011) 12 German Law Journal 827 and the cases discussed therein.

makes it even harder to challenge enhanced cooperation on the basis of its lack of capacity to reach the objectives identified in Article 20(1) TEU.

Article 326 TFEU further elaborates the provision contained in Article 20(1) TEU by setting several negatively worded conditions. To ensure that enhanced coordination does not cause the fragmentation of the Internal Market, the Treaty stipulates that it should not 'undermine the internal market' or 'economic, social and territorial cohesion', and it should not 'constitute a barrier to or discrimination in trade' or 'distort competition' between Member States. The interpretation of Article 326 TFEU plays a crucial role in defining the flexibility of enhanced cooperation. If these conditions are taken to their extreme, one may argue that almost any attempt at differentiated integration goes against the interests of the Internal Market. Admittedly, any kind of 'flexible' cooperation creates conditions for different treatment within and outside its borders, and thus some degree of distortion. In the light of this interpretation, some scholars have argued that '[i]f these conditions are strictly and cumulatively applied, one can only wonder what the scope of any enhanced cooperation could actually be'.⁹⁰ On the contrary, if the Court chooses to evaluate these conditions in the light of the 'inherent limits' of differentiated integration, it runs into the risk of depriving Article 326 TFEU of any real meaning.

The CJEU appears to be open-minded towards enhanced cooperation and seems to lean towards the more liberal interpretation. In *Spain and Italy v Council* (C-274/11 and C-295/11), the applicants argued that the uniform protection for innovations under enhanced cooperation 'would encourage activities relating to innovatory products to be drawn to that part of the Union' to the detriment of the non-participating Member States.⁹¹ It may also preclude 'the coherent development of industrial policy and increase the differences between Member States from the technological point of view'.⁹² The Court refused the allegation that the contested decision was damaging for the Internal Market and the cohesion of the Union, and declared it to be unfounded.⁹³ The Court referred to the same idea of 'inherent limits' that

⁹⁰ D. Kochenov and F. Amtenbrink, *Towards a More Flexible Approach to Enhanced Cooperation*, in A. Ott and E. Vos (eds.), *50 Years of European Integration: Foundations and Perspectives* (Den Haag: TMC Asser Press 2009), available at http://www.researchgate.net/publication/228280867_Towards_a_More_Flexible_Approach_to_Enhanced_Cooperation 4-5.

⁹¹ Joined Cases C-274 and 295/11 *Spain and Italy v Council*, ECLI:EU:C:2012:782, para 71; see also H. Ullrich, *Harmonizing Patent Law: The Untamable Union Patent*, Max Planck Institute for Intellectual Property & Competition Law Research Paper No. 12-03, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2027920 26-28.

⁹² Joined Cases C-274 and 295/11 *Spain and Italy v Council*, ECLI:EU:C:2012:782, para 73.

⁹³ Joined Cases C-274 and 295/11 *Spain and Italy v Council*, ECLI:EU:C:2012:782, para 78.

allowed it to read Article 118 TFEU as providing the EU with the competence to legislate even if the cooperation extends to only a part of the Union.⁹⁴ The consequences that ‘necessarily follow’ from enhanced cooperation have to be accepted. Taken further, this approach allows the disregarding of various types of detriments that naturally arise from the differentiated mode of integration.

To be fair, however, the Court’s jurisprudence on this matter does not allow a clear-cut answer to be given in terms of how far-reaching the ‘inherent limits’ of enhanced cooperation might be. In *Spain and Italy v Council* (C-274/11 and C-295/11), a potentially clarifying question was raised but it was not answered in substance: the Court refused to consider whether the language requirements created a source of distortion of competition and of discrimination between undertakings within the Internal Market, because the applicants relied upon Recital 7 of the preamble to the contested decision, which were not a ‘component part of the latter’.⁹⁵ Future litigation will help to clarify where the borderline of acceptable detriment to the Internal Market is. For instance, it has been argued by the author elsewhere that the 2013 FTT Proposal creates a risk of double taxation due to the interaction between the harmonised FTT zone and the independently designed FTTs introduced by the non-participating Member States.⁹⁶ Although the clash is apparent, it is unclear whether it would be sufficient to prove a breach of EU law. If Article 326 TFEU is interpreted in the light of the ‘inherent’ limits of enhanced cooperation, it seems unlikely that the Court will accept that the double taxation problem amounts to a breach.

Whilst the Court may still set the substantive conditions high enough to make enhanced cooperation practically unworkable, the first judgments in this area demonstrate that this is highly unlikely to happen. The judges showed their willingness to endorse enhanced cooperation and are ready to accept at least some dividing lines created by the mode of differentiated integration. It is clear that the political nature and vagueness of the substantive conditions create evident constraints upon the Court. In addition, one has to admit that the assessment of the implications associated with enhanced cooperation is even more challenging than that of uniform legislative measures, due to its flexible nature. The openness to new members creates an additional obstacle for any definite conclusions as regards detrimental impact. In view of these considerations, one has to question whether Article 326

⁹⁴ Joined Cases C-274 and 295/11 *Spain and Italy v Council*, ECLI:EU:C:2012:782, paras 68 and 75.

⁹⁵ Joined Cases C-274 and 295/11 *Spain and Italy v Council*, ECLI:EU:C:2012:782, paras 72, 76-78.

⁹⁶ J. Englisch et al., *The Financial Transaction Tax Proposal under the Enhanced Cooperation Procedure: Legal and Practical Considerations* (2013) 2 *British Tax Review* 223.

TFEU creates any real safeguards or whether it should be viewed as containing purely political declarations.

4.3. Guarantees for Non-participating Member States

As shown in Section 2 above, the Treaty amendments simplified the use of enhanced cooperation by, *inter alia*, lowering the minimum participation requirement and abolishing the gatekeeper power that each Member State possessed at the stage of authorisation in the Council. Indeed, the interests of ‘outsiders’ remain protected at the procedural level by the process of authorisation. Crucially, however, the Council’s decision is taken by a qualified majority even in areas where unanimity is required for acting under the traditional legislative procedure. This lower threshold may be seen as undermining the veto power of those Member States that disagree with a chosen policy. Furthermore, some important provisions may be added after the authorisation has been given, as happened with the FTT Directive: after the authorisation was granted, the Commission submitted an adjusted legislative proposal. The Council’s recommendation to introduce a measure that would prevent ‘evasive actions, distortions and transfers to other jurisdictions’ turned into a far-reaching ‘issuance principle’.⁹⁷ Although this caused dissatisfaction of some non-participating Member States, their political influence at the post-authorisation stage is limited. Even though the representatives of these governments may participate in deliberations, they may not take part in the voting (Article 20(3) TEU and Article 330 TFEU). The procedural framework thus generally favours those in agreement with deeper integration.

Additional tools for balancing the interests of participating and non-participating Member States can be found in substantive provisions. The principle of loyal cooperation underpins the rules on enhanced cooperation. The non-participating Member States ‘shall not impede its implementation by the participating Member States’ (Article 327 TFEU); in line with Article 4(3) TEU, they ‘shall facilitate the achievement of the Union’s tasks and refrain from any measure which could jeopardise the attainment of the Union’s objectives’. To balance these obligations, the acts adopted under enhanced cooperation are binding only upon the participating Member States and are not regarded as part of the *acquis*

⁹⁷ Council Decision of 22 January 2013 authorising enhanced cooperation in the area of financial transaction tax (2013/52/EU) [2013] OJ L22/11; Article 4(1)(g) and (2)(c) of the Commission’s Proposal for a Council Directive implementing enhanced cooperation in the area of financial transaction tax (COM(2013) 71 final).

communautaire, which has to be accepted by candidate States for accession to the EU (Article 20(4) TEU).

Furthermore, the participating Member States have to respect two obligations. First, 'any enhanced cooperation shall respect the competences, rights and obligations of those Member States which do not participate in it' (Article 327 TFEU). The scope of this prohibition was interpreted by the Court as follows:

While it is, admittedly, essential for enhanced cooperation not to lead to the adoption of measures that might prevent the non-participating Member States from exercising their competences and rights or shouldering their obligations, it is, in contrast, permissible for those taking part in this cooperation to prescribe rules with which those non-participating States would not agree if they did take part in it.⁹⁸

The second half of the above quote reiterates that under the current design of enhanced cooperation the question as to whether and to what extent the interests of 'outsiders' should be taken into account is left to the political arena. In principle, the preferences of non-participating Member States can be ignored insofar as they are not protected by Article 327 TFEU. The legal protection embraced in the first half of the above quote is far from clear. This provision aims to ensure that the existence of cooperation between some Member States does not deprive others from their autonomy to regulate a legal relationship in the relevant field. But what if enhanced cooperation influences the way in which those Member States exercise their competences? As described in Section 2 above, the Treaty initially stipulated that enhanced cooperation should not '*affect* the competences, rights, obligations and *interests* of those Member States which do not participate' (ex Article 43(1)(f) TEU, ToA), which was arguably stronger than the revised need to '*respect* the competences, rights and obligations of those Member States which do not participate'. Moreover, the Court in *Spain and Italy v Council* (C-274/11 and C-295/11) put the threshold even higher: a non-participating Member State now needs to prove that enhanced cooperation *prevents* it from exercising its competences and rights or fulfilling its duties. The Court's interpretation is strikingly different from the reading proposed by the Legal Service of the Council of the EU, which leans much more favourably towards the non-participating countries. The leaked Opinion from 6 September 2013 suggests that Article 327 TFEU:

⁹⁸ Joined Cases C-274 and 295/11 *Spain and Italy v Council*, ECLI:EU:C:2012:782, para 82.

[...] entails the protection of the right of non-participating Member States to maintain or adopt their own tax system, while respecting Union law of general application but without being made subject to an obligation to amend or complement their national rules in order to make them compatible with provisions adopted in the framework of an enhanced cooperation to which they are not a party.⁹⁹

The precise scope of this prohibition has already been litigated. In *UK v Council* (C-209/13), the UK challenged Council Decision 2013/52/EU, *inter alia*, on the basis of Article 327 TFEU, submitting that it authorises the adoption of a financial transaction tax with extraterritorial effects that will fail to respect the competences, rights and obligations of the non-participating Member States.¹⁰⁰ This plea was refused by the Court and found to be premature, but it may return to the Court if the FTT Directive is adopted with a similar scope.¹⁰¹

Second, the Treaty envisages financial guarantees for non-participating countries. All expenditure associated with the implementation of enhanced cooperation, other than the 'administrative costs entailed for the institutions', must be met by the participating Member States 'unless all members of the Council, acting unanimously after consulting the European Parliament, decide otherwise' (Article 332 TFEU). However, the concept of expenditure resulting from the implementation of enhanced cooperation needs clarification. In *UK v Council* (C-209/13), the UK government claimed that Council Decision 2013/52/EU was contrary to Article 332 TFEU because the implementation of the FTT will inevitably generate costs to the non-participating Member States.¹⁰² The costs will occur by virtue of the EU Mutual Assistance Directive 2010/24/EU and of the EU Administrative Cooperation Directive 2011/16/EU.¹⁰³ These two directives may prevent the non-participating Member States from recovering the costs of mutual assistance and the administrative cooperation of tax authorities associated with the implementation of an FTT. The Council, Austria, Portugal and the Commission opposed the UK's interpretation of Article 332 TFEU by arguing that the financial guarantee is limited to 'operational expenditure to be borne by the European Union

⁹⁹ Opinion of Legal Service of the Council of the EU from 6 September 2013 (13412/13), para 35.

¹⁰⁰ Case C-209/13 *UK v Council*, ECLI:EU:C:2014:283, paras 18-19.

¹⁰¹ Case C-209/13 *UK v Council*, ECLI:EU:C:2014:283, paras 35-36.

¹⁰² Case C-209/13 *UK v Council*, ECLI:EU:C:2014:283, para 22.

¹⁰³ Council Directives 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures [2010] OJ L 84/1; Council Directives 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC [2011] OJ L 64/1.

budget in relation to measures establishing enhanced cooperation', whilst any expenditure that might be incurred as a result of the application of Directives 2010/24/EU and 2011/16/EU remain beyond the scope of Article 332 TFEU.¹⁰⁴ The Court did not discuss these arguments in substance. It dismissed the UK's plea on the formal grounds that the Council's decision that was challenged 'contains no provision related to the issue of expenditure linked to the implementation of the enhanced cooperation'.¹⁰⁵ The principles of taxation were not completely established at the stage of authorisation.¹⁰⁶ The possible effects of the tax depend on the adoption of the 'counterparty principle' and the 'issuance principle', which were not 'constituent elements of the contested decision' and therefore could not be examined until then.¹⁰⁷ This issue may come back to the Court at a later stage.

Even though there are still open questions, this analysis allows the identification of the guiding principles already emerging from the Court's jurisprudence. Until now enhanced cooperation has been pictured as a mechanism that can help to overcome decision-making deadlocks, but such an analysis has often included certain reservations due to the uncertainty associated with the possible interpretation of the Treaty provisions by the Court.¹⁰⁸ These reservations can be relaxed. The Court has adopted a narrow reading of the procedural and substantive conditions envisaged by the EU Treaties. Indeed, one may argue that the judicial review of measures that are adopted for the purposes of the implementation of the authorised enhanced cooperation will be different, and that the above conclusions are primarily based on the Court's jurisprudence related to the Council's authorising decisions.¹⁰⁹ However, one can only speculate as to whether the outcome would be different. Two Opinions of AG Bot in *Spain v Parliament and Council* (C-146/13) and *Spain v Council* (C-147/13) suggest that the battlefield is moving into the realm of substantive arguments,¹¹⁰ but this does not entail that the interpretation of the Treaty requirements will become more critical.

¹⁰⁴ Case C-209/13 *UK v Council*, ECLI:EU:C:2014:283, para 28.

¹⁰⁵ Case C-209/13 *UK v Council*, ECLI:EU:C:2014:283, para 37.

¹⁰⁶ Case C-209/13 *UK v Council*, ECLI:EU:C:2014:283, para 38.

¹⁰⁷ Case C-209/13 *UK v Council*, ECLI:EU:C:2014:283, para 39.

¹⁰⁸ See, e.g. L. Cerioni, *The Possible Introduction of Common Consolidated Base Taxation via Enhanced Cooperation: Some Open Issues* (2006) 46:5 *European Taxation* 187.

¹⁰⁹ Case C-209/13 *UK v Council*, ECLI:EU:C:2014:283, para 34; Opinion of AG Bot in Joined Cases C-274 and 295/11 *Spain and Italy v Council*, ECLI:EU:C:2012:782, point 137.

¹¹⁰ Opinion of AG Bot in Case C-146/13 *Spain v Parliament and Council*, ECLI:EU:C:2014:2380; Opinion of AG Bot in Case C-147/13 *Spain v Council*, ECLI:EU:C:2014:2381.

5. Competing Routes to Differentiated Integration

The evaluation of these developments may vary depending on whether one sees differentiated integration in the EU as a desirable phenomenon or not; it will also be dependent on the assumptions made with regard to the potential use of this instrument in the future. The question that needs to be asked next is whether there is an alternative. If the Treaty conditions are to be interpreted and applied strictly, enhanced cooperation may remain primarily on paper and EU Member States will have to look for other legal mechanisms to accommodate diversity.

There are two major alternative routes for accommodating diversity.¹¹¹ First, certain 'flexible arrangements' may be incorporated into otherwise uniform legal acts. If a political agreement cannot be reached, a 'dissenting' Member State may request a formal opt-out clause to exclude its participation. The EU legal order currently contains a number of such 'opt-outs', such as the Schengen Agreement (Ireland and the UK), the Economic and Monetary Union (Denmark and the UK) and the common security and defence policy of the EU (Denmark). Similarly, a legal act may accommodate some smaller-scale differentiation through special clauses to allow, for instance, material derogations or differentiation in an enforcement date in order to reflect the readiness of a country to handle the measure in question; the Interest and Royalty Directive, for example, included transitional periods for various countries.¹¹² Although it carries some evident advantages for the uniformity of the EU legal order, this form of flexibility has been criticised for diluting the essence of the 'Community method', which may be dangerous in the long run. It could evolve into a 'Europe *a la carte*' that allows governments to cherry-pick the most advantageous initiatives, whilst avoiding engaging in cooperation or even in seeking a compromise when its national interests are undermined.

¹¹¹ In addition, EU Member States may also choose to coordinate their policies through non-binding and hybrid instruments, such as The Code of Conduct for business taxation that was set out in the conclusions of the Council of Economics and Finance Ministers (ECOFIN) of 1 December 1997, which are not considered in this contribution.

¹¹² Council Directive 2003/49/EC of 3 June 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States [2003] OJ L 157/49; Council Directive 2004/76/EC granted some of the new Member States transitional periods that allowed postponing the implementation of the Directive following their accession to the European Union (2004) OJ L 157/106; The Protocol concerning the conditions and arrangements for admission of the Republic of Bulgaria and Romania to the European Union, Annexes VI and VII, introduced transitional arrangements concerning these two Member States [2005] OJ L 157/116 and 156.

Second, EU Member States may opt for establishing cooperation through an intergovernmental instrument. This instrument may serve as an attractive alternative to enhanced cooperation if it involves a subgroup of EU Member States and does not include third countries (the 'partial intergovernmental agreement'). Intergovernmental agreements enjoy a greater degree of flexibility than enhanced cooperation, which makes them an attractive alternative, especially if these instruments can be linked to the substantive law of the EU and can confer powers upon EU institutions.¹¹³ A brief comparison can illustrate these advantages. The use of both instruments is limited to the Union's non-exclusive competences, but enhanced cooperation is additionally constrained by the principles of conferral, subsidiarity and proportionality. Intergovernmental agreements thus potentially have a wider scope of application, even though they must comply with the limitations set by Article 3(2) TFEU. A number of other conditions apply exclusively to enhanced cooperation: for instance, it is subject to the minimum participation requirement (Article 20(2) TFEU), whereas no mandatory participation rules apply in the context of intergovernmental instruments. Enhanced cooperation can only be adopted as a 'last resort' (Article 20(2) TEU), and is subject to a Treaty-based procedure of adoption and voting. The Commission exercises discretion as to whether a proposal will be submitted, and it has to be approved by the Council and also receive the consent of the Parliament (Article 329 TFEU). Furthermore, any Member State can join enhanced cooperation, subject to the conditions set in the authorising decision (Article 328 TFEU); the procedure is laid down in the Treaty and the admission is largely controlled by the Commission (Article 331 TFEU). In contrast, the adoption of intergovernmental instruments is less constrained, as they leave more flexibility and control for participating countries.

Although the use of intergovernmental instruments has been criticised for challenging the existing legal and institutional framework of the EU,¹¹⁴ the crucial question of the relationship between intergovernmentalism and enhanced cooperation remains open: to what extent does the availability of enhanced cooperation restrict the possibility of EU

¹¹³ For detailed analysis see, e.g. S. Peers, *Towards a New Form of EU Law?: The Use of EU Institutions outside the EU Legal Framework* (2013) 9:1 European Constitutional Law Review 37; M. Schwarz, *A Memorandum of Misunderstanding - the Doomed Road of the European Stability Mechanism and a Possible Way Out: Enhanced Cooperation* (2014) 51 CMLRev 389; M. Messina, *Strengthening Economic Governance of the European Union through Enhanced Cooperation: a still Possible, but already Missed, Opportunity* (2014) ELRev 404.

¹¹⁴ See, e.g. H. Kortenbergh, *Closer Cooperation in the Treaty of Amsterdam* (1998) 35 CML Rev 833, 835; B. de Witte, *Old-fashioned Flexibility: International Agreements between Member States of the European Union*, in G. de Burca and J. Scott (eds.), *Constitutional Change in the EU* (Oxford: Hart Publishing 2000) 31 et seq.; B. de Witte, *Chameleonic Member States: Differentiation by Means of Partial and Parallel International Agreements*, in B. De Witte et al. (eds.), *The Many Faces of Differentiation in EU Law* (Antwerp: Intersentia 2001) 231.

Member States establishing cooperation outside the framework of EU law to rely upon EU institutions?¹¹⁵ In *Pringle* (C-370/12)¹¹⁶ the Court had an opportunity to clarify this issue, but it did not use it. In its reasoning, the Court recalled earlier cases in which it had stated that ‘the Member States are entitled [...] to entrust tasks to the institutions, outside the framework of the Union’ subject to the condition that ‘those tasks do not alter the essential character of the powers conferred on those institutions by the EU and FEU Treaties’.¹¹⁷ The Court disregarded the fact that its rulings in this area – *Bangladesh* and *Lome*¹¹⁸ – predated the inclusion of provisions on enhanced cooperation in the EU Treaties. It refused the argument that the availability of a dedicated procedure meant that the Member States ‘should have established enhanced cooperation between themselves in order to be entitled to make use of the Union’s institutions’.¹¹⁹

Arguably, this ruling may be explained by the specific legal and factual circumstances. The use of enhanced cooperation is limited to the areas ‘where the Union itself is competent to act’, whereas in *Pringle* (C-370/12) the Court found that ‘the provisions of the Treaties on which the Union is founded *do not* confer on the Union a specific competence to establish a permanent stability mechanism such as the ESM’.¹²⁰ Accordingly, the Court ruled that ‘*in those circumstances*, Article 20 TEU does not preclude either the conclusion by the Member States whose currency is the euro of an agreement such as the ESM Treaty or their ratification

¹¹⁵ See also Editorial Comments, *What do we want? “Flexibility! Sort-of ...” When do we want it? “Now! Maybe ...”* (2013) 50 CMLRev 673, 679.

¹¹⁶ Case C-370/12 *Thomas Pringle v Government of Ireland, Ireland and The Attorney General*, ECLI:EU:C:2012:756; for a commentary see, e.g. B. de Witte and T. Beukers, *The Court of Justice Approves the Creation of the European Stability Mechanism outside the EU Legal Order: Pringle* (2013) 50 CMLRev 805; A. Hinarejos, *The Court of Justice of the EU and the Legality of the European Stability Mechanism* (2013) 72:2 The Cambridge Law Journal 237; P. Craig, *Pringle: Legal Reasoning, Text, Purpose and Teleology* (2013) 20:1 Maastricht Journal of European and Comparative Law 3; G. Beck, *The Legal Reasoning of the Court of Justice and the Euro Crisis – the Flexibility of the Cumulative Approach and the Pringle Case* (2013) 20:4 Maastricht Journal of European and Comparative Law 635; P. Craig, *Pringle and the Nature of Legal Reasoning* (2014) Maastricht Journal of European and Comparative Law 205.

¹¹⁷ Case C-370/12 *Thomas Pringle v Government of Ireland, Ireland and The Attorney General*, ECLI:EU:C:2012:756, para 158; and earlier cases Joined Cases C-181/91 and C-248/91 *Parliament v Council and Commission* [1993] ECR I-3685, paras 16, 20 and 22 (‘Bangladesh’); Case C-316/91 *Parliament v Council* [1994] ECR I-625, paras 26, 34 and 41 (‘Lome’); *Opinion 1/92* [1992] ECR I-2821, paras 32 and 41; *Opinion 1/00* [2002] ECR I-3493, para 20; and *Opinion 1/09* [2011] ECR I-1137, para 75.

¹¹⁸ Joined Cases C-181/91 and C-248/91 *Parliament v Council and Commission* [1993] ECR I-3685, paras 16, 20 and 22 (‘Bangladesh’); Case C-316/91 *Parliament v Council* [1994] ECR I-625, paras 26, 34 and 41 (‘Lome’).

¹¹⁹ Case C-370/12 *Thomas Pringle v Government of Ireland, Ireland and The Attorney General*, ECLI:EU:C:2012:756, para 166.

¹²⁰ Case C-370/12 *Thomas Pringle v Government of Ireland, Ireland and The Attorney General*, ECLI:EU:C:2012:756, para 168 (emphasis added).

of it'.¹²¹ The inclusion of the phrase 'in those circumstances' may intend to limit the provided interpretation to the specific context where the principle of conferral precludes EU Member States from reliance upon enhanced cooperation; but will the Court follow this reasoning even in those instances where the use of enhanced cooperation is available as an alternative?

In this respect, it has long been argued that the principle of sincere cooperation puts countries that are willing to establish closer cooperation under an obligation to consider the intra-EU mechanism.¹²² In his discussion of *Pringle* (C-370/12), Craig makes a strong call for the Court to accept that enhanced cooperation is a 'preferred mechanism for fostering integration while protecting EU values'.¹²³ Since Article 20 TEU explicitly permits the use of EU institutions under enhanced cooperation, this possibility should be seen as 'a benefit that inheres from use of enhanced cooperation'.¹²⁴ Craig further argues that the 'default assumption' must be that an EU institution should decline to participate in an intergovernmental agreement if the contracting states are not using enhanced cooperation and even more so 'if the states have not even considered in good faith whether they might attain their objectives within the Lisbon Treaty via enhanced cooperation'.¹²⁵ This point of view has its rationale, and such an interpretation might even be necessary to make enhanced cooperation more viable.

This reading, however, is only one possibility. It may be that the Court will adopt the same approach even if enhanced cooperation were available as an alternative. AG Kokott in *Pringle* (C-370/12) was not persuaded by the view that Article 20 TEU imposes 'a sort of bar on the conferral of tasks on the Union's institutions'.¹²⁶ The Opinion hints at a potential approach that the Court may adopt in the future:

It is therefore not apparent that the parties to the Treaties wanted, by means of the insertion of rules on enhanced cooperation, to restrict the possibility, confirmed by the

¹²¹ Case C-370/12 *Thomas Pringle v Government of Ireland, Ireland and The Attorney General*, ECLI:EU:C:2012:756, para 169 (emphasis added).

¹²² B. de Witte, *Chameleonic Member States: Differentiation by Means of Partial and Parallel International Agreements*, in B. De Witte et al. (eds.), *The Many Faces of Differentiation in EU Law* (Antwerp: Intersentia 2001) 231, 240.

¹²³ P. Craig, *Pringle and Use of EU Institutions outside the EU Legal Framework: Foundations, Procedure and Substance* (2013) 9:2 *European Constitutional Law Review* 263, 274.

¹²⁴ P. Craig, *Pringle and Use of EU Institutions outside the EU Legal Framework: Foundations, Procedure and Substance* (2013) 9:2 *European Constitutional Law Review* 263, 274.

¹²⁵ P. Craig, *Pringle and Use of EU Institutions outside the EU Legal Framework: Foundations, Procedure and Substance* (2013) 9:2 *European Constitutional Law Review* 263, 274.

¹²⁶ Opinion of AG Kokott in Case C-370/12 *Thomas Pringle v Government of Ireland, Ireland and The Attorney General*, ECLI:EU:C:2012:675, para 174.

Court of Justice in the cited case-law, of making use of the Union's institutions outside the scope of the Treaties.¹²⁷

Some sympathy for this reading can be found amongst academics. Kochenov and Amtenbrink, who generally promote the liberalisation of the Treaty requirements for enhanced cooperation, admit that whilst making this procedure subject to 'numerous hurdles', the EU Treaties have not created 'any effective safeguard clause' to prevent the establishment of cooperation outside the framework of EU law.¹²⁸ These scholars suggest that the principle of sincere cooperation can be seen as '[t]he only rather vague limitation' available,¹²⁹ and thus clearly refuse to recognise any 'preference' given to enhanced cooperation. Another possible enquiry can be put as follows:

[S]urely if the Treaties intended enhanced cooperation to be more than a voluntary framework, which has instead compulsorily stripped the Member States of their inherent sovereign power to contract inter se on the international plane, the Treaties should have spelled out that rather far-reaching legal consequence much more explicitly?¹³⁰

Indeed, Article 20 TEU does not explicitly state that enhanced cooperation is 'the preferred mechanism', or even 'the default assumption' as advocated by Craig. Furthermore, even if one may agree with the requirement to formulate a justification for not following the route of enhanced cooperation, the question remains as to whether the Court would be willing, or simple able, to control this requirement. If such a barrier were imposed, it might remain toothless.

Despite all these legal and practical concerns, clarification with regard to the role of enhanced cooperation is highly desirable. The acceptance of its primary status would help to

¹²⁷ Opinion of AG Kokott in Case C-370/12 *Thomas Pringle v Government of Ireland, Ireland and The Attorney General*, ECLI:EU:C:2012:675, para 174.

¹²⁸ D. Kochenov and F. Amtenbrink, *Towards a More Flexible Approach to Enhanced Cooperation*, in A. Ott and E. Vos (eds.), *50 Years of European Integration: Foundations and Perspectives* (Den Haag: TMC Asser Press 2009), available at <http://www.researchgate.net/publication/228280867_Towards_a_More_Flexible_Approach_to_Enhanced_Cooperation> 8.

¹²⁹ D. Kochenov and F. Amtenbrink, *Towards a More Flexible Approach to Enhanced Cooperation*, in A. Ott and E. Vos (eds.), *50 Years of European Integration: Foundations and Perspectives* (Den Haag: TMC Asser Press 2009), available at <http://www.researchgate.net/publication/228280867_Towards_a_More_Flexible_Approach_to_Enhanced_Cooperation> 8.

¹³⁰ Editorial Comments, *What do we want? "Flexibility! Sort-of ..." When do we want it? "Now! Maybe ..."* (2013) 50 CMLRev 673, 679.

bring this clarity and ensure that intergovernmental arrangements are considered in exceptional circumstances.¹³¹ This interpretation would certainly better suit the objectives of preserving the distinct features and the unity of the EU legal order. It would also correspond with the initial motive behind the introduction of enhanced cooperation, which was to create a viable regulatory alternative to intergovernmental instruments within the framework of EU law. Unless the relationships between these two instruments are clarified in favour of enhanced cooperation, any stricter interpretation of the substantive and procedural conditions for enhanced cooperation by the Court will ultimately make the intergovernmental route more attractive, which can hardly be seen as a desirable outcome.

So where does this leave us? The Court's recent cases suggest that the political goals of integration outweigh the sentiments over the unity and uniformity of EU law.¹³² The legal mechanisms that facilitate cooperation between a subgroup of EU Member States – be that enhanced cooperation or intergovernmental tools – are now more readily available than at any other point in European history. The logical enquiry is whether these developments will drive the political agenda towards the greater incorporation of flexibility, or whether these instruments will retain their extraordinary status. The answer to this question will be policy-specific and will be determined by the stage and possibility of harmonisation through other regulatory tools in any given area of law. The next section seeks to answer this question in relation to the field of taxation. It analyses the current EU tax policy agenda and asks whether it reflects the availability of more flexible instruments of integration.

6. Differentiated Integration in the EU Tax Policy Agenda

The possibility of using enhanced cooperation in the field of taxation was already acknowledged in 2001 when the Commission published its forward-looking Communication 'Tax Policy in the European Union – Priorities for the Years Ahead'.¹³³ The Commission declared that to reach its tax policy objectives 'all available mechanisms should be pursued',

¹³¹ Communication from the Commission 'A Blueprint for a deep and genuine economic and monetary union. Launching a European debate' COM(2012) 777 final, 13.

¹³² As regards the role played by the Court, see P. Koutrakos, *Political Choices and Europe's Judges* (2013) ELRev 291, 292; G. Beck, *The Court of Justice, Legal Reasoning, and the Pringle Case - law as the Continuation of Politics by Other Means* (2014) 39:2 ELRev 234.

¹³³ Commission, 'Tax Policy in the European Union – Priorities for the Years Ahead' (Communication) COM(2001) 260 final.

and in particular, 'careful consideration should be given to an increased use of nonlegislative solutions and to the mechanism of enhanced co-operation'.¹³⁴

6.1. The Rationale for Enhanced Cooperation in the Field of Taxation

The high expectation associated with enhanced cooperation in the field of taxation can be explained by the specific context in which the cooperation between EU Member States has developed.

6.1.1. Preserving Unanimity and Accommodating Diversity

The progress of tax integration, which is conditioned by the consensus of 28 heterogeneous economies, is questionable. The unanimous voting requirement supplies each country with a protective veto power enabling it to secure national fiscal interests from what Tocqueville once called the 'tyranny of the majority'. The Commission's initiative to move from unanimity to qualified majority in certain tax areas, which had been proposed during negotiations for the Constitutional Treaty, faced strong resistance from EU Member States.¹³⁵ In these circumstances, the use of enhanced cooperation in combination with unanimity may actually provide a viable alternative. It can be given higher credit for preserving the sovereignty of an EU Member State whilst allowing those interested in closer cooperation to establish it within the framework of EU law.¹³⁶ This possibility is particularly valuable in the aftermath of the financial crisis, when a tax policy becomes an even more sensitive issue, as national governments are experiencing budgetary problems. The Eurozone countries have been put under more rigorous control to guard against possible macroeconomic imbalances, which increases the importance of retaining autonomy in relation to their distributive and

¹³⁴ Commission, 'Tax Policy in the European Union – Priorities for the Years Ahead' (Communication) COM(2001) 260 final.

¹³⁵ The proposed areas included 'the operation of the internal market, i.e. modernising and simplifying existing legislation, administrative cooperation, combating fraud or tax evasion, measures relating to tax bases for companies, but not including tax rates; the aspects of free circulation of capital linked to the fight against fraud; taxation in respect of the environment'. This proposal was discussed at the Intergovernmental Conference on a Constitutional Treaty which began on 4 October 2003 and resulted in the approval of a Constitutional Treaty on 18 June 2004; see Opinion of the Commission of 17 September 2003 on the Intergovernmental Conference, COM(2003) 548, 7.

¹³⁶ See, e.g. A. Duff, *Do We Really Need Enhanced Cooperation?* Doc. CONV 759/03.

redistributive policies. These circumstances turn enhanced cooperation into an attractive option, and one of the very few regulatory tools available to the EU for achieving the advancement of its tax policies.

Although it primarily appears to be a pragmatic ‘second-best’ choice at a time when there is insufficient support for adopting a uniform legislative act, enhanced cooperation has value in itself. The diversity of EU Member States makes it hard to find tax policy solutions that reflect the revenue interests and redistribution policies of each country. Asymmetries between countries may prevent the creation of a coalition between all participants.¹³⁷ Enhanced cooperation may help to accommodate differences in national interests that cannot be bridged with more uniform instruments. After all, a smaller territorial scale of integration may simply offer a better alternative to the ‘lowest common denominator’ approach. Alternative coalitions may be formed on various bases: cooperation between large countries are more likely than coalitions between small countries, as the common gain from internalised tax spillovers is larger,¹³⁸ whereas a small coalition may serve as a pilot group when the gains from cooperation are uncertain and adjustments are costly.¹³⁹

6.1.2. *Supplementing Negative Integration*

One may argue that preserving the present state of affairs in the field of taxation might be the best way forward, and that no positive harmonisation (either rigid or flexible) is needed. However, this would mean accepting imbalanced progress via negative harmonisation in the field of direct taxation and the ‘imperfect’ market within the Union. Although negative harmonisation allows the elimination of barriers that hinder the freedom of cross-border movement and interfere with the principle of non-discrimination, the ability of the judiciary to fill in the legislative gap remains limited. First, Article 267 TFEU creates an accidental pattern of integration, where the agenda of the integration process is determined by private litigants. This effect is only partially balanced out by the Commission’s enforcement powers. Second, the application of case law at the domestic level is problematic, and progress towards

¹³⁷ J.B. Burbidge et al., *A Coalition-formation Approach to Equilibrium Federations and Trading Blocs* (1997) 87 *American Economic Review* 940.

¹³⁸ R. de Mooij and H. Vrijburg, *Enhanced Cooperation in an Asymmetric Model of Tax Competition* (2010) CESifo Working Paper No. 2915.

¹³⁹ M. Bordignon and S. Brusco, *On Enhanced Cooperation* (2006) 90 *Journal of Public Economics* 2063.

a homogeneous direct tax law in the EU as a result of negative harmonisation remains slow. It comes as no surprise that ‘the results [of negative harmonisation] are not the desirable ones either from the perspective of the effectiveness of ECJ case law or the protection of the taxpayers covered by EC law’.¹⁴⁰ Third, judicial power is limited to a discrimination- and restriction-based legal formula, and thus some problems, such as those created by the parallel exercise of Member States’ taxing rights, remain unresolved despite their negative implications for the functioning of the Internal Market. Overall, the reliance upon negative harmonisation alone is not sufficient for ensuring coherent and balanced changes across the EU.

6.1.3. Responding to New Challenges on the EU Tax Policy Agenda

As early as 2001, the Commission had indicated in general terms the areas where enhanced cooperation may be of use. In the field of direct taxation, where EU Member States arrange cooperation via bilateral tax treaties, the Commission ambiguously mentioned the need ‘to produce such benefits for the participating countries that non-participants would be motivated to become involved’.¹⁴¹ In relation to indirect taxation, the possibility of enhanced cooperation was mentioned with regard to environmental and energy taxation.¹⁴² For over a decade no further steps have been made in this direction. However, the global financial and economic crisis has generated new challenges for the EU tax policy agenda, and has forced the Commission to revisit its plans to make use of enhanced cooperation.

In the field of direct taxation, the EU’s objectives are currently closely aligned with those pursued by the OECD/G20 BEPS Action Plan in response to the political demand to fight base erosion and profit shifting.¹⁴³ In March 2015, the Commission presented a package of measures to enhance the transparency of tax affairs (the Tax Transparency Package).¹⁴⁴ The

¹⁴⁰ A.P. Dourado, *Is it Acte Clair? General Report on the Role played by CILFIT in Direct Taxation*, in A.P. Dourado and R. da Palma Borges (eds), *The Acte Clair in EC Direct Tax Law* (IBFD 2008) 13, 16 (citations omitted).

¹⁴¹ Commission, ‘Tax Policy in the European Union – Priorities for the Years Ahead’ (Communication) COM(2001) 260 final.

¹⁴² Commission, ‘Tax Policy in the European Union – Priorities for the Years Ahead’ (Communication) COM(2001) 260 final.

¹⁴³ OECD, ‘Action Plan on Base Erosion and Profit Shifting’ (2013), available at <<http://www.oecd.org/ctp/BEPSActionPlan.pdf>>.

¹⁴⁴ Commission Communication, ‘On Tax Transparency to Fight Tax Evasion and Avoidance’ (COM(2015) 136 final).

core legislative element of this Package is a proposal to introduce the automatic exchange of information between Member States on tax rulings. It was drafted as a Proposal for a Council Directive amending Directive 2011/16/EU as regards the mandatory automatic exchange of information in the field of taxation,¹⁴⁵ and is intended to be a uniform legislative instrument. In December 2014, France, Germany and Italy called upon the EU to adopt ‘a set of common, binding rules on corporate taxation to curb tax competition and fight aggressive tax planning’.¹⁴⁶ In the summer of 2015, the Commission will publish an Action Plan on Corporate Taxation to present further ideas on how to implement the anti-BEPS agenda at EU level.¹⁴⁷ It remains to be seen how comprehensive the Commission’s response to this call will be. An ambitious proposal may prevent a consensus of EU Member States, creating other potential areas for enhanced cooperation. The instruments of flexible integration will almost certainly be called upon for the Commission’s proposal to relaunch the CCCTB,¹⁴⁸ which is presented as a potential alternative solution for base erosion and profit shifting. Since political consensus on this far-reaching harmonisation initiative is unlikely, the turn towards enhanced cooperation is almost unavoidable.

In the field of indirect taxation, in addition to the reinforcement of rules against money laundering and further advancements related to a value-added tax, the Commission’s 2015 Working Programme promises that further efforts will be put into the adoption of an FTT.¹⁴⁹ In May 2014, the participating Member States agreed on the progressive implementation of the FTT, with the first steps to be implemented on 1 January 2016 at the latest.¹⁵⁰ Progress has been hampered by the lack of political agreement between the participating Member States about the core design features of this tax, as well as by some administrative difficulties.

¹⁴⁵ Proposal for a Council Directive amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation (COM(2015) 135 final); Commission Staff Working Document, ‘Technical analysis of focus and scope of the legal proposal Accompanying the document Proposal for a Council Directive amending Directive 2011/16/EU as regards exchange of information in the field of taxation (COM(2015) 135 final)’ (SWD(2015) 60 final).

¹⁴⁶ Letter of W. Schäuble, M. Sapin and P.C. Padoan from 18 November 2014, available at <http://www.economie.gouv.fr/files/files/PDF/letter-to-p_moscovici-11282014.pdf>.

¹⁴⁷ Commission Press Release from 18 March 2015 (IP/15/4610). Note: the Action Plan on Corporate Taxation was published by the Commission on 17 June 2015 when this publication was in the process of preparation for publication; see Commission Communication, ‘A Fair and Efficient Corporate Tax System in the European Union: 5 Key Areas for Action’ (COM(2015) 302 final).

¹⁴⁸ This possibility was mentioned already back in 2004, see Commission Non-Paper to informal ECOFIN Council, 10 and 11 September 2004, ‘A Common Consolidated EU Corporate Tax Base’, available at <http://ec.europa.eu/taxation_customs/resources/documents/taxation/company_tax/common_tax_base/cctbw_pnon_paper.pdf>.

¹⁴⁹ Commission Communication, ‘Commission Work Programme 2015: A New Start’ (COM(2014) 910 final).

¹⁵⁰ Press Release of 3310th Council meeting, Economic and Financial Affairs, 6 May 2014 (9273/14).

In January 2015, Austria and France called other participating Member States to kick-start the FTT. In an open letter they drew attention not only to the substantive disagreements but also to the poor coordination of work, as a result of which there had been no documents prepared in advance of political discussions and no follow-up minutes after them.¹⁵¹ The two countries also highlighted the lack of technical and logistics support from EU institutions and asked the Commission to explain ‘if and how it could support [their] work’. In the Joint Statement of the participating Member States that followed, the Austrian and French request was largely supported.¹⁵² The governments confirmed their initial commitment to reach an agreement on the FTT proposal and ‘to create the conditions necessary to implement the European financial transaction tax on 1st January 2016’. In substance, it was agreed that the tax should be levied on ‘the widest possible base and [at] low rates’, taking into account ‘the impacts on the real economy and the risk of relocation of the financial sector’; the working methods would be adjusted to improve their ‘operational effectiveness’. The participating Member States also made a call for support from EU institutions, in particular the Commission.

6.2. Factors That Need to Be Taken into Account

Enhanced cooperation is now more readily available and could potentially be used to reinforce tax integration in the EU. However, these high expectations may be premature, as turned out to be the case when this procedure was initially introduced into the EU Treaties in 1997. The potential impact of these developments on EU tax policy depends on several factors.

As shown above, the 2015 Commission’s Working Programme indicates at least two proposals that may test the role of enhanced cooperation in the area of taxation. The first attempts of the Commission in this area are being closely monitored and will determine the willingness of EU Member States to engage in similar initiatives in the future. If the FTT Directive fails after a long period of negotiations, even under enhanced cooperation, this procedural framework may lose its initial allure. A lack of agreement between a small group

¹⁵¹ Letter of M. Sapin and H.-J. Schelling to the finance ministers of Member States participating in enhanced cooperation in the area of financial transaction tax from 21 January 2015; see also Council Presidency, ‘Report Proposal for a Council Directive implementing enhanced cooperation in the area of Financial Transaction Tax – State of play’, 4 December 2014 (16498/14), available at <<http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2016498%202014%20INIT>>.

¹⁵² Joint Statement by ministers of Member States participating in enhanced cooperation in the area of financial transaction tax from 27 January 2015.

of participating Member States that initially expressed their interest in cooperation sets an unpromising example for other initiatives. It will create an unwelcome reminder of the early stages of European integration, where the Commission failed to implement its first tax harmonisation programme (1967) even though the European Community was less diverse.¹⁵³

Next, the availability of the mechanism that facilitates flexibility within the EU is just a first step. The Commission, which drives the EU legislative agenda and remains the gatekeeper for enhanced cooperation, needs to decide to what extent differentiated integration is desirable in the field of tax integration. For more than fifteen years after the Treaty of Amsterdam, this instrument has not yet established itself in any other policy area. Enhanced cooperation may either retain its status as a marginal instrument that is relied upon only occasionally, or evolve into a more casually used tool. After all, the entire area of direct taxation can be regarded as one where the adoption of legislation for the Union as a whole is not possible 'in the foreseeable future';¹⁵⁴ in this case a 'last resort' choice may well be turned into the primary tool of integration. At the moment, there is no conceptual vision with regard to the desirability of differentiated integration in the field of taxation or its potential use beyond the realm of the FTT and, potentially, the CCCTB proposals. It is clear, however, that if these proposals are adopted, they may lay the foundation for a more extensive legislative agenda. A potential long-term ambition can be found in the Blueprint for a Deep and Genuine Economic and Monetary Union (2012).¹⁵⁵ The EU is ready to explore the possibilities for deeper economic integration among the Economic and Monetary Union members, in particular by providing them with a fiscal stabilisation tool. The policy debate has developed various proposals.¹⁵⁶ The revenues are sought in, *inter alia*, a corporate tax, environmental taxes, and a tax on financial activity; these plans generate calls for a greater level of tax harmonisation, possibly via enhanced cooperation.¹⁵⁷

¹⁵³ Commission, 'Programme for the Harmonisation of Direct Taxes' (1967).

¹⁵⁴ Joined Cases C-274 and 295/11 *Spain and Italy v Council*, ECLI:EU:C:2012:782, para 50.

¹⁵⁵ Communication from the Commission 'A Blueprint for a deep and genuine economic and monetary union. Launching a European debate' (COM(2012) 777 final); see also President of the European Council, Interim Report, Towards a Genuine EMU (October 12, 2012); President of the European Council, Final Report, Towards a Genuine EMU (December 5, 2012); European Parliament Resolution, 'On Future Legislative Proposals on EMU' (May 23, 2013).

¹⁵⁶ A. Iara, *Revenue for EMU: A contribution to the debate on Fiscal Union* (2015) TAXUD Taxation Papers: Working Paper No. 54/2015; see also S. Plasschaert, *Towards an Own Resource for the European Union? Why? How? And When?* (2004) European Taxation 470.

¹⁵⁷ A. Iara, *Revenue for EMU: A contribution to the debate on Fiscal Union* (2015) TAXUD Taxation Papers: Working Paper No. 54/2015; see also other contributions cited therein, e.g. N. Caudal et al., *A Budget for the Euro Area* (2013) No. 20 Trésor-Economics 1; A. Bénassy-Quéré et al., *For a Euro Community*, Bruegel; A. Bénassy-

Finally, if the future of tax integration is differential, this prospect requires a careful examination and a long-term strategy.¹⁵⁸ Consideration should be given to the question of interaction between the countries that participate in such initiatives and those that remain outside them. Tax policies are likely to cause a conflict of interests by generating negative externalities. As illustrated above, the EU Treaties provide limited defence tools for non-participating Member States. Admitting that the Court is constrained in its ability to preserve the balance of interests, one can try to find a suitable solution using political rather than legal means. This may involve a more detailed assessment of each proposal required from the Commission, in particular a more comprehensive analysis of the impact on the non-participating Member States than that provided, for instance, in the case of the FTT; this would allow the Council to make an informed decision. The potential need for cross-border cooperation between tax authorities should be examined in the early stages. It would be sensible to express at least a political commitment to ensure that participating Member States will aim to mitigate any potential detriment for non-participating Member States.

7. Conclusion

The above analysis has demonstrated that the Treaty amendments made it easier to develop cooperation within a subgroup of EU Member States, and that this trend has found its continuation in the recent jurisprudence of the Court. The standard of judicial review adopted by the Court in *Spain and Italy v Council* (C-274 and 295/11) and *UK v Council* (C-209/13) illustrates that it will be hard for non-participating Member States to prove a breach of EU law if they allege that their interests (or the interests of the Internal Market more generally) are being endangered by enhanced cooperation. Yet, the first application of enhanced cooperation between 2010 and 2015 shows that unless the intended field of cooperation is independent (self-contained) and not associated with any negative impact upon ‘outsiders’, the use of enhanced cooperation may turn into a highly contentious issue. Accordingly, if the pre-2010 debate was largely driven by the idea of making enhanced cooperation more workable, the focus now needs to be shifted towards an assessment of whether the current state of play

Quéré et al., *Tax Harmonisation in Europe: Moving Forward*, Les notes du conseil d'analyse économique no. 14, Paris.

¹⁵⁸ For a more narrowly framed analysis, see e.g. L. Cerioni, *The Possible Introduction of Common Consolidated Base Taxation via Enhanced Cooperation: Some Open Issues* (2006) 46:5 *European Taxation* 187.

maintains a fair balance between the interests of participating and non-participating countries.

The significance of these developments will vary for different areas of law and may not have the same level of importance for each policy field. Areas such as taxation, which are subject to unanimity and are associated with potentially larger negative externalities for non-participating Member States, will predictably be more sensitive to this development and are of the greatest concern. In the field of taxation, this effect is further enhanced by the potentially increased costs of administrative cooperation between tax authorities. Currently, the EU tax policy agenda contains one pending legislative proposal under enhanced cooperation, the FTT Directive, and the Commission's intention to relaunch the CCCTB project may take the same route. The assessment of potential implications for the non-participating Member States, as well as a long-term impact of these initiatives on the Internal Market, should become important elements of the Commission's preparatory work. Acting differently would critically undermine the principle of sincere cooperation within the Internal Market.

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