

DIRECTORATE-GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT
CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS **C**

Constitutional Affairs

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**Flexibility Mechanisms
in the Lisbon Treaty**

STUDY FOR THE AFCO COMMITTEE



DIRECTORATE GENERAL FOR INTERNAL POLICIES

**POLICY DEPARTMENT C: CITIZENS' RIGHTS AND
CONSTITUTIONAL AFFAIRS**

CONSTITUTIONAL AFFAIRS

Flexibility Mechanisms in the Lisbon Treaty

STUDY

Abstract

Against any superficial impression of uniformity, the Treaty of Lisbon offers a significant number of mechanisms for flexibility (i.e. establishing different obligations and/or with different deadlines for accomplishment for different member states). External treaties complete the vast array for flexibility in European integration. Their full deployment depends on political opportunity and they may offer some opportunities to develop some policy areas. However, they are not panacea to face EU's biggest challenges.

This study was commissioned by the policy department for Citizen's Rights and Constitutional Affairs at the request of the AFCO Committee

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LINGUISTIC VERSIONS

Original: EN

ABOUT THE EDITOR

Policy Departments provide in-house and external expertise to support EP committees and other parliamentary bodies in shaping legislation and exercising democratic scrutiny.

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Manuscript completed in July 2015.
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This document is available on the Internet at:
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LIST OF ABBREVIATIONS

BENELUX	Belgium, The Netherlands, Luxembourg Customs Union
CoE	Council of Europe
ECB	European Central Bank
ECJ	European Court of Justice
EEA	European Economic Area
EES	European Economic Space
EFSF	European Financial Stability Facility
EFTA	European Free Trade Area association of the United Nations
EMU	European Monetary Union
ENP	European Neighbourhood Policy
EP	European Parliament
ESM	European Stability Mechanism
FTT	Financial Transaction Tax
GMO	Genetically Modified Organisms
OECD	Organization for Economic Cooperation and Development
OMC	Open Method of Coordination
NATO	North Atlantic Treaty Organization
SEA	Single European Act
SFJ	Security, Freedom and Justice (area of)
SRM	Single Resolution Mechanism
SRF	Single Resolution Fund
SSM	Single Supervision Mechanism
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UPC	Unified Patent Court

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EXECUTIVE SUMMARY

Background

The growth of EU membership and the parallel expansion of its areas of activity provoked increasingly the inability/unwillingness of some member states to participate equally in all policy areas. Flexibility responds to this heterogeneity. Flexibility means that decisions/policies do not apply to all member states and/or do not apply to all of them at the same time. The Treaty of Lisbon provides a significant number of mechanisms for flexible application/implementation of many of its provisions. This report examines the mechanisms for flexibility with the following aims:

Aims

- To synthesize the conceptual categories applied to describe flexibility mechanism;
- To present all mechanisms for flexibility within as well as outside the Treaty of Lisbon, specifying also those which are newly brought in by the Treaty and describing the historical and institutional context;
- To provide a general identification of provisions by policy field, to identify the legal basis for existing acts, discussing the frequency of their use in the past and the opportunity for its use in future
- To propose further adjustments of the current constitutional framework in relation to the mechanisms for flexibility/differentiated integrations in further rounds of treaty reform

GENERAL INFORMATION

KEY FINDINGS

Far from being marginal, mechanisms for flexibility are generalised in the EU under different forms and applying in different cases/circumstances. The Treaty of Lisbon legal architecture offers several different alternatives. Practice of flexibility has been particularly intense via derogations from primary legislation (i.e. Treaties) via treaty exemptions (opt outs) and via ad hoc external treaties and agreements among groups of member states. Mechanisms for flexibility via derived legislation (i.e. enhanced cooperation) have not been intensively used so far.

1. INTRODUCTION

The term differentiated integration refers to a variety of forms of cooperation and/or integration in which not all members of the EU take part.¹ Flexibility is the principle that allows to conceive and to put into practice methods of differentiated integration, as opposed to institutional, procedural and formal “uniformity” that has the effect of limiting progress because of the requirement of applying fully a single model in all cases and for all countries. Even though flexibility and differentiated integration are not synonymous, they allude to the same phenomenon: the mechanisms to create different sets of obligations and rights for different states/group of states. The objective is bypassing uniform treatment for these states/governments that may not accept the standard common objectives and seek a differentiated treatment. Differentiation does not seem an extraordinary mechanism; in fact, Leuffen et al. (2013) conceptualize the EU and explain its development as a system of differentiated integration: rather than restricting differentiation to a temporary, accidental non systematic feature of European integration, these authors argue that differentiation is an essential and most likely ending characteristic of the EU.

The growth in the scope of EU policies combined with growing membership and increased sets of domestic preferences on cooperation produced increased divergence among member states. Already in the 1950s, the treaties offered alternatives to accommodate national specificities but these concentrated on the implementation of EU law by means of directives (i.e. leaving margin for the domestic means to achieve common objectives). Forms of differentiated integration/flexibility mushroomed from the Treaty of Maastricht onwards, in coincidence with the expansion of both membership and competences. European economic and monetary union and the area of freedom, security and justice (FSJ), both initiated at this moment, concentrate the bulk of the instruments and cases of differentiated integration/flexibility.

This Report reviews firstly the conceptual formulas used to describe flexibility/differentiated integration. Chapter 3 list and analyses the legal configurations explicitly outlined in the treaties and also the ones existing outside the EU treaties. Chapter 4 discusses the record of the practical application of these modalities whilst chapter 5 addresses the prospects for formal treaty revisions regarding flexibility/differentiated integration clauses.

¹ See an extended review on the concept and its different meanings in Leruth and Lord; 2015

2. THEORETICAL MODELS OF DIFFERENTIATED INTEGRATION/FLEXIBILITY

2.1. Conceptual models: a glossary of terms

Scholars and politicians have used different terms in their effort of trying to capture the specific *ad hoc* designs that they have in mind and/or to describe existing mechanisms to accommodate specific requests/circumstances of specific states/groups of states or actors. They use, in some cases, visual metaphors in which, for instance, geometric forms may translate the variation in cooperation/integration (such as, for instance, the notion of variable geometry), they can alternatively compare the position of a state/government with that of a customer having full discretion to select his/her options (and hence, for instance, the notion of *à la carte*) or they can apply analogies with historical political constructions (as it happens with the notion of directory). The emphasis on the metaphor or analogy means also that these concepts do not correspond or reflect with precision the specific modalities of flexibility/differentiated integration formalised in the treaties. Additionally, fashion dictates very much whose notions gain currency in given circumstances, for instance, *à la carte Europe* looks now very much as a vintage concept whilst *multi-tier* has become widely popular in the last years.

However, an attempt of mapping out these notions may help to clarify discussions even though these terms may mean different things for different persons and in different contexts and their meaning can change through time. The EU Summary of Legislation offers also a glossary of terms² which nevertheless is not more authoritative than normal parlance. Hence, the definitions contained there are never taken as the real or best ones. The following paragraphs include references to that glossary in *italics*. The different options respond to two questions: who participates and when (i.e. whether non participation is a permanent or temporal aspect of the flexibility mechanism).

(Hard) Core, nucleus, vanguard or pioneer group. The notion of “core” indicates that a group of countries take part in all possible schemes and modalities of cooperation/integration. The two crucial questions in defining the core are who compose it and its relation with the rest of the EU and/or European states. By and large, defenders of the “core” coincide in identifying the six founding members as the composing states although proposals are not usually highly specific on composition. The second issue has two alternative interpretations: either the core is a permanent structure fixed in its membership or, more often, it defines a centre of gravity attracting all other states. The notion of core is associated also with a geographical dimension: it has served to distinguish a group of countries in the geographical centre of the continent from those in a geographical periphery position. However, the political and geographical notions do not coincide creating thus some misperceptions. The EU Glossary refers more graphically to the notion of hard core: *a limited group of countries able and willing to develop 'closer cooperation'*. The Glossary associates this expression with the implementation of the Schengen area. It also identifies the notion of “hard core” with the 'closer cooperation' mechanism introduced in the Treaty of Amsterdam. Proponents of the core have been occasionally ambiguous on the relation between the two groups of countries (i.e. core and non core). In 2000, Jacques Chirac, in a speech to the German Bundestag,

2 http://europa.eu/legislation_summaries/glossary/variable_geometry_europe_en.htm

called for a “pioneer group” with intergovernmental structures. Also in 2000, Jacques Delors called for the creation of an “avant garde” with a special council of ministers, a special bicameral parliament (comprising MEPs and national parliaments) and elected president of the “avant garde”.³

Talks about core have coincided with critical discussions on EU reform. One of these moments was the process before and after the EU constitution. The financial crisis from 2010 has sparked a similar number of proposals. Just to refer to the most recent ones, German and French Economic Ministers, Sigmar Gabriel and Emmanuel Macron published an *op ed* in several European newspapers in June 2015 calling for their two countries to lead in far reaching integration of the euro area. This would entail the creation of an euro budget with its own resources. They also called for harmonising wages. In July 2015, François Hollande called for a reinforced organization around the euro and the creation of an “avant garde” with the states willing to do so.⁴ His Prime Minister Manuel Valls included the six founding member states in this avant garde.

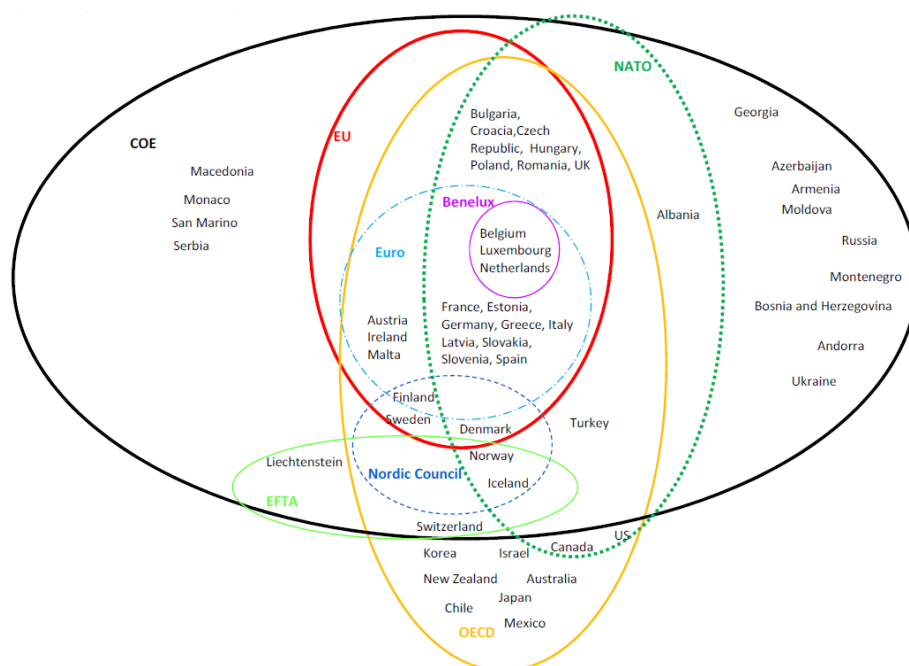
Directory. The notion of directory rests on the unilateral imposition of their preferences by a group of countries to the others. It gained salience during the management of the euro-crisis, where it became customary referring to the “Franco-German directory”.

Concentric circles. This notion appeals to a visual figure of overlapping organizations for cooperation beyond the EU itself. It also subsumes the notions of “core” and “periphery” within the EU itself. Figure 1 below illustrate. In 1995, Giscard d’Estaing clearly favoured this view distinguishing between a *Europe puissance* comprised by those states committed to Europe becoming a global power and surrounded by the outer circle of *Europe space* of countries only interested in the free market. He conceived this as a permanent, structural division.

³ Jacques Delors “Europe needs an avant garde, but not a Constitution” CER Bulletin No. 14 October/November <http://www.cer.org.uk/publications/archive/bulletin-article/2000/europe-needs-avant-garde>

⁴ François Hollande : “Ce qui nous menace, ce n'est pas l'excès d'Europe, mais son insuffisance” Journal du Dimanche 19 Juillet 2015 <http://www.lejdd.fr/Politique/Francois-Hollande-Ce-qui-nous-menace-ce-n-est-pas-l-exces-d-Europe-mais-son-insuffisance-742998>

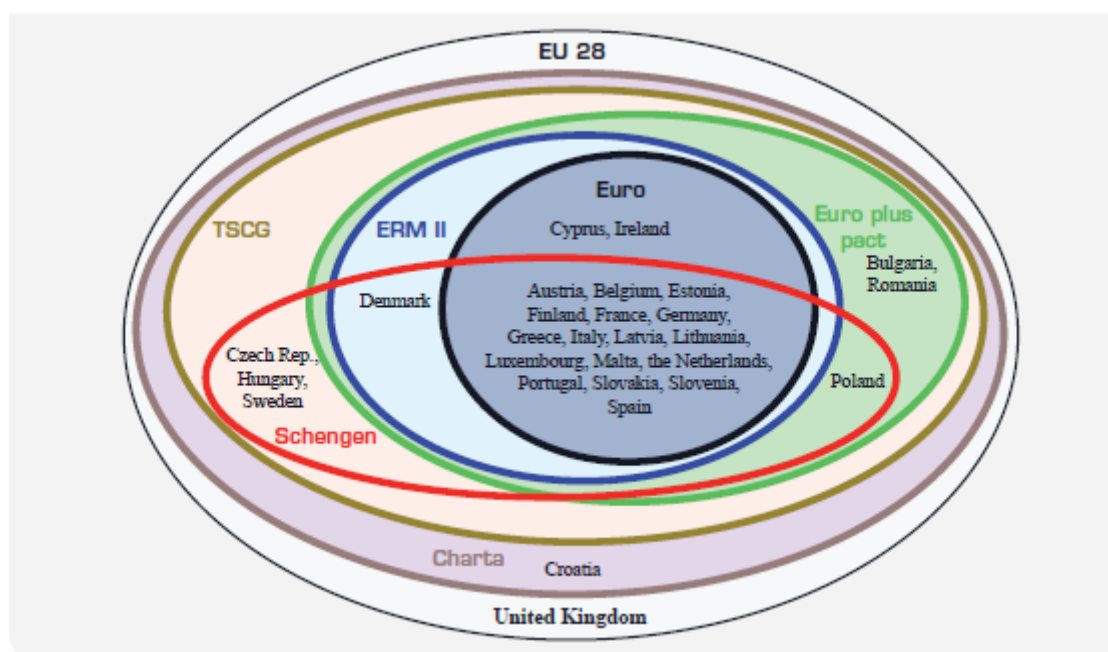
Figure 1. European integration and concentric circles



Source: Own elaboration

Within the EU, a similar structure of concentric circles emerges also taking as centre the euro and the governance instruments adapted since 2010 (see section 3.2.1). Figure 2 below captures this image.

Figure 2: Concentric circles in the EU



Source: Begg (2015) adapted from Tekin (2012)

Variable geometry. For each policy/issue area, a different form emerges. Form refers to the participant states, but also the normative instruments used, the decision-making rules adopted and the effects of the decisions. *Variable-geometry' is used to describe a permanent separation between a group of Member States and a number of less developed integration units.* Permanence is an essential feature of variable geometry and the one that makes it different to multi-speed.

Multi-tier. This is one of the newest notions and has entered debates on flexibility in relation to the differences in terms of policy and legislation between euro and non-euro EU member states. It closely resembles variable geometry because it refers also to a permanent situation (rather than the temporal one envisaged by multi-speed Europe).

Multi-speed Europe. This notion describes a different rhythm in attaining otherwise shared objectives by all member states. Some member states advance faster than others (depending on their capacity/willingness to do so). The notion may be or not associated to the existence of a core. On the second variety, an example is the paper published in 1994 by Wolfgang Schäuble and Karl Lamers (CDU). They argued in favour of a political union organised around the euro and led by France and Germany together with the Benelux.⁵ The other members will converge in future with this core which would have a centripetal effect. In his famous 2000 Speech at the Humboldt University, Joschka Fischer defended the creation of a federal Europe around a "centre of gravity".⁶ A Treaty would formalise the "centre" which would have its own institutions, a parliament and a directly elected parliament. The centre would have emerged as a response to the potential unwillingness of some member states to advance further. In 2004, Fischer declared passed his idea of a core following the Eastern enlargement.

À la carte Europe. This notion describes decisions from member states to pick and choose in which policy areas they want to cooperate and how. Being a method for selecting policies, à la carte is intuitively compatible with more static form-centred descriptions, such as variable geometry, multi-tier or multi-speed. The EU Glossary defines it as a *non-uniform method of integration which allows Member States to select policies as if from a menu and involve themselves fully in those policies; there would still be a minimum number of common objectives.*

Proposals for different models of differentiated integration have particularly mushroomed in moments of constitutional change and/or severe crisis (e.g. the discussions around the failed EU Constitution and the current fiscal crisis). All these models implicitly or explicitly place France and Germany as participants whatever the specific features chosen. And, in several instances, differentiated integration models have been constructed facing actual or future UK opposition to further integration even though this is not the only stimulus to pursue this path. The next chapter illustrates the models of flexibility/differentiated integration in the EU:

⁵ See *Überlegungen zur europäischen Politik* <https://www.cducsu.de/upload/schaeublelamers94.pdf>

⁶ Foreign Minister of the Federal Republic of Germany, "From Confederacy to Federation – Thoughts on the finality of European integration", Speech at the Humboldt University in Berlin on 12 May 2000 <http://www.federalunion.org.uk/joschka-fischer-from-confederacy-to-federation-thoughts-on-the-finality-of-european-integration/>

3. MODALITIES OF DIFFERENTIATED INTEGRATION/ FLEXIBILITY

Flexibility/differentiated integration mechanisms are numerous. This chapter identifies all existing varieties and the legal basis for them. The following sections in this chapter classifies the different modalities following two criteria. On the one hand, flexibility can operate via formal (i.e. explicitly established and defined in primary law such as the EU treaties) or informal (i.e. developed by means of ad hoc not formalised agreements and conventions) mechanisms. On the other hand, differentiated integration may happen within the EU treaties or outside them (even though, in this second case, there exist linkage mechanisms that relate to the EU Treaties). The chapter concludes with a general statement on the frequency of their use in the past and opportunity of their use in the future and discusses those that represent specific potential for future action, from legal, institutional and political perspective.

Table 1: Summary of instruments for flexibility/differentiated integration

	Formal	Informal
Within EU Treaties	<ul style="list-style-type: none"> - Treaty derogations (opt-outs) - Conditional policy participation (euro and Schengen acquis) - Euro specific provisions - Flexibility clause (art. 352 TFEU) - Flexible changes in decision-making rules (<i>passarelle</i>) - Enhanced cooperation and permanent structured cooperation - Brake and accelerator mechanisms - Implementation of actions under foreign policy, security and defence - Flexibility in policy areas related to the single market 	OMC <ul style="list-style-type: none"> - Charter of Fundamental Social Rights - Euro Plus Pact - Compact for Growth and Jobs - Europe 2020 Strategy
Outside EU Treaties	<ul style="list-style-type: none"> - Schengen Agreement - Agreement on Social Policy - Prüm Convention - EFSF - TSCG - TESM - Agreement on the SRF - Agreement on the UPC 	<ul style="list-style-type: none"> - Trevi Group

Source: Own elaboration

3.1. Differentiated integration within the Treaties (TEU and TFEU)

3.1.1. Formal mechanism for flexibility

- **Treaty Derogations (opt-outs)**

Allegedly, opt-outs are the strongest mechanism for creating differentiated integration and allowing flexibility. Plainly speaking, opt outs derogate Treaty obligations for specific Member States. Primary legislation (i.e. treaties) contains these derogations which are usually formalised in Protocols. They exist in different policy areas and for different states, as the table below shows

Table 2: Opt outs in the Treaties

	Social Policy	Euro	Schengen	Judicial cooperation	Defence	Charter of Fundamental Rights
Denmark		16	19 & 22	22	22	
Ireland			19 & 20	20 & 21		
Poland						30
UK	x	15	19 & 20	20, 21 & 36		30

Source: Own elaboration

Note: the number in the cell indicates the existence of a derogation in that particular area and the number of the Protocol of the Treaty of Lisbon which grants the derogation

The Protocol and Agreement on Social Policy (1991). Historically, this is the first case of opting out. Eleven member states (all but the UK) signed this agreement as part of the Treaty of Maastricht. The Agreement extended EC competences in the field of employment and social rights allowing for qualified majority voting. When the Labour Party won the 1997 election, it announced its intention to adhere to the Protocol and Agreement which became then part of the Treaty of Amsterdam.

Adoption of the euro as the national currency is the most important area for opt-outs. The Treaty defines a generic situation: whilst it assumes that all EU member states are finally obliged to adopt the euro, it also defines a general exception. *Member states (in respect to which the Council has not decided that they fulfil the necessary conditions for the adoption of the euro)* are considered as "Member states with a derogation" (article 139.1). For these states, a number of Treaty provisions do not apply (article 139.2). From this general situation, the UK shall not be under obligation of adopting the euro unless it notifies the Council that it intends to do so (Protocol 15.1). Denmark, instead, refers to the procedure to access the euro regulated in article 140 and which is almost automatic: Protocol 16 states that Denmark has an exemption whose effect is that all treaty articles referring to a derogation apply to Denmark. The procedure for the abrogation of this exception (i.e. the procedure in article 140) shall only be initiated at the request of Denmark (Protocol 16). Sweden has no *de jure* opt out but the country rejected joining EMU in a referendum. To fulfil the Treaty obligations and simultaneously respect the result of the referendum, Sweden does not fulfil on purpose all formal requirements and this allows it to keep a *de facto* opt out. This situation has never been questioned which shows a very flexible utilization of the treaty provisions.

Opt outs in relation to the Schengen area (border controls) a much more complex design. Protocol 19⁷ authorises some explicitly mentioned member states to *establish closer cooperation among themselves in areas covered by provisions defined by the Council which constitute the Schengen acquis* (article 1). Then, the Protocol establishes (article 2) that the Schengen acquis shall apply to the Member States referred to in Article 1 (i.e. the ones explicitly named which do not include Denmark, Ireland and the UK). These three member states have retained a possibility to opt back in although the mechanisms are different: Ireland and the UK *may at any time request to take part in some or all of the provisions of this acquis* (article 4). Both member states have two mechanisms to opt in again. Firstly, (they) may at any time after the adoption of a measure (....) notify its intention (...) that it wishes to accept that measure. In that case, the procedure provided for in Article 331(1) of that Treaty shall apply (i.e. notification of intention to participate and confirmation from the Commission. But if conditions for participation are not met, a unanimous Council vote may be required). Secondly, they may also indicate its willingness to participate in the adoption of new measures at the proposal stage.

Protocol 22 on the position of Denmark governs Danish participation (Article 3) and it creates the framework for the interpretation of some of Danish opt-outs. In relation to Schengen, it establishes that *Denmark shall decide within a period of six months after the Council has decided on a proposal or initiative to build upon the Schengen acquis covered by this Part, whether it will implement this measure in its national law. If it decides to do so, this measure will create an obligation under international law between Denmark and the other Member States bound by the measure* (article 4). The Danish opt-out as set in Protocol 22 is very cumbersome and it may lead to absurd situations, such as the conclusion of agreements of international law between the EU and Denmark, thus regarded as a third State (Piris, 2015). The Protocol however foresees that Denmark may adopt through its own constitutional mechanisms, a regime similar to Ireland and the UK. The new Danish Liberal minority government, elected in June 2015 and led by Lars Løkke Rasmussen, included in its governing program a referendum to be held before Christmas 2015 on scrapping opt-outs from EU justice affairs policies (and adopting the Irish and British model of opt out).

The existing opt out on Schengen is not a flexibility mechanism available for future members. The Treaty of Lisbon clearly establishes (Protocol 19) that *for the purposes of the negotiations for the admission of new Member States into the European Union, the Schengen acquis and further measures taken by the institutions within its scope shall be regarded as an acquis which must be accepted in full by all States candidates for admission*.⁸

Opt outs in relation to judicial cooperation benefit the same three Member States (i.e. Denmark, Ireland and the UK) with similar regimes as in relation to the Schengen acquis.

⁷ Protocol on the Schengen acquis integrated into the framework of the European Union

⁸ The commitment to adopt the Schengen acquis is stated in the Article 3 of the Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties, the European Union is founded on and the Article 3 of the Act concerning the conditions of accession of the Republic of Bulgaria and the Republic of Rumania and the adjustments to the Treaties, the European Union is founded on.

However, the UK has an additional instrument for differentiation: after the transitory period for the communitarization of the measures on freedom, security and justice, the UK could *notify to the Council that it does not accept, with respect to the acts referred to in paragraph 1, the powers of the institutions referred to in paragraph 1 as set out in the Treaties* (Protocol 36 Title VII, Article 10.4)⁹. The transitional period concluded in 2014 and the UK government exercised its opt out in relation to the powers of the institutions for all the 135 measures adopted in the past in the field. Then, following the procedure established in Protocols 19, 20 and 21 (i.e. use of the procedure of article 331.1) which involves authorisation of EU institutions, it opted back in again (i.e. recognised institutions powers) in 35 of these measures comprising the most important ones (i.e. European Arrest Warrant, Eurojust and Europol).

On defence, Denmark also obtained in the Treaty of Amsterdam a derogation which has been kept so far (Protocol 22). *Denmark does not participate in the elaboration and the implementation of decisions and actions of the Union which have defence implication* (in relation to measures adopted by the Council pursuant to Article 26(1), Article 42 and Articles 43 to 46 of the Treaty on European Union). *Therefore Denmark shall not participate in their adoption. Denmark will not prevent the other Member States from further developing their cooperation in this area. Denmark shall not be obliged to contribute to the financing of operational expenditure arising from such measures, nor to make military capabilities available to the Union.* In August 2015, the Danish government announced its intention to call a referendum on whether to terminate the country's opt out on defence.

Finally, the last case of an opt-out came with the Charter of Fundamental Rights, which was incorporated into the Treaty of Lisbon with a Protocol (30).¹⁰ The United Kingdom and Poland have excluded themselves partially (i.e. 1. *the Charter does not extend the ability of the Court of Justice of the European Union, or any court or tribunal of Poland or of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms* 2. *In particular, and for the avoidance of doubt, nothing in Title IV of the Charter creates justiciable rights applicable to Poland or the United Kingdom except in so far as Poland or the United Kingdom has provided for such rights in its national law*). One of the most authoritative authors, Jean Claude Piris concludes that this Protocol will probably have insignificant practical effects (Piris; 2015; 13).

Opt-outs have traditionally been perceived as undermining the EU integration model. But the cases show their positive side: opt-outs allow integration to be applied to a sector without depending on the will of those who exclude themselves. Furthermore, such countries are the ones who assume the cost of their own exclusion. Moreover, at this stage, only four member states enjoy opt-outs in a limited albeit very important policy fields. Finally, they have not created perpetual exclusions since states opting out can, at a later stage, opt in again via the already existing mechanism or via treaty revision. Thus, as far they are not generalised and they are not used as a mechanisms to free ride on other member states, opt-outs may result functional for EU objectives in an ever enlarging and diverse membership context.

⁹ Transitional provisions concerning acts adopted on the basis of Titles V and VI of the Treaty on European Union prior to the entry into force of the Treaty of Lisbon

¹⁰ Protocol (no 30) on the application of the charter of fundamental rights of the European Union to Poland and to the United Kingdom

- **Policy participation conditioned to the fulfilment of certain criteria**

This modality fits neatly with the concept of “two-speed” (i.e. a single objective and different moments to attain it). Both accession to the euro and the Schengen area require that member states fulfil certain criteria. In the case of the euro, all member states (except those with a derogation) must adopt it after fulfilling the so called convergence criteria: inflation rate, public deficit, public debt and long term interest rates. In the case of the Schengen agreement, new member states started to apply the Schengen acquis related to abolishing internal border checks and the common visa policy in line with the Article 3 (2) of the Act on Accession only after a decision of the Council of the European Union. This followed positive Schengen evaluations related to a correct and full application of the Schengen acquis and in all areas concerned (land, air and sea borders, police cooperation, data protection, visa and the Schengen Information System/SIRENE). The Council of the European Union made this decision only after a consultation with the European Parliament.

- **Provisions specific to Member States whose currency is the euro**

Article 5 of the TEU establishes that Member States whose currency is the euro will have specific provisions for the coordination of economic policy (article 5). The Treaty also assigns exclusive EU competence on monetary policy for Member States whose currency is the euro (article 3.c). The Treaty of Lisbon added a new Chapter 4 (3a) which comprises Articles 136–138 (115A–115C) TFEU and which applies exclusively to Member States that have adopted euro as their single currency.

Precisely, the EU approved two of the Regulations of the *Six Pack* (i.e. 1173/2011 and 1174/2011) and the Two Pack Regulations (i.e. 472/2013 and 473/2013) on the basis of the new article 136 (in conjunction with article 121.6). These four regulations set different requirements for euro and non-euro in macroeconomic and fiscal policy.

On the other hand, the European Banking Union is also a Eurozone design which applies only to euro member states (although others could adhere to on voluntary bases). It comprises the Single Supervision Mechanism (SSM) in Regulation 1024/2013¹¹ and the Single Resolution Mechanism (SRM), in Regulation 806/2014¹². However, it does not derive from Chapter 4 (3a) but rather article 127(6) TFEU has been used as their legal treaty bases. Non euro member states may participate in the SSM by establishing a close cooperation with the ECB.

- **Differentiated governance for the euro area**

The Ministers of the Member States whose currency is the euro meet *informally* to discuss issues related to the single currency involving both the Commission and the European Central Bank (Article 137 and Protocol 14). The Fiscal Compact (Title V) (see below) complemented these shallow governance provisions. Euro governance is supplemented by specific arrangements affecting EU institutions, specifically the Council. Thus, the Treaty of Lisbon established that when ECOFIN votes on matters that affect solely the Eurozone, only Member States whose currency is the euro would

¹¹ Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions

¹² Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010

take part in the vote (Articles 156.2 & 238(3)(a). The Economic and Fiscal Committee also meets in a euro area configuration, the so called Eurogroup Working Group (EWG), in which only the Euro Area Member States, the Commission and the European Central Bank are represented. In this configuration, the Committee prepares the work of the Eurogroup (article 135).

The ECB governing Council contains only members from EU Member States whose currency is the euro. The general Council includes also members from other member states. All national central banks subscribe the capital of the ECB (article 28.1 ECB Statutes) but only the Central Banks of euro member states pay effectively their share (Article 48 ECB Statutes).

- **Flexible changes in decision-making rules (*passarelle clauses*) (article 48.7)**

The revision of the EU Treaties is governed by the most rigid rule possible: unanimity with a significant number of veto players (Closa; 2015). This renders very difficult any future change to the treaties. To avoid this rigidity, Treaty drafters have devised a specific flexibility mechanism which serves to pass from unanimity to qualified majority and/or from special to ordinary legislative procedure. This is the so-called *passarelle* procedure. The approval of passing from one to other requires unanimity in the European Council (although member states with an opt-out and those who do not participate in an enhanced cooperation may not take part in the vote). The EP must approve the measure by absolute majority of its members and national parliaments are notified. They have a 6 months period to object to the proposal and if any does, the proposal fails. Beyond this general *passarelle* clause in article 48, the Treaty identifies explicitly 6 cases in which the requirements are different:

- Expansion of the list of foreign policy matters in which the Council of Ministers may vote by qualified majority. The European Council decides acting alone (i.e. no EP intervention) (Article 31 TEU)
- Allowing the Council of Ministers to act by qualified majority when adopting the regulations on the multiannual framework programme. The European Council decides acting alone (i.e. no EP intervention) (article 312 TFEU).
- Changes in an enhanced cooperation. Participating states may decide to move to qualified majority vote or to move from the special to the ordinary legislative procedure. Participating states decide unanimously in the Council of Ministers. The EP must be consulted if the change affects the legislative procedure (Article 333 TFEU).
- Change in certain areas affecting the rights of workers (1) and environmental matters (2) (articles 153 and 192 TFEU respectively). The Council acts unanimously following a Commission proposal and after consulting the EP to move from the special (i.e. unanimity with EP consultation) to the ordinary legislative procedure
- Adopting a decision determining these aspects of family law with cross-border implications which may be adopted by ordinary legislative procedure (article 81 TFEU).

- **“Flexibility clause” (Article 352 TFEU)**

This provision enables the EU to act beyond the powers explicitly conferred upon it by the Treaties if the objective pursued so requires. Before the Treaty of Lisbon, the existing provision (i.e. article 235 Treaty of Rome and article 308 Treaty of Nice) restricted the enlargement of EU competence (in case of not having an explicit legal basis) to objectives connected to the internal market. Some calculations argued that

the clause was used some 830 times (particularly during the 1970s and 1980s in relation to the single market), which gave ground to speak of the EU “creeping” competence. The Treaty of Lisbon extends the reach of the flexibility provision to all the objectives of the Union although it cannot serve as a basis for attaining objectives pertaining to the common foreign and security policy. The activation of the flexibility clause requires that the Council acts unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament.

- **Enhanced cooperation (articles 20, 82, 87 and 326-334)**

The Treaty of Lisbon has contains three mechanisms for institutional flexibility in decision making that facilitate agreeing on measures in areas which certain member states consider sensitive. The general mechanism for institutional flexibility is enhanced cooperation, a clear exponent of the notions of “variable geometry” or “multi-tier”. The other two are associated with enhanced cooperation: “brakes” and “accelerator” procedures.

Enhanced cooperation permits that a group (i.e. not all) Member States approve EU secondary (derived) legislation which applies only to those participating Member States. The Treaty of Amsterdam created “enhanced cooperation” to operate on areas of judicial cooperation on criminal matters and in areas related to the EC (the then Treaty establishing the European Community). The Treaty of Nice introduced major changes aimed at simplifying the mechanism. In particular, a Member State could not oppose the establishment of enhanced cooperation as originally allowed by the Treaty of Amsterdam. Finally, the Treaty of Lisbon has introduced additional modifications mainly related to the procedure for its initiation, as well as decision-making within the framework of such cooperation. The following describes the institutional design of enhanced cooperation.

- *Areas for application:* The Treaty (arts. 20 TEU and arts. 326 to 334 TFEU) designs a framework but does not identify *a priori* the areas for specific application (although these areas must be non-exclusive areas of jurisdiction which do not affect the internal market or economic, social and territorial cohesion). The Lisbon Treaty introduced enhanced cooperation on a case by case basis in both foreign policy and defence (articles 329(2) and 331 (2) TFEU). The provision has never been implemented.
- *Participants.* The design of enhanced cooperation does not set the specific countries which participate or which are excluded *a priori*. The pre-requisites for activating this policy are clearly established: there have to be at least nine member states interested (from eight under the Treaty of Nice), it must be open to including new participants, although “conditions of participation” can be established (articles 328.1; 333.1 of the Treaty of Lisbon).
- *Conditions for initiating an enhanced cooperation.* Enhanced cooperation can be activated as a *last resort* mechanism, once it has been confirmed that agreeing on ordinary EU rules is impossible.
- *Procedure.*

The initiative corresponds to the States whilst the proposal comes from the European Commission (or the High Representative if it is a question of Foreign and Security Policy).

The Council adopts the final decision to start enhanced cooperation by a qualified majority (or unanimity in the case of foreign and security policy) and

The European Parliament must grant its consent (in the case of foreign and security policy, the parliament will only be informed).

- Non participant member states are allowed to take part in deliberations but not in the adoption of decisions. *Effects of the norms*. The norms approved via enhanced cooperation apply only to participant states.

- **“Brake” clauses (Articles 48, 82 and 83 TFEU)**

These provisions allow a Member State to block ordinary legislation by appealing to the European Council if it considers that a piece of proposed draft legislation threatens a fundamental principle of its social security system, or its criminal/justice system. The procedure is suspended and the European Council may either:

- Send the draft legislation back to the Council who shall continue with the procedure taking into account the observations made or;
- Stop the procedure and ask the Commission for a new proposal

The procedure applies to three specific cases:

- Measures for coordinating social security systems for migrant workers (Article 48 of the Treaty on the Functioning of the EU);
- Judicial cooperation in criminal matters (Article 82 of the Treaty on the Functioning of the EU);
- The establishment of common rules for certain criminal offences (Article 83 of the Treaty on the Functioning of the EU).

The existence of this “brake” has allowed that the more recalcitrant Member States consent to the application of the ordinary legislative procedure to these three policy areas which previously required unanimity. Noticeably, in two of these areas (judicial cooperation and criminal offences), the brake does not necessarily condemn to inaction, since it may open the door to the use of enhanced cooperation automatically. This is the “accelerator” mechanism.

- **“Accelerator” (articles 82, 86 and 87)**

In certain issues of the area of security, freedom and justice, if the adoption of a piece of legislation via the ordinary legislative procedure fails, this failure automatically activates the creation of enhanced cooperation once it includes at least nine Member States and only a unanimous ‘no’ vote from the European Council can block its implementation. The Council, the Parliament and the Commission are therefore simply informed of the participating States’ desire to establish an enhanced cooperation. The four issues pre-defined for the activation of the “accelerator” are, under the new Treaty of Lisbon:

- mutual recognition of sentences, judicial and cross-border police cooperation (Article 82.3 TFEU);
- establishment of common rules for certain criminal offences (Article 83 TFEU);
- creation of a European Public Prosecutor’s Office (Article 86 TFEU);

- police cooperation (Article 87.3 TFEU).

This automatic mechanism is the biggest advantage of a system designed with the goal of overcoming the prospect of a British veto: the accelerator clauses concerning cooperation and criminal offences result directly from the activation of the existing brake clauses in these two areas. When the brake clause has been activated and has stopped the legislative procedure, the States wishing to do so may turn to the accelerator clause.

- **Constructive abstention (Article 31.1 TEU)**

This modality allows a Member State to abstain in a given vote on a foreign policy issue and, hence, not taken part in its implementation neither. Cyprus used this option in the vote on the recognition of Kosovo.

- **Permanent structured cooperation (articles 42(6), 46 and Protocol 10)**

The Lisbon Treaty extended enhanced cooperation to the military field. When unanimity cannot be reached those member states willing, a permanent structured cooperation can be established among *those Member States whose military capabilities fulfil higher criteria and which have made more binding commitments to one another in this area with a view to the most demanding missions*. Protocol 4 establishes the commitments that member states must enter into for entering permanent structure cooperation comprising: harmonization of capabilities, establishing synergies, system development, coordination in using forces in operations, integrating multinational forces or taking part in EU led operations. In practice, commitments mean national contribution to a European Battle Group and participation in a joint military project.

Institutional design. Permanent structured cooperation does not require a minimum of participant member states. It is open to Member States willing and able to cooperate. Establishing a structured cooperation requires a qualified majority in the Council (in contrast with unanimity in the foreign policy field). Although structured cooperation is seen as a compromise for the recurrent lack of European capabilities and to reinforce the NATO European pillar, it has not been implemented so far.

- **Implementation of EU operations involving military means by a group of Member States** (Article 44). Within the framework of the decisions adopted in accordance with Article 43, the Council may entrust the implementation of a task to a group of Member States which are willing and have the necessary capability for such a task. Those Member States, in association with the High Representative of the Union for Foreign Affairs and Security Policy, shall agree among themselves on the management of the task.
- **Flexible cooperation in the domain of defence.** More specific modalities for flexibility in defence within the Treaty of Lisbon comprise:
 - organization of cooperation and coordination among their administrations responsible for national security (art. 73);
 - creation of the European Defence Agency (art. 45.2), in which any member state which wishes can participate (in fact, all do except for Denmark).

Additionally, the Treaty of Lisbon recognises the right of neutral member states to retain their neutrality policy (although undetermined, Austria, Finland, Ireland, Malta and Sweden are normally considered to be neutrals). In parallel, the Treaty (art. 42(2) 2nd subparagraph and Protocol 42) recognises the respect for the obligations of Member States which are NATO members.

- **Flexibility in areas related to the single market**

- Derogations from uniform implementation of secondary legislation

Article 27(2) TFEU allows differentiation for certain member states within a legal act that addresses all of them.

- Safeguard clauses that enable the maintenance or introduction of more protective national measures

The SEA introduced the possibility that Member States introduced more protective national measures in a number of fields and this option has remained in the successive treaties until the Treaty of Lisbon. The areas in which reinforced national protection is permitted are social policy (Art. 153 (4, second subparagraph) TFEU), policy on consumer protection (Art. 169 (4) TFEU) and policy on environment (Art. 193 TFEU).

- Supplementary actions involving a group of member states

This possibility exists for the area of research, technological development and space (article 184 TFEU). These actions adopt the form of supplementary programs to the multiannual framework program and they involve group of member states that finance them. Their adoption passes through the ordinary legislative procedure involving both the Council and the EP although the agreement of participant states is needed.

- Special financial contributions

Member states can assign a special financial contribution to the budget or a specific revenue to a specific item of expenditure (Article 21 Council Regulation 966/2012). The High Flux Reactor is funded in this way (Decision 2012/709/EURATOM).

- Maintenance or introduction of national provisions qualifying harmonization measures on grounds of major needs referred to in Article 36, or relating to the protection of the environment or the working environment. The Commission needs to approve the applications (article 114). Following this provision, the EU has recently granted *Member States, in accordance with the principle of subsidiarity, more flexibility to decide whether or not they wish to cultivate GMOs on their territory without affecting the risk assessment provided in the system of Union authorisations of GMOs*.¹³ Greece and Latvia applied for exceptions from the Directive.

- **Flexibility/differentiated integration within EU secondary legislation**

¹³ Directive (EU) 2015/412 of the European Parliament and of the Council of 11 March 2015 amending Directive 2001/18/EC as regards the possibility for the Member States to restrict or prohibit the cultivation of genetically modified organisms (GMOs) in their territory. Official Journal of the European Union L 68/1 13.3.2015

Duttle et al. (2013) have researched to which extent differentiation (which they define as *the differential validity of EU law in EU member states*) exists in EU secondary legislation. They analysed all Council and Council/EP Directives and Regulations from 1958 to 2012 and all Decisions on Justice and Home affairs and Police and Judicial cooperation from 1993 to 2009. They concluded that differentiation in legal acts (meanings possible exemptions) has gradually decreased from 1958 to 2011, starting with a third of all the (few) 1958 acts, then varying between 10% and 20% for most of the period and dropping clearly to 3% in 2010. Moreover, when looking at specific acts' provisions, they found that there were more instances of potential than actually implemented differentiations. This means that states were prepared to preventively protect themselves but they were not so prepared to actually use the protective mechanisms that they had availed to themselves. Whilst EU enlargement has traditionally been identified as one of the major drivers of differentiation (Schimmelfenning and Winzen; 2014) because of the transitional agreements before full membership, recent research (i.e. Zhelazkova et al. 2015) concludes that the impact of enlargement on differentiation at the level of secondary legislation is much smaller than expected.

3.1.2 Informal mechanism for flexibility within the Treaties

The **Open Method of Coordination** (OMC) offers an alternative to developing common policies in areas which fall under the Member States sphere of competence (employment, social policy, education, training). The flexibility of the method is that it bypasses EU legislation. Alternatively, Member States rely on their own domestic instruments although they adopt some common decisions:

- They jointly identify and define the objectives to be achieved
- They jointly agree measuring instruments (such as statistics, indicators and guidelines)
- They assess performance by means of benchmarking (i.e. comparing best practices and results)
- The compliance mechanism relies on peer pressure and there is no enforcement mechanisms.

The Open Method of coordination is purely intergovernmental with the Commission is a supporting (and occasionally, supervising) role and no involvement for the EP and the ECJ. Although normally associated with the Lisbon Strategy (2000), the 1989 Charter of Fundamental Social Rights could be viewed as an early antecedent. Afterwards, three other EU initiatives conform to this model of coordination.

- **Community Charter of the Fundamental Social Rights of Workers** (1989). It was signed by all Member States but the UK. The Charter was a political instrument containing "moral obligations" whose object is to guarantee that certain social rights are respected in the countries concerned. These relate primarily to the labour market, vocational training, social protection, equal opportunities and health and safety at work. The Charter recognised (article 27) that it is more particularly the responsibility of the Member States, in accordance with national practices, notably through legislative measures or collective agreements, to guarantee the fundamental social rights in this Charter and to implement the social measures indispensable to the smooth operation of the internal market as part of a strategy of economic and social cohesion. The Charter contained also an explicit request to the Commission to put

forward proposals for translating the content of the Charter into legislation. The Charter was followed up by action programmes and specific legislative proposals. It was only adopted by the United Kingdom in 1998 as part of the integration of the principles of the Charter into the Amsterdam Treaty (and after in the Charter of Fundamental Rights).

- The **Euro-Plus Pact** (or Euro+ Pact, also initially called the Competitiveness Pact or later the Pact for the Euro) was signed in 2011 by a group of member states involving all euro plus 6 non euro countries (Bulgaria, Denmark, Latvia, Lithuania, Poland and Romania).¹⁴ The Pact remains open to other EU members on voluntary basis. They commit themselves to implement reforms in four areas (i.e. fostering competitiveness, fostering employment, contributing to the sustainability of public finances and reinforcing financial stability). The choice of specific policy instruments remains the prerogative of each participant member state. On a fifth area, tax policy, participating states commit themselves to engage in structural discussion. Flexibility comes not only from voluntary participation, but also because the objectives are not legally binding and the discretionary choice of means. The recent Four Presidents' report criticised the lack of efficiency of the Pact, arguing that its implementation has suffered from a number of shortcomings including the absence of a monitoring institution. They concluded that the Pact *largely failed to deliver the expected results in view of its intergovernmental, non-binding nature* and they recommended that its relevant parts should be integrated into the framework of EU law (Juncker; 2015: 7).
- The **Compact for Growth and Jobs**¹⁵ (2012) aims at promoting actions to achieve the objectives of the European 2020 Strategy. Actions evolve in six areas (growth-friendly fiscal consolidation, restoring normal lending to the economy, promoting growth and competitiveness, tackling unemployment and addressing the social consequences of the crisis and modernizing public administration). Actions are taken at the national level and the compliance and enforcement mechanism is, explicitly, peer pressure.
- **Europe 2020 Strategy**¹⁶ is the EU initiative for sustainable growth for the forthcoming decade. It singles out five objectives (i.e. ensuring 1. 75 % employment of 20–64-year-olds; 2. getting 3 % of the EU's GDP invested in research and development; 3. limiting greenhouse gas emissions by 20 % or even 30 %, providing 20 % of our energy needs from renewables and increasing our energy efficiency by 20 % (all compared to 1990 levels); 4. reducing school dropout rates to below 10 %, with at least 40 % of 30–34-year-olds having completed tertiary education; 5. ensuring 20 million fewer people are at risk of poverty or social exclusion (compared to 1990 levels). Each EU Member State adopts its own national targets in each of these areas on the basis of the national targets that each government sets for itself. Targets and actions integrate the National Reform Programmes. Enforcement mechanisms are very soft: Commission reporting and monitoring, benchmarking and mutual verification (by national governments) of accomplishment of national targets.

¹⁴ *The Euro Plus Pact Stronger Economic Policy Coordination for Competitiveness and Convergence* European Council 24/25 March 2011 Conclusions EUCO 10/1/11 REV 1 CO EUR 6 CONCL 3 Brussels, 20 April 2011 http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/120296.pdf

¹⁵ *Compact for Growth and Jobs* European Council 28/29 June 2012 Conclusions EUCO 76/12 CO EUR 4 CONCL 2 Brussels, 29 June 2012 http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/ec/131388.pdf

¹⁶ Communication from the Commission Europe 2020 A strategy for smart, sustainable and inclusive growth Brussels, 3.3.2010 COM(2010) 2020 final <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:2020:FIN:EN:PDF>

3.2. Differentiated integration outside the Treaties

EU member states have chosen in several occasions to organize forms of cooperation among themselves (all or a sub-set of members) outside the treaties. This is due to the traditional lack of willingness of some member states to participate but also when they want to avoid the rigidity and demands of EU decision-making procedures. Depending on the legal structure adopted, flexibility outside the treaties can be either *formal* or *informal*. Whilst the first relies on the existence of some treaty, convention or other formal international law instrument, the later depends on informal arrangements among participating states. The EU provides an abundant repertoire of either of these forms.

3.2.1. *Formal* differentiated integration outside EU Treaties

The number and range of varieties of formal integration instruments outside the treaties is large and it was initiated in 1980s. All the instruments adopted share one feature: not all member states participate in them. In less specific terms, two additional features could be added: signatory states share their preference for a later merging of these instruments with the EU treaty and they prefer the involvement of EU institutions rather than the creation of *ad hoc* bodies. In fact, explicit provisions signal in each case the prevalence of EU law; for instance, the Prüm Convention (*provisions of this Convention shall only apply in so far as they are compatible with European Union law ... [EU law] should take precedence in applying the relevant provisions of this Convention* (Article 47) or the TSCG..., article 2.1 and 2.2 SRF (*This Agreement shall be applied and interpreted by the Contracting Parties in conformity with the Treaties on which the European Union is founded and with European Union law*) (*This Agreement shall apply insofar as it is compatible with the Treaties on which the European Union is founded and with the Union law. It shall not encroach upon the competences of the Union to act in the field of the internal market*).

- **Schengen Agreement (1985)** *Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders*. Initially signed by 5 member states, it permitted eliminating identity controls among these member states. The Treaty of Amsterdam included the Schengen *acquis* within EU law at the same time that granted opt-outs for UK and Ireland and fixed participation conditions for all member states (Bulgaria, Croatia, Cyprus and Romania have not yet fulfilled these). Additionally, four non-EU member states (Iceland, Liechtenstein, Norway and Switzerland) also participate.
- **Prüm Convention (2005)** *Convention between the Kingdom of Belgium, the Federal Republic of Germany, the Kingdom of Spain, the French Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands and the Republic of Austria on the stepping up of cross-border cooperation, particularly in combating terrorism, cross-border crime and illegal migration*. Seven EU member states signed this agreement which permitted state parties to exchange information on DNA, fingerprints and vehicle registration and to cooperate in the fight against terrorism. Currently, 13 member states have acceded/ratified the Convention¹⁷ whilst four others have indicated their willingness to do so and Norway and Iceland have signed a treaty that

¹⁷ <https://treaties.un.org/Pages/showDetails.aspx?objid=0800000280263b7b>

partially applies the Convention (not yet in force).¹⁸ In 2008, a Council Decision incorporated some parts of the Convention into EU law,¹⁹ on which the UK exercised its opt-out.

- **European Financial Stability Facility Framework Agreement (EFSF)²⁰ (2010).** This Agreement has attracted the largest criticism because of its form: a *société anonyme* incorporated in Luxembourg and constructed in accordance with British (private) law (art. 16.1) in which euro member states participate. Differently to other formal instruments, it is not explicitly open to non-euro states (even though, logically, it could be assumed that the participation of would-be euro members is expected when they become full members).
- **Treaty on the European Stability Mechanism (TSCG) (2012).** This Treaty was negotiated outside the procedure of article 48 TEU given UK refusal to use it. The so-called *Fiscal Compact* offers allegedly the most complete menu of flexibility among formal instruments. It comprises both euro and non-euro states but for the former, the Compact was quasi compulsory. Both the UK and the Czech Republic did not sign and they are not parties even though the Czech Republic has finally ratified it. Several states which are not part of the euro (Hungary, Poland and Sweden) declared themselves only bound by Title V (on governance) whilst Bulgaria declared that Title III will apply only after its accession to the euro. The TSCG complements and makes harder the conditions of fiscal stability of the EU Stability and Growth Pact (enshrined in the Six and Two Packs). Its title V enlarges the TEU meagre provisions on euro governance although without providing a much more robust framework: It creates the Euro Summit and regulates its meetings (article 12) and introduces the figure of the President of the Euro Summits, to be elected for the same time period than the President of the European Council. It also regulates the meetings of the EP with the national parliaments of the euro area (article 13).
- **Treaty on the European Stability Mechanism (2012).**
This agreement creates a fund to be used to assist euro member states in case of serious financial difficulties. Only euro member states are part of the agreement
- **Agreement on the transfer and mutualisation of contributions to the Single Resolution Fund (SRF) (2014).**²¹ Following the creation of the Single Resolution Mechanism by ordinary EU legislation (see above), the provision of funds will happen via an external Agreement. Whilst the Resolution regulation applies to euro states and others on voluntary bases, all EU states except the UK have signed the Agreement. Non euro states will have to establish a "close cooperation" with the ECB.²²

¹⁸ <http://ec.europa.eu/world/agreements/prepareCreateTreatiesWorkspace/treatiesGeneralData.do?step=0&redirect=true&treatyId=8402>

¹⁹ Council Decision 2008/615/JHA of 23 June 2008 on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32008D0615> and Council Decision 2008/616/JHA of 23 June 2008 on the implementation of Decision 2008/615/JHA on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:210:0012:0072:EN:PDF>

²⁰ http://www.efsf.europa.eu/attachments/20111019_efsf_framework_agreement_en.pdf

²¹ <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%208457%202014%20INIT>

²² Following article 7 Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:287:0063:0089:EN:PDF>

- **Agreement on a Unified Patent Court (UPC).**²³ The creation of the European patent of unitary effect through enhanced cooperation required the additional creation of a mechanism for adjudicating on disputes. Member States participating in the patent opted for the creation of a Unified Patent Court. However, the ECJ ruled that the proposed Court would be incompatible with EU law and participant states elaborate an external agreement which was signed by 25 states (all EU member states except Spain, Poland and Croatia) on February 2013. The UPC comprises a Court of First Instance, a Court of Appeal in Luxembourg, an Arbitration and Mediation Centre and a common Registry. The Court of First Instance comprises a central division in Paris and thematic sections in London and Munich along with several local and regional divisions. Entering into force requires a. at least 13 of the signatory states ratify, b. these should include the three member states where most European patents are registered (i.e. France, Germany and United Kingdom) c. a required amendment to the Brussels I Regulation has entered into force. On May 2015, only six states had communicated ratification and only France of the necessary three had done so.

Table 3: Summary of formal instruments outside EU Treaty framework

	Signatories	Participants	Non EU	Open	Derogations	Merging provision
Schengen	5	22	4	Yes	No	Implicit
Prüm	7	13	2	Yes	No	Yes
EFSF (euro)	17	17	-	Implicit	No	Implicit
ESM (euro)	17	19	-	Yes (euro)	No	Implicit
TSCG	25	27*	-	Yes	Yes	Yes
SRF	26		-	Yes	Yes	Implicit
UPC	25	25(pending ratifications)	-	Yes	No	Implicit

Source: Own elaboration * Several member states have derogations from the TSCG

Two areas concentrate the external mechanisms for flexibility: euro governance and free circulation and judicial cooperation and only the UPC agreement does not fit within either of these. It is also worth noticing that there is a tendency of growing membership in each of these international instruments

3.2.2. Informal cooperation outside the Treaties

This modality results the less relevant one since avoiding simultaneously formalization and the EU framework offers almost infinite options for the cooperation of Member States. Interestingly, these forms of informal cooperation outside the treaties served in the past as preliminary forms that were afterwards integrated into the treaties. The Trevi Group illustrates this trend. The then 9 EU member states created the Trevi Group in 1976 with the aim of countering terrorism and to coordinate police cooperation. The group worked on purely intergovernmental cooperation with no initial role for the European Commission and the European Parliament. Later on, the Treaty of Maastricht formalised the

²³ Available at <http://www.unified-patent-court.org/images/documents/upc-agreement.pdf>

intergovernmental Justice and Home Affairs ‘pillar’ of the EU (later the SFJ area) and, finally, the Treaty of Lisbon eliminated the pillar structure and brought these policies under the main EU legal and institutional framework. Informal cooperation, by definition, cannot be regulated and must be taken as a early and incipient stage of future formalised forms of cooperation which contributes greatly to EU objectives.

3.3. Flexible participation of third parties in the EU acquis

This overview of flexibility/differentiated integration needs to take into account also the possibilities that the EU has created for the participation of non-Member States in some of its policies. Their involvement results from either the EU self-promotion of its policy acquis beyond its borders or the development of external ties to tackle growing interdependence (Lavenex, 2015). The existence of these relations substantiates the notion of concentric circles mentioned above.

- The European Economic Area (EEA) includes the EU and Norway, Iceland and Lichtenstein.
- The Schengen Agreement includes also Norway, Switzerland and Iceland
- The Prüm Convention includes Norway
- The EU maintains also different mechanisms for partnership (such as the European Neighbourhood Partnership), customs agreements (i.e. with Turkey) and bilateral relationships (i.e. Switzerland)
- Finally, article 50 foresees the possibility that a withdrawing member state conclude an agreement with the Union whose content will have to be negotiated *ad hoc*.

Beyond these forms of state membership of EU policies and their governance instruments, third country regulators have gained access to a plethora of committees and regulatory agencies that contribute to the development of EU policies (Lavenex, 2015: 850).

Article 50 opens a new avenue for participation in the EU *acquis*. Article 50 regulates the procedure for withdrawal of a member state from the Union and, it obliges the EU to negotiate a specific agreement with the withdrawing state (*the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union*) whose contents and consequences are not pre-determined and, hence, they remain very unclear. The agreement falls within the category of agreements between the EU and third parties (art. 214.2).

4. ANALYSIS FOR POLICY AREA

This section briefly discusses the use of the various flexibility mechanisms in relation to the opportunities for their deployment and the legal and political context. Taken together, the use of the mechanisms for flexibility/differentiated integration has been limited and, significantly, concentrated in the areas of euro governance and security, justice and freedom.

4.1. Policies associated with the internal market

Confronted with the proliferation of forms of flexibility and differentiated integration, the internal market and associated policy areas have preserved by and large their own integrity. There exist a number of very specific mechanisms and a general one. As for the former, these comprise derogation of uniform implementation, safeguard clauses, supplementary actions and special financial contributions. Enhanced cooperation, on the other hand, is the general mechanism. Specific instruments do not present significant political/legal problems and, in fact, a previous EP Report suggested that employment and social policy can be further developed (Articles 9 TFEU, Articles 151 & 153 AND 329 TFEU).²⁴ Labour market, in particular, is an area in which euro member states may need to reflect on some form of cooperative action in the future. Being still a national competence, the experience of the German 2000s labour market reform shows the huge capacity to increase competitiveness within a single currency area via unilateral reforms.

Differently to the specific modalities, enhanced cooperation developed as a kind of *deux ex machina* for applying in areas of the former pillar 1. But, despite expectations, the balance of its utilisation results very pale since, so far, enhanced cooperation has occurred in two occasions with a third one still pending future concretion. These cases involve rules on divorce, the creation of a European patent and the creation of a European financial transaction tax.

- Election of jurisdiction for divorce of different nationality couples (i.e. couples with nationalities from different member states). Sweden blocked the adoption of these rules in the domain of judicial cooperation because of fears of undermining its liberal divorce law. Eight member states formally requested the EU Commission to propose a measure for enhanced cooperation. After obtaining the consent of the EP and the approval of the EP, the Commission elaborated a draft regulation which was approved on December 2010. It came into force for 14 participants on June 2012 and currently, 14 Member States participate.
- European Patent with unitary effect. Italy and Spain blocked the creation of the patent by means of ordinary EU legislation because of disagreement on the treatment of their respective languages: the unitary patent would be examined and granted in one of the existing languages of the European Patent Organization: English, French or German. In this situation, twelve states initiated the procedure for enhanced cooperation in 2010. Following the

²⁴ Report on constitutional problems of a multitier governance in the European Union (2012/2078(INI)) A7-0372/2013 15.11.2013

procedure, the Commission proposed formally the initiative and the EP approved the use of enhanced cooperation. Once cleared the way, two Regulations were approved creating the patent. Spain demanded the annulment of both regulations but the ECJ rightly dismissed the claims and ruled against Spain. The entering into force depends on the parallel approval of an external agreement regulating the Unitary Patent Court (see below).

- Financial Transaction Tax (FTT). Two EU member states (i.e. Sweden and the UK) objected to the creation of a Union-wide financial transaction tax which would affect transactions between financial institutions. Nine states supported the creation of the scheme among themselves via enhanced cooperation. Following their request, the EU Commission proposed its use and the Council approved and EP consented. On February 2013, the Commission formally proposed a Directive creating a FTT among participant states. Whilst the EP approved the proposal in 2013, the Legal Service of the Council opined that the tax would not apply to “systemic risk activities” but it would rather affect healthy activities. The Council Legal Service also opined that the tax was incompatible with the EU Treaty and it also exceeded member states’ jurisdiction under international customary law. Facing these difficulties, participant states have not yet approved it and ten of them agreed to seek a “progressive” tax on “equities” and some derivatives.

The UK government asked the ECJ to annul Council’s decision authorising enhanced cooperation in the area of financial transaction tax. The UK government argued that the decision infringed Article 327 TFEU and customary international law in so far as the contested decision authorises the adoption of an FTT which produces extraterritorial effects. The second UK argument claimed an infringement of Article 332 TFEU in that that decision authorises the adoption of an FTT which will impose costs on Member States which are not participating in the enhanced cooperation (‘the non-participating Member States’). The Court dismissed the UK government demand.

Aside from whether it is actually used or not, the value of enhanced cooperation seems to lie more in its value as a threat to get a particular measure approved through regular EU channels.

4.2. Economic and monetary union

The fulcrum of the European project and the EU itself has moved progressively and inevitably towards the euro which increasingly concentrates new policies and initiatives for EU development (see Juncker; 2015) and these tend to be accommodated, increasingly, through the flexible application of differentiated integration. Two factors explain this trend. On the one hand, the spill-over effects of an incompletely defined economic and monetary union which requires, often urgently, new instruments to complete it (such as, for instance, the funds to help euro members in distress). On the other hand, in parallel, the increasing resistance of some member states (i.e. The last British governments) to take part in any measures associated with the euro –combined with the unanimity requirement- has forced to tailor *ad hoc* instruments to the urgent needs raised by euro governance. As a result, economic and monetary union comprises the widest possible range of flexibility/differentiated integration: opt-outs, phase-in instruments (to accede to the third

stage of emu) but also not highly formalised governance bodies (such as the Eurogroup) and external treaties which contain crucial regulation of euro governance. The rolling character of the institutional design of the euro area governance and the urgent needs prompted by the crisis required highly flexible and ad hoc responses which, nevertheless, have produced a significant fragmentation.

Whilst flexibility has allowed to deal with the crisis, its use has also created some problems. From the institutional point of view, the most important one is that euro governance is lightly regulated and, by and large, is regulated outside the EU treaties. In fact, the TSCG contains some regulations of the Euro summit as the ESM does with some other bodies. Both the Euro summit and the Euro group lack enough regulation and they have evaded any attempt of accountability and responsibility to European institutions (even though national ministers remain accountable to their own parliaments). Thus, there is no role for the EP and almost no role for the ECJ. This situation seems totally inadequate facing the vital decisions taken by the Eurogroup (being the last one the third rescue package for Greece). Hence, the EU should explore in full the merging mandate of the TSCG which refers to its substance comprising not only the policy contents but also the governance provisions.

4.3. Area of security, freedom and justice (SFJ)

The British, Danish and Irish opt-outs plus their respective opt-ins determine policy development in this area. However, the existence of these limitations have not precluded Member States moving on with the adoption of legislation. In fact, previously to the Treaty of Lisbon, the UK government complained of its exclusion from the development of the Schengen acquis, adopting a strategy based on litigation.

The ECJ has clarified the conditions for the participation of the United Kingdom in the adoption of measures which constitute a development of the Schengen acquis in joint cases C-77/05 and C-137/05. Several member states of the EU had adopted two Regulations (establishing the FRONTEX agency and regulating the anthropomorphic data to be included in data bases on electronic passports) and the United Kingdom appealed both before the European Court of Justice on grounds that it had been illegally excluded.

The United Kingdom had informed the Council of its intention to participate in the adoption of, on the one hand, the regulation establishing the FRONTEX agency and, on the other hand, the regulation establishing standards for security features and biometrics in passports. The Council refused to give its authorisation in both cases on the ground that the measures in question constituted a development of the provisions of the Schengen acquis in which the United Kingdom does not take part. The United Kingdom therefore brought an action for annulment against each of the two regulations based on the argument that it has a right to participate in the adoption of those measures which is independent of whether or not it takes part in the provisions of the Schengen acquis on which the measures in question are based.

The Court of Justice pointed out that the measures referred to in article 5 of the Schengen Protocol in the Treaty of Nice are based on the Schengen acquis within the meaning of Article 4 of the Protocol, of which they constitute merely an implementation or further development. It follows from this that such measures must be consistent with the provisions they implement or develop, so that they presuppose the acceptance both of

those provisions and of the principles on which those provisions are based. The Schengen Protocol became integrated in the EU via Protocol 19 Integrating the Schengen Acquis into the Framework of the European Union in the Lisbon Treaty.

The Court concluded from this that the participation of a Member State in the adoption of a measure pursuant to Article 5 of the Protocol is conceivable only to the extent that that State has accepted the area of the Schengen acquis which is the context of the measure to be adopted or of which it is a development. Accordingly, the United Kingdom and Ireland cannot be allowed to take part in the adoption of a measure under Article 5 of the Protocol without first having been authorised by the Council to accept the area of the acquis on which that measure is based, in accordance with Article 4 of the Protocol.

In conclusion, the Court held that, since in this case the United Kingdom had not requested to participate in the area of the Schengen acquis forming the context of the two disputed regulations, the Council was right to have refused to allow the United Kingdom to take part in the adoption of those regulations.

The Treaty of Lisbon added the new opt-in protocol (no. 21) applying to the area of SFJ. According to the UK government, the protocol has resulted highly efficient to avoid participation in SFJ measures when it did not consider them aligned with the UK national interest. The number of opt-ins has been more than half (see table 3 below). However, the House of Lords (2015) has opined that the government partly misplaced some legal acts as having a legal basis on Title V TFEU (which would allow exercising the opt-in mechanism).

Table 4: UK Government use of the opt-in (Protocol 21)

	Decisions taken	No Pcol. 21 legal basis	Opts-in	No opt-in
2011	17	2	9	8
2012	35	9	24	8
2013	21	6	13	8
2014	33	19	21 (13)	10

Source: own elaboration from the data contained in House of Lords (2015). In 2014, 13 of the opt-in decisions could not be considered under the area of Protocol 21 according to the House of Lords Report.

In any case, the UK government has resorted to the same strategy of litigation followed before the Treaty of Lisbon. After its entering into force on 1st December 2009, the UK government challenged three EU decisions (the three concerning international agreements) demanding that these should have Title V TFEU as their legal basis (in order to exercise the opt-in Protocol). In the three cases (C-431/11 UK vs. Council; C-656/11 UK vs. Council and C-81/13 UK vs. Council), the ECJ ruled against UK demands. In two other occasions, the UK government with the support of other actors, successfully convinced the Council to add Title V TFEU as the legal basis for the Commission proposal but the Commission successfully challenged the adopted legislation to have the Title V legal basis reference removed. The ECJ considered that the Commission had, in both occasions, selected the proper basis (Cases C-43/12 Commission vs. EP and Council and C-377/12 Commission vs. Council). In reviewing the UK government performance, the House of Lords did not find evidence that the Commission sought to deliberately undermine the safeguards in the opt-in Protocol. The House of Lords recommended also a revision on the UK government

litigation strategy and it concluded that the UK government interpretation of the opt-in Protocol has been incorrect and will remain so (House of Lords; 2015).

4.4. Foreign policy, security and defence

Being this an area closely associated with Member States sovereignty, it shows a poor record in its development. The EP has complained on *the combination* of the decision-making mechanisms and the lack of solidarity among member states, specially in civilian and military operations under the foreign, security and defence policy. Issues seem more closely associated with lack of solidarity. Thus, Joint Actions decided within the framework of security and defence have allowed the deployment of EU civil and military missions But the EP (Danjean; 2015) has rightly showed its dismay by the persistent problems of force generation encountered around the launch of military missions, noticing that, with the exception of the Mali mission, to which 23 Member States are making an effective contribution, all current EU military operations involve no more than six Member States. Cooperation in these areas tends to provide a collective good that faces the usual cooperation dilemmas: because of different reasons, Member States are inclined to free ride at least they perceive that some essential national interest is at stake. Problems of flexibility also exist and some commentators have argued vigorously in favour of more flexibility to tackle issues such as the Ukraine crisis (Blockmans, 2014). He suggests an increased use of qualified majority voting in order to define collective action on the basis of a European Council decision and an extended use of constructive abstention as a non-binding mechanism in decision-making.

5. FUTURE ADJUSTMENTS OF THE CURRENT CONSTITUTIONAL FRAMEWORK

The functioning and performance of the different flexibility/differentiated integration mechanisms does not seem to be greatly affected by their institutional design. Rather, it seems that political calculations of member states governments' determine if, when and how they can be used. This is particularly true of the general mechanisms of enhanced/structured cooperation. This section makes some specific recommendations requiring adjustments of the current constitutional framework (i.e. Treaty changes) in order to improve EU efficiency in reaching its objectives via flexibility mechanisms

Flexibility in the **euro area** is perhaps the most pressing issue on the EU agenda. Whilst the position of opt-outs countries and the conditional accession to EMU does not seem to require any future revision, the flexible fragmentation of the euro governance has created serious problems of democratic accountability, especially for the Eurogroup decisions but also on ECB performance. The following recommendations address some of the pending problems:

- Bringing into the TEU the relevant provisions of the Fiscal Compact and the ESM. The Fiscal Compact contains a merging mandate (article 16) but any meaningful revision of the Treaties should consider bringing also the substance of the TESC into the Treaties. At a minimum, references (i.e. linkages or bridging provisions) to these external instruments should be included in TEU.
- Formalization of euro governance. This involves bringing into the TEU the provisions from Title V of the Fiscal Compact. The TEU should also formalise the Euro summits and upgrade the provisions regulating the Eurogroup.
- Bring the substance of the Euro-plus pact within the framework of EU law. The Two and Six Packs have already advanced in this direction but the whole of the Pact should be developed through EU law.
- Opening up article 136 to voluntary participation of non-euro member states
- Mechanisms for enhancing democratic control and scrutiny of the euro zone economic and monetary policies. Article 13 of the Fiscal Compact calls for dialogue with the EP and national parliaments but this is clearly insufficient. Instead of solutions such as an euro-committee in the EP (Louis; 2013) or a body of national parliaments, the EP should remain the central parliamentary institution performing this role. The merging of the Fiscal Compact with the TEU should include EP's enhanced powers, for instance, to issue opinions on the so-called Golden Rules and on EU Commission recommendations on national budgets.

Other proposed changes are not specifically related to euro governance but they are nevertheless equally relevant.

- Flexibility clause (article 352 TFEU). Introducing (double) qualified majority voting for its activation would make easier its use.

- Introduction of qualified majority voting (instead of unanimity) to activate enhanced cooperation in the field of foreign and security policy will increase the likelihood that it is used at all
- In parallel, introduction of EP consent to initiate enhanced cooperation in foreign and security policy if the former reform is accepted
- Enlarge the scope of the areas covered by the accelerator mechanism (art. 82, 86 and 87)
- Deepen the Compact for Growth and Jobs and bring it into EU legislation. The introduction of its objectives in relation to Treaty objectives, the creation of specific EU legislation for its implementation and the provision of EU funding is crucial for the credibility of the Compact.
- Improvement of the EP involvement in the *pasarelle* provisions (article 48.7)
EP opinion should be required to expand the list of foreign policy issues requiring qualified majority (article 31 TEU)
EP opinion should also be mandatory in relation to Council of Ministers acting by qualified majority voting on the multiannual framework program.
The EP should be consulted in ***all cases*** related to changes in an enhanced cooperation decision-making procedures (currently, it is only consulted if the change affects the legislative procedure, as per article 333 TFEU)
- Bring into EU Treaty the remaining parts of the Prüm Convention. Current exemption mechanisms could be used to accommodate recalcitrant member states.
- Future adjustments could ponder also a fine tuning of article 50 which regulates the conditions for a future secession from the EU could be commendable. The recent debate in the UK on the in/out referendum has given salience to this specific issue. In particular, a more detailed description of the contents of the agreement to be concluded with the withdrawing party would enhance clarity.

6. CONCLUSIONS

Flexibility or differentiation seems to be consubstantial to EU governance rather than a marginal or punctual mechanism to tackling and adjusting member states preferences. Flexibility/differentiation is inherent to the functioning of the EU and it is likely to remain so in future. Forms of flexibility differentiated integration allow the EU to adapt to an ever growing membership and changing environment and the experience of the last decades has repeatedly proven that closer cooperation between Member States has, at the end of the day, been a (strong) catalyst for a deepening of EU integration (Emmanouilidis: 2013: 66-67). On the less positive side, every form of differentiated integration, be it positive or negative, by means of international treaties or within the Treaties as an enhanced cooperation, adds to the complexity of the Union (Pernice; 2013: 13).

In any case, no excessive expectations should be place upon these mechanisms since they respond to a specific governance issue, i.e. inflexibility or uniform application of EU norms and policies. But inflexibility does not seem to be the root of current EU governance problems which seem rather associated to a growing unwillingness to contribute to the provision of collective goods. Certainly, flexibility mechanism may alleviate to resolve these blockades but they are not the universal solution to the EU political problems.

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PHOTO CREDIT: iStock International Inc.



ISBN 978-92-823-8366-7 (paper)
ISBN 978-92-823-8365-0 (pdf)

doi: 10.2861/629579 (paper)
doi: 10.2861/760163 (pdf)